

Mine Safety & Health Law Special Institute

Encore at Wynn Las Vegas

September 24, 2016

Las Vegas, Nevada

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U.S. Department of Justice

U.S. Solicitor of Labor, Federal Mine Safety and Health Division

Mine Safety & Health Law Special Institute

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GREGORY E. GOLDBERG, Holland & Hart LLP, Denver, Colorado

DEBORAH J. HARRIS, U.S. Dept. of Justice, Environment and Natural Resources Division, Washington, D.C.

10:00 – 10:15 a.m. **Break**

10:15 – 11:00 a.m.

MSHA Document Requests During Investigations.....Paper 2

DEREK BAXTER, U.S. Dept. of Labor, Office of the Solicitor, MSH Division, Arlington, Virginia

MARK E. HEATH, Spilman Thomas & Battle, PLLC, Charleston, West Virginia

JEFFREY K. PHILLIPS, Steptoe & Johnson PLLC, Lexington, Kentucky

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NOELLE HOLLADAY TRUE, Rajkovich, Williams, Kilpatrick & True, PLLC, Lexington, Kentucky

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MARGARET S. LOPEZ, Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Washington, D.C.

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GOVERNOR DAVE FREUDENTHAL, former Governor of Wyoming, Crowell & Moring LLP, Cheyenne, WY

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PATRICK WAYNE DENNISON, Jackson Kelly PLLC, Pittsburgh, Pennsylvania

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MATTHEW C. COOPER, Squire Patton Boggs LLP, Denver, Colorado

PETER S. GOULD, Squire Patton Boggs LLP, Denver, Colorado

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ADELE L. ABRAMS, Law Office of Adele L. Abrams, P.C., Beltsville, Maryland

GARY M. BROADBENT, Murray Energy Corporation, Clairsville, Ohio

SUSAN F. WILTSIE, Hunton & Williams LLP, Washington, D.C.

DANIEL W. WOLFF, Crowell & Moring LLP, Washington, D.C.

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3:45 – 4:45 p.m.

Ask the Commission ..... **No Paper**

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Legal and Other Benefits

to Building and Maintaining a Culture of Workplace Safety ..... **Paper 8**

F. THOMAS RUBENSTEIN, Dinsmore & Shohl LLP, Morgantown, West Virginia

Criminal Enforcement

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Paper 1

Derek Baxter
MSH Division
U.S. Department of Labor, Office of the Solicitor

Derek is Co-Counsel for Trial Litigation with the Division of Mine Safety and Health (MSH). He previously served as Accident Investigation Coordinator with MSH, working on the Crandall Canyon and Upper Big Branch investigations. He graduated from NYU School of Law in 1999. Prior to coming to the Department of Labor, Derek was a trial attorney in the fields of farmworker legal services, labor law, and international human rights.

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Gregory E. Goldberg
Holland & Hart LLP

Mr. Goldberg is chair of Holland & Hart's Government Investigations practice group and a partner in its complex civil litigation practice group. He defends companies and individuals in complex commercial litigation matters as well as government investigations by grand juries, the U.S. Attorney's Offices, the Department of Justice, and federal and state agencies such as the EPA, FBI, SEC, FDA, DOL, MSHA, FTC, BLM, DOT, and IRS. Featured as a leading lawyer by *Chambers USA*, he "is lauded for his expertise in white-collar crime and government investigations, with sources enthusing that he is 'as good as it comes.'" Mr. Goldberg is also recognized in The Best Lawyers in America® and as a "Top 50 Lawyer" by *Colorado Super Lawyers*®, and holds an AV Preeminent 5.0 out of 5.0 rating by Martindale Hubbell.

Mr. Goldberg counsels clients confronting government inquiries or critical events, such as oil spills and other incidents of environmental contamination, allegations under the False Claims Act or Foreign Corrupt Practices Act, search warrants, grand jury subpoenas, workplace deaths, and healthcare and financial fraud. He has tried more than 20 federal criminal and civil trials.

Mr. Goldberg served in the U.S. Department of Justice where he received the Director's Award from the U.S. Attorney General for superior performance as a federal prosecutor. After earning his A.B. from Dartmouth College in 1990, he attended the Graduate Institute of International Affairs in Geneva, Switzerland. He received his J.D. from Columbia Law School.

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Deborah L. Harris
Environmental Crimes Section
U.S. Department of Justice

Deborah Harris has served as Chief of the Environmental Crimes Section since April 2014, where she supervises an office of 42 prosecutors responsible for the prosecution of environmental and wildlife crimes nationwide. In July 2015, oversight of three worker protection statutes – the Mine Safety Act, the Occupational Safety and Health Act, and the Migrant and Seasonal Agricultural Worker Protection Act – was transferred to the Environmental Crimes Section. Ms. Harris coordinates national legislative, policy, and training efforts in the criminal enforcement program, and co-chairs the Department's Environmental Crimes Policy Committee, which is comprised of senior attorneys from the Environmental Crimes Section, experienced Assistant United States Attorneys, and representatives of federal investigative agencies, including EPA and the FBI, Coast Guard, and the U.S. Fish and Wildlife Service.

Ms. Harris has worked in the Environmental Crimes Section since November 1999. During her tenure with the Justice Department, Ms. Harris has prosecuted environmental crimes throughout the United States and developed expertise dealing with Worker Endangerment, The Clean Air Act, and renewable fuel program fraud. Before joining the Environmental Crimes Section, Ms. Harris was a Staff Attorney for the Public Defender Service for the District of Columbia from 1992 to 1999.

Ms. Harris received a B.A. in English and Political Science from the University of North Carolina at Chapel Hill and a J.D. from the University of North Carolina School of Law. Following law school, she was a Prettyman Fellow at the Georgetown University Law Center Criminal Justice Clinic where she received her LL.M. in Trial Advocacy.

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Criminal Enforcement

Mine Safety & Health Law
Special Institute

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Mine Safety Enforcement Provisions

Derek Baxter, U.S. Department of Labor

1

Willful Violation of a Mandatory Standard by an "Operator"

30 U.S.C. 820(d): Willful violation by any operator of a mandatory standard

- First offense is a **misdemeanor** punishable by up to one year imprisonment; second offense is a felony punishable by five years
- "**Operator**" means "any person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at a mine," 30 U.S.C. 802(d)
- "Person" includes individuals and organizations, 30 U.S.C. 802(f)
- There may be more than one "operator" at a mine, s*ee Ames Constr., Inc. v. Fed. Mine Safety & Health Review Comm'n*, 676 F.3d 1109 (D.C. Cir. 2012)

2

Knowing Violation of Mandatory Standards by Agents of Corporate Operators

30 U.S.C. 820(c): A director, officer, or agent of a corporate operator **knowingly authorizes, orders, or carries out a violation** of a mandatory standard

- First offense is a **misdemeanor** punishable by up to one year imprisonment; second offense is a felony punishable by five years
- **"Agent"** means "any person charged with responsibility for the operation of all or part of a mine or the supervision of the miners in a mine," 30 U.S.C. 813(e)
- **"Corporate operator"** applies broadly to entities having the attributes of a corporation even if not incorporated, *Sumpter v. Sec'y of Labor*, 763 F.3d 1292 (11th Cir. 2014)

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Crimes That Impair MSHA's Enforcement Activities

30 U.S.C. 820(f): **Falsification of records or documents** required to be maintained under the Act

- Punishable by up to five years' imprisonment

30 U.S.C. 820(h): Selling equipment for use in a mine which is falsely represented as complying with the technical requirements of the Act

- Punishable by up to five years' imprisonment

30 U.S.C. 820(h): **Giving advance notice of any inspection** to be conducted under the Act

- Punishable by up to one year imprisonment, *see Donovan v. Dewey*, 452 U.S. 594, 603 (1981) (noting "notorious ease" with which mine operators can conceal violations if given advance notice)

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Crimes Relating to Miner Training

Prosecutions under Section 820(c) or (d) for violations of mandatory standards requiring training, 30 CFR Parts 46 and 48

- **New Miner Training** for miners with less than one year of experience. Must include 40 hours of instruction on such topics as statutory Mine Act rights, mine layout and work environment, and hazard recognition
- Yearly **Refresher Training** for all miners
- **Task Training** for assigned tasks that the miner has not performed previously

Prosecutions under Section 820(f) for falsification of training records that are required to be maintained under the Act

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Crimes Relating to Workplace Examinations

Section 820(c) or (d) charge for knowingly or willfully failing to conduct a required examination is a misdemeanor, including required

- Preshift examinations
- Onshift examinations
- Supplemental examinations
- Weekly examinations
- Pre-operation equipment checks
- Electrical examinations

Falsifying a record to claim that an examination was completed when it was not is a Section 820(f) felony

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Crimes That Threaten the Integrity of MSHA Inspections and Investigations

- 18 U.S.C. 111: Forcibly assaulting, impeding, or interfering with MSHA inspectors
- 18 U.S.C. 371: Conspiracy to violate the Mine Act or to defraud MSHA
- 18 U.S.C. 1001: Lying during MSHA accident investigations
- 18 U.S.C. 1505, 1512, 1513, 1519: Obstructing MSHA investigations, witness offenses

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MSHA Criminal Referral Process

- MSHA Special Investigators conduct investigations into possible criminal violations of the Mine Act
- Each of MSHA's regional enforcement districts has one or more Special Investigators
- With the concurrence of the Solicitor's Office, MSHA Coal or MSHA MNM Administrators refer cases directly to the U.S. Attorney's Offices for possible criminal prosecution

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Convictions related to Upper Big Branch Mine and Massey Energy

- Thomas Harrah, UBB foreman, fraudulently using a foreman's license and making false statements (2011)
- Hughie Stover, UBB security chief, making false statements and obstructing a federal investigation (2012)
- Gary May, UBB mine superintendent, conspiracy to impede MSHA in enforcing health and safety laws (2012)
- David Hughart, president of a Massey resource group, conspiring to impede MSHA and willfully violate mandatory standards (2012)
- Don Blankenship, CEO of Massey Energy, conspiracy to willfully violate health and safety standards at UBB (2015)

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Recent Developments in Criminal Enforcement

Deborah Harris, U.S. Department of Justice

DOJ Worker Safety Initiative

An average day in the United States:

- 13 workplace fatalities
- 150 deaths from occupational diseases
- 9,000 nonfatal injuries and illnesses

United States Attorneys' Manual Revision

D. Worker Safety Crimes

Occupational Safety and Health Act (OSHA), 29 U.S.C. § 651 et seq.
Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1801 et seq.
Mine Safety and Health Act (MSHA) of 1977, 30 U.S.C. § 801 et seq.*
Atomic Energy Act, 42 U.S.C. § 2272 et seq.

*Due to the unique history of Mine Safety and Health Act (MSHA) enforcement, at the election of the United States Attorney, the responsibility for the investigation and prosecution of MSHA cases will rest with the United States Attorney's Office. When the United States Attorney makes such an election for a particular case, the United States Attorney's Office will notify the Environmental Crimes Section of the election to prosecute the case (as required in USAM 5-11.103), and of its disposition (as required in USAM 5-11.108). If a United States Attorney's Office makes such an election to solely handle a MSHA case or matter within its district, it may also solely handle any appeal in the case or matter. In such an appeal, the United States Attorney's Office will provide reasonable notice to ENRD and a copy of the draft brief for comment prior to filing.

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The Yates Memo: Individual Accountability for Corporate Wrongdoing

- Six Key Steps

1. To qualify for cooperation credit, a corporation must provide all relevant facts relating to responsible individuals
2. Focus on individuals from the beginning of the investigation
3. Criminal and civil must routinely communicate with each other
4. Culpable individuals will not be released from liability in exchange for a corporate resolution
5. No corporate resolution without a plan on how to deal with the individuals; a declination as to individuals must be approved by the USA or AAG
6. Civil attorneys should focus on individuals as well as corporations, looking beyond the individual's ability to pay

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DOL/DOJ Memorandum of Understanding



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Memorandum for all U.S. Attorneys: Prosecutions of Worker Safety Violations

- December 17, 2015, memo encouraging an increase in the number and quality of criminal prosecutions of worker safety violations
- Suggests charging serious offenses that often occur in association with worker safety violations
- Directs appointment of an AUSA to regularly engage with OSHA, MSHA, and Wage and Hour Division

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Enhanced Enforcement

- The Mine Act
- Environmental Crimes
  - Clean Water Act / Clean Air Act / RCRA
  - Knowing / Negligent Endangerment
- Title 18 Offenses
  - False Statements
  - Obstruction of Justice
  - Conspiracy
- Manslaughter

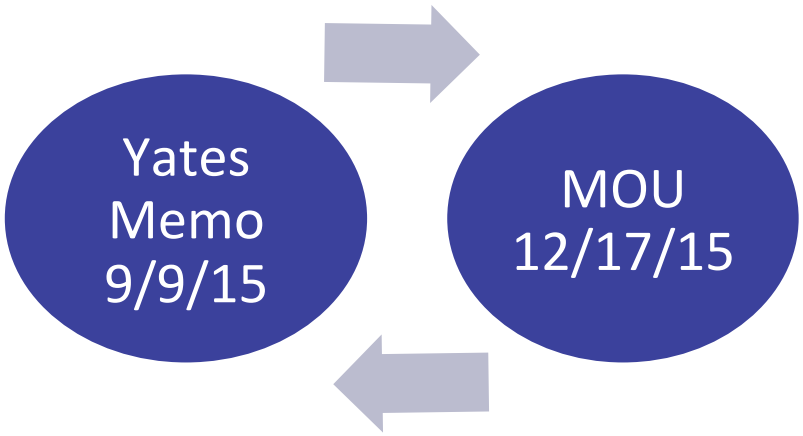
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Best Practices for Corporate Response to Enforcement Changes

Greg E. Goldberg, Holland & Hart LLP

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- Bigger penalties
- Linking safety violations with criminal prosecution
- Corporate cooperation
- Individual accountability
- Re-focused approach
- Company counsel
- Individual or “pool” counsel

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Yates / MOU: Impacts Everyone



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Referral Timing

- Referral may not occur for months
- Government investigation
- Internal investigation
- Witness interviews
- Document productions have occurred

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Company Counsel

- Limiting risk
- Document preservation
- Business operations
- *Upjohn* interviews
- Agency interviews
- Cooperation / Yates Memo

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Crisis Management



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MSHA Response Team

- Develop MSHA inspection team / plan
- Point person(s) for MSHA contact
- Legal counsel contact information immediately available
- Designated records clerks
- Employee rights training
- Internal investigation

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Physical Evidence

- Preserve all physical evidence
- Keep equipment out of service
- Ensure accident area is blocked off
- Air sampling?
- Photos / videos
- Emergency response disaster plan in place ahead of time

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Documents

- Preservation obligation
  - written
  - collection
  - imaging
- Tension between production & liability
  - Required production

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Documents

- Have required records ready
- Require written requests
- Company policies?
- Bates stamps / transmittals
- Seek counsel when needed

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Documents: Must Produce

- Government-required accident, injury and illness records
- Inspection files required by regulations
- Employee training records
- Required plans (ground control, ventilation, etc.)

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Documents: MSHA may ask for more

- Insurance records
- Personnel records
- Safety audits
- Company policy memoranda, rules, procedures or correspondence
- Maintenance records, logs, manuals, or work orders
- (recommended to ask MSHA for written document request before producing these types of items)

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Suspension & Debarment (S / D)

- Barred from government contracts / subcontracts
- Impacts exercise of options under existing contracts
- Procurement (goods & services)
- Non-procurement contracts (O&G leases, grants, loans, etc.)

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Suspension & Debarment

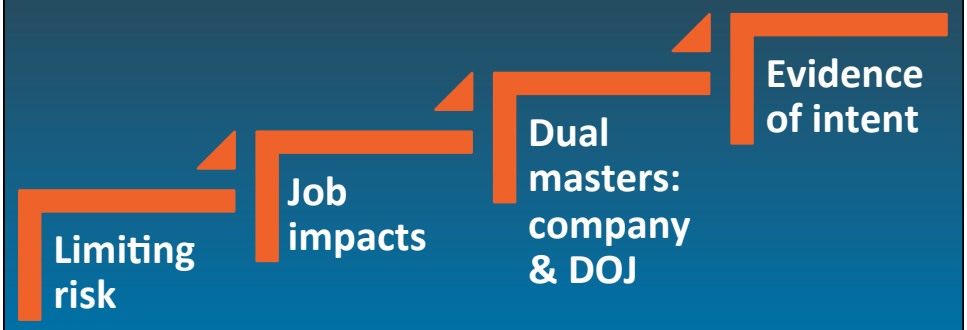
- No contracts with excluded entities
- S / D employees carry taint forward
- Exclusion is government-wide
- Forward looking (no existing contracts)

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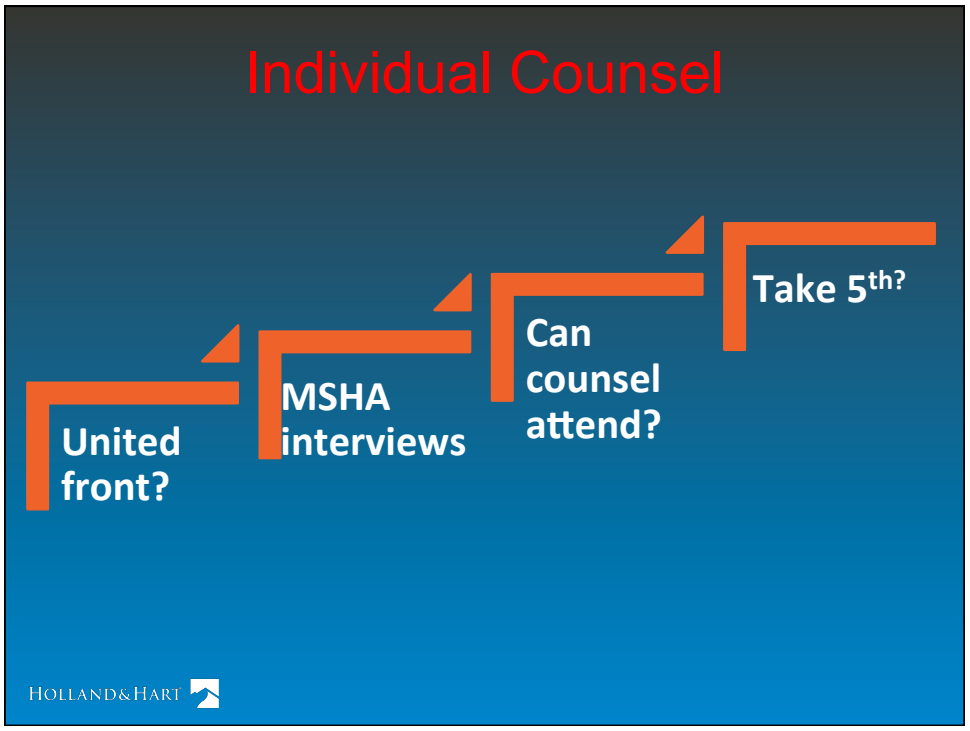
Suspension & Debarment

- Employee conduct imputed to company
- Each agency has own S / D process and regulations
- Parallel proceedings (e.g., FCA, criminal)
- Settlement does not foreclose S / D

Individual Counsel



HOLLAND&HART



Employee Rights

- No "Miranda" warnings for investigations if no "custody"
- Not required to talk to an investigator
- Right to counsel
- Right to discontinue interview

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Employee Rights

- Right to refuse to be recorded
- Right to refuse to sign a written statement
- Do not carry company's burden
- Evaluate direction of investigation by asking questions
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- Watch your statements!
- Do not advise subordinates to talk or not talk to government
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Southern District of West Virginia

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON GRAND JURY 2014
MARCH 10, 2015 SESSION

UNITED STATES OF AMERICA

v.

CRIMINAL NO. 5:14-cr-00244
30 U.S.C. § 820(d)
18 U.S.C. § 371
18 U.S.C. § 1001
18 U.S.C. § 2
15 U.S.C. § 78ff
17 C.F.R. § 240.10b-5

DONALD L. BLANKENSHIP

SUPERSEDING INDICTMENT

Summary

1. Beginning no later than January 1, 2008 and continuing through April 9, 2010 (the "Indictment Period"), defendant DONALD L. BLANKENSHIP ("BLANKENSHIP"), the Chief Executive Officer ("CEO") and Chairman of the Board of Directors of coal producer Massey Energy Company ("Massey"), conspired to commit and cause routine violations of mandatory federal mine safety standards at Massey's Upper Big Branch-South mine ("UBB").* Throughout the Indictment Period, BLANKENSHIP himself closely managed UBB, the coal from which was critical to Massey's financial performance. BLANKENSHIP knew that UBB was committing hundreds of safety-law violations every year and that he had the ability to prevent most of the violations that UBB was committing. Yet he fostered and participated in an understanding that

* Allegations herein are made with reference to the Indictment Period unless otherwise noted.

perpetuated UBB's practice of routine safety violations, in order to produce more coal, avoid the costs of following safety laws, and make more money.

2. Throughout the Indictment Period, BLANKENSHIP also conspired to defraud the United States by impeding the federal Mine Safety and Health Administration ("MSHA") in carrying out its duties at UBB.

3. Following a major, fatal explosion at UBB on April 5, 2010, BLANKENSHIP made, and caused to be made, materially false and misleading statements and representations, and omitted and caused to be omitted statements of material facts, regarding his and Massey's practice of willful violations of safety laws at that mine. These included materially false statements and representations made to the United States Securities and Exchange Commission ("SEC") and materially false statements and representations, and materially misleading omissions, made in connection with the purchase and sale of Massey stock.

Background

4. At all relevant times, Massey was a corporation engaged in the business of mining and selling coal, including at numerous mines in the Southern District of West Virginia, where Massey maintained a regional headquarters. UBB was a coal mine that Massey, through various subsidiaries, wholly owned and controlled, and was located in and around Montcoal, Raleigh County, West Virginia, within the Southern District of West Virginia. UBB and all Massey's other mines and mining-related facilities produced products that entered commerce and had operations and products that affected commerce, rendering them subject to Title 30, United States Code, Chapter 22, concerning mine safety and health, and to rules and regulations promulgated thereunder, including mandatory federal mine safety and health standards codified in Title 30, Code of Federal Regulations, Chapter I. UBB was subject to regular federal mine

safety inspections conducted by MSHA, an agency of the United States Department of Labor (DOL), which was part of the executive branch of the government of the United States. UBB was also subject to monetary penalties imposed by MSHA for violations of mandatory federal mine safety and health standards that federal mine safety inspectors discovered during inspections of UBB.

5. At all relevant times, Massey's Class A Common Stock was registered with the SEC and was publicly traded on the New York Stock Exchange. At all relevant times, in order to sell securities to members of the public and maintain public trading of its securities in the United States, Massey was required to comply with provisions of the federal securities laws, including the Securities Exchange Act of 1934, and rules and regulations promulgated thereunder.

6. At all relevant times, the SEC was an agency of the executive branch of the government of the United States.

7. At all relevant times, BLANKENSHIP, as CEO of Massey and Chairman of Massey's Board of Directors, was principally and ultimately responsible for the management of Massey's business. At all relevant times, the Restated Bylaws of Massey Energy Company provided that BLANKENSHIP, as CEO, had general supervision, direction, and control of the officers, employees, business, and affairs of Massey, including the UBB mine.

8. During the Indictment Period, UBB was cited approximately 835 times for violations of mandatory federal mine safety and health standards. This was one of the highest levels of safety-law violations of any Massey mine. Approximately 319 of these violations were in an especially serious category of violations: those that could significantly and substantially contribute to the cause and effect of a safety or health hazard. Approximately 283 of UBB's safety-law violations during the Indictment Period were violations of the laws on mine ventilation, which operate to

prevent explosions and fires in coal mines and to minimize deaths and serious injuries in the event an explosion or fire does occur. Approximately 59 of UBB's safety-law violations during the Indictment Period resulted in shutdown orders closing all or part of the mine until the violation was abated, pursuant to Title 30, United States Code, Section 814(d). Violations resulting in such shutdown orders were among the most serious category of violations that can occur in a coal mine. UBB ranked among the worst mines in the United States in such shutdown orders during the Indictment Period.

9. During the Indictment Period, UBB was important to Massey's financial performance. UBB produced a type of coal called metallurgical coal, which was used for manufacturing steel. During the Indictment Period, metallurgical coal sold for substantially more per ton than Massey's other major product, which was steam coal used to generate electricity. Metallurgical coal from UBB was particularly important to Massey's sales of metallurgical coal, because it was an essential ingredient in a blend of metallurgical coal that also included coal from a group of other Massey mines near UBB. In 2009, this UBB-centered group of mines generated revenues of approximately $331 million, which represented approximately 14% of Massey's approximately $2.3 billion in revenue—more than any of Massey's numerous other mining groups. For 2010, Massey projected UBB-group revenue of approximately $432 million, approximately 16% of Massey's projected revenue of approximately $2.7 billion and more than the projected revenue for any other Massey mining group.

10. Beginning in 2009 and continuing through the rest of the Indictment Period, one operating section of UBB employed a mining technique known as longwall mining. (A coal mining "section" was an area of a mine where coal was being produced. A single mine may have had multiple mining sections. While the longwall section was operating at UBB, UBB had, at

various times, four or five total active mining sections, with the other sections using a mining technique different from the longwall method.) Longwall mining was the most productive method of underground coal mining; it uses equipment and a mining configuration that permit the extraction of large swaths of coal in a short period of time. When operating at full productivity, the UBB longwall mining section could produce more than $600,000 worth of coal every day, more than any of Massey's dozens of other underground mining sections. The equipment needed to run a longwall mining section was expensive, typically costing many tens of millions of dollars.

Upper Big Branch Safety-Law Violations

Mine Ventilation Laws

11. Routine violations of mine-safety laws at UBB included violations of the laws on mine ventilation. Proper ventilation in a coal mine was essential to preventing explosions. The coal mining process inherently generates airborne coal dust, which was highly explosive. And in many coal mines, including UBB, the mining process also inherently releases methane gas into the mine air. Methane gas was explosive if it reaches certain atmospheric concentrations. A constant supply of clean air was necessary to dilute those airborne explosive substances and carry them away, preventing them from reaching dangerous concentrations.

12. *Minimum airflow requirements and mine ventilation plans.* At all relevant times, airflow in certain key areas of a coal mine was required, by mandatory federal mine safety standards, to be adequate to dilute, render harmless, and carry away explosive substances. At all relevant times, the operator of any coal mine was required to develop and follow a ventilation plan approved by federal mine-safety officials, also pursuant to a mandatory federal mine safety standard. This ventilation plan was required to be designed to control methane and coal dust, and

to mandate, in certain key locations, specific quantities of airflow that were adequate to dilute, render harmless, and carry away explosive substances. A violation of a mine's approved ventilation plan was a violation of a mandatory federal mine safety standard.

13. *Construction required for proper mine ventilation.* At all relevant times, coal mines were required to construct structures called ventilation controls and devices to manage the flow of air in a mine, pursuant to mandatory mine safety standards. These ventilation structures included permanent block walls and temporary walls made of heavy cloth or plastic to route mine air to locations where it was needed to carry away explosive substances. Maintaining this mandatory system of ventilation structures required continual construction, because as the mine's workings advanced deeper and deeper, new ventilation structures had to be built to route air through the most recently opened parts of the mine.

14. *Mine safety examinations.* At all relevant times, coal mines were required to conduct regular safety examinations to check for ventilation-related hazards, including the presence of potentially explosive methane gas in the mine air, illegally low levels of airflow, and air flowing in the wrong direction. In these safety examinations, mines were also required to check for the existence of any other hazardous conditions, including accumulations of explosive coal dust. Safety examinations in certain areas of a mine were required to be conducted within three hours before any working shift and at least once during each working shift. Wider ranging safety examinations were required to be conducted weekly. These requirements were established in mandatory mine safety and health standards.

15. The above-described mandatory federal mine safety standards concerning ventilation were basic, well-known principles of coal mining.

UBB's Routine Violations of Mine-Ventilation Laws

16. During the Indictment Period, BLANKENSHIP and Massey routinely violated the above-described and other mandatory safety standards on ventilation at UBB.

17. *Violations of airflow requirements and mine ventilation plan.* Examples of these violations included the following: On or around June 4, 2009, a federal mine safety inspector discovered airflow of 147 cubic feet per minute in an area of the mine where 9,000 cubic feet per minute was required. This legal minimum air quantity of 9,000 cubic feet per minute was established to ensure that airflow was sufficient to dilute and carry away explosive substances in the mine atmosphere. The inadequate air quantity violated a mandatory mine safety standard requiring the mine to follow its approved ventilation plan.

18. On or around June 3, 2009, a federal mine safety inspector discovered that UBB's section #1 was operating with less than half the minimum legal air quantity, which again violated the mandatory mine safety standard requiring the mine to follow its approved ventilation plan.

19. On or around October 21, 2009, a federal mine safety inspector discovered that UBB's section #2 was operating with less than the minimum legal air quantity. As a result of the illegally low air quantity, the federal mine-safety inspector observed visible airborne coal dust surrounding miners who were working on section #2. This illegally low air quantity again violated the mandatory federal mine safety standard requiring the mine to follow its approved ventilation plan.

20. On or around March 2, 2010, a federal mine safety inspector discovered that UBB's #1 section was operating with less than half the legal minimum air quantity, again violating the mandatory federal mine safety standard requiring the mine to follow its approved ventilation plan.

21. *Ventilation-plan violations regarding water sprays.* UBB also was cited repeatedly for violating another important component of its ventilation plan: its requirements for water sprays on equipment that cut coal from the coal seam. These water sprays suppressed coal dust and cooled the area where cutting occurred, the latter to diminish the possibility that frictional heat from cutting would ignite explosive substances in the mine air. On or around July 15, 2009, federal mine safety inspectors discovered that a continuous mining machine in UBB's section #2 was missing water sprays required by the mine's ventilation plan. On or around October 27, 2009, federal mine safety inspectors discovered that a continuous mining machine at UBB was running with less than the minimum level of water pressure for its sprays as required by the mine's ventilation plan. On or around March 23, 2010, federal mine safety inspectors discovered that a continuous mining machine at UBB was running with nearly half its required number of sprays in inoperable condition and with a water fitting for its spray system broken. Each of these discoveries represented a violation of the mandatory mine safety standard requiring compliance with the mine's approved ventilation plan, and each resulted in the issuance of a federal citation.

22. After the April 5, 2010 explosion at UBB, a federal investigation determined that at the time of the explosion, the longwall shearer in the mine's longwall section was operating with approximately seven of its required water sprays missing and with other sprays clogged. The missing sprays reduced the water pressure at the remaining sprays significantly below the minimum level required by the mine's approved ventilation plan and prevented the remaining sprays from counteracting frictional heat in the area where coal was being cut. Operating the longwall shearer with missing and clogged sprays and insufficient water pressure violated the mandatory federal mine safety standard requiring compliance with the mine's approved ventilation plan.

23. In total, UBB was cited approximately 61 times for violations of its approved ventilation plan during the Indictment Period. The cited violations occurred throughout the Indictment Period and ranged from in or around March 2008 through on or around April 5, 2010.

24. UBB's routine violation of its ventilation plan was the result of several causes, including the following: providing the mine with an inadequate number of coal miners focused on jobs important to safety-law compliance, including the maintenance of ventilation structures in airways away from the mine's active operating sections; BLANKENSHIP's imposition and aggressive enforcement of coal-production quotas that deprived UBB's coal miners of the time they needed to construct and maintain ventilation control structures, and that forced them to operate even where air quantities were below legal minimums; BLANKENSHIP's direction, addressed below, not to construct certain ventilation controls that would produce more reliable airflow because constructing them diverted time from coal production; and BLANKENSHIP's denial, also addressed below, of a request to construct an airshaft at UBB that would have increased airflow to areas of the mine where it was often below the legal minimum.

25. *Violations: Constructing and maintaining ventilation structures.* UBB also was routinely cited during the Indictment Period for violating mandatory federal mine safety standards on ventilation control structures and devices. For example, on or about November 19, 2009, and on or about December 1, 2009, federal mine safety inspectors discovered that legally mandated ventilation controls were missing in airways that were essential to airflow in at least two of the mine's operating sections, including the longwall mining section. Because of poor engineering, the roof and walls of the area of the mine in which these structures were located were collapsing, causing the structures to be crushed almost as quickly as they could be built. The president of UBB's mining group, whose identity is known to the Grand Jury (the "Known UBB Executive"),

along with other UBB officials known and unknown to the grand jury, knew that the ventilation control structures in this area of the mine were routinely being destroyed by the collapse of the area's roof and walls. They nonetheless caused the affected passageways to remain in use as part of the mine's ventilation system, thus willfully violating mandatory federal mine safety standards.

26. In total, UBB was cited for approximately 59 violations during the Indictment Period of mandatory federal mine safety standards regarding ventilation control structures and devices. The cited violations occurred throughout the Indictment Period and ranged from in or around January 2008 through in or around March 2010. Among the causes of these violations were an insufficient number of coal miners in jobs focused on the construction and maintenance of ventilation control structures and devices, and the imposition and aggressive enforcement of coal-production quotas that did not allow time to properly maintain ventilation control structures and devices.

27. *Violations: Mine-safety examinations.* UBB also was routinely cited during the Indictment Period for violating mandatory federal mine safety standards requiring regular safety examinations. For example, on or around March 9, 2009, federal mine safety inspectors discovered that, according to UBB's own records, one of the mine's aircourses that was required to be examined weekly had not been examined for more than a year. In total, UBB was cited for approximately 62 violations during the Indictment Period of mandatory federal mine safety standards requiring regular safety examinations, which were among the standards for ensuring proper mine ventilation. The cited violations occurred throughout the Indictment Period and ranged from in or around January 2008 through on or around April 5, 2010. Among the causes of these violations were the employment of an inadequate number of coal miners, and the

imposition and enforcement of coal-production quotas that did not allow time, to conduct required safety examinations in a mine the size of UBB.

28. *Violations: Support of the mine roof and walls.* During the Indictment Period, UBB also routinely violated mandatory federal mine safety standards concerning support of the mine's roof and ribs (walls). Because underground coal mining extracts a layer of coal that previously supported layers of earth and rock overhead, substitute support must be constructed to prevent the mine's roof and walls from collapsing into the resulting void. These supports included long bolts (as long as sixteen feet) that were installed in the mine roof and affixed to large plates that hold the stratum of rock above the mine in place, as well as timbers that helped bear the weight of overlying rock and earth. Just as with the mine's ventilation system, this construction process was a continual one: as mining advanced deeper and deeper, supports were required to be constructed in the mine's newly opened areas. The requirement to provide sufficient support to protect persons from falls of the mine's roof and walls was a basic, well-known principle of coal mining.

