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Testimony before the
House Committee on Education and Labor on
H.R. 5663; MINER SAFETY & HEALTH ACT OF 2010
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Thank you for inviting me to address the Education and Labor Committee about this important legislation. As President of the United Mine Workers of America ("UMWA"), I represent the union that has been an unwavering advocate for miners' health and safety for 120 years. I am pleased to have this opportunity to speak in support of H.R. 5663. It addresses some very serious problems that have been highlighted this year in the coal industry as well as other industries.

This Committee plays a significant role in advancing miners' health and safety. We are deeply appreciative of the leadership you have shown in trying to protect and enhance the health and safety of all miners. Your continued oversight is essential. We share with you the common goal of wanting to ensure that all miners will go home safely and in good health after the workers' shifts each and every day.

This Committee knows all too well that the status quo is inadequate; this year 40 coal miners have died at work -- and we are barely half way through the year! The horrific Upper Big Branch disaster claimed 29 underground coal miners. But eleven other coal miners also died - one or two at a time. We can and must do a better job of protecting our nation's miners.

I have testified before this Committee as well as before Senate Committees about some of the shortcomings in the existing laws and about problems MSHA confronts in enforcing the law. H.R. 5663 addresses many of the issues we have been discussing. I will review some of the current problems that demand attention, then speak about how the proposed legislation will address those problems; and I will make a few suggestions to further improve the proposed legislation.

A fundamental problem MSHA confronts is how to deal with operators that habitually violate the law. Voicing her apparent frustration on this very point after

yet another miner died, on July 1 Secretary of Labor Hilda Solis issued a press release in which she stated:

> …31 of the 40 coal mine fatalities that have occurred in 2010 have occurred at Massey mines. *We have issued citations, closure orders, stop orders, and fines to get Massey to take its safety responsibility seriously*. Earlier today, the U.S. Attorney in the Southern District of West Virginia announced four Massey supervisors will be charged criminally stemming from a MSHA and FBI investigation into the deaths of two miners at a Massey mine in 2006. But yet again, today we mourn the tragic loss of another miner whose safety was entrusted to Massey Energy (emphasis added.)

Clearly, the status quo isn't good enough. MSHA's efforts have failed to motivate at least some mine operators, like Massey, to do what is necessary to operate their mines safely each and every day. We know many operators are performing much better. ***In fact, of the 40 coal fatalities in 2010, not one was at a union operation***.

Even before the Upper Big Branch disaster in April, we met here to discuss how the huge and growing backlog at the Federal Mine Safety and Review Commission ("FMSHRC") was undermining miners' health and safety. While more Administrative Law Judges have been hired to deal with FMSHRC cases since I testified in February, there remains the problem of operators routinely challenging MSHA citations in an effort to delay resolution of their outstanding citations and orders -- whether to delay paying the penalties or to avoid the enhanced fines that attach to repeat violations, or to escape the challenging Pattern of Violation enforcement tool MSHA has threatened to use. And though Congress increased fines when it passed the MINER Act of 2006, because citations and orders are being regularly challenged, that new fine structure has not served to induce better compliance.

After a citation is fully litigated and there remains no further issue about an operator's obligation to pay a particular penalty, as it stands today a mine with unpaid fines can continue its production notwithstanding a lengthy delinquency. We understand that there is more than $27 million in unpaid fines resulting from MSHA final orders! One way to avoid any such delinquencies would be to require all assessed fines to be placed into an escrow account, as we have previously suggested.

Consistent with the expectation that all fines shall be paid close in time to the violation, the proposed legislation provides that when due process procedures have been exhausted, the operator must promptly pay its fines. And while MSHA has claimed uncertainty about its authority to take action against an operator with delinquent fines, the legislation will give MSHA the ability to temporarily close a mine if fines are not paid within 180 days. We think that's fair: operators that work within the legal framework shouldn't have to compete against those who flaunt the system.

MSHA also has been uncertain about its authority to take immediate action to shut down a mine when it observes violations the Agency believes place miners' health and safety at immediate risk. The proposed legislation addresses this by granting MSHA the authority to seek injunctive relief when it believes the operation is pursuing a course of conduct that jeopardizes miners' safety or health. This is sorely needed.

Another shortcoming with the existing framework concerns the criminal penalties in the Mine Act. They have been insufficient to coerce the compliance we need. First, the criminal sanctions only amount to misdemeanors -- a virtual slap on the wrist -- even though the consequences for Mine Act violations can be deadly. We know it can be difficult for a government agency to convince a prosecutor to pursue a case for Mine Act misdemeanors. This means that some who could have been prosecuted under the applicable legal standards likely escaped criminal prosecution simply because the criminal sanctions now available to prosecutors are too mild.

