

STATEMENT OF
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BEFORE THE
SENATE APPROPRIATIONS COMMITTEE
SUBCOMMITTEE ON LABOR, HEALTH AND HUMAN SERVICES, EDUCATION
AND RELATED AGENCIES

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Chairman Harkin, Vice Chairman Cochran, and members of the Subcommittee:

Thank you for inviting me here today to discuss a matter of great concern to me: the role of the Solicitor's Office in holding accountable those mine operators who do not live up to their moral and legal responsibility to ensure mine workers' safety and health and the resources the Solicitor's Office needs to carry out that role effectively.

This problem is, fundamentally, a safety and health problem. MSHA cannot be present at every mine at all times, nor should it be. Mine operators are the ones on the front lines of safety and health efforts, and they must do a better job of eliminating unsafe conditions in the first place. If MSHA inspectors can find violations, then mine operators should be able to find them, too – and fix them *before* they produce worker injuries and illnesses.

As you've heard, MSHA has used the additional funding you've provided during the past several years to hire more inspectors, which has enabled the agency to perform 100% of its statutorily mandated inspections and to conduct spot inspections and special emphasis programs. With more inspections, MSHA has found more violations and issued more citations. It also has assessed higher penalties as a result of statutory and regulatory penalty increases. At the same time, however, many mine operators have dramatically increased their contest rates, which has resulted in delayed adjudications and mounting case backlogs.

As you know, the President has committed to reducing the large and growing case backlog at the Federal Mine Safety and Health Review Commission. Miner safety and health

is poorly served when the system is overwhelmed by high contest rates and cases are not decided promptly. Backlogs and delays impede justice and dilute the deterrent effect that Congress intended civil penalties to have. But while litigation may have created the backlog, it cannot, by itself, eliminate it. As Assistant Secretary Main said, this problem can't be fixed simply by adding more money for lawyers, judges, and MSHA personnel to settle and litigate cases.

You asked me to provide information regarding resources needed to support the anticipated increase in the number of administrative law judges of the Federal Mine Safety and Health Review Commission. According to the Commission's FY 2011 budget request, a single judge can dispose of approximately 500 cases a year. Our own statistics show that, under the current litigation process, the Solicitor's Office utilizes approximately seven attorneys for each judge -- and that does not include resources that MSHA expends on Commission cases using its conference litigation representatives (CLRs).

To the extent that the Commission is funded for additional judges, the Solicitor's Office and MSHA will need a corresponding increase in resources. For example, if resources were provided to immediately increase the number of judges at the Commission to 26, then the Solicitor's Office and MSHA would require roughly an additional \$26.6 million above the FY 2010 appropriation and the President's 2011 Budget request. With any supplemental appropriation, we would request that Congress provide us with the flexibility to adjust the ratio of SOL attorneys and support staff and MSHA CLRs and support staff based on the mix of cases before the Commission.

While we would begin to use any new resources promptly, hiring, training, and deploying attorneys and CLRs will require time. Ideally, we would want any new funds to be made available over a period of time that will enable us to use the funds in the most efficient, cost-effective way possible, or to have an understanding that any down payment in a supplemental appropriation would be followed by the resources in the regular appropriation to address what is clearly a multi-year process. As we begin to implement improvements in the

way we handle Commission cases, which would be designed, at least in part, to achieve greater efficiencies, we would hope to need fewer resources.

Let me tell you a little about the process so that you can appreciate the workload involved.

Each Commission case typically involves a number of citations issued to an operator during a single inspection or related inspections. Each contested citation must be litigated separately, including the violation itself, any special findings, and the proposed penalty. Our attorneys research and investigate each item and often find it is necessary to consult with MSHA inspectors and experts just to understand the unique worksites and the technologically complex processes that are at issue.

Our attorneys also prepare and file with the Commission all necessary legal documents, including the petition, answers to notices of contest and motions. They also engage in settlement talks, discuss settlement offers with MSHA, and draft and file motions to approve settlements. Until a case has settled, however, our attorneys must still do all the things necessary to prepare for trial, including identifying, locating, interviewing, and evaluating witnesses – including expert witnesses – as well as obtaining and analyzing ventilation or roof control plans, mine maps, dust samples, inspector notes, and photographs.