29. On or around September 23, 2009, for example, a federal mine safety examiner at UBB discovered that most of the mine roof had fallen out in an area of the mine more than 100 feet long and approximately twenty feet wide, leaving the remaining roof unstable in an area where miners were required to work and travel on a regular basis. UBB's own records of past safety examinations showed that mine officials had been aware of this danger for almost a month but failed to correct it. This knowing failure violated a mandatory federal mine safety standard that required the roof and walls of areas where persons work or travel to be supported or otherwise controlled to protect persons from hazards related to falls of the roof and walls.

30. In total, UBB was cited approximately 91 times for violations during the Indictment Period of mandatory federal mine safety standards regarding support of the mine's roof and walls. The cited violations occurred throughout the Indictment Period, ranging from in or around January 2008 through on or around April 5, 2010. Among the causes of these violations were the employment of an inadequate number of coal miners to perform work necessary to comply with the safety laws on support for the mine's roof and walls, as well as the imposition and aggressive enforcement of coal-production quotas that did not allow enough time to perform such work.

31. *Violations: Explosive coal dust and combustible loose coal and other materials.* During the Indictment Period, UBB also routinely violated mandatory mine safety standards concerning accumulations of coal dust, loose coal, and other combustible materials. As explained above, coal mining inherently produced large quantities of airborne coal dust. This coal dust eventually settled out of the mine air and collected on surfaces throughout the mine. After settling, however, coal dust still posed a risk of explosion. If an explosion ignited in one part of a mine, the blast of air from that explosion could force settled float coal dust back into the mine air. Once the previously settled dust became airborne again, heat and flame from the initial ignition could cause it to explode. In this way, previously settled coal dust could enlarge a relatively small initial explosion and cause it to propagate throughout a mine. Consequently, a mandatory federal mine safety standard required that float coal dust be cleaned up and not permitted to accumulate. Mandatory federal mine safety standards also required that loose coal, which was flammable, and other combustible materials be cleaned up and not permitted to accumulate; fires were a serious danger in underground coal mines in part because such mines featured tight spaces and limited air supply, and because miners in such mines often worked far away from the safety of the surface. The mandatory federal mine safety standard requiring that explosive coal dust,

combustible loose coal, and other combustible materials be cleaned up and not permitted to accumulate was a basic, well-known principle of coal mining.

32. Examples of UBB's violations of these standards include the following: On or around January 28, 2010, a federal mine safety inspector discovered float coal dust accumulated along the entire length of the conveyor belt that carried coal from UBB's section #1. This accumulation violated the mandatory federal mine safety standard requiring that explosive float cost dust be cleaned up and not permitted to accumulate.

33. On or around March 15, 2010, a federal mine safety inspector discovered fine, black coal dust deposited along substantially the entire length of the conveyor belt that carried coal from UBB's longwall section. This accumulation violated the mandatory federal mine safety standard requiring that coal dust be cleaned up and not permitted to accumulate.

34. In total, UBB was cited approximately 81 times for violations during the Indictment Period of the mandatory federal mine safety standard requiring that coal dust, loose coal, and combustible materials be cleaned up and not permitted to accumulate. These violations occurred throughout Indictment Period, from in or around January 2008 through on or around April 5, 2010.

35. UBB's own records of mine safety examinations also revealed near-constant violations of mandatory federal mine safety standards concerning accumulations of coal dust and other combustible materials, as well as the application of rock dust, an incombustible substance that was required, pursuant to mandatory federal mine safety standard that were a basic, well-known principle of coal mining, to be spread throughout a coal mine to stop the spread of any explosion or fire that might occur in the mine. In a span of little more than a month, from March 1, 2010, through April 5, 2010, UBB's records of on-shift examinations reflected approximately 937

hazardous conditions arising from accumulations of coal dust and coal and from inadequate application of rock dust. The same records reflected that the majority of these hazardous conditions were not properly corrected. These records were reviewed daily by UBB officials.

36. Among the causes of UBB's routine violations of the laws on explosive and combustible materials and rock dusting were the employment of an inadequate number of coal miners to perform work necessary to comply with these laws, as well as the imposition and aggressive enforcement of coal-production quotas that did not allow sufficient time to perform such work.

Advance Warning of Federal Mine Inspection Activities

37. During the Indictment Period, a scheme existed at UBB to routinely warn underground workers when federal mine safety inspectors were on their way to inspect underground areas of the mine. At the entrance to the UBB mine property was a guardhouse. When federal mine safety inspectors passed this guardhouse on their way to the mine, it was standard practice for a guard to radio the UBB mine office, which sat just outside the entrance to the mine's underground areas, to warn employees in the mine office that the inspectors were on their way. It was standard practice for an employee in the mine office then to call underground (a telephone system connected the mine office to various areas of the mine's underground workings) to pass along this warning to underground personnel. Underground supervisors then would direct miners to quickly cover up violations of mandatory federal mine safety standards that the mine routinely committed, including missing ventilation control structures and devices, accumulations of float coal dust and loose coal, missing roof support, and failures to properly rock dust the mine. The purpose of this advance-warning scheme was to prevent federal mine safety inspectors from discovering and citing many of the violations of mandatory federal mine safety and health standards that were routinely committed at UBB. Because of the distance from the UBB

guardhouse to the mine office and the size of the mine's underground workings, the sections of the mine farthest from the mine entrance could be given as much as two hours' advance warning before federal mine safety inspectors arrived.

38. In order to avoid alerting federal mine safety inspectors that these warnings were being given, UBB employees frequently used code words and phrases when discussing imminent safety inspections on the mine telephone system.

39. UBB officials, including the Known UBB Executive and others known and unknown to the Grand Jury, frequently instructed and encouraged mine employees to provide advance warning whenever federal mine safety inspectors were on their way to inspect the mine's underground areas.

BLANKENSHIP was fully aware of UBB's practice of routinely violating mandatory federal mine safety standards.

40. BLANKENSHIP was fully aware of UBB's practice of routinely violating mandatory federal mine safety standards. As early as in or around January 2008, BLANKENSHIP learned that federal mine safety regulators had designated UBB as a mine with a potential pattern of violations, a status that applied only to the worst mines in the country as measured by serious safety-law violations and other indicators of safety. In or around early 2009, BLANKENSHIP began to request and receive reports detailing the cost of fines that Massey was being assessed for federal safety-law violations. And in or around April 2009, BLANKENSHIP requested and began to receive a report every workday detailing Massey's violations of mandatory federal mine safety standards, including an estimate of the fines that Massey would owe for these violations.

41. Each of these daily safety-violation reports showed BLANKENSHIP a count of Massey's safety-law violations for the year to date, along with year-to-date violation totals for each of Massey's mining groups. Each daily safety-violation report also showed BLANKENSHIP more

detailed information on the company's violations of the mine safety laws: how often each of the company's mining groups had violated those laws year-to-date, the specific mandatory federal mine safety standard that each group of mines violated most often, and the areas of mandatory federal mine safety standards that the company's mines violated most as a whole.

42. For example, on or around July 1, 2009, BLANKENSHIP received a safety-violation report for the year through on or around June 30, 2009. This report showed BLANKENSHIP that in the first six months of 2009, the UBB group of mines was cited for approximately 596 violations of mandatory federal mine safety and health standards resulting in an estimated $918,401 in fines—more than any other Massey mining group. The report also showed BLANKENSHIP that the mandatory federal mine safety standard violated most often at the UBB group of mines was the standard requiring that accumulations of explosive float coal dust, combustible loose coal, and other combustible materials be cleaned up and not permitted to accumulate. The report further showed BLANKENSHIP that the area of mandatory federal mine safety standards violated most often at Massey's mines as a whole were the standards concerning mine ventilation, which were intended, among other things, to prevent mine explosions and fires and to minimize the risk to miners of death or serious injury if an explosion or fire occurs. The report showed BLANKENSHIP that Massey's mines violated mandatory federal mine safety standards on ventilation approximately 1002 times in the first half of 2009.

43. On or around August 6, 2009, the daily safety-law violation reports sent to BLANKENSHIP began to include a page showing BLANKENSHIP the number of safety-law violations at individual Massey mines, as distinct from mining groups. On or around August 6, 2009, BLANKENSHIP received a daily safety-violation report that showed him that in the year to date, UBB had been cited for approximately 292 violations of federal mine safety laws, fourth

most of any Massey mine in the year to date. That report also showed BLANKENSHIP that the mandatory federal mine safety standard violated most often by mines in the UBB group continued to be the standard requiring that accumulations of explosive coal dust, combustible loose coal, and other combustible materials be cleaned up and not permitted to accumulate in the mine. The same report showed BLANKENSHIP that the area of mandatory federal mine safety standards violated most often at Massey's mines continued to be the standards on mine ventilation.

44. From approximately April 3, 2009, through April 5, 2010, BLANKENSHIP received approximately 249 of these daily safety-violation reports. It was BLANKENSHIP's practice to review each of these reports when he received it. Substantially every one of these 249 reports showed BLANKENSHIP that the UBB mining group was committing hundreds of safety-law violations every year.

45. Beginning on or around June 2, 2009, the daily safety-law violation reports that BLANKENSHIP received showed him which of Massey's mining groups were committing the most safety-law violations, which mandatory federal mine safety standard each mining group was violating most often, and which area of the mine safety laws Massey as a whole was violating most. From on or around June 2, 2009, through on or around April 5, 2010, BLANKENSHIP received approximately 210 of these daily reports of safety-law violations. Nearly all of those reports showed him that UBB's mining group was one of Massey's worst mining groups for safety-law violations and that the worst area of safety-law violations for Massey mines as a whole was mine ventilation. Approximately 193 of these reports showed BLANKENSHIP that the mandatory federal mine safety standard that the UBB group violated

most often was the standard requiring explosive coal dust, combustible loose coal accumulations, and other combustible materials to be cleaned up and not permitted to accumulate.

46. From approximately August 6, 2009, through April 5, 2010, BLANKENSHIP received approximately 163 daily safety-violation reports that showed him year-to-date safety-violation totals for the UBB mine itself, as distinct from its associated group of mines. Nearly all of these reports showed BLANKENSHIP that UBB was committing hundreds of safety-law violations each year and was among Massey's worst mines for safety-law violations.

47. On or around October 7, 2009, BLANKENSHIP received a Massey-internal "Report Card" detailing mine safety violations for each of Massey's mines in the third quarter (July through September) of 2009. This internal Report Card showed BLANKENSHIP that UBB violated mandatory federal mine safety standards 168 times in that three-month period, compared to a target of fifty-nine safety-law violations that Massey had set for UBB in the third quarter of 2009. The Report Card, which was created internally by Massey personnel who tracked safety-law violations at the company's mines, showed BLANKENSHIP that Massey itself had assigned UBB a grade of "Failed" for its number of safety-law violations in the third quarter of 2009.

48. During the Indictment Period, BLANKENSHIP personally monitored the details of UBB's operations closely. After the longwall section began operation at UBB, BLANKENSHIP insisted on personally receiving a report every thirty minutes detailing the longwall section's coal production and the reasons for any production delays. BLANKENSHIP insisted on receiving this report via fax at his home on evenings and weekends. For the other mining sections at UBB, BLANKENSHIP insisted on personally receiving a report every two hours detailing each section's coal production and the reasons for any production delays.

BLANKENSHIP's practice was to regularly review these production reports from UBB's longwall and other sections. Throughout the Indictment Period, BLANKENSHIP insisted on personally reviewing and approving or denying every proposed hire at UBB, every proposal to give a UBB employee a raise, every capital expenditure at UBB, and every hiring of a contractor to perform work at UBB. Throughout much of the Indictment Period, BLANKENSHIP demanded daily phone calls with UBB management, in addition to the dozens of written production reports he received every day, so that he could further supervise activity at UBB. During the Indictment Period, BLANKENSHIP—the CEO and Chairman of a publicly traded corporation with more than $2 billion in annual revenue—routinely, personally reviewed details such as one of UBB's operating sections starting three hours late because of necessary maintenance, a request to give a small number of truck drivers working for the UBB mining group a raise from approximately $11.59 an hour to approximately $13.50 an hour, and a request to spend $750 to hire a contractor to check the freeze-proofing systems at a UBB-group mine before cold weather arrived.

BLANKENSHIP could have drastically reduced violations of mandatory federal mine safety standards at UBB by taking reasonable steps to follow the law.

49. Blankenship could have drastically reduced violations of mandatory federal mine safety standards at UBB by taking reasonable steps to follow the law. A large majority of UBB's safety-law violations were preventable. For example, daily safety-law violation reports routinely showed BLANKENSHIP that the mandatory federal mine safety standard that the UBB mining group violated most often was the standard requiring that explosive coal dust, combustible loose coal, and other combustible materials be cleaned up and not permitted to accumulate in the mine. Following this safety law was a matter of basic housekeeping. BLANKENSHIP could have prevented the majority of these safety-law violations by hiring enough miners at UBB, and

giving them enough non-coal-production time, to clean up the explosive and combustible substances that collected in the mine. Similarly, most mine-ventilation violations—which BLANKENSHIP knew were the most common category of safety-law violations at Massey's mines—and roof-control violations at UBB could have been prevented by providing the mine with enough miners, and giving them enough non-coal-production time, to follow the safety laws. Yet throughout the Indictment Period, UBB regularly was staffed with too few miners and had too little non-coal-production time to reasonably be able to comply with mandatory federal mine safety and health standards on ventilation, combustible materials and rock dusting, and roof support, among other areas.

50. Throughout the Indictment Period, BLANKENSHIP possessed the authority to provide UBB with the resources necessary to prevent the majority of UBB's violations of mandatory federal mine safety standards. BLANKENSHIP was the highest-ranking official in the group of officials who approved each Massey mine's annual budget and production plan, which detailed how many miners each mine could hire in specific areas, including areas focused on safety-law compliance, and also set the amount of coal and profit that each mine was required to generate. BLANKENSHIP also exercised personal decision-making authority over every decision at UBB regarding hiring and the use of non-employee contractors, as well as capital expenditures for safety-compliance purposes. BLANKENSHIP possessed full authority to respond to UBB's hundreds of annual, preventable safety-law violations by providing the mine with more miners, particularly in areas focused on safety-law compliance, and to reduce the mine's requirements for coal production and profit so that miners would have more time to work on following the safety laws. Throughout the Indictment Period, BLANKENSHIP also possessed full authority to

discipline UBB executives for the mine's routine violations of mandatory mine safety and health standards, and to determine those managers' compensation.

51. Throughout the Indictment Period, Massey possessed, and BLANKENSHIP controlled, ample financial resources to provide UBB with the resources and reasonable production requirements that it needed to comply with mandatory federal mine safety standards. During the Indictment Period, Massey possessed cash and cash equivalents ranging from approximately $391 million to approximately $1.1 billion.

52. Throughout the Indictment Period, BLANKENSHIP closely managed the UBB mine and group of mines, routinely directing and making decisions on detailed matters of the mines' everyday operations. This elaborate level of involvement further enabled him to take action to reduce safety-law violations at UBB had he chosen to do so. During much of the Indictment Period, BLANKENSHIP received dozens of UBB coal-production reports every day, and had telephone conversations daily or even more frequently with the Known UBB Executive, in which BLANKENSHIP gave direction on UBB's operation. BLANKENSHIP also regularly managed UBB through handwritten messages to the Known UBB Executive, often written on reports regarding UBB's coal production or cost management with which BLANKENSHIP was dissatisfied. Examples of this practice include the following: on or around April 11, 2008, BLANKENSHIP sent the Known UBB Executive a handwritten note, written on a coal-production report from one shift in one operating section of the UBB mine, pressuring the Known UBB Executive to change the section's engineering plan to leave in place smaller coal pillars. Coal pillars were large blocks of coal left in place as a mine advances in order to help support the mine roof; smaller pillars generally provide less support but produce more coal and

thus more profit. The Known UBB Executive responded that the operating section that was the subject of the report would soon begin using smaller coal pillars.

53. Also on or around April 11, 2008, BLANKENSHIP sent the Known UBB Executive a handwritten note, written on a coal-production report from one shift in one operating section of one of the UBB-group mines, criticizing the placement of a specific piece of equipment in that section as it was depicted in a routine diagram on that report, demanding to know the details of the section's airflow configuration and the specific sequence in which the section cut coal from each of its passageways, and concluding, "It's easy to see why your mines don't run."

54. On or around May 15, 2008, the Known UBB Executive sent BLANKENSHIP a memo requesting to raise hourly pay for truckers at the UBB mining group from approximately $11.59 an hour to approximately $13.50 because the group could not find truckers willing to work for the rate of approximately $11.59 an hour. On or around that same day, BLANKENSHIP responded with a series of detailed, handwritten questions about the proposed raise to which he required answers before approving or denying the proposed raise.

55. On or around January 6, 2009, BLANKENSHIP received a regular report called a Lost Footage Report from one of UBB's operating sections. On or around that date, BLANKENSHIP, dissatisfied with the information shown on the report, sent the Known UBB Executive a handwritten note on a copy of the report itself. The note read, "Is this the Head or TailGate? Describe Roof Conditions? Why a late Belt move? I didn't see a report. Why? Did you call me yet [illegible]. TODAY? What do coreholes in mains say rider will do ahead of you?"

56. On or around March 19, 2009, BLANKENSHIP sent the Known UBB Executive a memorandum chastising him for not producing coal as quickly as BLANKENSHIP demanded at UBB. In this memorandum, BLANKENSHIP said that BLANKENSHIP would need to call

directly a subordinate of the Known UBB Executive so that BLANKENSHIP himself could figure out what to do to increase coal production at UBB.

57. On or around October 7, 2009, BLANKENSHIP sent the Known UBB Executive several handwritten notes written on a request from the Known UBB Executive to spend approximately $750 to have a contractor check and test the freeze-proofing systems at one of the UBB-group mines. Two of these handwritten notes read, "Nonsense Giving Money Away," and "What does this mean? It's yet another example of something I never recall having done by a contractor when I was a Group Pres."

Blankenship chose to routinely violate and cause routine violations of mandatory federal mine safety standards at UBB.

58. Despite having the ready ability to drastically reduce violations of mandatory federal mine safety standards at UBB, and even though he knew that UBB's practice of routinely violating such standards was unlawful, BLANKENSHIP purposely elected to continue that practice throughout the Indictment Period. Specifically, he chose to maximize profits by depriving UBB of the coal miners and non-coal-production time that it needed to comply with mandatory federal mine safety standards, concluding that it was less expensive to routinely pay fines for violating such standards than to allocate the necessary funds to following them.

59. During the Indictment Period, BLANKENSHIP instructed and encouraged UBB managers to violate mandatory mine safety standards. For example, on or around February 11, 2008, BLANKENSHIP sent the Known UBB Executive a memorandum that addressed work being done to permit UBB to follow mandatory federal mine safety standards on ventilation. This memorandum gave the following instructions: "You need to get low on UBB [sections] #1 and #2 and run some coal. We'll worry about ventilation or other issues at an appropriate time. Now is not the time." Throughout the Indictment Period, however, UBB was required to comply

with mandatory federal mine safety standards regarding ventilation, which were intended primarily to prevent mine explosions and fires and to prevent death and serious injury to miners if an explosion or fire occurs. Throughout the Indictment Period, UBB routinely violated those standards.

60. On or around April 29, 2008, BLANKENSHIP sent the Known UBB Executive a handwritten message chastising him because certain sections at UBB-group mines, including UBB itself, were not producing coal as quickly as BLANKENSHIP wanted. In this message, BLANKENSHIP instructed the Known UBB Executive to tell coal miners under his supervision to "run this sections [sic] like coal mines not like construction jobs." Continual construction, including construction of ventilation control structures and supports for a mine's roof and walls, was required to comply with mandatory federal mine safety standards.

61. On or around February 8, 2008, BLANKENSHIP sent the Known UBB Executive a handwritten message chastising him because certain sections at UBB-group mines, including UBB itself, were not producing coal as quickly as BLANKENSHIP wanted. In this message, BLANKENSHIP told the Known UBB Executive, referring to two mining sections at UBB, "Acting like construction sections. Get as low as possible and run coal."

62. On or around April 29, 2008, BLANKENSHIP sent the Known UBB Executive another handwritten message chastising him for not producing coal as quickly as BLANKENSHP wanted at one of the mines in the UBB mining group. This message instructed the Known UBB Executive, "Run coal. Don't bolt for the year 2525." This message was an instruction to increase coal production by devoting less time to the installation of roof bolts, which were a form of roof support. At all relevant times, mandatory federal mine safety standards and approved roof-support plans at all the UBB-group mines determined the number of roof bolts that each of those

mines were required to install, as well as the manner in which they did so, in order to help prevent falls of the mine roof and walls. At all relevant times, any violation of a mine's approved roof support plan was a violation of a mandatory mine safety standard.

63. On or around March 7, 2008, BLANKENSHIP sent the Known UBB Executive a handwritten message pressuring the Known UBB Executive to produce coal more quickly. The message contained the following instruction: "Do not cut any overcasts." An overcast was a ventilation control structure that helps ensure the reliable flow of air through a coal mine such as UBB. As a result of BLANKENSHIP's instruction in this handwritten message and similar instructions that BLANKENSHIP gave to UBB management at other times during the Indictment Period, overcasts were not constructed during the Indictment Period in numerous locations at UBB where they were needed to ensure reliable airflow. This practice contributed to numerous violations of mandatory mine safety and health standards concerning ventilation during the Indictment Period.

64. In or around August 2009, coal miners at UBB were performing work in preparation for the startup of the mine's longwall section, which was projected to be highly profitable. One of the last tasks remaining before the longwall section could begin producing coal was to cut a drainage path in certain passageways around the longwall section. Massey officials expected that water would enter the area near UBB's longwall mining section after it began producing coal, and the purpose of the planned drainage path was to drain this water from the mine in order to prevent flooding. With the drainage project approximately one to two weeks from completion, a Massey Energy Company executive known to the Grand Jury (the "Known Massey Executive") ordered that it be abandoned so that the longwall section could start producing coal sooner. This decision was made in substantial part as a result of pressure from BLANKENSHIP to begin

operating the longwall section as soon as possible. In or around November 2009, when the expected inflow of water entered the area of the longwall section, there was no system in place to drain it, and airways that were necessary to ventilate the mine flooded, at least two of filling with water from floor to roof. On or around December 14, 2009, a federal mine safety inspector issued a shutdown order upon discovering that coal miners at UBB were being required to work and travel in dark and murky water measuring up to four feet in depth with invisible slipping and tripping hazards on the floor of the flooded area—conditions that the inspector found could result in drowning. This condition, which made it impossible to examine several of UBB's aircourses in their entirety, violated a mandatory federal mine safety standard requiring that all aircourses be examined in their entirety at least weekly. It was caused by the decision to abandon the project to drain the area around the longwall section.

65. In or around December 2009, UBB's section #1 was still idled because one of its return aircourses (an aircourse that carries away air potentially contaminated by explosive substances and removes it from the mine) was flooded and could not safely be traveled to conduct required safety examinations, and had not been examined in several weeks. While this return aircourse was still flooded and not capable of being examined for safety, BLANKENSHIP directed the Known UBB Executive to start producing coal again in UBB's section #1, in violation of the mandatory mine safety standard requiring that all aircourses be examined at least weekly. When the Known UBB Executive resisted, BLANKENSHIP chastised him for "letting MSHA run his mines."

66. In or around the summer of 2009, during a period when certain sections at UBB routinely were operating with inadequate airflow, BLANKENSHIP counseled the Known UBB Executive

to ensure that UBB's underground operations were warned ahead of time when federal mine safety inspectors were coming to inspect those operations.

67. During the Indictment Period, UBB management repeatedly requested, in the course of the annual mine budgeting process that BLANKENSHP oversaw, to hire more coal miners to work in jobs critical to safety-law compliance. BLANKENSHIP and other Massey officials carrying out BLANKENSHIP's instructions and policies, whose identities are known and unknown to the Grand Jury, denied these requests, knowing that these denials would cause routine, preventable violations of mandatory federal mine safety standards to continue at UBB.

68. During the Indictment Period, BLANKENSHIP, together with other Massey officials carrying out BLANKENSHIP's instructions and policies, whose identities are known and unknown to the Grand Jury, imposed coal-production requirements on UBB that they knew would, in combination with the inadequate staffing and other resources provided to UBB, cause routine, preventable violations of mandatory federal mine safety and health standards to continue at UBB.

69. During the Indictment Period, BLANKENSHIP consistently pressured UBB management to cut the number of coal miners in jobs critical to safety-law compliance, including conducting safety examinations and cleaning and rock dusting the mine's conveyor belts. (In part, because UBB's conveyor belts carried large quantities of coal at high speeds, they inevitably developed accumulations of explosive float coal dust and combustible loose coal that had to be promptly cleaned up to comply with mandatory federal mine safety standards.) For example, on or around March 10, 2008, BLANKENSHIP sent the Known UBB Executive a handwritten note chastising him for employing too many coal miners in jobs that focused on safety examinations, cleanup of

explosive and combustible substances on conveyor belts, and other safety-compliance work, calling the UBB group's employment of such miners "ridiculous" and "[l]iterally crazy."

70. On or around April 18, 2008, BLANKENSHIP sent the Known UBB Executive another handwritten note chastising him for employing too many coal miners in jobs involving safety examinations and cleanup of explosive and combustible substances along conveyor belts. In this handwritten note, BLANKENSHIP demanded to be sent the name and job description of every coal miner assigned to clean and maintain conveyor belts at the UBB group so that he could personally review them.

71. On or around February 25, 2009, BLANKENSHIP directed UBB and all other Massey mines to reduce their labor cost from $18 per ton of coal mined to $14 per ton of coal mined. BLANKENSHIP knew that the only way to carry out this directive at UBB was to further cut the number of coal miners employed in jobs that focused on safety-law compliance rather than the direct production of coal, including coal miners who conducted safety examinations, cleaned up and maintained conveyor belts, and maintained compliance with safety laws in the mine's aircourses. BLANKENSHIP further knew that this reduction in the number of UBB coal miners who were focused on these and other safety-law compliance tasks, as distinct from direct production of coal, would cause continued routine violations of mandatory federal mine safety standards at UBB.

72. Throughout the Indictment Period, BLANKENSHIP aggressively pressured UBB management to produce more coal and reduce costs while rarely if ever mentioning the mine's routine safety-law violations unless they threatened to affect coal production. UBB managers knew that BLANKENSHIP was aware of the mine's routine safety-law violations, so his near-exclusive emphasis on coal production and cost-cutting, compared with his near silence on

UBB's hundreds of safety-law violations, further clarified to them that he expected and accepted routine safety-law violations as long as they did not compromise coal production.

73. For example, on or around March 19, 2009, BLANKENSHIP sent the Known UBB Executive a memorandum chastising him for not producing as much coal at UBB as BLANKENSHIP wanted. The memorandum said, "UBB's miner sections are a mitigated [sic] disaster," and threatened to shut down UBB if it did not begin producing more coal. In this memorandum, BLANKENSHIP stated that BLANKENSHIP himself would need to personally intervene with the Known UBB Executive's subordinates at UBB to determine, in detail, how to increase coal production at the mine.

74. On or around March 10, 2009, BLANKENSHIP sent the Known UBB Executive a handwritten note chastising him for using two different forms for reports to BLANKENSHIP on an area of cost-cutting at UBB. In this note, BLANKENSHIP threatened the Known UBB Executive's job for what BLANKENSHIP regarded as insufficient attention to cost-cutting, writing, "You have a kid to feed. Do your job."

75. On or around March 13, 2009, BLANKENSHIP sent the Known UBB Executive a handwritten note chastising the Known UBB Executive for not producing as much coal as BLANKENSHIP wanted at a UBB-group mine. This note said, "Pitiful. You need to get focused. As I said at UBB, Marsh F [Marsh Fork, another UBB-group mine], etc I could Krushchev [sic] you. Do you understand?"

76. On or around August 5, 2008, BLANKENSHIP sent a memorandum to several Massey mining-group presidents, including the Known UBB Executive, with the subject "HIGH COSTS." The memorandum said, in part, "It seems to me that none of you are too concerned about your costs. Please let me know whether you are concerned. If you are and you happen to

be responsible for mines like . . . UBB …, please advise how you can run the kind of cost that you run." The memorandum went on to say, "In my opinion, children could run these mines better than you all do. Look at your cost and figure out what you are going to do to get it down because if we don't have a better August and September than we had July, you can be assured that the stock options are not going to look very attractive." This memorandum made no reference to compliance with federal mine safety laws.

77. On or around February 9, 2009, BLANKENSHIP sent a memorandum to Massey mining-group presidents, including the Known UBB Executive, which said, "Please be reminded that your core job is to make money. To do this, you have to run coal at a low cost, ship your orders and control your quality." The memorandum went on to say, "My suggestion is that you begin looking at your daily P&L's [profit and loss statements] everyday because I'm looking to make an example out of somebody and I don't mean embarrassment." This memorandum made no reference to compliance with federal mine safety laws.

78. Meanwhile, during the Indictment Period, in hundreds of calls with the Known UBB Executive in which BLANKENSHIP managed and supervised operations at UBB, BLANKENSHIP rarely if ever mentioned UBB's practice of routine safety-law violations, of which practice BLANKENSHIP was well aware.

79. During the Indictment Period, BLANKENSHIP and others known and unknown to the Grand Jury used compensation decisions to communicate an expectation and acceptance that UBB would routinely violate mandatory federal mine safety and health standards. During the Indictment Period, BLANKENSHIP personally made decisions on compensation for the presidents of Massey's mining groups. In 2009, for example, UBB was cited for approximately 517 violations of mandatory federal mine safety standards. For 2009, however, BLANKENSHIP

made the Known UBB Executive, the president of UBB's mining group, among the highest-paid mining group presidents at Massey, with total compensation of approximately $450,000. Also for 2009, a year in which Massey mines were cited, according to Massey's own count in the daily safety-law violation reports that BLANKENSHIP received, for approximately 8,900 violations of mandatory mine safety and health standards, persons known and unknown to the Grand Jury voted to award BLANKENSHIP bonuses and other compensation that brought his total compensation for the year to approximately $17.8 million.

False and Misleading Statements and Omissions Following an Explosion at UBB

80. On April 5, 2010, an explosion occurred at UBB. The explosion resulted in a substantial number of fatalities and, as a result, attracted national and international media attention. Some media outlets reported that Massey had engaged in a practice of routinely violating mandatory safety standards. By April 7, 2010, Massey's Class A Common Stock price dropped approximately $9.15 per share, or 16.8%, from its closing pricing on April 5, 2010. This decrease reduced BLANKENSHIP's net worth by approximately $3 million.

81. On or around April 7, 2010, BLANKENSHIP directed Massey officials known to the Grand Jury to draft a statement to Massey shareholders (the "UBB Shareholder Statement"). On or around April 7, 2010, Massey officials known to the Grand Jury prepared a draft of the UBB Shareholder Statement and provided it to BLANKENSHIP for his review and approval. Among other things, the draft UBB Shareholder Statement specifically responded to public reports that Massey had engaged in a practice of routinely violating mandatory mine safety and health standards.

82. On or around April 8, 2010, BLANKENSHIP reviewed and approved the UBB Shareholder Statement, and approved its release to the public and its filing with the SEC.

BLANKENSHIP did these acts in or around Julian, Boone County, West Virginia, within the Southern District of West Virginia. The UBB Shareholder Statement that BLANKENSHIP approved included the following statements: "Media reports suggesting that the UBB tragedy was the result of a willful disregard for safety regulations are completely unfounded," and, "We do not condone any violation of MSHA regulations, and we strive to be in compliance with all regulations at all times." On or around April 8, 2010, as a result of BLANKENSHIP's approval, Massey released the UBB Shareholder Statement to the public and filed it with the SEC, using means and instrumentalities of interstate commerce.

83. On or around April 9, 2010, a public relations consultant retained by Massey and known to the Grand Jury sent BLANKENSHIP a draft press release with a message asking him to review the draft release and advising that the consultant wanted to issue the release that day. The release consisted primarily of a list of five claims marked with bullet points. The second of these items was this claim: "We do not condone any violation of Mine Safety and Health Administration (MSHA) regulations, and we strive to be in compliance with all regulations at all times." On or around April 9, 2010, in or around Julian, Boone County, West Virginia, in the Southern District of West Virginia, BLANKENSHIP responded in writing, approving the issuance of the release. On or around April 9, 2010, the public relations consultant issued the release on Massey's behalf through means and instrumentalities of interstate commerce, including commercial services intended to disseminate press releases to the financial and investing communities.

84. At the time BLANKENSHIP approved the release and filing of the UBB Shareholder Statement, he knew that the statements that "[w]e [Massey] do not condone any violation of MSHA regulations" and "we [Massey] strive to be in compliance with all regulations at all

times" were materially false, fraudulent, fictitious, and misleading; that the UBB Shareholder Statement contained untrue statements of material fact and omitted to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; that it employed devices, schemes, and artifices to defraud; and that it would operate as a fraud and deceit upon purchasers and sellers of Massey Class A Common Stock.

85. At the time the BLANKENSHIP approved the issuance of the press release described in Paragraph 83, he knew that the statements that "[w]e [Massey] do not condone any violation of Mine Safety and Health Administration (MSHA) regulations" and "we strive to be in compliance with all regulations at all times" were materially false, fraudulent, fictitious, and misleading; that the press release contained untrue statements of material fact and omitted to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; that it employed devices, schemes, and artifices to defraud; and that it would operate as a fraud and deceit upon purchasers and sellers of Massey Class A Common Stock.

Count One
(Conspiracy)

86. The Grand Jury re-alleges Paragraphs 1 through 85 as if fully incorporated herein.

87. Throughout the Indictment Period, BLANKENSHIP, together with others known and unknown to the Grand Jury, unlawfully, willfully, and knowingly combined, conspired, confederated, and agreed together with each other:

a. for BLANKENSHIP and Massey, as operators of UBB, to willfully violate mandatory federal mine safety and health standards at UBB, in violation of Title 30, United States Code, Section 820(d), and Title 18, United States Code, Section 371; and

b. to defraud the United States and an agency thereof, to wit, 1) to hamper, hinder, impair, impede, and obstruct, by trickery, deceit, and dishonest means, the lawful and legitimate functions of DOL and its agency, MSHA, in the administration and enforcement of mine safety and health laws at UBB, and 2) to defraud and deprive, by trickery, deceit, and dishonest means, the United States of money that it otherwise would have received.

88. The purposes of this conspiracy included, among other purposes, unlawfully increasing Massey's profits and unlawfully enriching BLANKENSHIP.