More importantly, the top-level people who create and maintain the corporate policies that put company profits ahead of workers' safety have been permitted to remain in power and to continue their misguided practices while their subordinates have to take the blame, including any criminal liability. We believe that CEOs and corporate Boards of Directors should be held accountable; they should have to take responsibility when systemic health and safety problems are evident within a company. H.R. 5663 would provide these changes: it imposes criminal penalties for "knowingly" taking actions that directly or indirectly hurt workers, and makes a felony any such conduct, with jail time increased from a one year maximum to five year maximum for a first offense and ten years for a second offense, and the fines increased from a maximum of $250,000 to $1 million, or $2 million for a second offense. It also makes it easier to prosecute corporate representatives who knowingly authorize, order, or carry out policies or practices that contribute to safety and health violations. We fully support these

improvements to the criminal penalties.

Even though the existing law requires MSHA inspections to occur unannounced, we have all heard stories about the many ways operators game the system so inspectors will not discover unsafe work practices or conditions. When this Committee visited Beckley for its hearing with Upper Big Branch families, you heard reports about the various signals and codes that were relayed underground (such as, "we've got a man on the property" from Gary Quarles testimony on 5.24.10) before the inspectors could arrive on a section, allowing managers to direct make-shift changes to avoid getting cited. And when MSHA took over the communication stations upon arrival at a couple of operations in Kentucky during recent blitz inspections, MSHA inspectors discovered many more violations than had previously been discovered – violations that likely would have been covered- up and gone undetected if the special warning codes were allowed to continue. To deal with these issues, the proposed legislation increases the criminal penalties for those who give notice, and requires information about the criminal penalties to be posted at mines so all miners will be on notice that giving any kind of notice about an MSHA inspection is improper and constitutes a very serious violation of the Act.

There has been a lot of discussion about the Pattern of Violation ("POV") tool that MSHA has long had a right to use, but which has not been effectively utilized. MSHA has alerted some operators about their being vulnerable to being put into a Pattern and this has generally been successful in accomplishing some short-term improvements. This happens because being put onto a POV is properly perceived as being a dramatic event that would be hard to ever escape. However, MSHA has been both too hard and too easy in its prior use of the POV. It is t*oo hard* insofar as if any mine would actually be placed into a POV (as opposed to just getting a warning notice about the possibility), under the current scheme it would be nearly impossible for the mine to ever again operate; once the POV attaches miners must be withdrawn if MSHA finds *any* S&S violation. But even the most-attentive operator may not be able to avoid all violations all the time. For example, barometric pressure changes can quickly give rise to an S&S violation.

MSHA's current POV protocol is also *too easy* insofar as after MSHA issues a POV warning notice the Agency only requires a 30% reduction in the short run for an operator to be relieved of the extra scrutiny. It is too easy for an operator to demonstrate short-term improvements without making the wholesale changes needed to render the mine safe on a long-term basis. The focus of a POV program should be to capture the attention of management and miners alike to affect a

wholesale cultural change -- to make everyone at the unusually hazardous operation aware of what may be comprehensive problems, and to make sure they learn and practice different and safer work practices. The improvements should be fully integrated so the mine operates more safely going forward on a long-term basis, not just long enough to get the mine off MSHA's watch list.

Rather than the punitive POV model now in place, the legislation seeks to turn the POV into a rehabilitation program. It provides for MSHA to tailor any remediation to the particular operation: if MSHA determines that more training would be helpful, it could require that; if the mine would benefit from a comprehensive health and safety program, the Agency could mandate that one be designed and implemented. The legislation also mandates a doubling of the inspections while the operation remains in POV status, as well as a doubling of the fines after 180 days if adequate improvements are not accomplished. An operation would remain in POV status for at least one year, which should be long enough to ensure that the new practices are actually working. Finally, MSHA plans to measure a mine's success against objective benchmarks, properly comparing any operation to other mines of similar kind and size.