Discovery – which takes place outside of court and generally without the involvement of a judge – can be especially time-consuming. A judge's order setting discovery deadlines may take the judge a few minutes to prepare, but conducting the actual discovery – preparing interrogatories, requests for production of documents, and requests for admissions, responding to operator requests, and preparing for and defending depositions – can take weeks and sometimes months. Depositions themselves usually require costly, time-consuming travel.

Of course trial preparation – drafting pretrial motions, preparing witnesses, negotiating with opposing counsel – is also resource intensive, and actual trials can last days and usually involve travel. Some trials require even larger amounts of time. For example, recently we

went to trial on a case in which we litigated 29 separate significant and substantial violations in an attempt to establish that a Massey mine – the Tiller Mine – should be put on a pattern of violations. Six attorneys have worked more than 1000 hours on that case, and more work may be required once a decision is issued.

In addition to their own caseloads, SOL attorneys train CLRAs and supervise their cases. We train MSHA inspectors in subjects such as evidence and courtroom procedures. And we analyze in advance all cases in which MSHA is considering individual agent liability, a “flagrant” designation, or a pattern of violations designation.

More judges may, of course, be part of the backlog solution, but only if they are accompanied by more CLRAs and Solicitor’s Office attorneys – and only if we have enough time to train and deploy them. To fix the backlog problem over the long run, we will need other tools as well. I’d like to discuss a few of them:

- Simplified Commission proceedings – I support fully the concept of simplifying the Commission’s adjudicatory proceedings, which Chairman Jordan mentioned. Streamlining the process in appropriate cases can help reduce the backlog by resolving them quickly and efficiently.
- Legislative reforms – We support a number of legislative reforms that could help reduce the backlog and improve mine safety and health. Subpoena power in routine investigations and inspections is one reform that would allow us more easily to obtain the evidence we need to resolve cases quickly. Another reform could clarify the proof needed to establish that a violation is “significant and substantial.” Under current Commission caselaw, such a violation is difficult and resource-intensive for us to prove. Still other reforms could provide financial disincentives for operators to contest cases by requiring them to put penalty amounts in escrow while their cases are pending, or to pay pre-judgment interest on final penalty amounts.

- Revise the pattern-of-violations (POV) process – MSHA’s Spring Regulatory Agenda includes a rulemaking to revise the way MSHA determines whether an operator has committed a pattern of violations. The proposed rule would reduce the current incentive for operators to contest violations in order to avoid final orders that count toward a pattern of violations. MSHA also is considering revising its internal policies for identifying operators for a potential pattern. SOL will work with MSHA to craft these new rules and policies. We also believe that legislative changes to the POV process may be necessary to make it more useful as a tool to address problem behavior in a more timely way, and look forward to exploring those changes with the Congress.

- Develop better cases – Good evidence, of course, is the key to strong cases. For example, recently we worked with MSHA to issue guidance that encourages inspectors to use cameras wherever possible to document violations. Commonsense steps like this can help reduce the number of facts at issue and lead to faster case resolutions.

- Simplify penalties – SOL is planning to help MSHA revise its penalty rules so that the categories on which penalties are based – such as the degree of operator negligence and the gravity of the violation – are simpler. By simplifying the penalty assessment process, we expect to see fewer issues on which MSHA and operators can disagree, and fewer contested citations.

- Provide incentives not to contest cases – Operators must be dissuaded from contesting citations simply because they believe they can get their penalties reduced. In some cases we therefore may ask for an *increase* in the penalties so that operators understand that there are significant disincentives to filing frivolous contests, especially in serious cases.

Thank you for the opportunity to testify here today. The time is, indeed, right for reform. But for reform to be truly effective and achieve long-term case control, we must pursue a multi-pronged approach. Resources are an important prong, but administrative, regulatory and legislative reforms are essential for long-term solutions. I look forward to taking your questions.