Objects of the Conspiracy

89. Among the objects of the conspiracy were to:

a. routinely violate mandatory federal mine safety and health standards;

b. hamper, hinder, impair, impede, and obstruct, by trickery, deceit, and dishonest means, the lawful and legitimate functions of DOL and its agency, MSHA, in the administration and enforcement of mine safety and health laws at UBB; and

c. defraud and deprive, by trickery, deceit, and dishonest means, the United States of money that it otherwise would have received.

Manner and Means

90. The manner and means of the conspiracy included, but were not limited to, the following:

91. It was a part of the conspiracy that BLANKENSHIP, together with others known and unknown to the Grand Jury, would and did instruct and counsel their subordinates to commit violations of mandatory federal mine safety and health standards, and to take actions that they knew would and did cause violations of those standards, and to engage in omissions to act that they knew would and did cause violations of those standards.

92. It was further a part of the conspiracy that BLANKENSHIP, together with others known and unknown to the Grand Jury, would and did refuse to provide UBB with enough coal miners, time to devote to safety-law compliance, and other resources to be reasonably able to comply with mandatory federal mine safety and health standards, knowing that this refusal would and did cause routine violations of federal mine safety and health standards at UBB.

93. It was further a part of the conspiracy that BLANKENSHIP, together with others known and unknown to the Grand Jury, would and did routinely pressure UBB management to increase coal production and cut costs, and specifically to cut the number of coal miners that UBB employed in jobs focused on safety-law compliance, knowing that these steps would cause UBB to continue routinely violating mandatory federal mine safety standards.

94. It was further a part of the conspiracy that BLANKENSHIP, together with others known and unknown to the Grand Jury, would and did routinely disregard UBB's practice of safety-law violations in communicating with UBB management, which served to inform UBB management that BLANKENSHIP and Massey expected and accepted routine violations of mandatory federal mine safety standards at UBB.

95. It was further a part of the conspiracy that BLANKENSHIP, together with others known and unknown to the Grand Jury, would and did reward with high levels of compensation, and declined to punish or discipline, officials who committed and caused routine violations of mandatory federal mine safety and health standards at UBB. These officials included BLANKENSHIP and the Known UBB Executive.

96. It was further a part of the conspiracy that persons known and unknown to the Grand Jury would and did routinely commit willful, readily preventable violations of mandatory federal mine safety and health standards at UBB.

97. It was a part of the conspiracy that BLANKENSHIP, together with others known and unknown, would and did cause and counsel to be given to persons at UBB advance warning of federal mine safety inspection activities, knowing and intending that the persons receiving this advance warning would conceal and cover up and cause to be concealed and covered up violations of mandatory federal mine safety and health standards that otherwise would result in citations and shutdown orders issued by federal mine safety inspectors, and in monetary penalties due to the United States.

98. It was further a part of the conspiracy that members of the conspiracy known and unknown, upon receiving advance warning of federal mine safety inspection activities at UBB, would and did conceal and cover up and cause to be concealed and covered up violations of mandatory federal mine safety standards that would otherwise result in citations and shutdown orders issued by federal mine safety inspectors, and in monetary penalties due to the United States.

99. It was further a part of the conspiracy that members of the conspiracy known and unknown falsified and caused to be falsified samples of respirable dust that were collected at

UBB pursuant to mandatory federal mine health standards, by falsely representing, and causing to be falsely represented, the locations at which dust sampling devices were placed for the collection of such samples.

Overt Acts

100. Overt acts committed in furtherance of the conspiracy and to effect the illegal objects thereof included, but were not limited to, the following:

a. The imposition of staffing levels and production requirements, by BLANKENSHIP and others known and unknown to the Grand Jury, that BLANKENSHIP and these others known and unknown to the Grand Jury knew would result in continued routine violations of mandatory federal mine safety and health standards at UBB, as alleged in Paragraphs 67 and 68;

b. the instructions and counsel to perform acts, and to commit omissions, that would violate and cause violations of mandatory federal mine safety and health standards, alleged in Paragraphs 59 through 65;

c. the counsel to provide advance warning of federal mine safety inspection activities in UBB's underground works, alleged in Paragraph 66;

d. providing and causing to be provided advance warning of federal mine safety inspection activities in UBB's underground works, as alleged in Paragraphs 37 through 39;

e. concealing and covering up, and causing to be concealed and covered up, routine violations of mandatory federal mine safety and health standards at UBB in response to warnings of federal mine safety inspection activities in UBB's underground works, as alleged in Paragraph 37;

f. falsifying and causing to be falsified, during the Indictment Period, samples of respirable dust collected at UBB pursuant to mandatory federal mine health standards, by falsely representing and causing to be falsely represented the locations at which dust sampling devices were placed for the collection of such samples;

g. regularly pressuring UBB management to increase coal production and reduce production costs while knowing that UBB was routinely failing to meet mandatory federal mine safety and health standards and that those steps would cause continued and increased violations of those standards at UBB, as alleged in Paragraphs 69 through 77;

h. awarding high levels of compensation to, and declining to discipline or punish, officials who committed and caused routine and ongoing violations of mandatory federal mine safety and health standards at UBB, as alleged in Paragraph 79;

i. making and causing to be made false and misleading statements and omissions intended to conceal the existence of, and thereby perpetuate, the conspiracy, as alleged in Paragraphs 80 through 85; and

j. committing routine violations of mandatory federal mine safety and health standards at UBB, as alleged in Paragraphs 16 through 36.

In violation of Title 30, United States Code, Section 820(d), and Title 18, United States Code, Section 371.

Count Two

101. The Grand Jury re-alleges Paragraphs 1 through 100 as if fully incorporated herein.

102. On or around April 8, 2010, in the Southern District of West Virginia, BLANKENSHIP, aided and abetted by others known and unknown, knowingly and willfully made and caused to be made materially false, fictitious, and fraudulent statements and representations; and knowingly and willfully made and used, and caused to be made and used, a false writing and document knowing the same to contain materially false, fictitious, and fraudulent statements and entries, in a matter within the jurisdiction of the executive branch of the Government of the United States, to wit, by filing and causing to be filed with the SEC a document containing statements, entries, and representations including the following: "[w]e [Massey] do not condone any violation of MSHA regulations" and "we [Massey] strive to be in compliance with all regulations at all times," which statements BLANKENSHIP then and there well knew were false, fictitious and fraudulent.

In violation of Title 18, United States Code, Section 1001(a)(2) and (3), and Section 2.

Count Three

103. The Grand Jury re-alleges Paragraphs 1 through 102 as if fully incorporated herein.

104. From on or around April 7, 2010, through on or around April 9, 2010, BLANKENSHIP, aided and abetted by others known and unknown to the Grand Jury, did directly and indirectly, by means and instrumentalities of interstate commerce, and by means of the mails and of the facilities of national securities exchanges, did make and cause to be made untrue statements of material fact, and did omit to state, and cause to be omitted to state, material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, did engage in acts and practices and courses of business which operated and would operate as frauds and deceits upon persons, all in connection with the sale and purchase of securities, to wit, Massey Class A Common Stock, in that BLANKENSHIP, aided and abetted by others known and unknown to the Grand Jury, did directly and indirectly, make and cause to be made the statements, "[w]e [Massey] do not condone any violation of MSHA regulations," and "[w]e [Massey] do not condone any violation of Mine Safety and Health Administration (MSHA) regulations," and "we [Massey] strive to be in compliance with all regulations at all times," in a filing made with the SEC by means of interstate wire transmission, and in a press release distributed by means of interstate wire transmissions and companies engaged in the business of distributing press releases by means of interstate wire transmissions.

In violation of Title 15, United States Code, Section 78ff; Title 17, Code of Federal

Regulations, Section 240.10b-5; and Title 18 United States Code, Section 2.

STEVEN R. RUBY
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA BECKLEY

UNITED STATES OF AMERICA

v. CRIMINAL NO. 5:14-00244

DONALD L. BLANKENSHIP

UNITED STATES' SENTENCING MEMORANDUM

May 1, 1900, Scofield, Utah: A coal dust explosion at the Winter Quarters mine kills 200 coal miners.

December 6, 1907, Monongah, Marion County, West Virginia: A coal dust and gas explosion at Fairmont Coal's No. 6 and 8 mines kills 361 coal miners.

December 9, 1911, near Briceville, Tennessee: An explosion likely caused by gas and coal dust at the Cross Mountain mine kills 89 coal miners.

March 2, 1915, Layland, Fayette County, West Virginia: A coal dust explosion at the New River and Pocahontas No. 3 mine kills 112 coal miners.

March 8, 1924, near Castle Gate, Utah: A gas and coal dust explosion at the Utah Fuel Company Castle Gate Mine No. 2 kills 171 coal miners.

April 28, 1924, Wheeling, West Virginia: A gas and coal dust explosion at the Benwood mine kills 119 coal miners.

May 12, 1942, Osage, Monongalia County, West Virginia: A methane and coal dust explosion at the Christopher No. 3 mine kills 56 coal miners.

February 5, 1957, Bishop, on the Virginia-West Virginia line: A gas and coal dust explosion at the Bishop mine kills 37 coal miners.

November 20, 1968, Farmington, West Virginia: An explosion at the Consol No. 9 mine kills 78 coal miners. The ensuing investigation determines that the mine suffered from inadequate ventilation and inadequate control of coal dust.

March 9 and 11, 1976, near Ovenfork, Kentucky: Two gas and coal dust explosions at the Scotia mine kill a total of 26 coal miners.

December 7, 1981, Kite, Kentucky: A coal dust explosion at the Adkins Coal No. 11 mine kills eight coal miners.

September 13, 1989, Sullivan, Kentucky: A methane explosion at the Pyro No. 9 Slope mine kills ten coal miners. The ensuing investigation determines that an inadequate preshift safety examination contributed to the explosion.

December 7, 1992, near Norton, Virginia: A methane and coal dust explosion at the Southmountain Coal No. 3 mine kills eight coal miners. The ensuing investigation determines that inadequate preshift and weekly safety examinations contributed to the explosion.

January 19, 2006, Melville, Logan County, West Virginia: A fire at Massey Energy's Aracoma Alma #1 mine kills two coal miners. The ensuing investigation determines that violations of the laws on mine ventilation and safety examinations contributed to the deaths. Massey's Aracoma subsidiary later pleads guilty to willful violations of mine safety and health standards resulting in death. Defendant, at the time, was Massey's chief executive officer and chairman of the board.

These catastrophes, terrible as they are, represent only a small fraction of the toll exacted by mining deaths. Since 1900, the earliest year that records are readily available, more than 100,000 workers have been killed in America's coal mines. The great majority of this loss of life could have been prevented by following well-known principles of mine safety.

This history matters. It is a stark reminder that the laws on mine safety are not just words on paper. They are the bitter fruit of decades of tragedy. We have known for a very long time what makes coal mines explode. We have known for a very long time how to prevent it. And, sadly, we have known for a very long time that some mine operators will ignore these hard-learned lessons until the law compels them to take notice. The mine safety laws, it is said with good reason, are written in coal miners' blood.

Defendant knew full well the awful risks, dramatized time and again in ghastly fashion over the years, that he was taking by flouting the mine safety laws at Upper Big Branch. There was no mystery about what poor ventilation meant: buildups of methane that would ignite with the slightest spark. Yet UBB's miners were left pleading for air. There was no question what accumulations of coal dust meant if not properly treated: a powder keg 1,000 feet below the surface, primed to blow at any time. Yet black dust pervaded the mine, a calamity in the making. There was nothing the least bit hidden or mysterious about the dangers of how Defendant chose to run UBB. They manifested themselves openly, obviously, to anyone with the most basic knowledge of coal mining, and certainly to Defendant. So let us dispense with the defense's obfuscation and double talk and say plainly what Don Blankenship did: He made a conscious, cold-blooded decision to gamble with the lives of the men and women who worked for him.

How does one take the measure of such a crime? Defendant was the chief executive of one of America's largest coal companies—a multibillion-dollar behemoth with its shares traded on the New York Stock Exchange, a fleet of private aircraft, luxurious board meetings at posh resorts around the country, and vast resources to support its mining operations. He had every opportunity to run UBB safely and legally. Instead, he actively conspired to break the laws that protect coal miners' lives. Although already fabulously wealthy by the time of the criminal

conspiracy of which he stands convicted, Defendant's greed was such that he would willfully imperil his workers' survival to further fatten his bank account.

What punishment can suffice for wrongdoing so monstrous? The United States knows of no other case in which a major company's CEO has been convicted of a crime against worker-protection laws, so direct reference points are difficult to come by. But compare this crime to others seen more regularly. Which is worse: a poor, uneducated young man who sells drugs because he sees no other opportunity, or a multimillionaire executive, at the pinnacle of his power, who decides to subject his workers to a daily game of Russian roulette? Which is worse: that young man carrying a gun during a single drug deal—a crime that will earn him a five-year mandatory minimum prison sentence—or a CEO jeopardizing the lives of hundreds, day after day? Which is worse: stealing money or trampling on laws that protect human life? In each case, to ask the question is to answer it. Under any fair assessment, only a sentence of many years in prison could truly reflect the seriousness of Defendant's crime and provide just punishment, which the law requires the court to do. 18 U.S.C. § 3553(a)(2)(A).

Other statutory provisions, of course, make such a sentence impossible here. The law says that willfully violating mine safety and health standards is worth at most a year in prison. 30 U.S.C. § 820(d). One doubts that Congress contemplated a set of facts like these when it imposed that one-year maximum: a CEO whose conspiracy led to near-constant safety violations, thousands of them, certainly, based on the testimony of the miners who worked at UBB. A year is woefully insufficient to comply with the purposes of the statutory section that governs this proceeding. *See* 18 U.S.C. § 3553(a). But under the law on the books, it is the best the court can do.

Given the magnitude of Defendant's crime, a sentence shorter than the maximum could only be interpreted as a declaration that mine safety laws are not to be taken seriously. In that

way, it would badly erode respect for these laws. 18 U.S.C. § 3553(a)(2)(A). And it would encourage, not deter, future violations of the same laws that Defendant disregarded for years. *Id.*(a)(2)(B). A year in prison for what Defendant did is paltry enough. Anything less would undermine the basic requirements of sentencing.

Sentencing guidelines

The sentencing guidelines call for a prison sentence between 15 and 21 months. This recommendation arises from a base offense level of six, with four levels added because Defendant was a leader and organizer of the offense of conviction, two levels for his abuse of a position of trust, and two levels for obstructing the administration of justice. U.S.S.G. §§ 2X5.2, 3B1.1; 3B1.3; 3C1.1.

The first of these enhancements applies because Defendant was the leader and organizer of criminal activity that involved five or more participants and was otherwise extensive. U.S.S.G. § 3B1.1. Defendant objects to this enhancement. His main contention is that he was only a passive participant in the conspiracy of which he was convicted. The record, as anyone who sat through the trial in this case knows, proves the contrary. Defendant was a micromanager—and boastful of that fact—who exerted detailed control over UBB's daily operations. His actions and decisions created the understanding that safety violations would routinely be committed there. The notion that he merely stood by while others broke the law contradicts both the record and the jury's verdict.

The second enhancement addresses Defendant's abuse of his position of trust. U.S.S.G. § 3B1.3. This enhancement applies when a defendant abuses a position of public or private trust in a manner that significantly facilitates the commission or concealment of his offense. A position of private trust includes a post in a private entity whose holder exercises "substantial discretionary judgment that is ordinarily given considerable deference." As CEO of Massey, of

course, Defendant enjoyed enormous discretion—in practice, plenary discretion—over what happened at Massey's mines, including UBB. And it was his authority as CEO that allowed him to foster the conspiracy of which he was convicted. The trial record establishes these facts and thus mandates the enhancement.

Defendant objects to the abuse-of-trust enhancement for two reasons. First, he asserts that he promoted safety at UBB. The jury, however, convicted Defendant of conspiring to willfully violate mine safety laws at UBB. His claim that he promoted safety merely expresses his dismay at having been convicted, which is understandable but not relevant here. Second, Defendant contends that the enhancement cannot be applied based on his job title alone. This is true. But Defendant was not convicted merely because of his title. The evidence showed that he grossly abused his power as chief executive officer of Massey to further the conspiracy of which he was convicted. Without that position of trust, he would have been unable to advance the conspiracy in the manner that he did. Indeed, without Defendant's active leadership of the conspiracy as Massey's CEO, no scheme could have existed that approached the scope of the one that he oversaw.

The third enhancement, for obstruction of the administration of justice, applies because of Defendant's involvement in advance warning of mine inspections at Upper Big Branch. Defendant objects to this enhancement and offers lengthy grounds for his objection. The United States' full response appears in its letter to the United States Probation Office (USPO) addressing Defendant's objections. Because of its length, that response will not be repeated here, but the letter is attached as an exhibit.

In brief, the obstruction enhancement applies because trial testimony established that on at least one occasion, Defendant encouraged the giving of advance warning of a mine inspection at UBB. The purpose of that warning was to conceal mine safety violations committed as part of

the conspiracy of which Defendant stands convicted. Because Defendant acted to prevent the detection of his offense of conviction, the enhancement applies. It makes no difference that the obstruction occurred before the commencement of the criminal investigation that led to his conviction. U.S.S.G. § 3C1.1, comment. (n.1). Nor is it significant that Defendant's involvement in advance warning also related to a part of the indictment that did not lead to a conviction. *United States v. Watts*, 519 U.S. 148, 149-57 (1997). And the claim that Defendant believed advance notice of inspections were lawful, which he pressed at trial and now raises again at sentencing, lacks any plausibility, given the longstanding criminal prohibition against such warnings and the evidence at trial of efforts to hide the warnings from inspectors. More than that, it is beside the point: even if Defendant believed that advance notice of inspections was lawful in and of itself, a system of advance warnings to conceal a criminal conspiracy is the sort of behavior that without question supports the sentencing guidelines' obstruction enhancement.

With these enhancements, as noted above, Defendant's guidelines range is 15 to 21 months' imprisonment. In other words, even the low end of his guidelines range is longer than the one-year maximum allowed by statute. A sentence less than a year would represent a downward variance for which there is no basis. Even if the enhancement for obstruction—the only enhancement to which Defendant devoted meaningful space in his objections—were omitted, the guidelines range still would be 10 to 16 months, corresponding to an offense level of 12. If the court were to adopt Defendant's argument on the instruction enhancement, in other words, a sentence of a year in prison nonetheless would be not only within his guidelines range, but in the bottom half of it.

Defendant's other objections to presentence report

Defendant sent the USPO lengthy objections to the presentence report, the majority of which concern the report's exposition of his offense conduct. These so-called objections

represent nothing more than a protracted statement of Defendant's disagreements with the jury's verdict—a repetition of the motion for judgment of acquittal that he made at trial, which the court rejected. The presentence report need not recite Defendant's failed motion for judgment of acquittal or rehash elements of his closing argument that the jury rejected in convicting him. His objections on offense conduct should be rejected.

Fine

The sentencing guidelines call for a fine between $4,000 and $40,000. U.S.S.G. § 5E1.2(c)(3). In this case, however, a fine in that range would fall grossly short of statutory mandates. The statutory provision that specifically governs fines requires the court to consider, in addition to the factors set forth in § 3553(a), Defendant's income and financial resources. 18 U.S.C. § 3572(a). And, as already noted, the court must impose a sentence—including a fine, where necessary—that reflects the seriousness of the offense, promotes respect for the law, provides just punishment for the offense, and deters criminal conduct. *Id.* § 3553(a)(2). The sentence must also take into account Defendant's particular history and characteristics, which include his financial means. *Id.*(a)(1).

Defendant, in keeping with his demonstrated disdain for the law, refuses to provide up-to-date information about his finances, even though he is required to do so. *See* 18 U.S.C. § 3664(d)(3). The court, however, does possess some information that Defendant provided to the pretrial services officer before his arraignment in November 2014. The United States will not repeat the details of that information in this sentencing memorandum, but it discloses that Defendant is—there is no other way to put it—immensely wealthy. A fine of $40,000 or less probably would strike him, and others, as comical. It would promote mockery of the law, not respect. It would do nothing whatsoever to deter violations of safety laws by mine executives. So it could not satisfy the law's requirements for a criminal fine.

The statutory maximum fine in this case is $250,000. 30 U.S.C. § 820(d); 18 U.S.C. § 371. In reality, a $250,000 fine for this Defendant is not much different from a $40,000 fine. But, to echo a previous point, it is the best the court can do given the laws on the books. With Defendant's fine, as with his sentence of imprisonment, a fair application of the governing statutory provision leaves the court little choice but to impose the maximum.

Restitution

Defendant's motion to hold a separate restitution hearing is pending, and the United States has agreed that a separate hearing is required under 18 U.S.C. § 3664(d)(4). ECF 566, 567. The amount of compensable losses to Alpha Natural Resources, Inc., has yet to be finally ascertained. Moreover, other claims for restitution have been submitted, and the United States is seeking further information to ascertain the amount of any compensable loss related to them. Accordingly, the United States remains of the view that a hearing and briefing on restitution, separate from the April 6, 2016 sentencing hearing, will be necessary.

Conclusion

It shocks the conscience that in the 21st century, knowing all that has been learned from decades of grief in our nation's mines, the CEO of a major coal company would willfully conspire against the laws that protect his workers' lives. One struggles for words to describe the inhumanity required for a mogul like Defendant to send working men and women into needless, mortal jeopardy for no purpose other than to pile up more money. The law, as it stands, offers no adequate punishment for his crime. But what the law does allow, the court should impose: a year in prison and the maximum fine. Don Blankenship owes at least that much to the men and women who worked at UBB.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that the foregoing "United States' Sentencing Memorandum" has been electronically filed and service has been made on opposing counsel by virtue of such electronic filing this 28th day of March, 2016 to:

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MEMORANDUM OF UNDERSTANDING BETWEEN THE U.S. DEPARTMENTS OF LABOR AND JUSTICE ON CRIMINAL PROSECUTIONS OF WORKER SAFETY LAWS

I. PURPOSE

The U.S. Department of Labor (DOL) and the U.S. Department of Justice (DOJ), recognizing the importance of ensuring the health and safety of America's workforce, enter into this memorandum of understanding (MOU) to provide for coordination of matters pertaining to worker safety that could lead to criminal prosecution by DOJ. This MOU establishes a process and framework for notification, consultation and coordination between DOL and DOJ to aid both agencies in more effectively implementing our national workplace statutes.

II. BACKGROUND AND RESPONSIBILITIES

A. DOL

DOL is organized into over twenty-five different components. The following DOL components have responsibility for, *inter alia*, fostering, promoting, and developing the welfare of the workforce of the United States; improving working conditions; and assuring work-related benefits and rights.

1. The Occupational Safety and Health Administration (OSHA)

The Occupational Safety and Health Act of 1970 (OSH Act), 29 U.S.C. §§ 651-678, gives the Secretary of Labor authority over all working conditions of employees engaged in business affecting commerce except those conditions with respect to which other federal agencies exercise statutory authority to prescribe or enforce regulations affecting occupational safety or health. The OSH Act also provides that states may operate their own occupational safety and health programs under a plan approved by the Secretary. The OSH Act is enforced through administrative penalties, including fines and corrective actions. Additionally, the OSH Act provides criminal sanctions for three types of conduct: (1) willfully violating a specific standard, and thus causing the death of an employee; (2) giving advance notice of OSHA inspection activity; and (3) falsification of documents filed or required to be maintained under the OSH Act.

2. The Mine Safety and Health Administration (MSHA)

The Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. §§ 801-965, authorizes the Secretary of Labor to promulgate and enforce safety and health standards regarding working conditions of employees engaged in underground and surface mineral extraction (mining), related operations, and preparation and milling of the minerals extracted. The Mine Act is enforced through administrative penalties, including fines and corrective actions. Additionally, the Mine Act provides criminal sanctions for: (1) knowing or willful violations of mandatory safety and health standards; (2) giving advance notice of MSHA inspection activity; and (3) falsification of documents filed or required to be maintained under the Mine Act.

3. The Wage and Hour Division (WHD)

The Migrant and Seasonal Agricultural Worker Protection Act (MSPA), 29 U.S.C. §§ 1801-1872, provides employment-related protections to migrant and seasonal agricultural workers. The WHD administers the MSPA. The MSPA provides for administrative penalties in the form of monetary fines and for civil injunctive relief. Additionally, the MSPA provides a criminal sanction for a willful or knowing violation of the MSPA or any regulation under the MSPA.

B. DOJ

DOJ has the responsibility to determine whether to institute criminal prosecution for violations of all federal statutes, including the OSH Act, MSHA, and MSPA, through the components set out below.

1. The Environment and Natural Resources Division

The Environment and Natural Resources Division (ENRD) is a litigating division within DOJ responsible, within a designated set of statutes, for the prosecution of criminal cases brought by the federal government. ENRD is responsible for supervision of enforcement under the OSH Act, MSHA and MSPA. United States Attorneys' Manual, 5-11.101.

2. United States Attorneys' Offices

United States Attorneys' Offices (USAOs) litigate cases in which the United States is a party. Among the USAOs' statutory responsibilities is the prosecution of criminal cases brought by the federal government. This includes enforcement of the worker safety statutes set out in II.A.

III. PRINCIPLES OF COORDINATION AND COOPERATION

DOL and DOJ will cooperate, to the extent authorized by law (specifically, consistent with grand jury secrecy requirements or enumerated statutory or procedural constraints), in developing and carrying out training, data and information exchanges, technical and professional assistance, referrals of alleged violations, and related matters concerning compliance and law enforcement activity to ensure the health and well-being of the Nation's workforce.

A. COORDINATION

1. Policy Matters

The DOL Deputy Solicitor for Regional Enforcement serves as the overall DOL coordinator, and as the primary DOL point of contact for policy matters arising under this MOU. ENRD's Environmental Crimes Section (ECS) shall serve as the overall DOJ coordinator and as the primary point of contact for policy matters arising under this MOU.

2. Criminal Referrals

The designated DOL points of contact for coordination of criminal enforcement referrals under the three statutes are as follows:

a. OSH Act: DOL Regional Solicitors in cooperation with OSHA Regional Administrators and the Office of Solicitor (SOL) Associate Solicitor for the Occupational Safety and Health Division;
b. MSHA: The Associate Solicitor for the Mine Safety and Health Division in consultation with the MSHA Administrator for either Coal Mine Safety and Health or Metal/Nonmetal Mine Safety and Health;
c. MSPA: DOL Regional Solicitors in cooperation with Wage Hour Regional Administrators and the SOL Associate Solicitor for the Fair Labor Standards Division.

These designated points of contact shall discuss periodically with DOJ those employers or worker safety matters that may be appropriate for enhanced investigation or criminal referral.

If a decision is made to refer a matter for consideration of criminal action, DOL will generally prepare a detailed referral memorandum and recommendation. Referrals may be made by either the Regional Solicitors or the Division, as is the developed practice in the DOL component program area, and may be made to either ECS, which will coordinate with the appropriate U.S. Attorney's Office and law enforcement agency, or to a U.S. Attorney's Office

in judicial districts in which DOL has an established relationship with that office, with a copy to ECS for tracking.

B. INFORMATION AND DATA SHARING

Upon identification of any matter appropriate for further investigation or prosecution, DOL commits to robust information sharing, including making its investigative files available to DOJ as needed for case development or litigation purposes to the extent permitted by law. DOJ agrees to protect confidential or sensitive information that may be found within DOL materials as authorized by law. DOL shall provide all information that is required to satisfy a federal prosecutor's legitimate due diligence requirements in pretrial discovery concerning, *inter alia*, the search for exculpatory evidence, in the event an indictment has been secured.

DOL and DOJ acknowledge that the information involved in these investigations may identify United States persons, whose information is protected by the Privacy Act of 1974 and/or Executive Order 12333 (or any successor executive order), as well as confidential business information and/or trade secrets, the identities of whistleblowers, and other possible areas of legal concern. All such information will be handled lawfully pursuant to the provisions thereof. Documents obtained pursuant to this MOU that are encompassed by a Freedom of Information Act, 5 U.S.C. § 552, request should be referred to the originating agency for a direct response to the requestor.

C. TRAINING

DOL and DOJ will cooperate in developing and conducting periodic training programs for each other's personnel regarding the respective laws, regulations, and procedures of each agency, as appropriate, to ensure that valid referrals are made when potential violations are found and to increase the frequency and effectiveness of criminal prosecutions of worker-safety violations.

IV. IMPLEMENTATION

This MOU is not an obligation or commitment of funds, nor a basis for transfer of funds, but rather is a basic statement of the understanding between the parties of the matters described herein. Expenditures by each of the parties are to be subject to their respective budgetary processes and to the availability of funds and resources pursuant to applicable laws, regulations, and policies. The parties expressly acknowledge that the language in this MOU in no way implies that funds will be made available for such expenditures.

This MOU is not intended to, does not, and may not be relied upon, to create any rights or benefits, substantive or procedural, enforceable at law by a party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person, including any party to litigation arising out of any investigation conducted pursuant to this MOU.

Nothing in this MOU commits DOJ to investigate or prosecute any particular worker-safety incident.

V. POINTS OF CONTACT

The following personnel are designated as the principal points of contact between the parties in the performance of this MOU.

DOL	DOJ
Deputy Solicitor for Regional Enforcement	Chief, Environmental Crimes Section

VI. DURATION, MODIFICATION AND TERMINATION

This MOU supersedes all previous MOUs or agreements between the parties on the subject of criminal prosecution under the OSH Act, MSHA and MSPA (or its predecessor, the Farm Labor Contractor Registration Act). This MOU is effective when signed by both parties. Modifications to this MOU must be in writing and signed by appropriate officials of both parties. This MOU will be reviewed periodically by the parties and shall remain in effect until cancelled, in writing, by either party with at least sixty days advance notice. The confidentiality provisions will survive cancellation.

Christopher P. Lu
Deputy Secretary of Labor
U.S. Department of Labor

Date: 12/17/15

Sally Quillian Yates
Deputy Attorney General
U.S. Department of Justice

12/17/15

U. S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

December 17, 2015

MEMORANDUM FOR ALL UNITED STATES ATTORNEYS

FROM: Sally Quillian Yates
Deputy Attorney General

SUBJECT: Prosecutions of Worker Safety Violations

The Department is committed to ensuring every American's right to a safe workplace. Currently, an average day in the United States is marked by 13 workplace fatalities, nearly 150 deaths from occupational diseases, and about 9,000 nonfatal injuries and illnesses. The Occupational Safety and Health Act of 1970 ("OSH Act") provides criminal sanctions for three types of conduct impacting worker safety: (1) willfully violating a specific standard, and thus causing the death of an employee; (2) giving advance notice of OSHA inspection activity; and (3) falsification of documents filed or required to be maintained under the OSH Act. Each of these is a misdemeanor punishable by a fine of no more than $10,000 and/or imprisonment for no more than 6 months. Perhaps because these penalties have never been increased, there are only a handful of reported criminal prosecutions under the OSH Act each year (*e.g.*, three in 2013).

Prosecutors can make enforcement meaningful by charging other serious offenses that often occur in association with OSH Act violations – including false statements, obstruction of justice, witness tampering, conspiracy, and environmental and endangerment crimes. With penalties ranging from 5 to 20 years' incarceration, plus significant fines, these felony provisions provide additional important tools to deter and punish workplace safety crimes.

The Environmental Crimes Section (ECS) of the Environment and Natural Resources Division (ENRD) has worked with the Department of Labor (DOL) over the past decade to aggressively prosecute numerous worker safety cases, developing an expertise in worker safety enforcement. ECS has also trained hundreds of OSH Act inspectors to recognize and document Title 18 offenses. To further our ability to deter worker safety crimes, the Attorney General's Advisory Committee recently voted to approve amendments to the U.S. Attorneys' Manual (USAM) that would transfer the responsibility shared with the U.S. Attorneys' Offices for criminal worker safety prosecutions from the Criminal Division's Fraud Section to ENRD's

ECS. Those USAM changes specifically address criminal prosecutions under the OSH Act, the Mine Safety Act, 30 U.S.C. § 801 et seq., the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1801 et seq., and the Atomic Energy Act, 42 U.S.C. § 2272 et seq. The revisions to the USAM can be found at: http://www.justice.gov/usam/usam-5-11000-environmental-crimes#5-11.101. The changes are intended to allow ECS to provide support and resources to the U.S. Attorneys' Offices in this important area.

Earlier today, in order to enhance coordination between the Department of Justice (DOJ) and DOL, I executed a Memorandum of Understanding with the Deputy Secretary of DOL. It is available at http://www.justice.gov/enrd/worker-endangerment. The Memorandum of Understanding establishes a process and framework for notification, consultation and coordination between DOJ and DOL to aid both agencies in more effectively implementing our national workplace statutes.

In the next few weeks, ECS will be providing to you the name of a designated Criminal Coordinator from the Department of Labor. I encourage you to work with this person to increase the frequency and effectiveness of criminal prosecutions of worker safety violations in your District. Appointing an attorney in your office to engage regularly with the designated Criminal Coordinator and relevant enforcement personnel will help to identify matters appropriate for investigation and prosecution. ECS stands ready to provide assistance at your request, and, now that it has responsibility for the worker safety statutes, will be engaging in outreach to the U.S. Attorney community to offer support in this area. U.S. Attorneys' Offices are encouraged to consider criminal referrals from DOL and to work with ECS in using all tools available under the U.S. Code to build strong workplace safety cases.

cc: Acting Associate Attorney General
Heads of Litigating Components
Director, Executive Office for United States Attorneys

U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

September 9, 2015

MEMORANDUM FOR THE ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION
THE ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION
THE ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION
THE ASSISTANT ATTORNEY GENERAL, ENVIRONMENT AND NATURAL RESOURCES DIVISION
THE ASSISTANT ATTORNEY GENERAL, NATIONAL SECURITY DIVISION
THE ASSISTANT ATTORNEY GENERAL, TAX DIVISION
THE DIRECTOR, FEDERAL BUREAU OF INVESTIGATION
THE DIRECTOR, EXECUTIVE OFFICE FOR UNITED STATES TRUSTEES
ALL UNITED STATES ATTORNEYS

FROM: Sally Quillian Yates
Deputy Attorney General

SUBJECT: Individual Accountability for Corporate Wrongdoing

Fighting corporate fraud and other misconduct is a top priority of the Department of Justice. Our nation's economy depends on effective enforcement of the civil and criminal laws that protect our financial system and, by extension, all our citizens. These are principles that the Department lives and breathes—as evidenced by the many attorneys, agents, and support staff who have worked tirelessly on corporate investigations, particularly in the aftermath of the financial crisis.

One of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing. Such accountability is important for several reasons: it deters future illegal activity, it incentivizes changes in corporate behavior, it ensures that the proper parties are held responsible for their actions, and it promotes the public's confidence in our justice system.