The proposal also would provide more immediacy in MSHA's assessment of an operation: MSHA would evaluate a mine's safety record for POV purposes based on contemporaneous citations and orders MSHA inspectors would be writing, rather than measuring a mine's safety record based on final orders that now can take years to process. Because contested citations are now caught up in a very long backlog at the FMSHRC, by using only final orders for POV purposes (as MSHA now does) the Agency could be placing a mine on a POV in 2010 based on its unsafe conduct from 2008, because it could take that long for the underlying orders to become final. From a safety management point of view this doesn't make sense. A mine with poor safety practices in 2008 should be placed in the POV status in 2008 -- when the added scrutiny is most needed, not years later when the various legal challenges get resolved. Likewise, if management at an operation with numerous S&S citations and withdrawal orders in 2008 recognized it had serious problems with its safety practices and initiated changes that yielded significant improvements, under the current scheme that mine might be vulnerable to a POV in 2010, after its safety practices had improved.

The POV tool is an extreme one and should be available for MSHA to help put an immediate end to unsafe work practices *before* miners get hurt. It is precisely when MSHA inspectors are writing an unusually large number of citations and orders that a mine should receive the extra attention POV anticipates,

not years later when those citations – if contested – finally become final orders. And because the overwhelming percentage of citations and orders that MSHA inspectors write are upheld even when contested, there is no serious issue about due process based on a POV process that is prompted by written citations as opposed to final orders. In FY 2009, only 4-11% of litigated penalties related to unwarrantable failure and S&S citations ended up being withdrawn or dismissed. With a POV program re-focused on rehabilitation rather than punishment, and given the small withdrawal and dismissal rate, it is fully consistent with the protective purposes of the Mine Act to err on the side of safety and accept this modest margin of error. The proposed legislation would make the POV program more remedial and less punitive, which we support. The goal must be to turn operations with the worst health and safety records into much safer operations, and to teach the miners and managers about what is required to operate safely so they will do so on a long-term basis.

A related issue that also affects the POV program arises from the current system for accident and injury reporting. Operators are required to report on all accidents and injuries and to file quarterly reports with MSHA. However, the reporting process is now badly flawed. Operators go to extraordinary lengths to dissuade their employees from ever filing accident reports even when an injury is serious. Some would rather pay an employee with a broken back to perform light duty than have him report the injury. While we have heard stories about these practices for years, former Massey employee Jeff Harris testified about his personal knowledge of this practice when he addressed the Senate HELP Committee on April 27, 2010.

To the extent that accident and injury reports constitute a factor used in measuring an operator's relative safety record for POV status, all operations should be obligated to report accidents and injuries pursuant to the same objective standard. This is an area where changes may be required for H.R. 5663. Only if accident and injury reports are regularly and reliably filed can we learn about dangerous mining practices, and about problems with equipment. If reports are not provided when all accidents occur, the same problems are more likely to recur. There is no place for subjectivity; rather, *all* accidents and injuries should be reported so the mining community can learn from our collective experiences. Top level mine management should also be required to sign off on the reports -- both to ensure that the personnel with the power to make changes (when needed) actually know about the accidents at an operation, and to provide much-needed accountability.

A strength of the proposed legislation concerns the entities from which MSHA would receive and maintain accident and injury data. As it stands today, MSHA reports do not relate the health and safety records of an operator's contractors to the operator itself. Yet, if an operator would be required to take more responsibility for those working on its property, that operator would be more attentive to its contractors' safety records and start demanding better health and safety performance. A disproportionately high rate of accidents is attributable to contractors, so this change is warranted. And while any operator *could* be demanding better compliance with mine safety laws and regulations, operators generally have made no effort to exercise this power. Imposing the legal requirement is appropriate and should effect better contractor compliance with Mine Act requirements.

Miners continue to be intimidated into working in an unsafe manner, and this has got to change. As you heard at the Beckley WV hearing in May 2010, and as Jeff Harris testified before the Senate HELP Committee in April 2010, miners have provided testimony about how difficult it is for them to raise safety concerns at a non-union mine. Even when they know that their work environment is dangerous, miners are reluctant to voice safety issues because jobs are scarce -- and coal-mining jobs pay well. The testimony confirmed that a miner working at a non-union operation has good reason to fear losing his job for complaining about unsafe conditions. But no miner should have to choose between earning a good paycheck (while praying he will survive) and working safely. No worker should feel he is jeopardizing his family's economic security by raising bona fide work concerns on the job. And no miner should be told he needs to find another job when he tries to exercise the statutory right to refuse unsafe work, as coal miner Steve Morgan reported his 21-year old son Adam Morgan was told by his boss at the Upper Big Branch mine before perishing in the April 5 disaster. In short, the anti-discrimination protections in the existing law are terribly important, but they don't go far enough to protect miners. H.R. 5663 addresses this continuing problem by making sure that miners are specifically trained each year about their safety rights, and authorizing punitive damages and criminal penalties for retaliation against miners who blow the whistle on unsafe conditions.

