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April 28, 2015

US HOUSE HEARING: "PROTECTING AMERICA'S WORKERS: AN ENFORCEMENT UPDATE FROM THE MINE SAFETY AND HEALTH ADMINISTRATION"

For clients and friends of Jackson Kelly PLLC

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On April 23, 2015, Joseph A. Main, Assistant Secretary of Labor for Mine Safety and Health, testified before the U.S. House Education and Workforce Committee's Subcommittee on Workforce Protections on various topics related to Mine Safety and Health Administration ("MSHA") enforcement and rulemaking conducted over the last five years. The purpose of his testimony was to inform the Subcommittee of MSHA's efforts to create a safer and healthier work environment for miners. Assistant Secretary Main discussed the reduction in mine fatalities from 2010 to 2014, the effect of enforcement procedures including an overhaul of the Pattern of Violations ("POV") process, and the implementation of new mandatory health and safety rules.

Assistant Secretary Main discussed the significant reduction in mine fatalities during the five year period from 2010 to 2014. During that period, an average of 46 mine fatalities occurred each year, which shows significant improvement over the average of 96 mine fatalities per year during the 1990s. Mine operators also showed progress by reducing the annual fatal injury rate by approximately half during the period. In 2014 there were 44 fatalities – the lowest on record, but out of those 44, 28 were at metal and non-metal mines, which Assistant Secretary Main noted was an area of concern.

In April 2010, MSHA began to conduct impact inspections targeted at troubled mines with a poor compliance history. Since the program was implemented, MSHA has conducted nearly 900 targeted inspections that

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resulted in the issuance of 13,951 citations and 1,244 orders. The Secretary purported that as a result of these impact inspections, the number of S&S violations decreased by 27 percent and unwarrantable failure violations decreased by 55 percent at targeted mines during the five year period.

Additionally in 2010, MSHA reformed the POV process by revising its criteria for screening mines for potential patterns of violations. The revision to the screening criteria was intended to further identify mines that have been subject to closure orders, unwarrantable failures to comply with health or safety standards, failure to provide miners with required training, and the existence of imminent dangers in the mine. Implementation of the new screening criteria identified 51 mines for further review, a number that was reduced to 12 mines by 2014. The Secretary noted that mines that have been placed on POV or have been warned of a POV have significantly improved compliance.

Over the period from 2010 to 2014, the Secretary discussed a number of initiatives by MSHA to further mine safety and health, including the End Black Lung – ACT NOW campaign which involves outreach and education to help end black lung disease. In 2010, MSHA introduced the Rules to Live By program, which purports to prevent the most common types of mining fatalities. As a result of both internal and independent review of MSHA's actions at the Upper Big Branch Mine, MSHA completed action on about 100 reforms, including 40 policy directives and more than 20 training sessions for MSHA personnel. These reforms also included significant revisions to the Coal and Metal and Nonmetal Mine Inspection handbooks and a new Roof Control Handbook. MSHA also took steps to harmonize applicable regulations with those promulgated by OSHA by recognizing that in many cases compliance with OSHA's fall protection standard would satisfy MSHA's standard. According to Assistant Secretary Main this resulted in improved compliance, with a reduction in fall protection violations between 2013 and 2014 by 12 percent.

During the five year period, MSHA finalized a significant number of rules deemed critical to mine safety and health. In 2010, MSHA published the *Coal Mine Dust Sampling Devices* rule, setting requirements for approving the use of the new continuous personal dust monitor, or CPDM. In 2011, MSHA issued the *Maintenance of Incombustible Content of Rock Dust in Underground Coal Mines* rule that increased the percentage of rock dusting required in a mine. In 2012, MSHA issued the *Examinations of Work Areas in Underground Coal Mines for Violations of Mandatory Health and Safety Standards* rule, which requires mine operators to conduct more thorough workplace examinations. In 2013, MSHA issued the new *Patterns of Violations* rule. In 2014, MSHA published the final *Respirable Coal Mine Dust* rule. This year, MSHA issued the *Proximity Detection Systems for Continuous Mining Machines in Underground Coal Mines* rule intended to prevent miners from being injured by movement of continuous mining machines. MSHA has also issued a proposed rule to revise the civil penalty regulations. The comment period and rulemaking record closed on March 31, 2015, and MSHA is presently reviewing the comments.

Finally, the Secretary discussed the fact that MSHA must realign agency resources in response to a decline in coal mining, particularly in Appalachia.

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At the outset of the hearing, Rep. Frederica Wilson (D – FL), ranking member of the Subcommittee on Workforce Protections, announced that she, along with Rep. Bobby Scott (D – VA), ranking member of the Education and Workforce Committee, had reintroduced the Robert C. Byrd Mine Safety Protection Act. This bill contains significant amendments to the Mine Act, including:

- A broadened definition of “significant and substantial” (“S&S”). A violation of the Mine Act would be considered S&S if it “is of such a nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard as described in § 104(d).” This appears to dramatically lower the threshold for an S&S finding.
- Extend statute of limitations for filing a whistleblower complaint from 60 to 180 days and establish minimum and maximum penalties on a graduated scale for whistleblower complaints.
- Provide for felony criminal sanctions for those who knowingly retaliate with the intent to adversely impact directly or indirectly the employment or livelihood of those who provide information on health and safety conditions to MSHA or law enforcement.
- Expanded subpoena powers for MSHA and for a new independent investigation panel chaired by NIOSH appointed to conduct investigations of major accidents.
- New rulemaking directives for atmospheric monitoring in underground coal mines, electronic record-keeping requirements for all mines, and requirements to communicate hazards prior to beginning a shift or traveling to a work area.
- Increased composition of incombustible materials in rock dust.
- MSHA would have expanded powers to enjoin mines from operating and issue withdrawal orders with the adoption of the new POV rules.
- Creating a new category of penalties up to \$220,000 for: changing a ventilation plan without prior approval of the Secretary which diminishes safety below the minimum requirements of the approved ventilation plan; violating a mandatory health and safety standard requiring rock dusting in a coal mine; violating the prohibition on giving advanced notice of an inspection; and, violating a mandatory health and safety standard requiring examinations of work areas in an underground coal mine.
- Expanded scope of potential § 110(c) violations.
- Provisions for the expanded compensation of miners

whenever a mine is closed by an MSHA issued order until such order is lifted.

- Increased miner training requirements and increased MSHA discretion to require more training.
- Requirement that MSHA inspections occur during all shifts.
- Additional MSHA authority to close a mine for failure to pay MSHA penalties within 180 days of a final order.
- Whistleblower protections that also protect a miner's immediate relatives.
- A cap of 60 days for compensation of miners idled due to MSHA withdrawal orders.
- Expanded employment protections for underground coal miners for mines under POV status.
- Limiting the new category of penalties up to \$220,000 for changing a ventilation plan without prior approval of the Secretary to those circumstances where the alteration diminishes safety below the minimum requirements of the approved ventilation plan (as opposed to penalizing an operator for *any* change, even one that improves the mine's safety).
- New criminal sanctions for tampering or disabling a required safety device, violating a health of safety standard, or failing to comply with a § 104 or § 107 order incorporated into a final decision under the Act, that "recklessly exposes a miner to a significant risk of serious injury, serious illness, or death."

Jackson Kelly will keep you updated on the progress of the Byrd Bill.

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