There are, however, many substantial challenges unique to pursuing individuals for corporate misdeeds. In large corporations, where responsibility can be diffuse and decisions are made at various levels, it can be difficult to determine if someone possessed the knowledge and criminal intent necessary to establish their guilt beyond a reasonable doubt. This is particularly true when determining the culpability of high-level executives, who may be insulated from the day-to-day activity in which the misconduct occurs. As a result, investigators often must reconstruct what happened based on a painstaking review of corporate documents, which can number in the millions, and which may be difficult to collect due to legal restrictions.

These challenges make it all the more important that the Department fully leverage its resources to identify culpable individuals at all levels in corporate cases. To address these challenges, the Department convened a working group of senior attorneys from Department components and the United States Attorney community with significant experience in this area. The working group examined how the Department approaches corporate investigations, and identified areas in which it can amend its policies and practices in order to most effectively pursue the individuals responsible for corporate wrongs. This memo is a product of the working group's discussions.

The measures described in this memo are steps that should be taken in any investigation of corporate misconduct. Some of these measures are new, while others reflect best practices that are already employed by many federal prosecutors. Fundamentally, this memo is designed to ensure that all attorneys across the Department are consistent in our best efforts to hold to account the individuals responsible for illegal corporate conduct.

The guidance in this memo will also apply to civil corporate matters. In addition to recovering assets, civil enforcement actions serve to redress misconduct and deter future wrongdoing. Thus, civil attorneys investigating corporate wrongdoing should maintain a focus on the responsible individuals, recognizing that holding them to account is an important part of protecting the public fisc in the long term.

The guidance in this memo reflects six key steps to strengthen our pursuit of individual corporate wrongdoing, some of which reflect policy shifts and each of which is described in greater detail below: (1) in order to qualify for any cooperation credit, corporations must provide to the Department all relevant facts relating to the individuals responsible for the misconduct; (2) criminal and civil corporate investigations should focus on individuals from the inception of the investigation; (3) criminal and civil attorneys handling corporate investigations should be in routine communication with one another; (4) absent extraordinary circumstances or approved departmental policy, the Department will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation; (5) Department attorneys should not resolve matters with a corporation without a clear plan to resolve related individual cases, and should

memorialize any declinations as to individuals in such cases; and (6) civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay.[1]

I have directed that certain criminal and civil provisions in the United States Attorney's Manual, more specifically the Principles of Federal Prosecution of Business Organizations (USAM 9-28.000 *et seq.*) and the commercial litigation provisions in Title 4 (USAM 4-4.000 *et seq.*), be revised to reflect these changes. The guidance in this memo will apply to all future investigations of corporate wrongdoing. It will also apply to those matters pending as of the date of this memo, to the extent it is practicable to do so.

1. To be eligible for <u>any</u> cooperation credit, corporations must provide to the Department all relevant facts about the individuals involved in corporate misconduct.

In order for a company to receive <u>any</u> consideration for cooperation under the Principles of Federal Prosecution of Business Organizations, the company must completely disclose to the Department all relevant facts about individual misconduct. Companies cannot pick and choose what facts to disclose. That is, to be eligible for any credit for cooperation, the company must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all facts relating to that misconduct. If a company seeking cooperation credit declines to learn of such facts or to provide the Department with complete factual information about individual wrongdoers, its cooperation will not be considered a mitigating factor pursuant to USAM 9-28.700 *et seq.*[2] Once a company meets the threshold requirement of providing all relevant facts with respect to individuals, it will be eligible for consideration for cooperation credit. The extent of that cooperation credit will depend on all the various factors that have traditionally applied in making this assessment (*e.g.*, the timeliness of the cooperation, the diligence, thoroughness, and speed of the internal investigation, the proactive nature of the cooperation, etc.).

This condition of cooperation applies equally to corporations seeking to cooperate in civil matters; a company under civil investigation must provide to the Department all relevant facts about individual misconduct in order to receive any consideration in the negotiation. For

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[1] The measures laid out in this memo are intended solely to guide attorneys for the government in accordance with their statutory responsibilities and federal law. They are not intended to, do not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party to litigation with the United States.

[2] Nor, if a company is prosecuted, will it support a cooperation-related reduction at sentencing. *See* U.S.S.G. USSG § 8C2.5(g), Application Note 13 ("A prime test of whether the organization has disclosed all pertinent information" necessary to receive a cooperation-related reduction in its offense level calculation "is whether the information is sufficient ... to identify ... the individual(s) responsible for the criminal conduct").

example, the Department's position on "full cooperation" under the False Claims Act, 31 U.S.C. § 3729(a)(2), will be that, at a minimum, all relevant facts about responsible individuals must be provided.

The requirement that companies cooperate completely as to individuals, within the bounds of the law and legal privileges, *see* USAM 9-28.700 to 9-28.760, does not mean that Department attorneys should wait for the company to deliver the information about individual wrongdoers and then merely accept what companies provide. To the contrary, Department attorneys should be proactively investigating individuals at every step of the process – before, during, and after any corporate cooperation. Department attorneys should vigorously review any information provided by companies and compare it to the results of their own investigation, in order to best ensure that the information provided is indeed complete and does not seek to minimize the behavior or role of any individual or group of individuals.

Department attorneys should strive to obtain from the company as much information as possible about responsible individuals before resolving the corporate case. But there may be instances where the company's continued cooperation with respect to individuals will be necessary post-resolution. In these circumstances, the plea or settlement agreement should include a provision that requires the company to provide information about all culpable individuals and that is explicit enough so that a failure to provide the information results in specific consequences, such as stipulated penalties and/or a material breach.

2. Both criminal and civil corporate investigations should focus on individuals from the inception of the investigation.

Both criminal and civil attorneys should focus on individual wrongdoing from the very beginning of any investigation of corporate misconduct. By focusing on building cases against individual wrongdoers from the inception of an investigation, we accomplish multiple goals. First, we maximize our ability to ferret out the full extent of corporate misconduct. Because a corporation only acts through individuals, investigating the conduct of individuals is the most efficient and effective way to determine the facts and extent of any corporate misconduct. Second, by focusing our investigation on individuals, we can increase the likelihood that individuals with knowledge of the corporate misconduct will cooperate with the investigation and provide information against individuals higher up the corporate hierarchy. Third, by focusing on individuals from the very beginning of an investigation, we maximize the chances that the final resolution of an investigation uncovering the misconduct will include civil or criminal charges against not just the corporation but against culpable individuals as well.

3. Criminal and civil attorneys handling corporate investigations should be in routine communication with one another.

Early and regular communication between civil attorneys and criminal prosecutors handling corporate investigations can be crucial to our ability to effectively pursue individuals in

these matters. Consultation between the Department's civil and criminal attorneys, together with agency attorneys, permits consideration of the full range of the government's potential remedies (including incarceration, fines, penalties, damages, restitution to victims, asset seizure, civil and criminal forfeiture, and exclusion, suspension and debarment) and promotes the most thorough and appropriate resolution in every case. That is why the Department has long recognized the importance of parallel development of civil and criminal proceedings. *See* USAM 1-12.000.

Criminal attorneys handling corporate investigations should notify civil attorneys as early as permissible of conduct that might give rise to potential individual civil liability, even if criminal liability continues to be sought. Further, if there is a decision not to pursue a criminal action against an individual – due to questions of intent or burden of proof, for example – criminal attorneys should confer with their civil counterparts so that they may make an assessment under applicable civil statutes and consistent with this guidance. Likewise, if civil attorneys believe that an individual identified in the course of their corporate investigation should be subject to a criminal inquiry, that matter should promptly be referred to criminal prosecutors, regardless of the current status of the civil corporate investigation.

Department attorneys should be alert for circumstances where concurrent criminal and civil investigations of individual misconduct should be pursued. Coordination in this regard should happen early, even if it is not certain that a civil or criminal disposition will be the end result for the individuals or the company.

4. Absent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for any individuals.

There may be instances where the Department reaches a resolution with the company before resolving matters with responsible individuals. In these circumstances, Department attorneys should take care to preserve the ability to pursue these individuals. Because of the importance of holding responsible individuals to account, absent extraordinary circumstances or approved departmental policy such as the Antitrust Division's Corporate Leniency Policy, Department lawyers should not agree to a corporate resolution that includes an agreement to dismiss charges against, or provide immunity for, individual officers or employees. The same principle holds true in civil corporate matters; absent extraordinary circumstances, the United States should not release claims related to the liability of individuals based on corporate settlement releases. Any such release of criminal or civil liability due to extraordinary circumstances must be personally approved in writing by the relevant Assistant Attorney General or United States Attorney.

5. **Corporate cases should not be resolved without a clear plan to resolve related individual cases before the statute of limitations expires and declinations as to individuals in such cases must be memorialized.**

If the investigation of individual misconduct has not concluded by the time authorization is sought to resolve the case against the corporation, the prosecution or corporate authorization memorandum should include a discussion of the potentially liable individuals, a description of the current status of the investigation regarding their conduct and the investigative work that remains to be done, and an investigative plan to bring the matter to resolution prior to the end of any statute of limitations period. If a decision is made at the conclusion of the investigation not to bring civil claims or criminal charges against the individuals who committed the misconduct, the reasons for that determination must be memorialized and approved by the United States Attorney or Assistant Attorney General whose office handled the investigation, or their designees.

Delays in the corporate investigation should not affect the Department's ability to pursue potentially culpable individuals. While every effort should be made to resolve a corporate matter within the statutorily allotted time, and tolling agreements should be the rare exception, in situations where it is anticipated that a tolling agreement is nevertheless unavoidable and necessary, all efforts should be made either to resolve the matter against culpable individuals before the limitations period expires or to preserve the ability to charge individuals by tolling the limitations period by agreement or court order.

6. **Civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay.**

The Department's civil enforcement efforts are designed not only to return government money to the public fisc, but also to hold the wrongdoers accountable and to deter future wrongdoing. These twin aims – of recovering as much money as possible, on the one hand, and of accountability for and deterrence of individual misconduct, on the other – are equally important. In certain circumstances, though, these dual goals can be in apparent tension with one another, for example, when it comes to the question of whether to pursue civil actions against individual corporate wrongdoers who may not have the necessary financial resources to pay a significant judgment.

Pursuit of civil actions against culpable individuals should not be governed solely by those individuals' ability to pay. In other words, the fact that an individual may not have sufficient resources to satisfy a significant judgment should not control the decision on whether to bring suit. Rather, in deciding whether to file a civil action against an individual, Department attorneys should consider factors such as whether the person's misconduct was serious, whether

it is actionable, whether the admissible evidence will probably be sufficient to obtain and sustain a judgment, and whether pursuing the action reflects an important federal interest. Just as our prosecutors do when making charging decisions, civil attorneys should make individualized assessments in deciding whether to bring a case, taking into account numerous factors, such as the individual's misconduct and past history and the circumstances relating to the commission of the misconduct, the needs of the communities we serve, and federal resources and priorities.

Although in the short term certain cases against individuals may not provide as robust a monetary return on the Department's investment, pursuing individual actions in civil corporate matters will result in significant long-term deterrence. Only by seeking to hold individuals accountable in view of all of the factors above can the Department ensure that it is doing everything in its power to minimize corporate fraud, and, over the course of time, minimize losses to the public fisc through fraud.

Conclusion

The Department makes these changes recognizing the challenges they may present. But we are making these changes because we believe they will maximize our ability to deter misconduct and to hold those who engage in it accountable.

In the months ahead, the Department will be working with components to turn these policies into everyday practice. On September 16, 2015, for example, the Department will be hosting a training conference in Washington, D.C., on this subject, and I look forward to further addressing the topic with some of you then.

MSHA Document Requests During Investigations

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Session 2

Mark E. Heath
Spilman Thomas & Battle, PLLC

Mark E. Heath is a member of Spilman Thomas & Battle, PLLC, in the Charleston, West Virginia office. He Co-Chairs the firm's OSHA and MSHA practice group and concentrates his practice in safety issues, litigation and labor and employment law.

His work involves both federal and state court actions, as well as administrative cases before federal and state agencies. Mr. Heath represents employers on matters pertaining to the Mine Safety and Health Administration, the Occupational Safety and Health Administration, and state safety agencies with respect to interpretations of regulatory requirements, significant citations and orders, accident investigations, special investigations, and employment discrimination issues related to safety. Mr. Heath regularly tries cases before Federal Mine Safety and Health Review Commission ALJs and before state mine safety boards in Kentucky and West Virginia. He also litigates commercial claims in civil courts and in arbitration.

He is listed in *The Best Lawyers in America,* 19th to 22nd and 23rd editions, in Energy Law and recognized by *Chambers USA: America's Leading Lawyers for Business* for Labor & Employment and Energy Law.

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MINE SAFETY AND HEALTH SPECIAL INSTITUTE 2016

MSHA DOCUMENT REQUESTS DURING INVESTIGATIONS

A. If there is no public hearing, is the Secretary's demand for certain records during an investigation *ultra vires* because it exceeds an express statutory limitation on the Secretary's power?

As a starting point, it is well-settled that like all agencies, MSHA has only that power specifically granted to it by Congress, and no more: "[A]n agency literally has no power to act. . . unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). *See also Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002) (recognizing that "a federal agency . . . is a 'creature of statute,' having 'no constitutional or common law existence or authority, but *only* those authorities conferred upon it by Congress' "). Thus, the Secretary's power to force a mine operator to produce information is only as broad as Congress has specifically allowed.

Generally speaking, MSHA may investigate whether mining laws are being followed, investigate the cause of an accident at a mine site and investigate a miner's claim of discrimination. 30 U.S.C. § 813(a)(b); 30 U.S.C. § 815(c)(2). To help accomplish these investigations, Congress has delineated MSHA's right to access certain written information. With regard to the ability to subpoena records, Section 103(b) of the Federal Mine Safety and Health Act of 1977 ("the Mine Act") expressly provides:

> "For the purpose of making any investigation of any accident or other occurrence relating to health or safety in a coal or other mine, the Secretary may, after notice, hold public hearings, and may sign and issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books and documents, and administer oaths."

30 U.S.C. § 813(b). Recently, though, the Secretary has had success arguing that documents may be obtained from mine operators during an investigation without the necessity of notice, a

public hearing or a subpoena. For the most part, the Secretary has relied upon Section 103(h) of the Mine Act, which says as follows:

> "In addition to such records as are specifically required by this Act, every operator of a…mine shall establish and maintain such records, make such reports, and provide such information as the Secretary…may reasonably require from time to time to enable him to perform his functions under this Act." 30 U.S.C. § 813(h).

That mandate comes on the heels of a provision in the Mine Act requiring certain documents be created by an operator and made available to MSHA. In particular, all accidents are to be investigated by the operator or his agent to determine the cause and the means of preventing a recurrence. "Records of such accidents and investigations shall be kept and the information shall be made available to the Secretary…and the appropriate state agency. Such records shall be open for inspection by interested persons." 30 U.S.C. § 813(d). Importantly, subpoena power is nowhere mentioned in section 103(h).

Despite section 103(b) being the only portion of the Mine Act expressly allowing the Secretary to subpoena documents, some have construed section 103(h) to empower the Secretary with subpoena, or "administrative subpoena," authority.

Accident Investigations

MSHA's authority to request records in an accident investigation is very broad. The Mine Act requires only that MSHA's records demands be reasonable and the information requested would enable MSHA "to perform [its] functions' under the Act." 30 U.S.C. § 813(h); *see also Big Ridge, Inc.*, 715 F.3d 631 (7th Cir. 2013)[1]. MSHA's statutory authority is not just limited to "relevant and necessary" information. *Warrior Coal, LLC*, 38 FMSHRC 913 (May

[1] Case discussed in further detail below.

2016) (Comm'n), appeal docketed, No. 16-3646 (6th Cir. 2016)[2]. Similarly, Section 103(h) broadly authorizes the Secretary to request access to records not required to be kept by operators, as long as the records are "reasonably require[d]" to enable him to perform his function under the Mine Act. *Id.*

The Secretary's Program Policy Manual provides that an operator may not interfere, directly or indirectly, with MSHA's right to inspect or investigate. I MSHA, U.S. Dept. of Labor, *Program Policy Manual*, I. 103-1 (1996). Attempts to delay an investigation, even to allow your lawyer to be present, can be deemed a violation of Section 103(a). See *U. S. Steel Corp.*, 6 FMSHRC 1423 (June 1984) (Comm'n) (found operator who restricted MSHA access to the investigation site due insisting that its lawyer be present but then failed to provide time when lawyer could be there violated Section 103(a)).

Audit of Accident, Injury and Illness Reports

During a part 50 audit, MSHA requested medical reports and payroll information, which prompted an objection by mine operators in *Big Ridge, Inc.*, 715 F.3d 631 (7th Cir. 2013). The *Big Ridge* Court overruled the objection and held that "MSHA acted within its statutory and constitutional authority…in demanding information that would permit MSHA to verify the accuracy of mine operators' injury reports…" *Id.*, at 634. The Court acknowledged that 30 C.F.R. §50.41 expressly directed that "an operator shall allow MSHA to inspect and copy information related to an accident, injury or illness which MSHA considers relevant and necessary to verify a report of investigation [submitted by the operator] or relevant and necessary to a determination of compliance with…reporting requirements…" *Id.*, at 635. Consequently, the *Big Ridge* Court concluded that "under 30 C.F.R. §50.41, MSHA may require mine operators

[2] Case discussed in further detail below.

to permit MSHA inspectors to review and copy employee medical and personnel records necessary to verify the mine operators' compliance with other reporting obligations." *Id.*, at 637.

Importantly, though, the *Big Ridge* Court said "we read section 813 [of the Mine Act] to authorize MSHA to **promulgate a regulation** that requires mine operators to permit MSHA to review files that are relevant for verifying compliance with other reporting requirements." *Id.*, at 640 (emphasis added). In *dicta*, the Court seemed to make the contradictory statement that "we read the plain text of the statute as not requiring MSHA to promulgate specific rules whenever it wants to be able to make reasonable demands for records under section 813(h)." *Id.*, at 640. This statement need not have been made by the Court because a regulation authorizing collection of the requested records was already on the books; namely, 30 C.F.R. § 50.41.

The *Big Ridge* Court also took the odd step of calling section 103(h) of the Mine Act a vehicle that gave the *defacto* right to issue administrative subpoenas, despite the fact that the Court acknowledged the Mine Act "does not expressly refer to MSHA's document review power as the power to issue an 'administrative subpoena.'" *Id.*, at 646. Further, the Court conceded that the record-production authority set forth in section 103(h) does not bear all the elements of an administrative subpoena. Unlike typical administrative subpoenas, MSHA may set penalties for non-compliance before a judicial officer has ordered compliance with the document demand. *Id.*

Nonetheless, the *Big Ridge* Court said an "administrative subpoena in substance" existed because MSHA officials did not enter the mine's private offices and search through files; rather, it was "up to the mine operators themselves to search for, review, identify, and produce the responsive documents." *Id.*, at 645. Not surprisingly, the Court's apparent recognition of "administrative subpoena" power by MSHA has caused confusion, division and disagreement.

Section 110(c) investigation

In *Warrior Coal, LLC*, 38 FMSHRC 913 (May 2016) (Comm'n), appeal docketed, No. 16-3646 (6th Cir. 2016), a special investigation was undertaken by MSHA because of alleged hazardous roof and rib conditions. MSHA requested the mine operator provide names, addresses, positions, shifts worked and phone numbers of employees. When the operator did not provide the information until granted permission to do so by the involved mine employees, MSHA issued a citation alleging a violation of section 103 of the Mine Act. The Commission employed the "administrative subpoena" analysis outlined in *Big Ridge*; namely, was the request sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance was not unreasonably burdensome. Unsurprisingly, the Commission found the document request to be reasonable.

Notably, the Commissioners conceded that "it is certainly true that the Mine Act does not provide MSHA with the express power to issue subpoenas except in connection with summoning witnesses to appear and documents to be produced for investigatory public hearings." *Id.*, at 918, n. 10. However, three of the five Commissioners said that "the power to reasonably require the production of records and other information from operators" set forth in section 103(h) "is properly analogized to the power to issue administrative subpoenas for such records and information." *Id.*

Two of five Commissioners flatly said "a document demand under section 103(h) is not an administrative subpoena." *Id.*, at 925 (Althen, concurring), *Id.*, at 927 (Young, dissenting). The majority's confidence in its position that MSHA has some type of administrative subpoena authority is undermined by the Commission's recognition that "our opinion rests not on MSHA's

power to issue subpoenas, but on Congress's explicit grant of authority to MSHA pursuant to section 103(h) of the Act." *Id.*, at 919, n. 11.

In his dissent, Commissioner Young called the bestowing upon the Secretary of the power to issue an administrative subpoena "an alarming and unconstitutional expansion of the law." *Id.*, at 927. This dissenting Commissioner said at the heart of the majority opinion in *Warrior Coal* was "the mistaken assumption that MSHA has the authority to issue administrative subpoenas…" *Id.* According to Commissioner Young, "Congress not only failed to confer general administrative subpoena power on MSHA, it designed the Mine Act to preclude any inferences in favor of that power." *Id.*, at 928.

Commissioner Young pointed out that the United States Department of Justice previously recognized "it is clear both from the wording of the statute and the court interpretations that the subpoena power of the Mine Act is limited to investigating public hearings being conducted by the Secretary." *Id.*, at 929. He said subpoena power may not be inferred; instead, it must be expressly granted by Congress, and that was not done here. *Id.*, at 929-30. Moreover, attempts to pass new federal mine safety legislation were premised upon the understanding that the Secretary does not currently have administrative subpoena power. *Id.*, at 930.

Section 105(c)

In *Hopkins County Coal, LLC*, 38 FMSRHC _____, KENT 2009-820-R, (June 2016) (Comm'n), a mine operator refused to release personnel records to MSHA during a section 105(c) discrimination investigation. While the fired coal miner's discrimination complaint form did not set forth protected activity, three of five commissioners held that MSHA was compelled to investigate the claim and could do so by seeking personnel records from the mine operator. The Commission also said section 103(h) broadly authorized the Secretary to request access to

records not required to be kept by the Mine Act, as long as the records were reasonably required to enable the Secretary to perform his functions under the Mine Act. *Id.*, at 11. Once again, the Commission suggested section 103(h) amounted to "administrative subpoena" power. *Id.*, at 12 and 16. Two of the five Commissioners dissented and reiterated that "[a]n MSHA request for documents under section 103(h) is not an administrative subpoena." *Id.*, at 22, n. 1.

B. Does Section 103(h) stretch as far as it has recently been pulled?

Another look at section 103(h) may be beneficial. It simply says that "in addition to such records as are specifically required by this Act, every operator of a…mine shall establish and maintain such records, make such reports, and provide such information, as the Secretary…may reasonably require from time to time to enable him to perform his functions under this Act."

The word "subpoena" does not appear in section 103(h), whereas it is expressly noted in section 103(h). As previously stated, a federal agency has absolutely no power unless Congress extends it. See *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). Congress did not confer subpoena authority upon the Secretary in section 103(h).

Next, the first half of section 103(h) addresses records specifically required by *the Act*, *i.e.*, by Congress, while the second half addresses records specifically required by regulations lawfully promulgated in accord with appropriate notice and comment. Section 103(h) cannot possibly sweep in any *ad hoc* demand by the Secretary for documents, because if it did, then *no* mine operator could possibly have *any* reasonable expectation of privacy in *anything at all*, since after all, the operator should realize that at any time, the Secretary might call and want it. Such an interpretation would work a total evisceration of the Fourth Amendment's protections.

Relatedly, the first half of the first sentence in § 103(h) ("such records as are *specifically* required by this chapter" (emphasis added)) deals with records that are "specifically required" by

the Act, *i.e.*, identified by Congress, while the second half of that sentence ("such records, make such reports, and provide such information, as the Secretary…may reasonably require from time to time to enable him to perform his functions under this chapter") deals with records, reports, and information that the Secretary requires operators to maintain through rulemaking, *i.e.*, data that Congress only *impliedly* rather than specifically required, delegating final responsibility to the Secretary to fill in the interstitial details by identifying which specific data. Congress only specifically identified certain "records" and then left it up to the Secretary to later promulgate rules "from time to time" requiring whatever other data he needs to do his job, data that would in all likelihood be more than just the records that Congress required operators to establish and maintain.

The phrase "from time to time" in section 103(h) means that the Secretary may from time to time require, *i.e.*, promulgate regulations, that mine operators establish, maintain, and report certain data. To the extent the phrase means non-routinely, then, the Secretary's rulemaking is what's happening "from time to time," not the operators' activities regarding the records themselves. In fact, the phrase occurs hundreds of times in the Code in this context. *See, e.g.*, 10 U.S.C. § 428(d) ("The Secretary [of Defense] shall prescribe, and from time to time revise, such regulations and policy guidance as are necessary to ensure the protection of classified information disclosed to contractors of the Department of Defense."); 15 U.S.C. § 277 ("The Secretary of Commerce shall, from time to time, make regulations regarding [certain enumerated functions] and such other matters as he may deem necessary for carrying this chapter into effect."); 21 U.S.C. § 154 ("The Secretary of Agriculture is authorized to make and promulgate from time to time such rules and regulations as may be necessary to [carry out certain enumerated functions] or otherwise to carry out this chapter . . . ."); 33 U.S.C. § 1231(a) ("In

accordance with the provisions of section 553 of Title 5, the Secretary [of the department in which the Coast Guard is operating] shall issue, and may from time to time amend or repeal, regulations necessary to implement this chapter.")

C. To bestow "administrative subpoena" power on the Secretary will expand his statutory powers, and allow him to impermissibly end-run around the Administrative Procedures Act.

In *Am. Min. Congress v. MSHA*, 995 F.2d 1106 (D.C.Cir. 1993), the Secretary had promulgated rules concerning certain injury reporting requirements, and had also "supplemented" these rules with Program Policy Letters ("PPLs"), *id.* at 1107–08. The question was what force those PPLs had, *i.e.*, were they merely interpretive or were they substantive. *Id.* at 1109. En route to arriving at its decision, the court of appeals held that the Secretary's authority under § 103(h) to impose recordkeeping obligations was limited to rulemaking:

> Our own decisions have often used . . . language[] inquiring whether the disputed rule has "the force of law". We have said that a rule has such force only if Congress has delegated legislative power to the agency and if the agency intended to exercise that power in promulgating the rule.
>
> On its face, the "intent to exercise" language may seem to lead only to more smog, but in fact there are a substantial number of instances where such "intent" can be found with some confidence. *The first and clearest case is where,* ***in the absence of a legislative rule by the agency, the legislative basis for agency enforcement would be inadequate****. . . . The present case is similar [to the one discussed in the AG's Manual on the APA], as to Part 50 itself, in that § 813(h) merely requires an operator to maintain "such records . . . as the Secretary . . . may reasonably require from time to time". 30 U.S.C. § 813(h). Although the Secretary might conceivably create some "require[ments]" ad hoc,* ***clearly some agency creation of a duty is a necessary predicate to any enforcement against an operator for failure to keep records****.*

Id. at 1108–09 (emphasis added) (citations omitted) (scattered alterations in original). *See also id.* at 1110 (cataloguing cases invalidating agency action where agency attempted to use open-ended statutory authority to create specific regulatory obligations without following the APA).

The same court later called § 103(h) "a statute [that] defines a duty ***in terms of agency regulations***," *U.S. Telecom Ass'n v. FCC*, 400 F.3d 29, 38 (D.C. Cir. 2005) (emphasis added), and another court of appeals said this about *American Mining*: "The *American Mining* case itself provides another example where there was an ***inadequate legislative basis for enforcement without the rule in question***." *Erringer v. Thompson*, 371 F.3d 625, 630 (9th Cir. 2004) (emphasis added).

> The Act empowers the Secretary to "develop, promulgate, and revise as may be appropriate, improved mandatory health or safety standards for the protection of life and prevention of injuries in coal or other mines," 30 U.S.C. § 811(a), and authorizes the Secretary to require mine operators to "establish and maintain such records, make such reports, and provide such information, as the Secretary . . . may reasonably require from time to time to enable him to perform his functions under this chapter." 30 U.S.C. § 813(h).

Energy W. Min. Co. v. FMSHRC, 40 F.3d 457, 459 (D.C. Cir. 1994) (alterations in original). The court then called these two powers the Secretary's "rulemaking authority," as distinguished from his enforcement authority in § 104(a):

> In addition to delegating *rulemaking authority*, the Act grants enforcement authority to the Secretary, who, acting through MSHA, issues citations to mine operators for violations of Mine Act regulations. 30 U.S.C. § 814(a).

Id. (emphasis added).

D. Conclusion

Congress did not expressly, or impliedly, confer subpoena power upon the Secretary through section 103(h) of the Mine Act.

MSHA Investigations and Document Requests

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PART I
ACCIDENT INVESTIGATIONS AND PART 50 REQUESTS

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- This topic will trace the evolution of MSHA Requests for Information.
- Beginning with accident investigations and Part 50 Audits, the Agency has asserted its authority to review records not required to be maintained under the Mine Act.
- In the early days, most litigation turned on whether a record was required to be kept under the Mine Act. If it was not, MSHA could not get access to the records.

- Some may recall former Commissioner Duffy who gave a presentation in one of our earlier programs on what records had to be kept under the Act.
- This first began to change in accident investigations and then carried over into Part 50 audits and 110(c) investigations.
- It has now evolved at the ALJ, Commission and Courts of Appeal levels to give MSHA access to almost all records.

- ALJs and the Commission have increasingly recognized MSHA's authority to request information.
- Today we will discuss the evolution and whether we are headed towards or have arrived at a recognition of an administrative subpoena.
- The three of us will cover:
  - Accident investigations
  - Part 50 audits
  - 110(c) investigations
  - 105(c) investigations.

Accident investigations…..
U. S. Steel Corp., 6 FMSHRC 1423 (June 1984)

- Here, the Commission considered whether an operator violated section 103(a) by restricting access to an accident scene and insisted on the presence of corporate counsel during an investigative interview of one of its foremen.
- Commission ruled operator violated the Act and denied access to the MSHA investigator (who was at the mine conducting a regular inspection). It further, held § 103(a) conferred MSHA broad authority to conduct mine inspections. Id. at 1430-31.
- It also concluded that the operator violated section 103(a) by insisting that its attorney be present during MSHA's interview of a foreman pursuant to an accident investigation, and then failed to specify when he or she would be available. The Commission held that this impeded the accident investigation in violation of section 103(a). Id. at 1433.

Right to Information in Accident Investigations and Part 50 Audits

- [T]he Secretary…shall make frequent inspections and investigations in coal…mines…for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases, physical impairments originating in such mines, [and] (2) gathering information with respect to mandatory health or safety standards… **§ 103(h) Mine Act**

- …every operator of a coal…mine shall establish and maintain such records, make such reports, and provide such information as [MSHA] may reasonably require from time to time to enable [MSHA] to perform [its] functions [under the Mine Act]…Except to the extent otherwise specifically provided by this Act, all records, information, reports, findings, citations, notices, orders or decisions required or issued…may be published from time to time, may be released to any interested person, and shall be made available for public inspection. **§ 103(h) Mine Act**

- Upon request by MSHA, an operator shall allow MSHA to inspect and copy information related to an accident, injury or illness which MSHA considers relevant and necessary to verify a report of investigation required by § 50.11 of this part or relevant and necessary to a determination of compliance with the reporting requirements of this part. **30 CFR § 50.41**

Big Ridge, Inc. et al. v. Secretary of Labor, 715 F.3d 631 (7th Cir. 2013)

- In October 2010, MSHA acted on a new and broader interpretation of existing regulations that require mine operators to report to MSHA all mine-related injuries and illnesses suffered by mine employees.

- It informed 39 mine operators that, in addition to providing the injury and illness reports, they would be required to permit an MSHA inspector to review employee medical and personnel records during their next inspections. MSHA claimed that reviewing employee medical and personnel records would enable it to verify that the mines have not been under-reporting miners' injuries and illnesses.

- Two mine operators, subsidiaries of Peabody and Massey Energy, and refused to provide the records. Mine personnel complied with the requests to produce the 7000-1 and 7000-2 reports and the number of employees working at the mine for each quarter (items 1, 2, and 4), but they refused to produce payroll and medical records (items 3 and 5).

Underlying Facts

- MSHA sent another letter demanding the same list of documents. Counsel for Massey and Peabody responded to the letter explaining that the mine operators would not comply with the medical and payroll record demands because they did not believe the demands were within MSHA's authority. They also expressed concern for the privacy rights of miners and privacy of the mines' "confidential business information."
- Both operators received a citation under § 104(a) of the Mine Act for an alleged failure to permit inspection of certain records in response to a request by an authorized representative of the Secretary of Labor pursuant to 30 C.F.R. § 50.41.
- After the operators still continued to refuse to furnish the information, MSHA issued orders pursuant to section 104(b) of the Act, 30 U.S.C. § 814(b), to each mine for failing to abate the violations.
- MSHA later imposed a penalty fee of $4,000 per day in conjunction with the failure-to-abate order on one mine, Peabody Midwest.
- Because Massey agreed to produce the records without waiving its right to preserve its appeal before the Commission, no daily penalty was assessed to it.

ALJ Ruling

- The mine operators contested the orders and citations, and the cases were tried back to back before the administrative law judge.
- MSHA stayed the daily failure-to-abate penalties while the hearings were pending.
- In two opinions issued on May 20, 2011, the ALJ affirmed the citations and orders.
- The ALJ specifically found:
  - (1) The medical and personnel records MSHA sought were relevant to the mines' compliance with reporting regulations;
  - (2) MSHA was authorized to demand the records as part of a Part 50 audit; and,
  - (3) The demands did not impose an unreasonable burden on the mine operators.
- Both the Peabody and Massey subsidiaries appealed to the Commission, which consolidated the cases. A group of miners who objected to the record demands intervened and filed briefs.

The Commission Decision

- In a single decision, the Commission affirmed, holding that MSHA was authorized to make the demands under sections 813(a) and (h) and Part 50.41.
- The Commission also held that MSHA's demands did not violate either the mine operators' or the miners' privacy or Fourth Amendment rights.
- The Commission also ruled that the demands did not violate mine operators' Fifth Amendment right to due process, nor did they conflict with other federal and state laws.
- One commissioner dissented, arguing that MSHA would need to undertake additional notice-and-comment rulemaking to have the authority to demand the records without offending the Fourth or Fifth Amendments.
- While the case pending before the Commission, Alpha purchased Massey and its subsidiaries. Alpha elected not to file an appeal of the Commission decision.
- Big Ridge filed an appeal with the 7th Circuit Court of Appeals.

The 7th Circuit's Decision

- The Circuit Court agreed with the Commission that MSHA acted within its statutory and constitutional authority both in demanding information that would permit MSHA to verify the accuracy of mine operators' injury reports and in issuing citations and monetary penalties when mine operators refused to comply.