As for accident investigations, the Act requires MSHA to investigate all serious accidents. However, it now does so with one arm essentially tied behind its back. This results from the fact that MSHA investigative interviews are conducted on a volunteer basis. That is, MSHA identifies who might have helpful information and invites them to meet with the Agency. Any individual may decline MSHA's invitation. Likewise any witness can leave the interview at any

time. The only exception lies with the public hearing option, for which MSHA has the power to subpoena witnesses and documents, but which has rarely been used. We think MSHA should have the subpoena power for *all* accident investigations, not just for a public hearing component of an accident investigation as is expected to occur as part of the Upper Big Branch investigation. By providing MSHA with the subpoena power MSHA could speak with anyone it thinks has relevant information to contribute and it would give MSHA broader authority to review records. We also think that granting the Agency subpoena power for inspections would better protect miners who may wish to speak with MSHA inspectors. The legislation would make these changes.

In the aftermath of the Upper Big Branch tragedy, we urged MSHA to conduct a public hearing for its primary investigation for multiple reasons: only by doing so could it utilize its subpoena power; and we believe that allowing an open hearing would permit more issues to be more fully explored, reducing the possibility that some less popular but still any feasible theories about root causes would be overlooked. Yet, MSHA chose to conduct this investigation largely behind closed doors. We think that procedure creates needless problems. And while MSHA plans to conduct a separate investigation into its own conduct as it relates to the Upper Big Branch mine, such an internal investigation could produce issues that bear on the primary investigation. It would be best if all such issues would be raised, considered, and resolved at the same time, not sequentially. We also believe that MSHA should not be the one investigating its own conduct, but an independent investigation team should perform this analysis. The proposed legislation addresses this by requiring a parallel and coordinated investigation to be performed under the direction of NIOSH for all accidents involving three or more fatalities. The independent team would include knowledgeable participants from other interested entities, including employer and worker representatives. We think this procedure will help assure the mining community, Congress, and the public at large that the investigation is thorough.

However, the proposed legislation should be adjusted to incorporate a role for the miners' representative to participate fully in all accident investigations. For some of the more recent multi-fatal accident investigations, even though the UMWA was designated as a miners' representative, the UMWA was excluded from the accident interviews. The miners' representatives are permitted to join in the underground investigation, but little more. Without being allowed to join the interviews, the miners' representative cannot fully represent the miners at the operation who have selected such a representative.

The Upper Big Branch investigation is another current MSHA accident investigation in which the UMWA has been excluded from the interviews even though the Union has been designated as the miners' representative for miners at that operation. The government has claimed that the on-going criminal investigation justifies MSHA's closed-door investigation and the exclusion of the miners' representative. Yet, for another investigation now taking place – that following the BP explosion in late April -- there is also a parallel criminal investigation. If simultaneous civil and criminal investigations are feasible in that context we believe it should also be viable for accident investigations within MSHA's jurisdiction. We thus urge a change in the legislation to specifically provide for miners' representatives to fully participate in all accident investigations. After all, miners who made their designation have a significant interest in learning what happened, and they may be returning to work at the same operation. They should have a seat at the table in the form of their designated representative.

There has also been a recurring problem with the process of designating a Section 103(f) miners' representative after a disaster occurs at a non-union operation. The Act does not presently provide for a family member to designate a miners' representative on behalf of a miner who is trapped or dies in a mine accident. The proposed legislation would change this, so that the family member may exercise the right to designate a miners' representative if the miner is unable to exercise his right due to a mine accident.

Though we don't yet have official information from the accident investigation, it is generally believed that inadequate rock dusting exacerbated the Upper Big Branch explosion. This legislation would require more protective rock dust standards. To reduce the likelihood of dangerous coal dust explosions, the Bill also requires the use of technology to better monitor rock dust compliance.

To the extent the proposed legislation anticipates MSHA rulemaking and authorizes the Agency to exercise new and expanded responsibilities, we wish to note that it will require full funding for these new mandates. I think we can all agree that it would be far better to support a pro-active MSHA than to fund yet more large-accident investigations.

Finally, the UMWA is in support of those provisions of the proposed legislation that would fall within OSHA's jurisdiction.

Thank you for allowing me to speak about H.R. 5663; we look forward to

working with you to pass it into law.