> We conclude first that under 30 C.F.R. § 50.41, MSHA may require mine operators to permit MSHA inspectors to review and copy employee medical and personnel records necessary to verify the mine operators' compliance with other reporting obligations. We also conclude that section 50.41 is a valid exercise of the agency's authority under sections 813(a) and 813(h) of the statute. Second, we then consider petitioners' Fourth Amendment challenges to the demands, concluding that the demands do not impermissibly infringe on the mine operators' Fourth Amendment rights and do not impermissibly infringe on the privacy of the miners' personal information. Third, we consider whether imposing daily penalties before the opportunity for Article III judicial review of the validity of the underlying violation infringes the mine operators' right to due process; we conclude that it does not. Fourth, ... the document demands do not impermissibly conflict with other federal and state laws.

Does MSHA Have Subpoena Power?

- The Mine Act does not provide MSHA with the express power to issue subpoenas except in connection with summoning witnesses to appear and documents to be produced for investigatory public hearings. 30 U.S.C. § 813(b).
- However, MSHA has the power to request information pursuant to section 103(h), which "amounts to an administrative subpoena in substance." Big Ridge, Inc. v. Fed. Mine Safety & Health Review Comm'n, 715 F.3d 631, 645–46 (7th Cir. 2013).
- Refusal to provide requested records can result in citation for violation of Section 103 of the Mine Act. Warrior Coal, KENT 2011-1259-R et al., Commission Opinion dated May 17, 2016.
- Refusals to comply after the section 103 citation can then result in 104(b) order for failure to abate the violation. Warrior Coal, supra.

PART II
A Solicitor's Perspective On Information Requests under the Mine Act

Mine Safety & Health Law Special Institute
September 24, 2016
Las Vegas, NV

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*** These slides are for informational purposes only and do not necessarily reflect the views of MSHA.**

Section 103(a) of the Act

- SEC. 103. (a) Authorized representatives of the Secretary or the Secretary of Health, Education, and Welfare shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirements of this Act.

Section 103(h) of the Act

- (h) In addition to such records as are specifically required by this Act, every operator of a coal or other mine shall establish and maintain such records, make such reports, and **provide such information, as the Secretary … may reasonably require from time to time** to enable him to perform his functions under this Act. The Secretary … is authorized to compile, analyze, and publish, either in summary or detailed form, such reports or information so obtained. Except to the extent otherwise specifically provided by this Act, all records, information, reports, findings, citations, notices, orders, or decisions required or issued pursuant to or under this Act may be published from time to time, may be released to any interested person, and shall be made available for public inspection. (Emphasis added)

30 CFR 50.41

- Upon request by MSHA, an operator shall allow MSHA to inspect and copy information related to an accident, injury or illnesses which MSHA considers relevant and necessary to verify a report of investigation required by § 50.11 of this part or relevant and necessary to a determination of compliance with the reporting requirements of this part.

Some scenarios where records requests have arisen

- Part 50 audits– for example, POV-related
- 110(c) and 105(c) investigations
- Recent Commission decisions have addressed all these scenarios. Others may arise.

Big Ridge v. FMSHRC, 751 F. 3d 631 (7th Cir. 2014)

- Upheld Commission decision allowing MSHA to request medical and personnel records during a Part 50 audit.
- The court rejected Fourth Amendment concerns– authority under 103(h) to request records, holding that "we conclude that the record demands are best understood, in constitutional terms, as administrative subpoenas."
- The request was "sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome."
- Daily civil penalties imposed for failure to provide the records; the court ruled the procedures for imposing these penalties did not violate due process. A settlement was later reached.

Sec. v. Warrior Coal LLC, 2016 WL 3035308 (FMSHRC 2016)

- A case involving name and contact info. for witnesses in a 110(c)/(d) investigation about bad roof and ribs in a working section.
- The company had them on file but declined to provide except for those working on the section at the time of the violation, unless the miners signed authorization releases.
- MSHA asserted it was reasonable to seek to interview witnesses off-site and protect their status as informants, and to protect confidentiality by not having to ask the operator for specific names and addresses.

Warrior Coal, cont'

- The Commission held that MSHA's statutory authority is not limited to 'relevant and necessary' information."
- The broad scope of the request was justified by the circumstances of the investigation.

Hopkins County Coal, 2016 WL 3574640 (FMSHRC 2016)

- A case involving the refusal to provide MSHA with the personnel files of employees who were disciplined for purportedly engaging in certain misconduct.
- MSHA requested the information as part of its investigation of a complaint alleging that a miner was discharged for engaging in protected safety activity

Hopkins County, cont'

- The Commission upheld the information request, holding it was reasonable in scope and manageable, and that the operator didn't need to receive any more notice about the 105(c) investigation beyond the claimant's complaint.

PART III
MSHA DOCUMENT REQUESTS DURING INVESTIGATIONS

Mine Safety & Health Law Special Institute
September 24, 2016
Las Vegas, NV

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The United States Supreme Court has explicitly stated that a federal agency "literally has no power to act…unless and until Congress confers power upon it."

La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986)

"For the purpose of making **any investigation** of **any accident or other occurrence** relating to health or safety in a coal or other mine, the Secretary may, **after notice**, hold **public hearings**, and may sign and **issue subpoenas** for
the attendance and testimony of witnesses and the production of relevant papers, books, and **documents**, and administer oaths."

Section 103(b), Federal Mine Safety and Health Act of 1977; 30 U.S.C. § 813(b)

"In addition to such records as are specifically required by this Act, every operator…shall establish and maintain such records, make such reports, and provide such information as, the Secretary…may reasonably require from time to time to enable him to perform his functions under this Act."

Section 103(h), Federal Mine Safety and Health Act of 1977; 30 U.S.C. § 813(h)

Big Ridge, Inc., 715 F.3d 631 (7th Cir. 2013)

- 30 C.F.R. § 50.41 – "upon request by MSHA, an operator shall allow MSHA to inspect and copy information related to an accident, injury or illness which MSHA considers relevant and necessary…"
- "Although the Mine…Act does not expressly refer to MSHA's documents review power as the power to issue an 'administrative subpoena,' the authority the Act confers upon MSHA amounts to an administrative subpoena in substance." *Id.*, at 646.

Warrior Coal, LLC, 38 FMSHRC 913 (May 2016) (Comm'n), appeal docketed, No. 16-3646 (6th Cir. June 2016)

- Section 110(c) investigation
- No CFR provision, like 30 C.F.R. § 50.41 in Big Ridge, Inc.
- "It is certainly true that the Mine Act does not provide MSHA with the express power to issue subpoenas except in connection with summoning witnesses to appear and documents to be produced for investigatory public hearings." Id., at 918, n. 10
- "[A]lthough Congress did not give MSHA the power to subpoena individuals to testify except in connection with investigatory public hearings, it did give MSHA the power to reasonably require the production of records and other information from operators" which is analogous to "the power to issue administrative subpoenas." Id.

Warrior Coal, LLC, 38 FMSHRC 913 (May 2016) (Comm'n), appeal docketed, No. 16-3646 (6th Cir. June 2016)

- "Our opinion rests not on MSHA's power to issue subpoenas, but on Congress's explicit grant of authority to MSHA pursuant to section 103(h) of the Act. "
  Id., at 919 n. 11.



Hopkins County Coal, LLC, 38 FMSHRC ____ (June 24, 2016) (Comm'n)

- Section 105(c) investigation
- The Seventh Circuit said a request for information and records from an operator pursuant to section 103(h) amounts to an administrative subpoena in substance. Id., at 12, n. 17.
- "[W]e conclude that section 103(h) broadly authorizes the Secretary to request access to records not required to be kept by operators, as long as the records are reasonably required to enable him to perform his function under the Mine Act." Id., at 11.

Hopkins County Coal, LLC, 38 FMSHRC ____ (June 24, 2016) (Comm'n)



- MSHA's demand for information must be sufficiently limited in scope, relevant in purpose and specific in directive so that compliance will not be unreasonably burdensome. *Id.*, at 16.

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PART IV
SCENARIOS

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A QUICK TEST

COMMON SCENARIOS WHERE MSHA OR DOJ MAY SEEK COMPANY RECORDS

Scenario #1

- MSHA is conducting an accident investigation and requests access to the scene of the incident.
- Should your attorney be present?
- Can you deny access and demand that the investigation be rescheduled so your attorney can be present?
- Can you insist on delaying witness interviews to an undetermined date so that your attorney can be present?

Scenario #2

- MSHA is conducting an accident investigation and requests the names, home, addresses and telephone numbers of witnesses.
- Can you refuse?
- Can you condition your providing of this information upon the employee's consent?

Scenario #3

- MSHA is conducting a 110(c) investigation and requests the coal production reports for a particular section.
- You are not required to maintain those records for MSHA.
- Can you refuse to provide them?

Freedom Energy Mining, 32 F.M.S.H.R.C. 1495 (ALJ) (2010)

- During 110(c) investigation, MSHA requested Massey Energy Production Reports and name, address, phone numbers and hours worked of all employees working on the 001 Section.
- Freedom refused to produce the coal product reports and was issued a citation. Freedom argued that the requested exceeded the Secretary's authority and violated the Fourth Amendment, particularly because production reports are not required to be kept under the Mine Act.
- The ALJ rejected Freedom's arguments, holding that "under Section 103(h) of the Act, the Secretary's demand for coal production reports is a request that is reasonably required by the Secretary from time to time to enable her to perform her functions under the Act."

Scenario #4

- MSHA conducts a Part 50 audit of your accident, injury and illness reports.
- During the audit, MSHA requests access to medical reports and payroll information.
- MSHA also requests access to review employee medical and personnel records, including workers' compensation filings, sick leave requests, drug testing documents and emergency medical transportation records "relating to accidents, injuries or illnesses that occurred at the mine or may have resulted from work at the mine."
- Your employees do not want to provide MSHA access to their medical records.
- MSHA has no warrant or subpoena when it requests access to the records.

Scenario #5

- During a routine inspection, an MSHA inspector observes multiple hazardous roof and rib conditions in a place where miners were actively working.
- MSHA issues a citation and order pursuant to section 104(d) and begins a special 110(c) investigation.
- During the investigation, MSHA requests the names, addresses, shift worked and telephone numbers of all mine employees, not just those working on the section and during shift where hazards observed.
- You think the request is overly broad and an invasion of your company and your employees privacy.
- Is MSHA within its rights to request the information?
- Can you insist that employees approve your release of the information before you comply?

Warrior Coal, Docket No. KENT 2011-1259-R et al., Commission Decision dated May 17, 2016

- Here, Commission upheld MSHA's citation and order issued for the operator's failure to produce such records and rejected the argument that MSHA's requests must be relevant and necessary. Rather, the request must only be reasonable.
- In determining reasonableness, the Commission considered with the request was "sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome."
- The Commission found the Secretary's request to be reasonable, even though it was broad, stating "the broad scope was justified by the circumstances of the investigation." The Commission also found no unreasonable burden on the employee because he or she can refuse to speak to the inspector.
- The Commission side-stepped the privacy issue, stating "every individual working at a mine understands the dangers faced by miners" and that "the Secretary has the important task of assuring compliance with laws and regulations protecting the health and safety of miners."

Scenario #6

- During investigation of an accident caused by a roof fall, MSHA requests that you provide copies of all non-privileged e-mail communications regarding or relating to the accident, as well as all e-mail communications between the foreman in charge and any of his subordinates or superiors during the six months prior to the accident relating to roof support.
- You are not required to maintain such records. Here, no citation/order has been issued.
- Can you refuse to comply?

Scenario #6A

- Months later, MSHA issues a 104(d) violation and, after filing a Notice of Contest, the case proceeds to litigation.
- During discovery, MSHA requests copies of all non-privileged e-mail communications regarding or relating to the accident, as well as all e-mail communications between the foreman in charge and any of his subordinates or superiors during the six months prior to the accident related to roof support."
- Can you refuse to comply at this time?

Scenario #6A Continued

THE RELEVANT FRCP 26(b)(1) NOW STATES:

Unless otherwise limited by court order, the scope of discovery is as follows: **Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.** Information within this scope of discovery need not be admissible in evidence to be discoverable.

Scenario #7

- In a major accident, MSHA brings in the U.S. Attorney to begin a criminal investigation within one week.
- The U.S. Attorney requests the following:

  All emails related to the accident;
  All personal notes and diaries;
  All electronic data
  All communications from the mining sub to its parent
  All public statements on the accident, including all reports to the SEC.

- What do you do?

This is the game changer.

In a criminal investigation, the U.S. Attorney will get almost all these documents:

All emails related to the accident;
All personal notes and diaries;
All electronic data;
All communications from the mining sub to its parent; and
All public statements on the accident, including all reports to the SEC.

The only caveat would be for documents that are attorney client and/or work product privileged.

Discrimination – So What's New?
105(c) Cases & Developments

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Session 3

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Noelle practices in the areas of mine safety and health, occupational safety and health, and business litigation. Her primary focus area is Mine Safety and Health Administration work. She represents coal companies around the country in litigation matters before the Federal Mine Safety and Health Review Commission, and locally before the Kentucky Mine Safety Review Commission. Noelle represents and advises mine operators during special investigations conducted by the Mine Safety and Health Administration in cases involving accidents, fatalities, and claims of discrimination, and also advises operators on other compliance issues involving federal and state agencies.

Noelle is a member of the Fayette County, Kentucky and American Bar Associations, as well as the Energy & Mineral Law Foundation, the Kentucky Coal Association, and the Fayette County Bar's Women Lawyers Association. She was a recipient of the 2004 Lexington Young Professionals Association's "Rising Star Award." In law school, Noelle was an Associate Editor for the *Kentucky Law Journal*, in which she authored an article entitled "The Limited Fiduciary Duties Owed by Corporate Managers to Preferred Shareholders: A Need for Change." She is President and a Board member for the University of Kentucky College of Law Alumni Association, and a 2016 Class member of Leadership Kentucky. In the past, she has served on the Board of Directors (and as Treasurer) for the New Opportunity School for Women in Berea, Kentucky, on the Finance Committee for Southern Hills United Methodist Church, as Chair of the Steering Committee for the Southern Hills Early Childhood Program, and on the Board of Directors for the Friends of Raven Run in Lexington. Noelle frequently makes presentations on topics of interest in the area of coal mine safety and health at various seminars throughout the country.

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DISCRIMINATION – SO WHAT'S NEW?

105(C) CASES & DEVELOPMENTS

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Mine Safety & Health Law Special Institute
Las Vegas, NV – Sept. 24, 2016

OVERVIEW OF PRESENTATION

- What Section 105(c)(1) of the Mine Act says
- Interference Cases
- Claims against Individuals
- Time Bar Issues
- Protected Activity – some recent cases

WHAT § 105(C) OF THE MINE ACT SAYS…

"No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner … has filed or made a complaint under or related to this Act, including a complaint notifying the operator … of an alleged danger or safety or health violation…

WHAT § 105(C) OF THE MINE ACT SAYS…

… or because such miner … is the subject of medical evaluations and potential transfer … or because such miner … 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 because of the exercise by such miner … of any statutory right afforded by this Act."

30 U.S.C. § 815(c)(1) (emphasis added)

INTERFERENCE CASES

- § 105(c)(1) provides, "No person … shall interfere with the exercise of the statutory rights of any miner…"
- There have been in an increase in claims filed under this discrimination theory
- As a result, recent Commission case law has developed the analysis to be used in interference claims

INTERFERENCE CASES

***UMWA o/b/o Franks & Hoy v. Emerald Coal Resources*, LP, PENN 2012-250-D**

- 8/29/14 - Commission split as to whether claim constitutes discrimination or interference
- 8/29/15 - 3rd Circuit remanded to Commission
- 2/10/16 - Commission remanded to ALJ Miller for interference analysis
- 4/11/16 - ALJ Miller found interference
- 5/17/16 - Commission ultimately approved 50% penalty reduction (Alpha bankruptcy)

INTERFERENCE CASES

***Secretary o/b/o Greathouse, et al. v. Monongalia County Coal Co.*, et al., WEVA 2015-904-D, et al.**

- Murray implemented "Safety and Production Bonus Plans" at six of its mines
- Miners alleged interference with their rights
- 12/30/15 – ALJ Miller denied Respondents' Motion to Dismiss
- 5/2/16- ALJ Miller found interference, ordered Respondents to pay $150,000 ($25,000 per mine)

INTERFERENCE CASES

***Secretary o/b/o McGary, et al. v. Marshall Co. Coal*, et al., WEVA 2015-583-D, et al.**

- Murray power point requires miners with MSHA complaints to also report issues to company
- Miners alleged policy interferes with right to file anonymous complaints
- 11/18/15 - ALJ Miller found interference, fined each mine $30,000, and ordered Mr. Murray to personally speak at mines
- 2/10/16 - Commission stayed penalties and requirement for Mr. Murray to speak

INTERFERENCE CASES

***Secretary o/b/o Pepin v. Empire Iron Mining Partnership*, LAKE 2015-386-DM**

- 6/6/16 - ALJ Barbour found supervisor's remarks to Pepin (regarding MSHA's negative finding on her complaint) constituted interference, assessed $8,000 fine
- Pepin was not actually prevented from exercising her rights, but ALJ Barbour found the remarks tended to instill "a fear of reprisal for exercising protected activity"

CLAIMS AGAINST INDIVIDUALS

- § 105(c)(1) provides, "No person shall discharge or in any manner discriminate against … any miner…"

- Recent cases have included issues arising from claims asserted against individual miners (both hourly miners and management persons)

CLAIMS AGAINST INDIVIDUALS

***Pendley v. Highland Mining Co. & James Creighton*, KENT 2013-606-D**

- 2/12/15 – ALJ Andrews found that Creighton, an hourly miner, had interfered with Pendley's rights as a miners' rep
- 10/27/15 - Applying penalty criteria set forth in Section 110(i) of the Act, ALJ Andrews assessed Creighton a $250 fine (reducing the fine from MSHA's proposed $500 fine due to Creighton's disability and inability to pay)

CLAIMS AGAINST INDIVIDUALS

***Michael Wilson v. Jarrod Farris*, et al., KENT 2015-672-D**

- Wilson brought complaint against 3 hourly miners, claiming their inquiry to MSHA inspector (of how they could get Wilson removed as miners' rep) was discrimination
- 1/12/16 - ALJ Moran denies Wilson's motion for discovery, says no material fact at issue
- 2/3/16 – ALJ Moran grants Respondents' Motion for Summary Decision, finds there is no adverse action, no discrimination

CLAIMS AGAINST INDIVIDUALS

***Michael Wilson v. Jim Browning*, KENT 2016-0095-D**

- Wilson (a miners' rep) brought complaint against Browning (an hourly miner) after Browning told Wilson to leave the mine
- 5/18/16 – on cross motions for Summary Decision, ALJ Miller finds there was no interference with Wilson's rights as a miners' rep, that this was merely an isolated incident between employees

TIME BAR ISSUES

- § 105(c)(2) provides that a miner must file a discrimination complaint with the Secretary within 60 days of the alleged discrimination
- § 105(c)(3) provides that the Secretary shall notify miner within 90 days of the filing of the complaint of the Secretary's determination of whether a 105(c) violation occurred
- Recent cases have disregarded these time periods

TIME BAR ISSUES

***Secretary o/b/o Scoles v. Harrison County Coal Co.*, WEVA 2016-274-D**

- Scoles filed his 105(c) complaint 20 days late after waiting for a final arbitration ruling
  - Complaint was filed 26 days after arbitration ruling, and 80 days after his suspension
  - Scoles said he thought he had to exhaust his other administrative remedies
- 5/10/16 – ALJ Andrews held the complaint was not time-barred since the Act's 60 day filing period is not jurisdictional, and the company was not prejudiced

TIME BAR ISSUES

***Secretary o/b/o Brewer v. Monongalia County Coal Co.*, PENN 2016-240-D**

- Brewer filed his 105(c) complaint 29 days late after waiting for a final arbitration ruling
  - Complaint was filed 15 days after arbitration ruling, and 89 days after his suspension
  - Secretary also late in filing due to reassignment
- 7/21/16 – ALJ Andrews held complaint not time-barred since filing period not jurisdictional, the miner should not be penalized for attorney's late filing, and no prejudice to company

TIME BAR ISSUES

***Secretary o/b/o Michael Murray v. Mach Mining LLC*, LAKE 2016-186-D**

- 5/16/16 – ALJ Rae denied Mach Mining's motion to dissolve temporary reinstatement to miner whose case had been under MSHA investigation for over 90 days
- ALJ Rae held 90 day deadline not jurisdictional, and miner should not be penalized for the government's delay

PROTECTED ACTIVITY - PROFANITY

***Secretary o/b/o Harrison v. Marion County Coal Co.*, WEVA 2015-811-D**

- Harrison was terminated after he wrote profanity on a voided check received from the company's bonus plan, posted it on Facebook, and then returned it to payroll
- 7/2/15 – ALJ Harner ordered temporary reinstatement, ruling that writing profanity on the voided check was a complaint to the bonus plan, and was protected activity
- 2/5/16 – reinstatement stands despite idled mine

NOT PROTECTED – MEDICAL ABSENCE

***Mark Lujan v. Signal Peak Energy, LLC*, WEST 2015-252-D**

- 1/15/16 – ALJ Barbour ruled that Lujan's medically-related absences for gout flare-ups was not a protected activity under § 105(c), but stated that work refusals for medical reasons could potentially be protected
- ALJ Barbour also held that Lujan's 402-day-late filing was excusable since there was no material prejudice to company, and since Lujan failed to consult with counsel

Judicial Deference in Mine Act Cases

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Session 4

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MINE SAFETY AND HEALTH LAW SPECIAL INSTITUTE
SEPTEMBER 24, 2016

JUDICIAL DEFERENCE IN MINE ACT CASES: Circuit Courts Split on Whether Full *Chevron* Deference Should be Given to the Secretary's Litigating Position

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I. The Basics: *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

   A. Where the meaning of the statute is plain – no question of deference – the Court applies the statute as written.

   B. Where the statutory meaning is unclear – the question becomes whether the agency's interpretation entitled to deference

   C. The Agency's interpretation is entitled to deference if it is "reasonable."

      1. An interpretation is "reasonable" if it is a permissible interpretation.

      2. A Court is to uphold the agency's reasonable interpretation, even if the Court finds that it is not the best interpretation.

      3. The Court will not substitute its judgment for that of the agency.

II. According to the Supreme Court in *United States v. Mead*, 533 U.S. 218, 226-27 (2001), not every agency interpretation is entitled to full *Chevron* deference (in which the agency's interpretation will be upheld as long as it is reasonable). *Chevron* deference is to be limited to the following circumstances:

   A. Where Congress has granted the agency the authority to make rules carrying force of law; and

   B. When the agency is exercising that authority.

III. A split in the Circuits has developed on whether full *Chevron* deference is to be accorded to the Secretary's litigating position on interpretation of statutory provisions in the Federal Mine Safety and Health Act, 30 U.S.C. §§ 801 et seq., ("Mine Act").

   A. *Knox Creek Coal Corp. v. Secretary of Labor*, 811 F.3d 148 (4th Cir. 2016).

      1. The Court noted it had not previously decided a case concerning "how much deference is owed to the Secretary's litigating positions." *Id*. at 158.

2. The Court also noted that there is a split in the circuit courts on this question. *Id*. at 158 (*comparing North Fork Coal Corp. v. Federal Mine Safety and Health Review Commission*, 691 F.3d 735, 742 (6th Cir. 2012) *with Secretary of Labor v. Excel Mining, LLC*, 334 F.3d 1, 6 (D.C. Cir. 2003).

3. In considering the factors under *Mead*, the Court noted that Congress had granted the Secretary the authority to make rules carrying the force of law. *Id.* (*citing A.T. Massey Coal Co. v. Holland*, 472 F.3d 148, 166 (4th Cir. 2006)).

4. The Court then considered the second prong of the *Mead* deference test – whether the Secretary was exercising that lawmaking authority in interpreting the statute. *Id.* at 159. The Court found that was a more difficult issue to resolve. This was a position taken in litigation, rather than under an express delegation of lawmaking authority. The Court considered whether "legislative-type" traits apply to this activity such as: "'weighing conflicting policies, considering adversarial viewpoints, [and] promulgating forward-looking rules of general applicability'" and found that they do not. *Id.* (*quoting A.T. Massey Coal*, 472 F.3d at 166).

5. The Court noted that when the Secretary engages in enforcement activity, such as issuing citations, he is exercising his express statutory delegation of power. When he defends a citation in Court, he is acting more like prosecutor than a legislator. *Id.*

6. The Fourth Circuit then noted that litigating positions are not binding or precedential, which dictates against *Chevron* deference. *Id.*

7. The Court also stated that litigating positions lack a background of formal procedure that would provide for fairness and deliberation. *Id.*

8. Deference is still due, however, according to the Fourth Circuit. *Id.* at 160. The Court then applied the lesser deference standard set out in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). Under *Skidmore*, deference will be granted to an agency's position, according to its "power to persuade," -- based upon a weighing of the following factors:

    a) The thoroughness of the agency's consideration;

    b) The validity of the agency's reasoning;

    c) The consistency between this and other pronouncements; and

    d) All other relevant factors.

B. *Secretary of Labor v. Excel Mining, LLC*, 334 F.3d 1 (D.C. Cir. 2003).

1. In an oft-quoted phrase, the D.C. Circuit stated, "the Secretary's litigating position… is as much an exercise of delegated lawmaking powers as is the Secretary's promulgation of a … health and safety standard, and is therefore deserving of deference." *Id.* at 6 (quoting cases).

2. The Court then applied full *Chevron* deference.

C. *North Fork Coal Corp. v. Federal Mine Safety and Health Review Commission*, 691 F.3d 735 (6th Cir. 2012).

1. The Court first agreed with the D.C. Circuit's pronouncement in *Excel Mining* that the Secretary's litigation position is an exercise of delegated lawmaking powers. *Id.* at 742 (*citing Excel Mining*, 334 F.3d at 6).

2. The Court went on, however, to find that less than full *Chevron* deference is due because the Secretary's position in this case (regarding the Mine Act's temporary reinstatement provision) was offered "via an informal medium" as a litigation position and thus lacks the force of law. *Id.*

3. The Court then applied the *Skidmore* analysis to determine whether the Secretary's position has the "power to persuade." *Id*. at 743.

D. *Andalex Resources*, 797 F.3d 1252 (10th Cir. 2015).

1. The Tenth Circuit appears to be aligned with the Fourth and Sixth Circuits on *Chevron* deference, but the Court still granted "great deference" to the Secretary's position.

2. The Court concluded that full *Chevron* deference will not be given to interpretations appearing in an agency handbook. *Id.* at 1258.

3. Nevertheless, the Court afforded "great deference" to MSHA's application of the factors for determining when to revoke a Petition for Modification. *Id.* at 1258.

E. The Seventh Circuit has indicated it would not confer *Chevron* deference to the Secretary's interpretation of the temporary reinstatement provision of the Mine Act as this interpretation is in a form akin to a "general policy or interpretive statement." *Vulcan Construction Materials v. Federal Mine Safety and Health Review Commission*, 700 F.3d 297, 315-316 (7th Cir. 2012) (dicta). The Court determined that the *Skidmore* standard for deference was the appropriate one to apply in this case. The Court's rationale for applying the *Skidmore* rather than *Chevron* analysis was based on the following:

1. The interpretation was not the product of a formal adjudication or rulemaking.

2. The interpretation is not embodied in a citation the Secretary seeks to defend in this case.

3. The interpretation lacks the force of law.

IV. Closing Thoughts

A. Court opinions often find that a statute is ambiguous – concluding that statutory meaning is not plain, simply because the parties disagree in the interpretations they have advanced in the case.

B. More attention should be given to the question of agency "expertise" in interpreting statutory provisions. Not every agency interpretation is based on specialized expertise. *See generally*, *Vulcan Construction Materials*, 700 F.3d at 316; *North Fork Coal*, 691 F.3d at 744.

C. Even where less than full *Chevron* deference is accorded by the Courts, the amount of deference applied is still considerable. Deference is still deference in many instances.

D. A serious concern with *Chevron* deference, or deference in any form, is that deferring to an administrative agency's interpretation removes the independence of judicial review that is a core principle of the Constitution. *See Perez v. Mortgage Bankers Association*, 135 S.Ct. 1199, 1217-20 (2015) (Thomas, J., concurring).

JUDICIAL DEFERENCE - Circuit Courts Split on *Chevron* and the Secretary's Litigating Positions

Mine Safety and Health Law
Special Institute
September 24, 2016

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Chevron

- Where the meaning of the statute is plain -- no question of deference
  - *The Court applies the statute as written*
- Where the statutory meaning is unclear – the question becomes
  - *Is the Secretary's interpretation entitled to deference?*

Chevron
Step 2 Deference

Where the statutory meaning is unclear --

Secretary's interpretation is entitled to

deference if it is "reasonable"

Chevron
Step 2 Deference

- Agency interpretation is reasonable if it is a permissible interpretation
- Does not have to be the best interpretation
- Court will not substitute its judgment for that of the agency

The Dilemma of Judicial Deference -- Operator's Perspective

- "Checks and Balances" on Executive Power
- Under deference – that balance swings heavily toward agency's view
- Difficult for operator to defeat "deference"
- "Reasonableness" often a low standard
- Does not have to be the "best" interpretation

Circuit Split
Over
Deference to Secretary's Litigating Position

Knox Creek (4th Cir. 2016)

- First Impression in 4th Circuit – How much deference to give Secretary's litigating position
- Circuit split
  - *North Fork*, (6th Cir. 2012)
  - *Excel Mining*, (D.C. Cir. 2003)

A Limit to *Chevron* Deference -

United States v. Mead, 533 U.S. 218 (2001):

Full *Chevron* deference applies where –

(1) Congress gave agency authority to make rules carrying force of law

and

(2) Agency is exercising that authority

Knox Creek (4th Cir. 2016)

- Secretary has authority to make rules carrying force of law
- Was Secretary exercising that authority in non-rulemaking context?
  - Weighing conflicting polices;
  - Considering adversarial viewpoints; and
  - Promulgating forward looking rules of general applicability?

Knox Creek (4th Cir. 2016)

- Agency defending citation is more like a prosecutor than a legislator
- Litigating position differs from "legislative-type determinations"
  - Not binding or precedential
  - Not arising from formal procedure of fairness and deliberation

Agency's litigating position not entitled to full *Chevron* deference

Knox Creek (4th Cir. 2016)

Deference is still due – to the extent the position has the "power to persuade" (*Skidmore v. Swift,* 323 U.S. 134 (1944))

Court will weigh:

- Thoroughness of agency's consideration
- Validity of its reasoning
- Consistency with other pronouncements
- All other relevant factors

Excel Mining (D.C. Cir. 2003)

"Secretary's litigating position is as much an exercise of delegated lawmaking as promulgation of standards"

Agency's litigating position is entitled to *Chevron* deference

North Fork (6th Cir. 2012)

- Secretary's litigation position is an exercise of delegated lawmaking powers
- Lacks force of law
- Entitled to some deference because not "*post hoc* rationalizations" of previous agency action
- Applying agency expertise in advocating for this interpretation

Skidmore deference is to be applied to Secretary's litigation position

10th Circuit Aligned with 4th and 6th Circuits on Degree of Deference?

Andalex Resources (10th Cir. 2015)

- Full *Chevron* deference not given to interpretations in agency "handbook"
- Court still gives "great deference" to MSHA's "handbook"

Seventh Circuit – *Chevron* Deference not Warranted

Vulcan Construction Materials (7th Cir. 2012)

General policy or interpretive statement (re. dissolution of temporary reinstatement)

- No formal adjudication or rulemaking
- General policy or interpretive statement
- Lacks force of law

Skidmore deference is to be applied to Secretary's litigation position

Another Notable Deference Case from 2016

National Mining Association v. Secretary of Labor (11th Cir. 2016) (challenge to new dust rulemaking)

"Extreme degree of deference" given to agency's evaluation of scientific data within its technical expertise"

"To do otherwise puts this court in the unenviable – and legally untenable – position of making for itself judgments entrusted by Congress to MSHA"



Closing Thoughts

- Ambiguity in Statute Too Often Found
- Who Has the “Expertise”
- Less than Full *Chevron* Deference Is Still Deference
- Independence of Judicial Review at Issue

An Update on Notable Recent Commission and Court Cases

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Session 5

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Energy and Mineral Law Foundation
Special Institute on Mine Safety and Health Law
September 2016

An Update on Notable Commission and Court Cases

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I. Commission and Circuit Court Judicial Acquiescence of Agency Overreach

A. Judicial Deference in Administrative Law

1. In July 2016, the University of Georgia School of Law research paper series published, "findings from the most comprehensive empirical study to date on how the federal courts of appeals have applied *Chevron* deference."[1] Based on 1561 agency interpretations the circuit courts reviewed from 2003 to 2013, the study found that "the circuit courts overall upheld 71% of interpretations and applied *Chevron* deference 75% of the time." The study also concluded that "there was nearly a twenty-five percentage-point difference in agency-win rates when the circuit courts applied *Chevron* deference than when they did not."[2] Agency interpretations were significantly more likely to prevail under *Chevron* deference (77.3%) than *Skidmore* deference (56.0%) compared with *de novo* review (38.5%).[3]

   Recent notable cases decided by the Federal Mine Safety and Health Review Commission, its Administrative Law Judges, and United States Courts of Appeals exhibit a pattern of judicial acquiescence of agency overreach that appears to be fostered by the doctrine of deference.

B. Pattern of Violations

5. *Brody Mining, LLC*, 36 FMSHRC 2027 (Rev. Comm. Aug. 2014). The Commission upheld the validity of a pattern of violations rule promulgated by the Mine Safety and Health Administration ("MSHA") at 30 C.F.R. § 104(e). A 4-1 majority of the Commission affirmed the ALJ and held that the rule is facially valid, and that it was not applied in an impermissibly

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[1] Barnett, Kent H. and Walker, Christopher J., Chevron in the Circuit Courts (July 12, 2016). Michigan Law Review, Vol. 115, Forthcoming; Ohio State Public Law Working Paper No. 359; UGA Legal Studies Research Paper 2016-27. Available at SSRN: http://ssrn.com/abstract=2808848 or http://dx.doi.org/10.2139/ssrn.2808848

[2] *Id*. at * 1.

[3] *Id*. at * 5.

retroactive manner to Brody. The majority found that the terms "violation" and "pattern of violations" are ambiguous and that Congress did not clearly address whether the term "violations" in Section 104(e) refers only to final orders, but that under *Chevron U.S.A. v. Natural Res. Def. Council, Inc.*, it will defer to an interpretation proffered by the Secretary so long as it is reasonable.[4]

Brody appealed the case to the D.C. Circuit Court of Appeals but the petition was withdrawn after the company filed for bankruptcy.

6. *Brody Mining, LLC*, 37 FMSHRC 1914 (Rev. Comm. Sept. 2015). At issue was whether the ALJ had jurisdiction to review the validity of the POV notice and, if so, whether the ALJ erred in dismissing the notice. The majority, led by Commissioners Young, Cohen and Nakamura, held that while the ALJ had jurisdiction to review the POV notice, he erred by invalidating the POV notice prior to the hearing. Chairman Jordan (concurring) wrote separately, and agreed with the majority that the ALJ had jurisdiction, and that the decision should be vacated and remanded, but she rejected any consideration of procedural/due process error that resulted from the Secretary's refusal to provide the theory of POV.[5] Commissioner Althen (concurring in part and dissenting in part) agreed with the majority regarding the jurisdictional issues, but dissented and found the ALJ's dismissal of the POV determination to be proper. He found the majority's decision regarding the identification of a specific number of S&S violations to be a "makeweight to justify reversal."[6] To Commissioner Althen, the ALJ's direction was clear and the Secretary failed to provide any of the necessary information covered by the ALJ's order.[7]

   The Commission remanded the case, which the parties subsequently settled.

7. *Pocahontas Coal Co.*, 37 FMSHRC 2654 (ALJ Miller Nov. 2015)(currently pending review). The ALJ sustained the pattern of violation notice, relying primarily on the Commission's decisions in *Brody Mining, LLC*, referenced above. This case currently pending appeal before Commission.

8. *Ohio Coal Association, et al., and Murray Energy Corporation, et al., v. Secretary of Labor, et al.*, __ F.3d __ (S.D. Ohio June 2016) (Case No. 2:14-cv-2646, No. 2:15-cv-448), available at 2016 WL 3350466. The National Mining Association, et al., filed a petition for review before the

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4 *Brody*, 36 FMSHRC at 2036, citing *Chevron*, 467 U.S. 837, 843 (1984).
5 *Brody*, 37 FMSHRC at 1933-36.
6 *Id*. at 1939.
7 *Id*. at 1939-52.

United States Court of Appeals for the Sixth Circuit, challenging MSHA's final POV rule. The Sixth Circuit dismissed the petition for lack of subject matter jurisdiction without prejudice holding that the 2013 POV rule was not a mandatory health or safety standard and was not reviewable by the court of appeals.[8]

After the circuit court ruling, NMA, Murray Energy and the Ohio Coal Association filed complaints, which were consolidated, in the District Court for the Southern District of Ohio Eastern Division alleging that the final rule violates the Administrative Procedure Act and Due Process. The Secretary filed a motion for summary decision asserting a lack of subject matter jurisdiction, and a failure to state a claim upon which relief can be granted.

The District Court denied the Secretary's motion to dismiss and found that it has jurisdiction to hear the case of the regulation. The court concluded that despite there being no pending POV notice, the plaintiffs might be afforded no judicial review of their claims without "betting the farm" and incurring a violation, and that their claims are "wholly collateral to the Mine Act and not the type of claims Congress intended to be heard exclusively through the Mine Act's review scheme."[9]

C. **Requests for Documentation/Information**

9. *Warrior Coal Co.*, 38 FMSHRC 913 (Rev. Comm. May 2016)(currently pending review). The Commission, relying on its 2012 *Big Ridge* decision,[10] affirmed MSHA's demand for additional information pursuant to the Act's requirement in Section 103(h). MSHA had requested a list of employees and contact information for all persons employed at the mine, following an inspection. The operator opposed the request as overbroad. The Commission affirmed the ALJ's holding that the production of the information was within the scope of the agency's authority under *Big Ridge*, given the information was relevant and that its production imposed no significant burden on the operator. Commissioner Young dissented, arguing that the 7th Circuit decision in *Big Ridge* assumed a subpoena power Congress did not confer upon MSHA.[11]

Warrior Coal Co., has filed a petition for review before the Sixth Circuit Court of Appeals.

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8 *National Mining Association, v. Sec'y of Labor*, 763 F.3d 627 (6th Cir. 2014).

9 *Ohio Coal Ass'n v. Perez*, No. 2:14-CV-2646, 2016 WL 3350466, at *11

10 *Big Ridge, Inc.*, 34 FMSHRC 1003 (May 2012), *aff'd*, 715 F.3d 631 (7th Cir. 2013).

11 *Warrior Coal Co.*, 38 FMSHRC at 927-34.

D. **Rulemaking by Policy and Judge Shopping**

10. *Tilden Mining Company, LC v. Secretary of Labor, et al.*, ___ F.3d ____ (D.C. Cir. 2016), available at 2016 WL 4254997. This case involved the issue of whether the Secretary improperly applied 30 C.F.R. § 56.12028 to extension and power cords. From at least 1977 until 1993, MSHA did not require continuity or resistance testing of power cables or extension cords in compliance with Section 56.12028.[12] This understanding was made explicit in the 1988 Program Policy Manual ("PPM"), which established that "the annual test does not apply to grounding conductors in trailing cables, powers cables, and cords which provide power to portable or mobile equipment." In 1994, MSHA issued a Program Policy Letter ("PPL") that for the first time sought to mandate such testing. The PPL mandate was incorporated into the PPM in 1996. In 1999, FMSHRC ALJ Hodgdon issued a decision that vacated 68 citations issued to Hibbing Taconite and USX Corporation – Minntac for alleged violations of Section 56.12028, holding that the standard did not apply to extension and power and that notice and comment rulemaking was required before Section 56.12028 could be applied to trailing cables, power cables and cords.[13] The decision was not appealed by the Secretary and MSHA engaged in no rulemaking.

The D.C. Circuit affirmed the Commission's decision, which held that requiring testing of extension cords and power cables under Section 56.12028 was not a substantive change requiring notice and comment rulemaking and that the Secretary's interpretation of the standard was entitled to deference because it was reasonable to include extension cords and cables within the definition of grounding system.[14] The D.C. Circuit failed to address the ALJ's decision in *Hibbing Taconite* or arguments presented by Tilden that the Secretary should have subjected its "interpretation" to notice and comment rulemaking because it is a substantive change to the rule. Tilden filed a Petition for Rehearing or Rehearing *En Banc*.

E. **Jurisdiction**

11. *Maxxim Rebuild Co.*, 38 FMSHRC 605 (Rev. Comm. Apr. 2016) (currently pending review). The Commission affirmed the ALJ's decision that MSHA had jurisdiction over a repair and fabrication shop located on abandoned mine property. The Commission relied on that fact that work performed at the shop was primarily on equipment used in mining processes and that the shop performed additional work for other mining companies. Despite the fact that MSHA had previously relinquished

12 *Hibbing Taconite Company*, 21 FMSHRC 346, 349-350 (ALJ Hodgdon March 1999).

13 *Id.*

14 *Tilden Mining Co., Inc. v. Sec'y of Labor*, No. 14-1170, 2016 WL 4254997 (D.C. Cir. Aug. 12, 2016)

jurisdiction over the shop when it was at another abandoned mine site, the Commission rejected the argument that MSHA acted inconsistently by imposing jurisdiction over the shop.[15]

Maxxim filed a petition for review before the Sixth Circuit Court of Appeals. Briefing is ongoing.

F. Petitions for Modification

5. *Canyon Fuel Company, LLC et al., and Rosebud Mining Company, et al., v. MSHA, et al.,* __ F.3d __ (D.C. Cir. 2016), available at 2016 WL 3606369. The D.C. Circuit upheld the decisions of the Assistant Secretary which imposed certain conditions for complying with a requested modification of the permissibility standards to allow the use of non-permissible electronic surveying equipment in underground coal mines.[16] The D.C. Circuit deferred to the Assistant Secretary's decisions because the Agency is purportedly deemed to be the expert in the area of mine safety. The D.C. Circuit found that the provisions, which included the requirement that coal production cease while surveying occurs in or inby the last open crosscut, in return air or within 150 feet of longwall faces or pillar workings, the bar on surveying when float coal dust is in suspension and the instruction to use viable mechanical surveying equipment if it becomes available, were not arbitrary.[17]

   Canyon Fuel and Rosebud Mining filed a Petition for Rehearing or Rehearing *En Banc*.

G. Significant and Substantial Analysis

6. *Knox Creek Coal Co.*, 36 FMSHRC 1128 (Rev. Comm. May 2014), *aff'd*, 811 F.3d 148 (4th Cir. 2016). Knox Creek petitioned for review a final order of the Commission reversing the ALJ, and concluding that four citations were S&S. Three of the citations alleged permissibility violations and one alleged an accumulations violation. The Fourth Circuit affirmed the Commission's decision finding S&S and held that the Commission did not improperly reweigh the facts found by the ALJ; the litigating positions of the Secretary of Labor under an ambiguous provision of the Mine Act are owed *Skidmore*, not *Chevron* deference; the hazard can be assumed for purposes of an S&S determination in the context of the permissibility violations; and planned abatement efforts did not actually reduce the hazard for purposes of S&S analysis.

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15 *Maxxim Rebuild Co.*, 38 FMSHRC at 610-11

16 30 U.S.C. §811(c).

17 *Canyon Fuel Company, LLC et al.*, No. 14-1285, 2016 WL 3606369.

7. *Newtown Energy, Inc.*, __ FMSHRC ___ (Rev. Comm. Aug. 2016) (Docket No. WEVA 2011-283). The Commission reversed the ALJ's Non-S&S findings; vacated and remanded the unwarrantable failure determination; vacated and remanded the civil penalty consistent with negligence and gravity findings made in the decision.[18] The significance of the Commission's decision in *Newtown* pertains to an interpretation of prong 2 of the Commission's test for analyzing whether an alleged violation is properly designated as significant and substantial (S&S). In *Mathies Coal Co.*,[19] the Commission announced its test for analyzing the propriety of an S&S designation, which provides that the Secretary must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. In *Newtown,* Commissioners Young, Althen and Nakamura joined together in finding that prong 2 of the *Mathies* test should focus on "whether the hazard was reasonable likely to occur given the particular facts surrounding this violation" (emphasis added).[20] According to the majority, when analyzing prong 2, the ALJ is to first determine/define the specific hazard the standard is aimed to prevent and then determine whether based upon particular facts surrounding this violation, there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory standard is directed.[21]

   The majority's opinion was a response to the *Knox Creek Coal Co.*, 36 FMSHRC 1128 (Rev. Comm. May 2014), aff'd, 811 F.3d 148, 163 (4th Cir. 2016), decision where the United States Court of Appeals for the Fourth Circuit stated, in dicta, that prong two of the *Mathies* test was satisfied where the Secretary established that the violation is "at least somewhat likely to result in harm." The majority in *Newtown* rejected any notion that the Fourth Circuit promulgated a new test for prong 2 given that prong 2 that was not at issue in *Knox Creek*.[22] The majority found that the Fourth Circuit's use of the phrase "at least somewhat likely" was not intended to change the Commission's "long-existing reasonable likelihood standard where the issue was not before it."[23]

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[18] Commissioners Young, Althen and Nakamura joined together in the interpretation of the *Mathies* test. Chairman Jordan and Commissioners Cohen and Nakamura joined to reverse the ALJ's finding of Non-S&S, with Commissioner Cohen and Chairman Jordan disagreeing with the majority's S&S test. Commissioners Althen and Young upheld the ALJ's finding of Non-S&S. Commissioners Young, Cohen and Althen vacated and remanded ALJ's finding of unwarrantable failure; Chairman Jordan and Commissioners Cohen and Nakamura join in reversing the ALJ's "low negligence" and "unlikely" findings.

[19] 6 FMSHRC 1, 3-4 (Rev. Comm. Jan. 1984)

[20] *Newtown*, at * 9

[21] *Id.* at *9.

[22] *Id.* at *7, discussing *Knox Creek Coal Co.*, 811 F.3d 148 (4th Cir. 2016)

[23] *Id.* at *8.

Conversely, Chairman Jordan and Commissioner Cohen disagreed with the majority's test for prong 2. Rather than determining whether the specific hazard associated with the cited standard was reasonably likely to occur given the particular facts surrounding this violation, Chairman Jordan and Commissioner Cohen relied on language from the decision in *Knox Creek Coal Co.,* which stated that prong 2 of the *Mathies* test was satisfied if it is "somewhat likely to result in, or could result in, a safety hazard."[24]

Because Commissioner Nakamura agreed with Commissioners Althen and Young regarding the burden of proving prong 2 of the *Mathies* test, but sided with Chairman Jordan and Commissioner Cohen in reversing the ALJ's S&S findings, the S&S analysis issue, unlike other issues, was not remanded back to the ALJ for consideration.

H. **Flagrant**

8. *The American Coal Co., et al.*, ___ FMSHRC ___ (Rev. Comm. Aug. 2016) (Docket No. LAKE 2009-35). At issue was the ALJ's decision that upheld the flagrant designations of two orders alleging violations of 30 C.F.R. Section 75.400 issued by MSHA approximately five days apart on two different belt transfer points.[25] The initial assessed penalties were $179,300 and $164,700 but the ALJ reduced the penalties to $101,475 and $77,737. In so doing, the ALJ rejected the Secretary's interpretation of repeated flagrant which relied on a history of past violations ("broad" approach) but upheld the flagrant designations under what the Commission refers to as the "narrow" approach which relies on the "express terms" of the Miner Act's "flagrant" provision. 30 U.S.C. § 820(b)(2).

   All five Commissioners agreed with the ALJ that Order No. 7490584 was properly designated as flagrant; however, Commissioner Althen disagreed with the Commission's holding and wrote separately. According to the Commission, for a flagrant violation it must be established that (1) there was a condition that constituted a violation of a mandatory health or safety standard, (2) the violation was "known" by the operator; (3) the violation either (a) substantially caused death or serious bodily injury, or (b) reasonably could have been expected to cause death or serious bodily injury; (4) there was a failure on the part of the operator to make reasonable efforts to eliminate the violation; and (5) the failure was either "reckless" or "repeated."

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[24] *Newtown*, at * 19-21, citing *Knox Creek Coal Co*., 36 FMSHRC 1128.

[25] *The American Coal Co.*, 35 FMSHRC 2208 (ALJ McCarthy July 2013).

The Commission held that a violation is "known" if the operator had actual or constructive knowledge of the violative condition.[26] Whether the violation either (a) substantially caused death or serious bodily injury, or (b) reasonably could have been expected to cause death or serious bodily injury, the Commission rejected American Coal's position that the gravity must be something more than "lost work days" or "permanently disabling." The Commission found that the flagrant language was close to prong 4 of the *Mathies* test for S&S, but ultimately declined to decide "whether the slight difference between the pertinent language of the flagrant provision and the fourth element of *Mathies* mandates that flagrant violations cover only 'a narrower, more severe subset of hazards' than violations of S&S." The Commission also found that the term "repeated" was ambiguous, and that the focus should be on the "operator's dereliction where immediate remedial action was required, and not on a particular number of failures."[27] The Commission rejected American Coal's contention that it did not have notice of what constituted "repeated failure" and found that an operator's history may be probative of the conditions in which the alleged flagrant failure occurred.[28]

While upholding the ALJ's determination that the first order was flagrant, the Commission remanded the decision concerning the second order to determine whether it was flagrant under the narrow approach in light of certain findings made by the Commission and if not, whether it was flagrant under the broad approach, which considers the operator's history of past violations. Commissioner Althen (concurring in part, dissenting in part) disagreed with the majority that constructive knowledge was enough to establish a known violation and that a flagrant designation can be substantiated by a history of previous violations.[29]

I. Commission's Role in Settlement

9. *The American Coal Co., et al.*, ___ FMSHRC ___ (Rev. Comm. Aug. 2016) (Docket No. LAKE 2011-13). Commission held that it has the exclusive authority to oversee settlements of contested penalty cases, based on the "very clear" language of Sec. 110(k) of the Mine Act and that the ALJ did not abuse his discretion when he denied a settlement motion. In so doing, the Commission noted that the Secretary is seeking to overturn 38 years of administrative practice and case law.[30]

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26 *American Coal* (Docket No. LAKE 2009-35) at *6
27 *Id.* at *12-14.
28 *Id.* at *15-16.
29 *Id.* at *41-55.
30 *American Coal* (Docket No. LAKE 2011-13)

J. Section 111 Compensation Case

10. *United Steelworkers Local 5114 v. Hecla Limited*, 38 FMSHRC 200 (Rev. Comm. Feb. 2016). The United Steelworkers, Local No. 5114 ("Steelworkers") brought a Sec. 111 compensation claim in response to facts involving an amendment to a section 103(k) order, which resulted in miners working underground during a period when they should have been withdrawn. The ALJ applied the statutory language to the amendment of Section 111, and concluded that compensation was owed to 19 miners who, during the eight days between issuance of and compliance with the amendment, worked when they should have been withdrawn.[31]

The Steelworkers appealed and contended that the statutory language applies to the entire section 103(k) order, and that compensation should be paid to the 218 miners idled by the order during the 19 months between issuance and termination of the order. The Commission upheld the ALJ's decision and held that compensation was limited to miners who worked in conditions covered by the order and that those miners were entitled to compensation at their regular rates of pay, in addition to any pay they received for working during the affected shift. The Commission affirmed the ALJ's rejection of the Steelworkers' claim that the compensation should relate back to the issuance of the original control order, which had resulted in miners being withdrawn, and not limited to the issuance of the modification permitting re-entry so long as ground conditions were properly monitored.[32]

[31] *United Steelworkers Local 5114 v. Hecla Limited*, 36 FMSHRC 3345 (ALJ Manning Dec. 23, 2014); 37 FMSHRC 243 (ALJ Manning Feb. 4, 2015).

[32] *United Steelworkers Local 5114*, 38 FMSHRC at 207.

Energy and Mineral Law Foundation
Mine Safety and Health Special Institute
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An Update on Notable Recent Commission and Court Cases

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Jackson Kelly, PLLC

Client Focus | Industry Insight | National Reputation

Agency Overreach & Judicial Acquiescence

- List of cases represents:
  - FMSHRC
  - United States Courts of Appeals
    - Excludes Section 105(c)
- Doctrine of Deference
- We will end on a positive note (hint: deference is not involved)

Agency Overreach & Judicial Acquiescence

- Doctrine of Deference:
  - Types:
    - *Chevron* (steps 1 & 2)
      - Agency prevails 77.3%

        70.0% of the interpretations that moved to Chevron step two (the step at which the courts defer to reasonable agency interpretations when Congress' intent was not clear at step one), the agency prevailed 93.8% of the time.*
    - *Skidmore*
      - Agency prevails 56.0%
- *De novo* review
  - 38.5%

* Barnett, Kent H. and Walker, Christopher J., Chevron in the Circuit Courts (July 12, 2016). Michigan Law Review, Vol. 115, Forthcoming; Ohio State Public Law Working Paper No. 359; UGA Legal Studies Research Paper 2016-27. Available at SSRN: http://ssrn.com/abstract=2808848 or http://dx.doi.org/10.2139/ssrn.2808848

Pattern of Violations

- FMSHRC Litigation:
  - *Brody Mining, LLC*
  - *Pocahontas Coal Co.,*
- United States Court of Appeals for the 6th Circuit
  - *National Mining Association, et al.*
  - *Murray Energy Corp., et al.*

Pattern of Violations

Industry's Position

- Challenges the validity of the rule.
- Screening criteria should have been subjected to notice-and-comment rule making.
- Violation of due process by including non-final citations/ orders.
- Violation of due process by not providing adequate pre-deprivation process.

MSHA's Positions

- Screening criteria are a non-binding statement of agency policy.
- Act allows for use of non-final citations/orders.
- Rule and Commission procedures satisfy due process.

Pattern of Violations

- *Brody Mining, LLC.*, 36 FMSHRC 2027 (Rev. Comm. Aug. 2014), voluntarily dismissed: unreported case (D.C. Cir. 2015).
  - Upheld the validity of a pattern of violations rule. See 30 C.F.R. § 104(e).
  - Screening criteria not subject to notice-and-comment rulemaking.
- Brody appealed the case to the D.C. Circuit.
  - Appeal to D.C. Circuit withdrawn.

PATTERN OF VIOLATIONS

- *Brody Mining, LLC*, 37 FMSHRC 1914 (Rev. Comm. Sept. 2015)
  - Commission vacated and remanded the ALJ's decision that dismissed the POV notice issued to Brody.
  - All five Commissioners held that ALJ had jurisdiction to review POV notice.
  - Commissioners Young, Cohen, Jordan and Nakamura held that ALJ erred by invalidating the POV notice prior to the hearing.
  - Commissioner Althen found the ALJ's dismissal of the POV was proper

    ALJ's direction to define pattern was clear and the Secretary failed to provide any of the necessary information covered by the ALJ's order.

PATTERN OF VIOLATIONS

- Other Cases:
  - *Pocahontas Coal Co.*, 37 FMSHRC 2654 (ALJ Miller Nov. 2015)
    - ALJ sustained pattern of violation notice
    - Case currently pending appeal before Commission.
  - *National Mining Association / Ohio Coal Association / Murray Energy*

PATTERN OF VIOLATIONS

- *Ohio Coal Association, et al., and Murray Energy Corporation, et al., v. Secretary of Labor, et al.*, __ F.3d __ (June 2016) (Case Nos. 2:14-cv-2646, 2:15-cv-448)
- National Mining Association, et al., filed a petition for review before the Sixth Circuit, challenging the POV rule.
  - Sixth Circuit dismissed without prejudice on jurisdictional grounds
  - Consolidated cases (NMA, Murray Energy and Ohio Coal Association) in the District Court for the Southern District of Ohio Eastern Division after Sixth Circuit's decision.
  - Despite the fact that the Sec'y had previously argued that jurisdiction would be proper before the district court, the Sec'y moved to dismiss
    - (1) lack of subject matter jurisdiction, and;
    - (2) failure to state a claim upon which relief can be granted.

PATTERN OF VIOLATIONS

- *Ohio Coal Association, et al.*, _____ (June 2016).
  - District Court denied the motion to dismiss.
  - District Court found that it has jurisdiction to hear the case of the MSHA "regulation," which is not a mandatory standard.
  - Petitioners sufficiently stated APA claims to proceed.
    - Should not have to bet the farm to challenge by incurring POV notice;
    - Claims are collateral to the Mine Act and not the type Congress intended to be heard exclusively through the Mine Act's review scheme.

Requests for Documents/Information

- *Warrior Coal Co.,* 38 FMSHRC 913 (Rev. Comm. May 2016)
  - Followed the *Big Ridge* decision
  - Approved MSHA's demand for additional information pursuant to the Act's requirement in section 103(h).
  - Affirmed the ALJ's holding that the production of the information was within the scope of the agency's authority under *Big Ridge*
    - Information was relevant and production imposed no significant burden.
  - Commissioner Young dissented
    - 7th Circuit decision in *Big Ridge* assumed a subpoena power Congress did not confer upon MSHA.

Rulemaking by Policy & Judge Shopping

- *Tilden Mining Company, LC v. Secretary of Labor, et al.,* ___ F.3d ____ (D.C. Cir. 2016), available at 2016 WL 4254997
  - Issue of whether the Secretary improperly applied 30 C.F.R. § 56.12028 (continuity & resistance testing) to extension and power cords.
  - From at least 1977 until 1993, MSHA did not require continuity or resistance testing of power cables or extension cords in compliance with Section 56.12028.
  - *Hibbing Taconite Company*, 21 FMSHRC 346 (ALJ Hodgdon March 1999)

    ALJ vacated 68 citations for alleged violations of Section 56.12028.

    Standard did not apply to extension and power cords

    Notice and comment rulemaking was required

    The decision was not appealed by the Secretary

RULEMAKING BY POLICY & JUDGE SHOPPING

- *Tilden Mining Company, LC v. Secretary of Labor, et al.*, ___ F. 3d ____ (D.C. Cir. 2016), available at 2016 WL 4254997
  - Ignored *Hibbing Taconite* decision
  - Did not address notice and comment rulemaking because it is a substantive change to the rule.
  - The decision was not appealed by the Secretary.
  - Ignored that the Secretary's actions undermine the regulatory process.

JURISDICTION

- *Maxxim Rebuild* Co., 38 FMSHRC 605 (Rev. Comm. Apr. 2016)
- Commission unanimously affirmed a finding of MSHA jurisdiction over a repair and fabrication shop located outside of an abandoned mine.
- Maxxim has petition for judicial review before the Sixth Circuit Court of Appeals.
  - Murray Energy filed Amicus brief
  - Briefing is ongoing

PETITIONS FOR MODIFICATION

- *Canyon Fuel Company, LLC et al., v. MSHA, et al.*, __ F.3d __ (D.C. Cir. 2016)
- *Rosebud Mining Company, et al., v. MSHA, et al.*, __ F.3d __ (D.C. Cir. 2016)
  - Consolidated before the D.C. Circuit Court of Appeals.

PETITIONS FOR MODIFICATION

- Modification to permissibility standard to allow the use of electronic surveying equipment underground
  - Mechanical is obsolete
  - Electronic is 8x to 10x more accurate
  - Surveyors are not trained to use mechanical equipment
  - No new commercially available mechanical theolodites
  - No parts to repair mechanical equipment
  - Safer given its accuracy

PETITIONS FOR MODIFICATION

- Three Department of Labor ALJs found in favor of Rosebud and Canyon Fuel.
- Assistant Secretary Main overturned the ALJs' credibility findings and even took judicial notice.
- Assistant Secretary Main discredited company experts and credited MSHA's witness testimony, despite the fact that they were not qualified as experts.
- Assistant Secretary Main imposed a requirement to cease production and return to the use of mechanical surveying equipment if it becomes "viable."
- D.C. Circuit deferred to Assistant Secretary's decisions because the Agency is deemed to be the expert and they found the provisions were not arbitrary.

SIGNIFICANT AND SUBSTANTIAL

- *Mathies test:*
  - To establish that a violation of a mandatory safety standard is S&S, the Secretary must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.
    - *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Rev. Comm. Jan. 1984).

SIGNIFICANT AND SUBSTANTIAL

- *Knox Creek Coal Co.*, 36 FMSHRC 1128 (Rev. Comm. May 2014), aff'd, 811 F.3d 148 (4th Cir. 2016).
- Commission reversed the ALJ and concluded that four violations were S&S.
- Fourth Circuit affirmed the Commission's decision and held
  - Commission did not improperly reweigh the facts found by the ALJ
  - Litigating positions of the Secretary under an ambiguous provision of the Mine Act are owed *Skidmore* deference, as opposed to full *Chevron* deference;
  - Ignition and escape of hot gas through an impermissibly large electrical enclosure opening could be assumed for purposes of an S&S
  - Planned but not-yet-begun abatement efforts did not actually reduce the hazard.

SIGNIFICANT AND SUBSTANTIAL

- *Knox Creek Coal Co.*,
- Permissibility: The court found the Secretary's interpretation (relevant hazard should be assumed under the third prong of the *Mathies* test) to be persuasive.
    - Only likelihood determination under prong 3 is that the hazard will result in serious injury. Court held that while the Commission did not adopt the above "assumption of the hazard's existence" position, it properly determined that the violations were S&S.
  - Accumulation: The court found that the Commission properly adopted the Secretary's interpretation in determining that the accumulation violation was S&S.
    - Plan for abatement efforts do not actually reduce the risk of harm of the hazard – must be active abatement or substantial steps (e.g., order to cease operations to abate)
  - For prong 2 – court adopted the "at least somewhat likely" verbiage regarding the likelihood of a discrete hazard,

SIGNIFICANT AND SUBSTANTIAL

- *Newtown Energy, Inc.*, __ FMSHRC ___ (Rev. Comm. Aug. 2016), docket no. WEVA 2011-283.
- Hodgepodge of Commissioners reversed the ALJ's finding of Non-S&S; vacate and remanded the unwarrantable failure determination;
  - Commissioners Young, Althen and Nakamura joined together in an interpretation of the *Mathies* test.
  - Chairman Jordan and Commissioners Cohen and Nakamura joined to reverse the ALJ's finding of Non-S&S, unlikely.
  - Commissioners Althen and Young would have upheld the ALJ's finding of Non-S&S.
  - Commissioners Young, Cohen and Althen vacated and remanded ALJ's finding of unwarrantable failure;
  - Chairman Jordan and Commissioners Cohen and Nakamura join in reversing the ALJ's "low negligence" and "unlikely" findings.

SIGNIFICANT AND SUBSTANTIAL

- *Newtown Energy, Inc.*,
- Commissioners Young, Althen and Nakamura joined together in an interpretation of prong 2 of the *Mathies* test in response to the Fourth Circuit's *Knox Creek* decision.
  - Prong 2 of the *Mathies* test – "whether the hazard was reasonable likely to occur given the particular facts surrounding this violation" (emphasis added). Newtown, __ FMSHRC __ * 9.
    - ALJ is to first determine the specific hazard the standard is aimed to prevent;
    - Determine whether based upon particular facts surrounding this violation, there exists a reasonable likelihood of the occurrence of the hazard against which the mandatory standard is directed. *Newtown*, __ FMSHRC __ * 9.
- Chairman Jordan and Commissioner Cohen sought to keep the "at least somewhat likely to result in harm" test from *Knox Creek*. *Newtown*, __ FMSHRC __ * 19-21.

FLAGRANT

- *The American Coal* Co., ___ FMSHRC ___ (Rev. Comm. Aug. 2016) (docket no. LAKE 2009-35).
- All five Commissioners agreed with the ALJ that Order No. 7490584 was properly designated as flagrant
  - Commissioner Althen disagreed with the Commission's holding and wrote separately
- Must established that
  - (1) there was a condition that constituted a violation of a mandatory health or safety standard,
  - (2) the violation was "known" by the operator;
  - (3) the violation either (a) substantially caused death or serious bodily injury, or (b) reasonably could have been expected to cause death or serious bodily injury;
  - (4) there was a failure on the part of the operator to make reasonable efforts to eliminate the violation; and
  - (5) the failure was either "reckless" or "repeated."

FLAGRANT

- *The American Coal* Co.(docket no. LAKE 2009-35).
- "Known" violation if the operator had actual or constructive knowledge of the violative condition.
- Whether the violation either (a) substantially caused death or serious bodily injury, or (b) reasonably could have been expected to cause death or serious bodily injury.
  - Close to prong 4 of the *Mathies* test for S&S
    - Declined to decide "whether the slight difference between the pertinent language of the flagrant provision and the fourth element of *Mathies* mandates that flagrant violations cover only 'a narrower, more severe subset of hazards' than violations of S&S."
- Term "repeated" was ambiguous, and that the focus should be on the "operator's dereliction where immediate remedial action was required, and not on a particular number of failures."
- Rejected American Coal's notice argument for what constituted "repeated failure."
- Operator's history may be probative of the conditions in which the alleged flagrant failure occurred

COMMISSION'S ROLE IN APPROVING SETTLEMENT

- *The American Coal Co.*,___ FMSHRC ___ (Rev. Comm. Aug. 2016)(Docket No. LAKE 2011-13).
  - Commission unanimously held that it has the exclusive authority to oversee settlements of contested penalty cases, based on the "very clear" language of Sect. 110(k) of the Mine Act.
  - ALJ did not abuse his discretion when he denied a settlement motion
  - Secretary seeking to overturn 38 years of administrative practice and case law.
  - Commission noted that settlements are rarely rejected
    - From 2009 through October 2014, records showed 38,501 settlements were approved by Commission ALJs, and only 17 were rejected.

COMMISSION'S ROLE IN APPROVING SETTLEMENT

- Commission relied on legislative history to show that Congress was very explicit on the split enforcement scheme created by Congress.
  - Split enforcement scheme?
  - Separate entity created to review Agency action?
  - Deference negates the purpose of the Commission?

SECTION 111 COMPENSATION

- Think positive….not all cases involve deference!



SECTION 111 COMPENSATION

- *United Steelworkers Local 5114 v. Hecla Limited*, 38 FMSHRC 200 (Rev. Comm. Feb. 2016).
- Section 111 compensation case:
  - Commission held that compensation due under Section 111 is limited to miners who worked in hazardous conditions, despite an obligation for the operator to withdraw them from those conditions.
  - Miners entitled to compensation at their regular rates of pay, in addition to any pay they received for working during the affected shift.
  - Commission affirmed finding that the triggering event in the statute is miners working in conditions from which they should have been withdrawn.
  - Commission affirmed ALJ's rejection of Steelworkers claim that compensation was due until the Section 103(k) order was terminated by MSHA (approximately 18 mos.)

QUESTIONS

- For more information on these and other occupational safety and health topics, please visit: **http://safety-health.jacksonkelly.com/**

Successorship, Bankruptcy and Mine Act Enforcement: When the Automatic Stay is not Automatic

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Session 6

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Matthew Cooper, attorney in Squire Patton Boggs' Denver office, practices both Health & Safety and Labor & Employment law and helps guide employers as they navigate interactions with numerous government agencies. His practice consists of helping employers respond to regulatory inspections, investigations, accidents, and other crises management, as well as litigating a wide array of government enforcement actions, including both MSHA and OSHA actions.

As an employment attorney, Mr. Cooper also litigates and counsels employers on a comprehensive range of workplace matters, including wage and hour compliance, agency audits and investigations, employment agreements, policy drafting and implementation, and discrimination, retaliation, and whistleblower claims. Mr. Cooper represents employers ranging from five to thousands of employees, and takes great pride in getting to know each particular organization in order to provide the best service possible.

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Peter also gives strategic advice related to energy development and transportation and power generation and transmission from natural gas, coal, wind, and solar sources. He advises entities doing business worldwide and provides representation nationally in litigation before federal and state courts and agencies, as well as in domestic and international arbitrations.

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SQUIRE PATTON BOGGS

Successorship, Bankruptcy and Mine Act Enforcement: When the Automatic Stay is not Automatic

Energy & Mineral Law Foundation
in conjunction with
National Mining Association's
2016 MINExpo International

Mine Safety & Health Law Special Institute
September 24, 2016 * Las Vegas, Nevada



Peter S. Gould
Matthew Cooper

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Outline of Presentation

1. Why are We Talking about This?
2. The United States Bankruptcy Code and its Purpose and Processes
3. The Automatic Stay (and Exceptions)
4. Successorship
5. ESH Considerations

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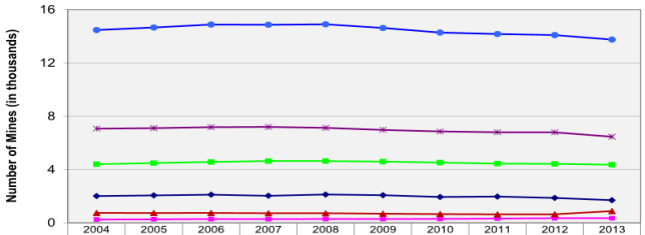
Why Are We Talking About This?

Economics 101 - Supply and Demand – Shifting U.S., State and Local Policy Prioritie

- Slowdown in demand growth for commodities.
- Generally, however, supply remains robust.
- Supply surpluses are forecasted.
- As a result, commodity prices are being depressed.
- Majority of analysts are forecasting moderate at-best recovery in underlying metals prices over the next few years.
- Policy shifts not favorable to coal industry

U.S. Mining Statistics, Then and Now

Number of Active Mines by Sector and Year, 2004-2013
Data Source: MSHA



	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
Coal	2,011	2,063	2,113	2,030	2,129	2,076	1,945	1,973	1,871	1,700
Metal	251	263	280	278	293	289	296	318	351	349
Nonmetal	741	739	741	725	720	685	654	637	641	882
Stone	4,401	4,490	4,573	4,639	4,633	4,601	4,525	4,445	4,433	4,362
Sand & Gravel	7,074	7,111	7,178	7,199	7,132	6,980	6,863	6,803	6,797	6,466
Total	14,478	14,666	14,885	14,871	14,907	14,631	14,283	14,176	14,093	13,759

Note: Active mines are those mines that reported any employee hours during the year.

http://www.cdc.gov/niosh/mining/UserFiles/statistics/13g04aaa.svg (last visited Sept. 12, 2016).

Energy and Mining Bankruptcy Statistics

"2015 Bankruptcy Recap: 46% Increase Fueled by Oil & Gas/Mining Industry Analysts Predict Further Uptick"

http://bankruptcydata.com/public/assets/uploads/pdf/PR_011216.pdf

"A gauge of contracts on the London Metal Exchange has slid 26 percent this year, the most since 2008, to near the lowest in six years. About 15 percent of copper production and a quarter of zinc output are unprofitable, while 60 percent of aluminum and 70 percent of nickel are supplied at a loss, according to Standard Chartered Plc."

http://www.bloomberg.com/news/articles/2015-12-03/why-bankruptcy-might-be-the-mining-industry-s-last-best-hope

	2009	2010	2011	2012	2013	2014	2015
Number of Coal Mines	2,076	1,944	1,973	1,871	1,701	1,632	1,460
Coal Miners	134,089	135,500	143,437	137,650	123,259	116,010	102,804

https://www.msha.gov/data-reports/statistics/mine-safety-and-health-glance

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The U.S. Bankruptcy Code

- The Congress shall have power to "establish … uniform laws on the subject of bankruptcies throughout the United States . . . ." U.S. Const. art. I, § 8.
- Congress enacted the "Bankruptcy Code" in 1978, codified as 11 U.S.C.
  - Uniform federal law that governs all bankruptcy cases.
  - Congress intended to give debtors "fresh start" and relief from burdensome debts.
  - U.S. Supreme Court: "[I]t gives to the honest but unfortunate debtor…a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt." *Local Loan Co. v. Hunt*, 292 U.S. 234 (1934).
  - This goal is accomplished through the bankruptcy discharge, which releases debtors from personal liability from specific debts and prohibits creditors from ever taking any action against the debtor to collect those debts.
- Each judicial district has at one bankruptcy court – 90 total nationwide.
- United States bankruptcy judges are judicial officers of the United States district court. Bankruptcy judge decides related matters, including a debtor's bankruptcy eligibility and whether the debtor may discharge its debts.

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The US Bankruptcy Code - Chapters

- Chapter 1 – Definitions and general provisions
- Chapters 3 and 5 – Concepts applicable to most chapters
- ***Chapter 7 – Liquidation***
- Chapter 9 – Municipal
- ***Chapter 11 – Reorganization***
- Chapter 13 – Wage earner
- ***Chapter 15 – Ancillary cross border proceedings***

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Chapter 11 of Bankruptcy Code

- **What is *Chapter 11* bankruptcy? Reorganization.**
- **Who are the Players?**
- **The Debtor**
  - Filing for Chapter 11 bankruptcy creates an "estate"
  - Debtor in possession/fiduciary
  - Duties
    - File schedules and various reports
    - Operate the business in the ordinary course
    - Maximize value of estate and assets
    - File a plan of reorganization
  - "Fresh start" goal
  - Public policy behind maintaining existing debtor as debtor-in-possession

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Players in a Chapter 11 Case

- **Secured Creditor**
  - Secured to the extent of the value of the collateral
    - Different treatment of secured and deficiency claims
  - Must be adequately protected
  - May be granted additional rights and protections if debtor in possession financing is provided
  - Secured claims must be treated in specified manner in a plan of reorganization
  - Secured creditors have more "control" than most other creditors in the Chapter 11 process
- **Unsecured Creditor**
- **Everyone Else**

Chapter 15 of the Bankruptcy Code

- The United Nations Commission on International Trade Law (UNCITRAL) adopted the Model Law on Cross-Border Insolvency to harmonize procedures for cross border insolvencies. In 2005, Chapter 15 of the U.S. Bankruptcy Code was enacted to adopt the UNCITRAL Model Law.
- The purposes of Chapter 15 are the following:
  - Provide effective mechanisms for dealing with cross-border insolvency.
  - Enhance cooperation between U.S. courts and foreign courts.
  - Provide greater legal certainty for trade and investment.
  - Provide fair and efficient administration that protects all creditors and interested parties, including the debtor.
  - Facilitate the rescue of financially troubled businesses to protect investment and preserve employment.

  See 11 U.S.C. § 1501(a).
- Chapter 15 is a mechanism for a foreign company in an insolvency proceeding abroad to protect its assets in the U.S. for the benefit of all its creditors, not just local creditors.

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Eligibility Under Chapter 15

- The foreign proceeding must be a collective or administrative proceeding for liquidation or reorganization, including an interim proceeding, but not a receivership for the benefit of one party.
- The foreign proceeding must be governed by a law relating to insolvency or adjustment of debt.
- The foreign proceeding must be under the control or supervision of a foreign court. *See* 11 U.S.C. § 101(23).
- The debtor's eligibility requirements of section 109(a) of the U.S. Bankruptcy Code apply in cases under chapter 15, so the foreign debtor must reside or have a domicile, a place of business or property in the United States. *Drawbridge Special Opportunities Fund LP v. Barnet (In re Barnet), Case No. 13-612 (2d Cir. Dec. 11, 2013).*

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The Automatic Stay: 11 U.S.C. § 362

- Most important bankruptcy protection
- Effect of automatic stay
- Exceptions for certain financial transactions and governmental police power
- Grounds for creditor to lift stay
  - 11 U.S.C. § 362(d)(1) – For cause, including lack of "adequate protection"
  - 11 U.S.C. § 362(d)(2) – Debtor has no equity in property, and it is not necessary for reorganization
  - 11 U.S.C. § 362(d)(3) – Special provisions for single asset real estate cases

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The Automatic Stay

- Pursuant to 11 U.S.C. 362(a), filing a petition with the Bankruptcy Court under the Bankruptcy Code stays the "the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title . . . ."
- The filing of a bankruptcy petition, however, does not operate as a stay for certain types of actions listed under 11 U.S.C. § 362(b).
- The stay provides the debtor an opportunity to catch its breath, allowing negotiations to occur so as to resolve the debtor's financial problems.

MSHA Enforcement in this Context

- **General Rule: Automatic Stay Inapplicable in MSHA Enforcement Context**.
- Police-Powers Exception– may bring claims if …acts within a governmental unit or agency's police or regulatory powers. (Bankruptcy Code, 11 U.S.C. 362(b)(4))
- ** "effectuate and enforce mandatory safety standards that implement the Mine Act," see 11 U.S.C. 362(b)(4); thus, the automatic stay provision of the Bankruptcy Code does not operate to limit the Commission's authority to order the requested relief. Hidden Splendor Resources, Inc., 35 FMSHRC 1548, 1550, 2013 WL 3759789 (June 6, 2013); see also Jim Walter Resources, 12 FMSHRC 1521 (August 20, 1990).*
- MSHA generally has authority under the police-powers exception to bring enforcement and whistleblower proceedings irrespective of a collateral bankruptcy proceeding.

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MSHA Enforcement in this Context

- Generally, Inspections, Investigations, Enforcement; Document Production Requests May Proceed.
- However, this does not necessarily apply in a collection action.
- Collections of unpaid penalties, however, will generally place the U.S. Department of Treasury as a General Unsecured Creditor, requiring the government to "Get In Line"
- What does this mean?

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Successor Liability

- Bankruptcy
  - Asset sale agreement - typically purports to allow the purchaser of mining assets (not liabilities) from a bankruptcy estate to take control of substantially all mining assets from the estate "free and clear of . . . all claims as defined in section 101(5) of the Bankruptcy Code (11 U.S.C. § 101(5)), including all rights or causes of action . . . , obligations, demands, restrictions, indemnification claims or liabilities relating to any act or omission of the debtors prior to the Closing."
  - Bankruptcy Court Orders approving asset sales from a Bankruptcy estate (e.g., Ch. 11 and 15) frequently contain explicit language allowing the purchaser to take control of substantially all mining assets from the bankruptcy estate "**free and clear of…all claims** as defined in section 101(5) of the Bankruptcy Code (11 U.S.C. § 101(5)), including all rights or causes of action…, obligations, demands, restrictions, indemnification claims or liabilities relating to any act or omission of the debtor prior to the Closing."
  - **Yet courts have found that "successor liability" can exist in certain situations.**
- Beyond Bankruptcy

Successor Liability

- For example, courts and FMSHRC use a nine-factor test to determine whether an entity is a successor in interest to a mining operation or simply a new owner of the formerly owned mining assets in a court proceeding:
  - (1) whether the successor company had notice of the charge,
  - (2) the ability of the predecessor to provide relief,
  - (3) whether there has been a substantial continuity of business operations,
  - (4) whether the new employer uses the same plant,
  - (5) whether he uses the same or substantially the same work force,
  - (6) whether he uses the same or substantially the same supervisory personnel,
  - (7) whether the same jobs exist under substantially the same working conditions,
  - (8) whether he uses the same machinery, equipment and methods of production, and
  - (9) whether he produces the same product.
- *See Sec'y of Labor on behalf of Zambonino v. Colonial Mining Materials*, 36 FMSHRC 1239 (May 2014) (ALJ) (citing *Munsey v. Smitty Baker Coal Co.*, 2 FMSHRC 3463, 3465-66 (Dec. 1980), aff'd in relevant part sub nom., ***Munsey v. FMSHRC*, 701 F.2d 976 (D.C. Cir. 1983.)**

Environmental & Safety and Health Considerations

- As to a Distressed Company Pre-petition:
  - ESH compliance is mission critical.
    - As we know, MSHA can issue withdrawal and closure orders for actual or perceived violations with little process, ceasing or hindering operations and thus cash flow with potentially devastating effects for distressed companies.
  - Ensure all permits are in order.
    - Align permit holder information with organization, so that if permits/authorizations are held in different parties (because transfers were not correctly done or company organization has changed and permits have not been updated) and eliminating guarantors, if possible.
  - Conserve cash flow but not by scrimping on ESH Processes and Compliance.
    - Catastrophes such as explosions, fires and other serious accidents that can cripple operations, generally also cause irreparable harm to employees and/or the public, company assets and cash flow, often resulting in debtor company defaulting on obligations.

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Environmental & Safety and Health Considerations

- Post-petition
  - Automatic stay is generally inapplicable.
  - In most cases ESH agencies have authority under the law enforcement exception to the automatic stay to pursue these matters as enforcement actions notwithstanding any bankruptcy proceeding.
  - Whistleblower actions are also costly and can be disruptive to debtor's ongoing operations.

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Environmental & Safety and Health Considerations

- Successors (Bankruptcy and Beyond)
  - Effects of NO automatic stay
  - Incurring predecessor liabilities
  - The D-Chain and POV
  - MSHA's perceptions and inspections

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Peter Gould, managing partner of Squire Patton Boggs' Denver office, works closely with federal and state regulatory agencies, the private sector and nongovernmental organizations to assist clients with matters involving administrative law, government investigations, litigation and dispute resolution and public policy.

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Paper 7

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Adele is a regular columnist for numerous magazines on safety and legal issues, and is co-author of several books related to mining, construction and occupational safety and health. She is also on the adjunct faculty of the Catholic University of America, where she instructs on Employment and Labor Law.

She is a member of the Maryland, D.C. and Pennsylvania Bars, the U.S. District Courts of Maryland, DC and Tennessee, the U.S. Court of Appeals, DC, 3rd and 4th Circuits, and the United States Supreme Court. She is a graduate of the George Washington University's National Law Center, and earned her B.S. in Journalism from the University of Maryland, College Park. Her professional memberships include the American Society of Safety Engineers, National Safety Council, International Society of Mine Safety Professionals, the National Stone, Sand & Gravel Association, the Industrial Minerals Association-North America, and the Energy & Mineral Law Foundation.

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Susan Wiltsie is a partner on Hunton & Williams' Labor and Employment team and heads up the team's D.C. office. Her practice includes all aspects of the employer/employee relationship. She is national counsel for a number of companies and has represented employers in almost all 50 states on employment, labor, and OSHA/MSHA matters. Her OSHA/MSHA practice includes compliance assistance through such measures as internal audit programs and representation of employers in accident investigation, OSHA/MSHA inspections, and citation/whistleblower defense. She also participates in OSHA/MSHA rulemaking proceedings, including administrative litigation on final rules. In the traditional labor area, she represents a number of unionized clients in collective bargaining negotiations, arbitration, and NLRB proceedings. Her employment law practice includes advice and litigation defense related to discrimination, harassment, retaliation, wage/hour, FMLA, WARN Act, tort claims, breach of contract, restrictive covenants, duty of loyalty and trade secrets. She has particular interest in complex issues that involve OSHA/MSHA and employment laws, such as infectious disease, violence, and other workplace disruption issues.

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MSHA's Regulatory Agenda

EMLF/RMMLF

Mine Safety & Health Law Special Institute

September 24, 2016
Las Vegas, NV

Regulatory Agenda (May 2016)

Agency	Agenda Stage of Rulemaking	Title	RIN
DOL/MSHA	Prerule	Refuge Alternatives for Underground Coal Mines	1219-AB79
DOL/MSHA	Prerule	Request for Information to Improve the Health and Safety of Miners and to Prevent Accidents in Underground Coal Mines	1219-AB85
DOL/MSHA	Prerule	Exposure of Underground Miners to Diesel Exhaust	1219-AB86
DOL/MSHA	Proposed Rule	Respirable Crystalline Silica	1219-AB36
DOL/MSHA	Proposed Rule	Examination of Working Places in Metal and Nonmetal Mines	1219-AB87
DOL/MSHA	Final Rule	Proximity Detection Systems for Mobile Machines in Underground Mines	1219-AB78
DOL/MSHA	Final Rule	Refuge Alternatives for Underground Coal Mines; Limited Reopening of the Record	1219-AB84

Crystalline Silica

- Per MSHA Regulatory Agenda:
  - Notice of Proposed Rulemaking: Sept 2016 (Not going to happen)
  - Part 58 (Health Standards – M/NM)

Examination of Working Places

- Parts 56 and 57 (Safety Standards – Surface and Underground M/NM)
- Proposed rule issued June 8, 2016
- Comment period extended to Sept 30, 2016
- No proposed deadline for final rule
  - Doubtful it can be accomplished in this administration

Diesel Exhaust

- Parts 57, 70, 72, and 75 (Health Standards for UG M/NM and Coal Mines)
- RFI issued June 8, 2016
- Comment period extended to Nov 30, 2016
- Any action will come in future administration

HUNTON& WILLIAMS

Mine Safety & Health Law Special Institute
MSHA Regulatory Agenda -- Silica

Susan F. Wiltsie

September 24, 2016

MSHA Silica Plans

- OSHA's final rule on exposure to respirable crystalline silica went into effect June 2016
- MSHA/OSHA interagency agreement -- provides for coordination between MSHA and OSHA in all areas of mutual interest
- MSHA has stated that it intends to use OSHA's work on health effects and risk assessment, adapting it as necessary for the mining industry
- Anticipated - rule from MSHA this Fall

OSHA Rule

- 50 micrograms per cubic meter of air
- Exposure assessment
- Lab/Sample issues
- Regulated areas
  - Demarcation
  - Access
  - Construction differences
- Abrasive blasting

OSHA Rule

- Engineering controls
- Administrative/Work practice controls
- PPE/respiratory protection program
- Medical surveillance
- HazCom
- Recordkeeping

OSHA Rule

- Implementation dates
- Lab timing issue/Appendix A
- Special industry issues

OSHA Rule Challenges

- Update on legal challenges to the rule
- MSHA challenges anticipated
  - Arbitrary & capricious standard
  - Other differences MSHA/OSHA

Questions?

MSHA's MNM Workplace Examination Proposal

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Overview

- Since 2000, approx. 14,000 citations/orders issued to MNM operators related to workplace exams, including more than 80 issued for fatal and non-fatal accidents
- MSHA Program Policy Letter (PPL) P15-IV-01 (7/22/15) on examination of working places (30 CFR 56/57.18002)
  - Applies to all surface/UG metal/nonmetal mine operators, including independent contractors and equipment manufacturers
- Policy adds that if multiple safety hazards are not identified by the examiner, this may indicate inadequate or absent task training under 46.3(a) and (b)(3) or 48.3(c)(8)/48.23(c)(8)
  - This can lead to double (or triple) dipping on citation issuance!
  - "Adequacy" requirement read into standard by FMSHRC in *Sunbelt Rentals* case (7/16)
- MSHA's proposed MNM standard would alter and expand requirements – comment deadline was extended until Sept. 30, 2016

Current Provisions of 56/57.18002

- A competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health. The operator shall promptly initiate appropriate action to correct such conditions
  - The examiner – even if hourly – may be considered an "agent of management" for Sec. 110(c) purposes – *Nelson Quarries* FMSHRC decision
- A record that examinations were conducted shall be kept for a year and made available for review by MSHA
- Conditions which may present an imminent danger which are noted by the examiner shall be brought to the immediate attention of the operator, who shall withdraw all persons from the affected area until the danger is abated.
  - Persons who are involved with abatement, under Sec. 104(c) of Mine Act are permitted within the area

Competent Person & Working Place

- Competent person is defined in 30 CFR 56/57.2 as "a person having abilities and experience that fully qualify him to perform the duty to which he is assigned."
  - MSHA Policy adds: "Examiner should be able to recognize hazards and adverse conditions that are known by the operator to be present in a work area or that are predictable to someone familiar with the mining industry."
  - MSHA "Best Practice": For a foreman or supervisor to conduct the exam; an experienced non-supervisory miner may also be "competent" but inexperienced miners should not conduct the workplace exam.
- Working place is defined in 30 CFR 56/57.2 as: "Any place in or about a mine where work is being performed."
  - As used in 56/57.18002, MSHA applies the phrase to all locations at a mine site where miners work in the extraction or milling processes.
  - This includes area where work is infrequently performed, such as areas accessed during maintenance periods or clean-up.
  - ALL such working places must be examined by a competent person at least once per shift.

Recordkeeping: MSHA PPL

- MSHA takes position that a "meaningful" record should contain the following:
  - the date the examination was made;
  - the examiner's name; and
  - the working places examined
- MSHA adds: it is a BEST PRACTICE to also include a description of such conditions in the examination record to facilitate correction and to alert others at the mine of conditions that may recur or in other ways affect them.
- EVIDENCE that a previous exam was not conducted or that corrective action was not promptly initiated constitutes a violation of 56/57.18002(a)
  - EVIDENCE may include information which demonstrates that safety or health hazards existed prior to the shift on which they were found.

Proposed MNM Workplace Exam Rule

- MSHA would revise the standard to require:
  - Signature of person conducting workplace exam and recordation of all identified hazardous conditions
  - Updating record to reflect the date and corrective action taken for each identified hazard, and signature of person recording corrective action
  - Workplace exam would have to be conducted at the start of the shift or prior to entry of miners into working place (current rule permits exam to be done any time during the shift)
  - Miners would have to be notified of the hazardous conditions found in work area
  - Miners would have access to the records, which would still have to be retained for 12 months and also made available to MSHA
  - Proposed rule retains requirement to withdraw miners if "imminent danger" is identified
    - Issue is what constitutes an imminent danger in light of FMSHRC *Knife River Construction* case (on appeal to USCA-DC Cir), which held that a non-S&S citation can support an imminent danger order!

MSHA Clarification of Proposal

- In 8/25/16 *Federal Register* notice, MSHA clarified that:
  - only active mining areas where extraction and production occur would be within the scope of the rule (as opposed to bathrooms, kitchens, administrative offices, inactive storage areas, or roads not involved with the mining process);
  - "to promptly notify miners" means any notification that alerts them to adverse conditions in the working place – the notice can be verbal, warning signage, or other written notification – and that "promptly" means before miners are potentially exposed to the condition (before work begins in the area or as soon as possible after work begins if the condition is discovered while miners are already working in an area);
  - the definitions of "working place" has not been altered, but clarifying that this does not mean the entire mine unless miners will be working in all areas; and,
  - "before work begins in an area" does not coincide with any particular shift, but is depending upon when miners actually will be working in a particular working place.

Additional Issues for Comment

- MSHA seeks additional comment (by 9/30/16) concerning:
  - Signing of records: MSHA says: "the single act of printing one's initials or name, as opposed to signing one's name, adds no more and no less to the substantive duties and qualifications of the person who conducts the examination" but it wants comments on alternative approaches, such as simply requiring that the name of the competent person, rather than the signature, be included in the examination record.
  - How mine operators have used the examination record to identify and correct systemic adverse conditions that may contribute to an accident, injury, or fatality.
  - Possible limitations that would be placed on the mine operators' ability to use the examination record to identify and correct systemic adverse conditions if a record of an adverse condition that is immediately corrected is not made.

Other Issues …

- Because MSHA has no "audit safe harbor" (unlike OSHA) and the Mine Act imposes strict liability, would recorded hazardous conditions that are violations could be cited, even if already corrected?
- Would MSHA use records documenting recurring problems to show "pattern or practice" in existing violations, rendering them "unwarrantable failure" violations under Sec. 104(d)?
- Will hourly workers who "initiate corrective action" or withdraw miners from hazardous conditions ("directing the workforce") be considered "agents" for Sec. 110(c) purposes?
- Will MSHA continue its PPL posture of issuing citations for "inadequate" examinations simply because violations are found in a work area, but were not recorded on the examination form?
- Will undocumented corrective actions serve as a basis for citations – and how long will mine operators be given to update the records with corrective action information?
- If MSHA finds a hazard in an area post-examination, and there is miner exposure, will a separate citation be issued for violating the "notice" or "withdrawal" requirements of the revised rule?
- Will MSHA accept the use of barricades, signs and caution tape, to temporarily block access to hazardous areas, as proof of initiating corrective action … and how long can such temporary devices be used before MSHA would consider the situation to be unabated?

Questions???

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Diesel Developments

MSHA Seeks Information As Science Develops

Dan Wolff
Crowell & Moring LLP

Introduction

- On June 8, MSHA issued a Request for Information (RFI) on exposure of underground miners to diesel exhaust. That is the first step to a potential rulemaking and ratcheting down of DPM rules.
- MSHA was inspired by scientific developments like the publication of the results of the Diesel Exhaust in Miners Study.
- Industry groups and individual companies should be monitoring these developments and should seek a seat at the table.

Presentation Roadmap

- How did we get here? A brief history of regulatory interest in diesel exposure.
- What's new?
  - Diesel Exhaust in Miners Study (DEMS)
  - Reanalysis Efforts
  - Regulatory Developments
- Where are we going?
  - MSHA's RFI



Early Regulatory Activity

- Diesel has been on MSHA's radar since 1975, when NIOSH sent a warning letter to MSHA's predecessor agency about the potential health effects of diesel exhaust for underground coal miners, including the possibility of carcinogenicity
- 1988 – NIOSH Central Intelligence Bulletin 50 concluded that "potential occupational carcinogenic hazard exists in human exposure to diesel exhaust"
- 1988 – IARC classified diesel exhaust as a probable human carcinogen

Early Regulatory Activity

- 1995 & 1999 – HEI Diesel Working Group conducted reviews of the existing literature, but cautioned that the existing studies had limited utility for quantitative risk assessment
- 1996 – At an HEI Workshop on Diesel Exhaust, MSHA official asserts that since underground miners had more exposure than any other occupational group, MSHA would regulate their exposure

Current DPM Rules

- 1998 – MSHA proposes rules governing DPM exposure of underground metal and nonmetal mines and underground coal miners
- Midnight rulemaking in 2001
- For underground metal/non-metal mines and coal mines
  - Even short term exposures to concentrations of DPM like those observed may result in serious health problems

Current DPM Rules

- Surface miners deserving of equal protection, but not covered by the rules.
- The DPM Rules, 30 C.F.R. §§ 57.5060 – 57.5075, are mandatory and enforceable
- Coal standards impose tailpipe emission limit (2.5 grams per hour)
- Metal/nonmetal standards impose PEL of 160_{TC} μg^3 measured as eight-hour equivalent full shift concentration

Diesel Exhaust in Miners Study (DEMS)

- Joint effort NIOSH-NCI
- Two-part retrospective study:
  - (1) Mortality study of 12,315 surface and underground workers at 8 non-metal mines (the cohort study)
  - (2) Nested case control study
    - 198 lung cancer deaths and 562 controls
- 8 study mines volunteered
  - 3 potash, 1 limestone, 3 trona, 1 salt

DEMS

- Respirable Elemental Carbon (REC) used as diesel exhaust surrogate
- Historical estimate of exposure back to the time when the mines started using diesel
- Analyses were both unlagged and lagged to exclude recent exposure occurring within last 15 years
- Nested case control study adjusted for smoking; cohort did not

DEMS Results

- Conclusion: exposure to diesel exhaust caused a statistically significant increase of risk of death from lung cancer
  - Found increasing risk of lung cancer in relation to increased REC exposure, lagged 15 years
  - Above the rate of cancer attributable to smoking or normally found in the population
  - Among heavily exposed workers, the risk of dying from lung cancer was approx. 3 x greater than that for workers in the lowest

The Truckers Study

- Also completed in 2012
- Built on peer-reviewed publications for the period of 1971-2000 and subsequent epidemiological analyses
- Examined the risk of lung cancer in relation to quantitative estimates of personal exposure to submicron elemental carbon in a large cohort of 31,135 workers employed in trucking facilities across the United States.



The Truckers Study, cont'd

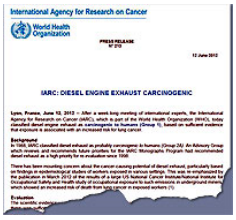
- Individual smoking data not available
- Found weak associates and evidence of trends in hazard ratios for cumulative SEC, lagged 5 and 10 years, and lung cancer in the cohort excluding mechanics. Those associations and trends were strengthened when adjusted for duration of employment, used as a proxy for "healthy worker survival bias."

Significant Data Challenges – DEMS and the Truckers Study

- Dealing with imperfect information – historical estimates of exposure, lack of smoking information as in the Truckers Study
- Diesel technology has changed dramatically, raising the question of the true utility of these backwards-looking studies
- New technology study by HEI found no evidence of gene-damaging effects in rats and mice, and few mild lung effects

IARC Reclassification

Based on DEMS and the Truckers Study, IARC upgraded its hazard classification of diesel engine exhaust in June 2012 from "probable human carcinogen" to "carcinogenic to humans"


International Agency for Research on Cancer

World Health Organization

IARC: DIESEL ENGINE EXHAUST CARCINOGENIC

HEI

- HEI convened a panel in 2013 at the request of its sponsors to review the epidemiological studies of diesel exhaust and lung cancer that IARC used in its reclassification: DEMS and the Truckers Study
- Charge: to determine whether the data and results could be used as the basis for a quantitative characterization of the lung cancer risks from exposure to diesel exhaust

HEI

- A quantitative risk assessment is significant:
  - Process by which scientists use available evidence to estimate the likelihood and severity of adverse health outcomes that cannot always be observed directly or with complete certainty
  - It is a prerequisite to identifying levels of exposure that would be protective of human health in ambient or occupational settings

Reanalysis Efforts

- Industry coalition led by the Truck & Engine Manufacturers Association (EMA) sought to conduct "follow on" science, test DEMS data
- Confidentiality concerns prevent unrestricted access to data sets
- Finally gained access at secure data site where no "linking" permitted



Reanalysis Conclusions

- In the DEMS cohort, the reanalysis team found that the positive-association results were driven by the naturally ventilated limestone mine that participated in the study
  - Once those workers were removed from the data, no significant exposure-response relationship existed
- They also concluded that the modifying impact of temporal factors and effect modification by age should be addressed in any quantitative risk assessment

Reanalysis Conclusions

- The reanalysis team also conducted a reanalysis of the nested case-control data
- They found radon was a confounding factor:
  - Without adjusting for radon, their results were similar to DEMS
  - When exposure to radon was adjusted, the evidence for an effect from diesel exhaust was greatly diminished
- They also found no consistent evidence for only-underground miners

HEI Report

- Peer-reviewed report published November 2015
- Concluded that both the Truckers Study and DEMS were "well-designed and well-conducted" and made "considerable progress" toward addressing limitations of previous work
- Results and data provide a "useful basis for quantitative risk assessments of exposures in particular to older diesel engine exhaust"

HEI
HEALTH EFFECTS INSTITUTE

HEI Report

- Many contend that the HEI panel has not given equal consideration to the industry-funded reanalysis work; the final report does acknowledge those papers, but they are not a focus
- The HEI Panel had access to the data, albeit the same limited access as was given to the reanalysis team, but declined to conduct a comprehensive reanalysis
- Panel was invited to visit a study mine, but did not do so
- Panel did acknowledge some "key uncertainties and limitations"

MSHA

- Issued a 2012 diesel exhaust hazard alert with OSHA informing workers that prolonged DE/DPM exposure can increase the risk of cardiovascular, cardiopulmonary, and respiratory disease and lung cancer

MSHA

- RFI issued June 8, 2016
- Asks 28 questions to assist MSHA in determining whether existing DPM standards are sufficiently protective
- Largely focused on coal, but some questions aimed at metal/nonmetal
- Focused on underground operations

MSHA

- Comment period for the RFI ends on November 30 (extended from early September)
- MSHA and NIOSH have been asked to form a Diesel Exhaust Effects Partnership to gather information, hear from stakeholders, and find a path forward.
  - Both agencies are in favor of the partnership.
  - Stakeholders would include mining industry, engine manufacturers, and labor

NIOSH, cont'd

- In 2014, NIOSH announced at a HEI workshop that it would use DEMS as the basis for a new quantitative risk assessment
- Work appears to be proceeding slowly

Conclusion

- Each development is another step down the path to increased regulation of diesel use at mines.
- Industry should be engaged and involved – the time to influence a new DPM rulemaking is now!

MSHA'S REGULATORY AGENDA

Energy Mineral Law Foundation's Mine Safety and Health Law Special Institute

September 24, 2016

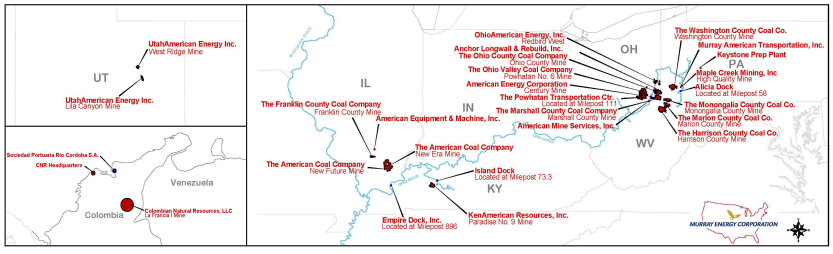
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MSHA Rulemakings Impacting Coal

- **Penalty Increases -** DOL Federal Civil Penalties Inflation Adjustment Act Catch-up Adjustments (Interim Final)
- **Proximity Detection -** Proximity Detection Systems for Mobile Machines in Underground Coal Mines (Proposed)
- **Diesel Exhaust Rules -** Exposure of Underground Miners to Diesel Exhaust - Request for Information (Pre-Rule)
- **Silica Rule -** Respirable Crystalline Silica - Anticipated (Potential Future)
- **BONUS:** OSMRE's Stream Protection Rule (Proposed)

Penalty Increases

- Interim Rule (penalty increase only, no substantive changes to Part 100)
- Penalties assessed after August 1, 2016, whose violations occurred after November 2, 2015
- New Penalties:
  - Max for Regular Assessments = $68,300 (old = $70,000)
  - Minimum for 104(d)(1) Citation = $2,277 (old = $2000)
  - Minimum for 104(d)(2) Order = $4,553 (old = $4000)
  - Failure to notify MSHA under 103(j), min = $5,692 (old = $5000), max = $68,300 (old = $65,000)
  - Flagrant violations = $250,433 (old = $242,000)

Proximity Detection – Mobile Equipment



Proximity Detection – Mobile Equipment

- Comment Period Closed December 1, 2015. Awaiting Final Publication. Government Website says August 2016.
- Proposed Rule Targets Mobile Equipment (Shuttle cars, Rams, Scoops, etc.)
- Only Four Current MSHA-Approved Proximity Detection Systems
- Phase-In Requirements (after rule in effect):
  - 8 Months
  - 36 Months

Diesel Exhaust Rules

- Request for Information Stage ("RFI")
- Comment period extended to November 30, 2016
- Current RFI Categories
  - Non-Permissible, Light-Duty, Diesel-Powered Equipment in Underground Coal Mines
  - Maintenance of Diesel-Powered Equipment in Underground Coal Mines and Recordkeeping Requirements
  - Exhaust After-Treatment and Engine Technologies

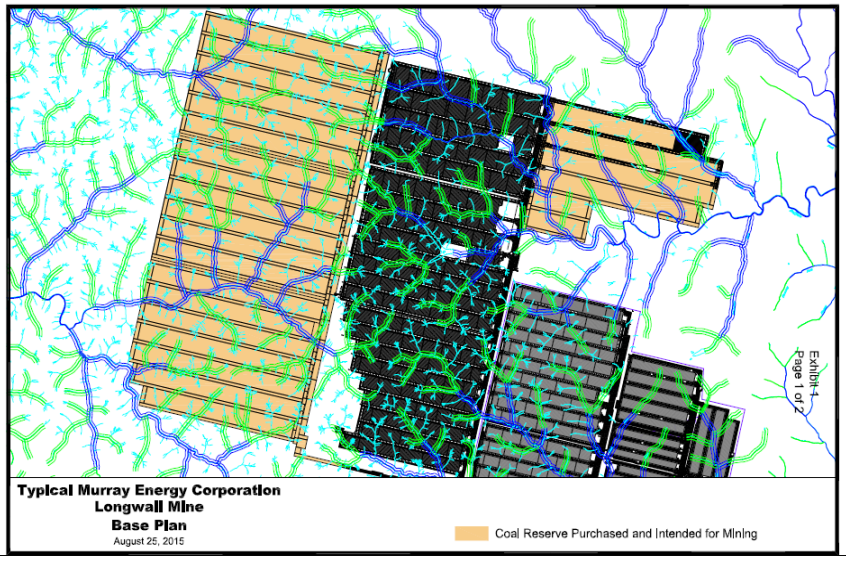
Silica Rule

- OSHA Rule passed in March 2016
  - Cut permissible limits from 100 to 50 micrograms
  - Imposes new requirements for: exposure assessment; respiratory protection (i.e. engineering controls such as water or ventilation); medical surveillance; hazard communication; and recordkeeping
- Speculation that MSHA will follow suit because Silica present in nearly all mines, both coal and M/NM
  - However, science and analysis is different, so a lot of work for Agency
  - MSHA has other current dust regulations standards that arguably already address this hazard adequately
  - Respirable Dust Rule occupies the territory

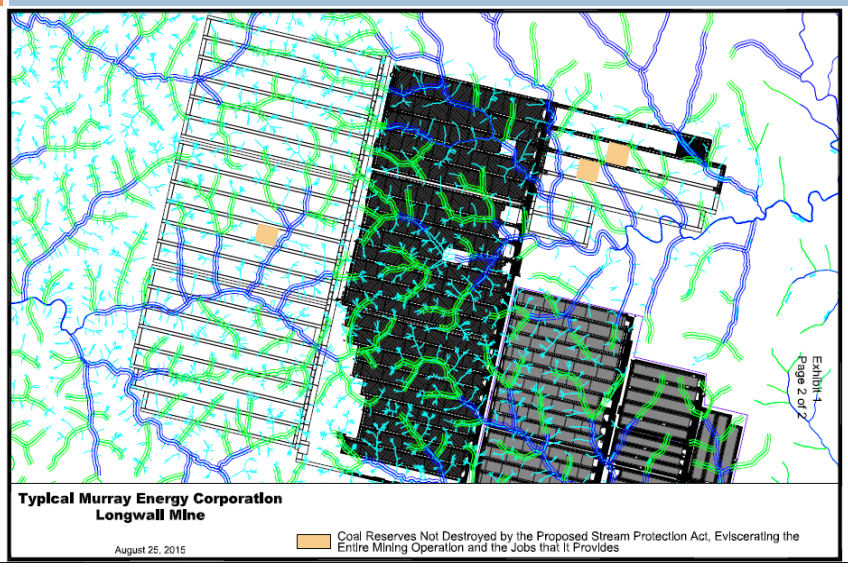
Stream Protection Rule



Typical Mine Plan – Without SPR



Typical Mine Plan - With SPR



An Ephemeral Stream in Ohio



Economic Impact of SPR

- $26.7 to $58.7 billion in lost GDP per year
- Reduction of Federal and State Tax Revenue between $3.1 and $6.4 billion per year
- Up to 289 million tons of coal stranded, with a value of at least $18.2 billion
- Loss of 112,757 to 280,809 direct jobs in the United States
- Loss of 440,418 to 852,720 indirect jobs in the United States

Questions

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Legal and Other Benefits to Building and Maintaining a Culture of Workplace Safety

F. Thomas Rubenstein
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Session 8

F. Thomas Rubenstein
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Tom is a partner in the Natural Resources Practice Group of Dinsmore. He has over 35 years of experience as a coal and energy lawyer with both substantial in-house and private practice experience representing public and private operating and land holding companies. He is skilled in all legal and business matters pertaining to the coal industry, including transactions, mergers and acquisitions, corporate record keeping and compliance, coal sales, mine safety and health, including supervisory training, and lease, sublease, operating and contract mining agreements. He is also experienced with oil and gas leasing matters, including Marcellus and Utica Shale leasing and project development matters. He is an experienced arbitrator and mediator for coal and commercial disputes.

In recent years, Tom has represented a coal company in a little more than $750 million of coal operations/properties acquisitions and an oil and gas client in a $140 million transaction.

Tom received his J.D. from West Virginia University College of Law (Order of the Coif, Law Review, Duffy and Koontz Scholarship Awards, 1981) and his B.A., in Mathematics from West Virginia University (*magna cum laude*, Pi Mu Epsilon, 1978 Spring Honors Dinner, 1978).

He is licensed to practice in West Virginia and Virginia and is admitted to the U.S. District Court for the Northern District of West Virginia, U.S. District Court for the Southern District of West Virginia, and the U.S. Court of Appeals for the Fourth Circuit.

Tom has been listed in *The Best Lawyers in America* for Energy, Mining and Natural Resources Law annually since 2007. He is also listed in *Chambers USA®, America's Leading Lawyers for Business,* Natural Resources. Tom is a Trustee of the Energy & Mineral Law Foundation and a member of the West Virginia Coal Association.

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LEGAL AND OTHER BENEFITS TO BUILDING AND MAINTAINING A CULTURE OF WORKPLACE SAFETY

F. Thomas Rubenstein
Dinsmore & Shohl LLP

I. Introduction – Survival

II. Legal and Other Benefits – Underlying Issues
- A. Mine Act
- B. Negligence
- C. Mitigating Circumstances
- D. Flagrant Enforcement Actions
- E. Unwarrantable Failure Actions
- F. Potential For Civil and Criminal Penalties
- G. The Benefits
  1. Intangible Benefits/Avoiding Higher Level Enforcement Actions
  2. Expense Savings Benefits
     - (a) Typical Example
     - (b) Elevated Enforcement Actions
     - (c) Other Savings

III. A Paradigm Shifting Approach
- A. The Nuclear Navy
- 1. Pillars of the Nuclear Navy
  - (a) Integrity
  - (b) Level of Knowledge
  - (c) Questioning Attitude
  - (d) Formality
  - (e) Forceful Watch Team Backup
- 2. Chronic Unease
- 3. High-Reliability Culture
- B. Instant Pre-Play
- C. Can This Be Done?

IV. Conclusion – Taking the Challenge

Legal and Other Benefits To Building and Maintaining A Culture of Workplace Safety

I. Introduction

Survival. Quite simply, as a coal lawyer with over 35 years of experience, in my estimation only those companies who are able to produce safely, efficiently and in an environmentally sound manner will continue to exist. Market pressure from alternate supply sources, regulatory enforcement issues and socioeconomic pressures, including within financial lending sectors, have combined to make this the most challenging time ever for operating entities and it is the new reality and not a season that will pass. The costs associated with workplace injuries, including, without limitation, the immeasurable costs associated with suffering that results from workplace accidents, to the high financial costs associated with enforcement actions, both in terms of penalty amounts[1] and loss of production time associated with closure orders and investigations, as well as the real potential for personal civil and criminal penalties, not to mention expensive legal fees and expenses, stack the deck to create a challenging environment.[2] Being engaged in the mineral extraction industry is not for the faint of heart. But there are proactive steps and measures that can be taken. However, there are no shortcuts or quick fix solutions. Leadership, vision casting, resource allocation, planning, training, re-training, implementing and fostering improvements and sticking to a long term plan are essential ingredients to building and maintaining a culture of workplace safety. It will be hard. *"It's supposed to be hard. If it wasn't hard everyone would do it. The hard is what makes it great".*[3]

II. Legal And Other Benefits – Underlying Issues

A. The Mine Act places a clear burden on operators to provide a safe work place for employees. Two basic areas of analysis by an MSHA inspector concerning any enforcement action are: (i) the physical facts and conditions which can often be measured (e.g., % of incombustible content in a sample) or things that can be clearly observed (e.g., the guard had been taken down and not reinstalled); and (ii) the less objective items which are frequently left to deductions, conjecture or speculation and which frequently address the issue of the operator's behavior[4] (e.g., why was the guard taken down, how long had it been down, when

[1] As of August 1, 2016, civil penalty conversion amounts were modified and while in a few instances the result is a lower penalty assessment, typically the result is a 13.6% increase in the "points to penalty" conversion table at 30 C.F.R. §100.3 (Table XIV).

[2] How vigorously does MSHA enforce the Mine Act regulations against coal operators? The penalty assessment amounts for coal only for the past several years are: 2009 - $96,400,000; 2010 - $110,600,000; 2011 - $120,000,000; 2012 - $89,400,000; 2013 - $64,900,000; and 2014 - $63,100,000. See "MSHA By the Numbers" at www.msha.gov/.

[3] Quote by Tom Hanks as Jimmy Dugan in A League of Their Own.

[4] While beyond the scope of this paper, an issue which, unfortunately, remains controversial is personal accountability. To build a solid safety culture, operators must, among other things, develop, implement, provide training about, and enforce, safety and safe practice rules that may result in discipline which could include termination from employment (and ironically defending an MSHA complaint of discrimination for adverse employment actions by employees who have broken such rules but allege the adverse employment action resulted from a protected activity, such as making a safety complaint). Consistent with this point, and ironically in the author's opinion, the August 1, 2016 civil penalty adjustments actually decreased the smoking penalty fine that can be imposed on an individual from $375 to $313.

would it have been replaced; when was the area last rock dusted, etc.). This second area of analysis comes clearly into focus when the criteria of the operator's negligence[5] is being evaluated by the inspector.

B. Negligence. The Mine Act's penalty regulations currently provide for five (5) categories of negligence which include: "No negligence" meaning, in the inspector's judgment, the operator exercised diligence and could not have known of the violative condition or practice), with 0 points assigned for the penalty conversion; "Low Negligence" meaning, in the inspector's judgment, the operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances, with 10 points assigned for the penalty conversion; "Moderate negligence" meaning, in the inspector's judgment, the operator knew or should have known of the violative condition or practice, but there are mitigating circumstances, with 20 points assigned for the penalty conversion; "High negligence" meaning, in the inspector's judgment, the operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances[6], with 35 points assigned for the penalty conversion; and ultimately at the top of this criteria, and of the greatest concern to an operator, "Reckless disregard" meaning, in the inspector's judgment, that the operator displayed conduct which exhibits the absence of the slightest degree of care, with 50 points assigned for the penalty conversion. Very often during the inspection process, the inspector's judgment is influenced by information he is provided by both the operator's designated representative as well as miners encountered during the inspection. High Negligence "suggests an aggravated lack of care that is more than ordinary negligence" and "an operator's intentional violation constitutes high negligence for penalty purposes." Topper Coal Co., 20 F.M.S.H.R.C. 344, 350 (Apr. 1998).

C. Mitigating Circumstances. Mitigating circumstances may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices. Of course, on the practical side of things, "operators" only operate by the actions and conduct of individual employees. Imagine for a moment a workplace where the employees have confidence that their employer is committed to running a safe operation, where they accept the challenge of being their brother's keeper, and where trust in their employer exists to the extent they would and do recommend their place of employment to their closest friend, brother/sister or son/daughter. At such an operation, how do you suppose an inspector's question about conditions, practices and mitigating circumstances unfolds versus a workplace where the culture is one of "getting by", making excuses, blaming the previous shift or worse – being untruthful with an inspector.

D. Flagrant Enforcement Actions. The concept of a "flagrant" enforcement action came about as amendment to Section 110 of the Mine Act. Flagrant is described as a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death, or serious bodily injury. A fine of up to $250,443 can be invoked for just one flagrant violation.

E. Unwarrantable Failure Actions. Section 104(d)(1) of the Mine Act

[5] A simple definition of negligence is the measurement of a person's behavior in the fulfillment of a duty owed.
[6] The Mine Act does not define high negligence but the definition comes from 30 C.F.R.§100.3(d) (Table X).

provides, that if, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

Unwarrantable failure is aggravated conduct constituting more than ordinary negligence. It is characterized by such conduct as reckless disregard, intentional misconduct, indifference, or a serious lack of reasonable care. Emery Mining Corp., 9 F.M.S.H.R.C. 1997 (Dec. 1987). Whether conduct is "aggravated" in the context of unwarrantable failure is determined by considering all of the facts and circumstances of the case to see if any aggravating factors exist. Such factors are the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. *See* Consolidation Coal Co., 22 F.M.S.H.R.C. 340, 353 (Mar. 2000); Mullins & Sons Coal Co., 16 F.M.S.H.R.C. 192, 195 (Feb. 1994).

F. Potential for Civil and Criminal Prosecutions.

Section 110(c) of the Mine Act provides that whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under the Mine Act or any order incorporated in a final decision issued under [the Mine Act], except an order incorporated in a decision issued under subsection (a) or section 105(c), any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsection (a) and (d).

Section 110(d) of the Mine Act provides that any operator who willfully violates a mandatory health or safety standard, or knowingly violates or fails or refuses to comply with any order issued under section 104 and section 107, or any order incorporated in a final decision issued under this title, except an order incorporated in a decision under subsection (a)(1) or section 105(c), shall, upon conviction, be punished by a fine of not more than $250,000, or by imprisonment for not more than one year, or by both, except that if the conviction is for a violation committed after the first conviction of such operator under this Act, punishment shall be by a fine of not more than $500,000, or by imprisonment for not more than five years, or both.

Knowingly: "A person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence." MSHA v. Kenny Richardson, 1 F.M.S.H.R.C. 874 (July 1979). Under this standard, aggravated conduct is required. The conduct must go beyond simple negligence and be more than high negligence.

Willfully: MSHA has the authority to bring criminal prosecutions under the Mine Act against a director, officer or agent. To succeed in a criminal prosecution under Section 110, MSHA must prove a willful violation of a mandatory health and safety standard. Willfully means "… done knowingly and purposely by a [person] who, having a free will and choice, either intentionally disobeys the standard or recklessly disregards its requirements." U.S. v. Consolidation Coal Co. & Kidd, 504 F.2d 1330, 1335 (6th Cir. 1974).

G. The Benefits

1. Intangible Benefits/Avoiding Higher Level Enforcement Actions.

While, to my knowledge, no empirical data exists that has sought to measure these types of benefits and perhaps such benefits are not subject to objective measurement, in my experience, an inspector's more severe level of negligence findings are very frequently accompanied by what is said, or not said, during an inspection and any close out. For example, when a supervisor observing a condition with an inspector towards the end of a shift says "I told Jim to take care of that at the beginning of the shift", the supervisor has done several things that could have a large influence on an enforcement action's severity. He has appeared to admit that he knew about the condition several hours ago, he has assumed without checking that Jim did not take any action in response to his request – which can reflect poorly on both the supervisor (was it important enough for follow-up) and Jim (a second person who had knowledge of a condition and who may or may not have taken any appropriate action). Having a culture established where there is follow-up and communication could dramatically change the outcome. Or, consider the upper end of the spectrum of enforcement actions such as an investigation by a special investigator following an accident or injury or a high negligence or unwarrantable failure enforcement action. That workplace culture and attitude of the non supervisory employees is going to be critical. That investigator is likely going to speak with non supervisory employees before approaching those who may be considered "agents" of the operator and who may be subjected to personal civil and criminal penalties. The spectrum of responses may range from "safest guy/company I ever worked for, cares about each of us and our safety" to "I hate to say anything that might get him/the company in trouble, but …". Now that it has been demonstrated how key of a role circumstantial evidence can play in even criminal prosecutions under the Mine Act, the right kind of culture, built systematically over time, can go a tremendously long way to avoiding the significant problems and the attendant large costs those problems can bring with them.

2. Expense Savings Benefits.

(a) Typical Example. Assuming a large mine and a large parent company and an MSHA citation, including a designation of high negligence, for which 106 points are assigned, the resulting conversion table penalty amount would be $5,054. With just one mitigating circumstance established by the operator to prevent the inspector from issuing this hypothetical citation with a high negligence finding (but rather with a moderate negligence finding), the penalty would be reduced by $3,532. Keep in mind from the prior discussion that a move from a finding of high negligence to moderate negligence means the identification and demonstration to an inspector of any mitigating circumstance (because the definition of high negligence rests on there being no mitigating circumstances). In a culture where root causes of regulatory non-compliance matters are systemically being identified and efforts made to eliminate them, identifying one mitigating circumstance is nearly a certainty. But, words about what should have been done won't suffice, the facts must reveal that such efforts were actually undertaken. Equally importantly, the discussion needs to occur at the time the enforcement action is being contemplated because in later settlements or hearings in which legal challenges are raised do not necessarily result in penalty adjustments tied back to the conversion table penalty amounts.[7] Multiplied by multiple such citations over the course of each of four quarterly inspections at an underground mine and the funds to include the training and follow-up to accomplish such results becomes much more manageable.

(b) Elevated Enforcement Actions. As mentioned above, a fine of up to $250,443 can be invoked for just one flagrant violation. It is not unusual for multiple flagrant violations to be issued as the result of one spot inspection or investigation of any serious accident or injuries. The type of culture described would significantly help to alleviate allegations and issuances of reckless or repeated failure to make reasonable efforts to eliminate known violations of mandatory health and safety standards enforcement actions and prevent the imposition of the extremely large penalties associated with such issuances.

(c) Other Savings. The other savings from moving from legal challenges of enforcement actions to avoidance of enforcement actions include savings in legal fees and savings of the time of key personnel, as well as overcoming the loss of production from shut downs which can happen upon the issuance of higher level enforcement actions such as unwarrantable failure allegations as noted above. The value of management time spent developing plans and implementing plans for safe and efficient operations versus time spent dealing with issues that arise from compliance shortcomings can be significant and success breeds success.

[7] In this example, a U.S. Department of Labor solicitor or conference legal officer during a later legal challenge may only be willing to agree to a reduction of a certain percentage of the penalty amount (far less than the change in amount that would result from the conversion table application). Also, ALJs who hear these cases have discretion and are not bound by the penalty points to dollar conversion table in determining final penalty amounts, even when an operator is successful before the ALJ. The value of a knowledgeable and informed work force that takes action to insure compliance, which also establishes mitigating circumstances, and that engage appropriately with an inspector in the inspection process, cannot be overstated.

III. A Paradigm Shifting Approach

A. The Nuclear Navy

According to the father of the concept of failsafe safety for the nuclear navy, Admiral Hyman Rickover, "properly running a sophisticated technical program requires a fundamental understanding of and commitment to the technical aspects of the job and a willingness to pay infinite attention to the technical details. If you ignore those details and attempt to rely on management techniques or gimmicks, you will surely end up with a system that is unmanageable." There are no shortcuts.

1. Pillars of the Nuclear Navy
   (a) Integrity
   (b) Level of Knowledge
   (c) Questioning Attitude
   (d) Formality
   (e) Forceful Watch Team Backup

2. Chronic Unease. The pillars together represent the chronic unease that permeates the nuclear navy: the belief that an accident may be just around the corner, and only through vigilant adherence to the pillars can it be avoided.

3. High-Reliability Culture

Values:	Behaviors:
· High Level of Standardization	· Prevention
· High Level of Maintenance	· Monitoring
· High Quality Training	· Action

Values + Behavior = Culture

Continuous Prevention, Monitoring, Action … It is up to each operator to set its own high standards and establish the follow-through action to address prevention and monitoring on an on-going basis.

B. Instant Pre-Play. Rather than an after the fact, "what happened and why" style, a practical method for verifying standardization of approach to different work assignments and to help insure prevention while utilizing the "chronic unease" mindset (training ourselves to "see" problems before they develop rather than allowing ourselves the comfortable default mode of "everything is OK"). Before undertaking an assignment, the supervisor runs through a checklist of all tools, supplies, equipment and materials that will be required (involving crew for thoroughness). Condition of tools, supplies, equipment and materials is checked and verified as safe and ready for use. Supervisor runs through checklist of issues that have arisen in the past with the assignment, including any injuries, incidents, and near misses, and the root causes for

those. Supervisor also takes into account (again using crew's experience and obtaining their commitment and buy in) any changing "environmental" conditions that could affect the safe performance of the task and examine how to identify and deal with all such matters – ahead of beginning the task. Anything found out of order is addressed before assignment begins. Another way of thinking about this factor is to be prepared to deal with things timely as they come up since even with the best planning and checking issues arise. While a truthful, "that was not known" can lower the potential negligence or culpability in a situation, it is necessary and appropriate to get a culture to a different level to take timely and appropriate action and have an answer for the question of "what did you do once you knew"?

C. Can This Be Done? Yes. However, to change a culture, behavior and attitudes takes time. It cannot be rushed and there are no shortcuts. Training in both a classroom setting and on working sections will be needed. Several years of consistent effort and consistent allocation of resources are essential. To quote a good friend who I worked through this type of change process with *"You cannot act your way out of a problem you behaved your way into."* And his companion quote, with particular application to supervisors and managers, as we began to achieve results: *"You have to be credible for a long time before you are perceived as being credible."*

IV. Conclusion - Taking the Challenge

"The ultimate measure of a man is not where he stands in moments of comfort and convenience, but where he stands at times of challenge and controversy."[8] A culture of workplace safety can be built and maintained. It will be hard. It is never-ending and it will take leadership, time and resources. In my experience the decent, good and hard-working people employed in the extraction of minerals industry are up to the challenges. The challenges have never been this widespread nor this severe, but great things can occur when the tests are faced and addressed. Do not count these folks out – they will succeed. In closing, let's ask ourselves, what is our deepest fear?

"Our deepest fear is not that we are inadequate. Our deepest fear is that we are powerful beyond measure. It is our light, not our darkness, that most frightens us. Your playing small does not serve the world. There is nothing enlightened about shrinking so that other people won't feel insecure around you. We are all meant to shine as children do. It's not just in some of us; it is in everyone. And as we let our own lights shine, we unconsciously give other people permission to do the same. As we are liberated from our own fear, our presence automatically liberates others."[9]

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[8] Martin Luther King, Jr.

[9] Quote by Rick Gonzalez as Timo Cruz in Coach Carter. The actual complete quote is often attributed to Nelson Mandela but is believed to be properly attributable to Marianne Williamson – "Our deepest fear is not that we are inadequate. Our deepest fear is that we are powerful beyond measure. It is our light, not our darkness that most frightens us. We ask ourselves, Who am I to be brilliant, gorgeous, talented, and fabulous? Actually, who are you not to be? You are a child of God. Your playing small does not serve the world. There is nothing enlightened about shrinking so that other people will not feel insecure around you. We are all meant to shine, as children do. We were born to make manifest the glory of God that is within us. It is not just in some of us; it is in everyone and as we let our own light shine, we unconsciously give others permission to do the same. As we are liberated from our own fear, our presence automatically liberates others".

ENERGY AND MINERAL LAW FOUNDATION
Mine Safety & Health Law Special Institute



Legal And Other Benefits To Building And Maintaining A Culture Of Workplace Safety

Encore at Wynn Las Vegas
September 24, 2016
Las Vegas, Nevada

F. Thomas Rubenstein
- Partner, Dinsmore & Shohl's Natural Resources Practice Group, Morgantown, WV
- 35+ years of experience as a coal lawyer
- Phone: (304) 225-1414
- Email: thomas.rubenstein@dinsmore.com

›

The New Reality

Prediction: **Only companies that can produce safely, efficiently and in an environmentally sound manner will continue to exist**

‹ ›

Can it be Done?

Yes, but it will be hard

- "It's supposed to be hard. If it wasn't hard, everyone would do it. The hard is what makes it great."*

*Tom Hanks as Jimmy Dugan in League of Their Own.

Givens:

- **Mine Act places strict liability on mine operators to provide a safe workplace**
- **MSHA enforces the Mine Act regulations vigorously**

How Vigorously Does MSHA Enforce the Law?

Dollar amount of MSHA Penalty Assessments – Coal*

2009 - $96,400,000.00
2010 - $110,600,000.00
2011 - $120,000,000.00
2012 - $89,400,000.00
2013 - $64,900,000.00
2014 - $63,100,000.00

*www.msha.gov – "MSHA By The Numbers"

Average Assessment Per MSHA Coal Enforcement Action Issued*

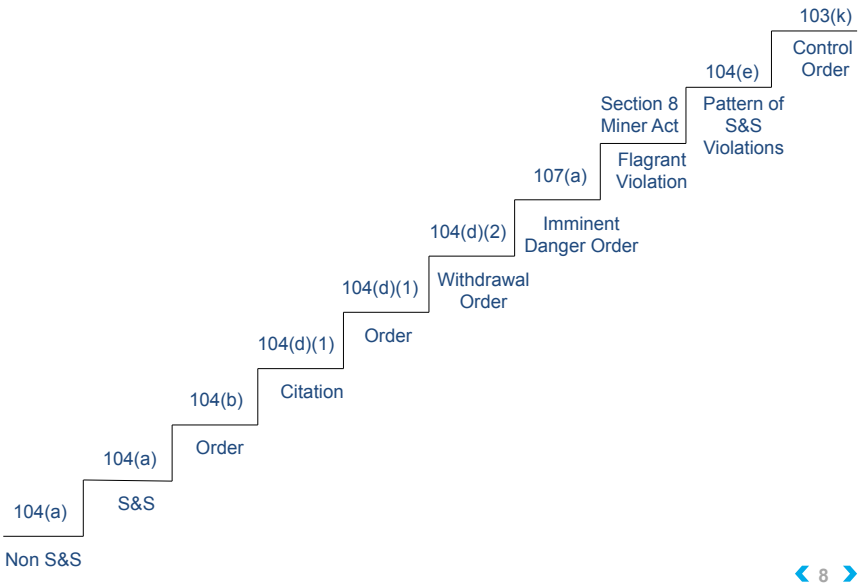
2009 - $945.98
2010 - $1,147.88
2011 - $1,289.39
2012 - $1,133.75
2013 - $1,027.02
2014 - $1,009.05

*www.msha.gov – "MSHA By The Numbers"

Cost of Lost Time Due to Enforcement Actions, Accidents, Incidents, Injuries . . .

?

MSHA's Graduated Enforcement Scheme



8

“Knowledge is power.”

--Francis Bacon

“A problem well stated is a problem half-solved.”

--Charles Kettering

A Large Factor to be Addressed

Negligence –

Behavior –

- A simple definition of negligence is the measurement of a person’s behavior in the fulfillment of a duty owed.

- **The Mine Act requires operators to be on the alert for hazards that can affect employee safety;**
- **And to take steps to prevent or correct these hazards.**
- **The failure to do so is called negligence.**

- **In each citation or order issued, the inspector must evaluate the degree of negligence from among five different options:**
  - None
  - Low
  - Moderate
  - High
  - Reckless Disregard

Degrees of Negligence

- **No Negligence:** The operator exercised diligence and could not have known of the violative condition.
- **Low Negligence**: The operator knew or should have known of the violative condition or practice but there are considerable mitigating circumstances.

Degrees of Negligence

- **Moderate Negligence**: The operator knew or should have known of the violative condition or practice, but there were mitigating circumstances.
- **High Negligence:** The operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances.
- **Reckless Disregard:** The operator displayed conduct which exhibits the absence of the slightest degree of care.

The Importance of Mitigating Circumstances

- Mitigating circumstances may include, *but are not limited to*, efforts you have made to **prevent or correct** hazardous conditions.
- You should be able to find mitigating circumstances in any citation MSHA issues.

As a supervisor you usually get what you accept or allow…



Expect More!

Flagrant Violations

- A creature of the amendments to Section 110 of the Mine Act.
- Flagrant is described as "reckless or *repeated* failure to make reasonable efforts to eliminate a *known* violation of a *mandatory* health or safety standard that *substantially and proximately* caused, or reasonably could have been expected to cause, death or serious bodily injury."
- A fine up to *$250,433* can be invoked for a flagrant violation.

Section 104(d) Unwarrantable Failure Citations and Orders

- Unwarrantable failure citations and orders must be based on "aggravated conduct." If not, they are invalid as a matter of law.
- Aggravated Conduct is defined as *reckless* disregard, *intentional* misconduct, *indifference*, or a *serious* lack of *reasonable* care.
- It is *not* "negligent conduct" which is defined as inadvertent, thoughtless, or inattentive.

The Commission's "*Mullins* Factors" Test for Unwarrantable Failure

- In unwarrantable failure cases the Commission examines the following factors to determine if the mine operator exhibited aggravated conduct (i.e. reckless disregard, intentional misconduct, indifference, or a serious lack of reasonable care):

The *Mullins* Factors

- Extent of the violative condition
- Length of time the condition existed
- What efforts were made to abate the violative condition prior to the issuance of the citation (Pre-citation efforts to abate are relevant in determining aggravated conduct; post-citation efforts are not – *Enlow Fork Mining Co.*, PENN 94-259; PENN 94-400 (Jan. 1997))
- Whether the violation was obvious
- Whether the operator had been placed on notice that greater efforts were necessary for compliance
- The danger posed by the violative condition

The *Mullins* Factors

- **Unlike the test for S&S, it is not necessary for MSHA to produce evidence on every one of the *Mullins* factors to uphold unwarrantable failure.**
- **However, knowledge of the condition alone is not enough to support a finding of aggravated conduct.**
  - The Commission has held that use of a **knew or should have known test** by itself would make unwarrantable failure indistinguishable from ordinary negligence. *Virginia Crews Coal Company,* 15 F.M.S.H.R.C. 2103 (October, 1993).

Ramifications of Unwarrantable Failure Citations and Orders:

- 104(d) Chain
- Mandatory Minimum Penalties
- Special Investigations under Section 110 of the Mine Act
- Pattern of Violation Action Consideration
- Flagrant Violations
- Lost Production Time – Never Recovered

QUESTION:

When is the best time to defend a citation?

ANSWER:



Before the citation is written!

“If you deliberately plan on being less than you are capable of being, then I warn you that you’ll be unhappy for the rest of your life.”

--Abraham Maslow

Pattern of Violations

- This enforcement tool now allows MSHA to issue a POV notice without first issuing a Potential POV (“PPOV”) notice and review (thus eliminating the prior 90 day improvement period).
- A common theme throughout the application of this tool is the responsibility of the mine operator to monitor its own performance.

Potential Civil and Criminal Prosecutions

Section 110(c) "Knowingly"

Section 110(d) "Willfully"

Section 110(c) Investigations

- Whenever a corporate operator violates a mandatory health or safety standard or **knowingly** violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act, except an order incorporated in a decision issued under subsection (a) or section 105(c), any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsection (a) and (d).

Section 110(c) Investigations

- **Knowingly**: "A person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence." *MSHA v. Richardson*, 1 F.M.S.H.R.C. 874 (July, 1979).
  - **Under this standard, aggravated conduct is required.**
    - **The conduct must go beyond simple negligence and be more than high negligence.**

Criminal Prosecution under Section 110

- **MSHA has the authority to bring criminal prosecutions under the Mine Act against a director, officer, or agent.**
- **To succeed in a criminal prosecution under Section 110 MSHA must prove a willful violation of a mandatory health and safety standard.**

Criminal Prosecution under Section 110

- **Willfully**: "…done knowingly and purposely by a [person] who, having a free will and choice, either intentionally disobeys the standard or recklessly disregards its requirements." *U.S. v. Consolidation Coal Co. & Kidd*, 504 F.2d 1330, 1335 (1974).

Initiation of 110 Investigation

- According to MSHA PPM, the investigation of a possible Section 110 violation of the Mine Act is initiated at the request of the District Manager *usually* as the result of one of the following:
  - **A mine accident;**
  - **A complaint (such as false reporting or equipment misrepresentation); or**
  - **A review of citations/orders for possible knowing or willful violations.**

According to MSHA's PPM, the following citations/order ***WILL*** be reviewed for possible further action:

- Each 104(a) citation issued which contributed to the issuance of a 107(a) imminent danger order of withdrawal;
- Each 104(d) citation/order which is identified as S&S and the negligence is marked "high" or "reckless disregard"; and
- Each citation issued for working in violation of a withdrawal order.

A Challenging Solution!

A NEW PARADIGM – THE "NUCLEAR NAVY"

What is our *real* goal? We will only achieve goals which <u>we</u> set and measure ourselves against.



"Properly running a sophisticated technical program requires a fundamental understanding of and commitment to the technical aspects of the job and a willingness to pay infinite attention to the technical details. If you ignore those details and attempt to rely on management techniques or gimmicks, you will surely end up with a system that is unmanageable."

--Admiral Hyman G. Rickover

There are NO Shortcuts…

Pillars of the Nuclear Navy

- Integrity
- Level of knowledge
- Questioning attitude
- Formality
- Forceful watch team backup

Pillars of the Nuclear Navy

The Pillars together represent the "chronic unease" that permeates the Nuclear Navy: the belief that an accident may be just around the corner, and only though vigilant adherence to the pillars can it be avoided.

High-Reliability Culture

Values:
- High level of standardization
- High level of maintenance
- High quality training

Behaviors:
- Prevention
- Monitoring
- Action

Continuous Prevention, Monitoring, Action… It is up to us to set our own high standards and the follow-through on prevention, monitoring and action!

Values + Behavior = Culture

40

Instant Pre-Play

Rather than traditional "What Happened and Why" developing a mindset and behavior of knowing what can and will happen, let's prevent it "Chronic Unease"



"Always do right - this will gratify some and astonish the rest."

- Mark Twain

The Benefits

- **Accident free operations**
- **Greater productivity**
- **No lost time due to incidents or enforcement actions or investigations**
- **Lower stress**
- **Cost savings of penalties and legal expenses**
- **Stable workforce – low turnover**
- **Remaining in business**

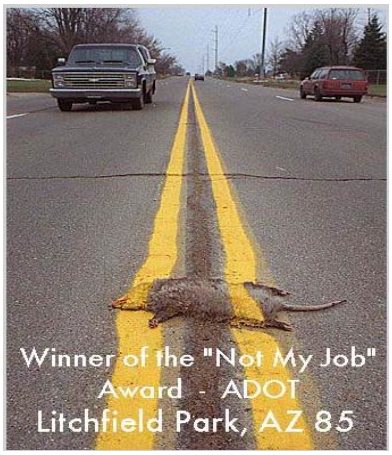
Practical Example

Assume large operator large mine and a high negligence citation with one mitigating circumstance established penalty reduction for partial assessment can be dramatically decreased

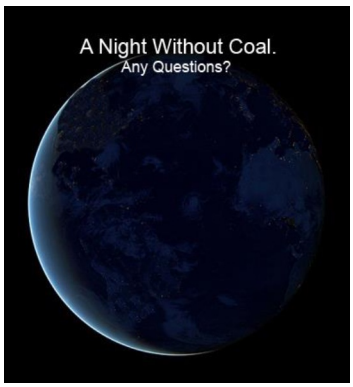
30 C.F.R. Part 100 Penalty Conversion Table

- 106 points = $5,054
- Change from “high” negligence to “moderate negligence” 35-20 points = 15 point reduction
- 91 points = $1,522
- $3,532 **decrease** for one enforcement action!

Type of Attitude/Behavior to be Changed



Thank You!




Let's Accomplish more.SM Together.

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