

# **Undermining Safety:**

## **A Report on Coal Mine Safety**

By Christopher W. Shaw

Introduction by Ralph Nader

## About the Author

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## INTRODUCTION –

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More coal miners have lost their lives from cave-ins and lung disease since 1900 than all the Americans who died in World War II. While federal regulations, especially since the late Sixties, have produced safer conditions in both categories of trauma and pneumoconiosis (“black lung” disease), the current boom in coal production, accompanied by the opening of new, much deeper, riskier coal mines is raising additional questions of incapacity and refusal on the part of the Mine Safety and Health Administration (MSHA) to perform their obligatory safety and health missions.

Christopher Shaw’s timely evaluation of MSHA and the powerful and frequently defiant coal industry comes against a backdrop of recent coal mine collapses and fatalities that reflect a recurrent pattern of MSHA’s not requiring available life-saving technologies and best practices across the board.

At a time when high coal prices and automation are producing massive profits for the coal barons, they nonetheless continue, with few exceptions, to violate regulations, receive slap-on-the-wrist fines and oppose proposed regulations even when coal mine disasters warrant their overdue issuance.

Coal industry trade journals are waxing giddy over the glowing prospects for domestic coal in an energy hungry world. However, not many pages are reserved for the courage of their miners and their families, who make mine owner profits possible, or the pathos of their casualties. When half of the nation’s coal companies were fined in 1991, under the first Bush Administration, for faking coal dust samples in 847 underground mines, Labor Secretary Lynn M. Martin said: “We are talking about tampering with people’s lives.” Yet she imposed only a total fine of \$7 million.

Generous with their campaign contributions to key legislators in Congress and to both political parties, the coal operators know that they can wait out media-saturated coal mine disasters. For the media rarely stays with the story of efforts to more rigorously regulate miners by such advocates as the United Mine Workers union, former MSHA officials such as the knowledgeable, Davitt McAteer, surviving miners and the families of the victims.

The rhetorical pattern is easily discernible. First the coal company executives oppose the post-disaster reforms. During our struggle in the late Sixties and Seventies to make the federal government regulate this industry and protect among the most defenseless workers in our country (try working 600 to 1800 feet underground week after week), the defiant declarations of some coal industry spokespeople should not be forgotten. They attacked for example, the Coal Mine Health and Safety Act of 1969 as being “unnecessary, unfeasible, and unconstitutional.” We even had to deal with coal mine owners and their indentured company physicians who denied the very existence of black lung disease, attributing these maladies to smoking or asthma. Yet, thirty years earlier, British coal miners were provided workers’ compensation for their black lung disabilities.

At Senate hearings on the 1969 legislation, coal miners with the disease came to Congress where their x-rays and their shortness of breath were put on display so as to cut through the pitiless propaganda of the coal industry lobbyists. Fortunately, the Senators got the message and the bill became a major life-saving law for the coalfields.

Once regulations were issued, after being weakened by the industry's attorneys, their beneficial effect was turned around by the coal industry as evidence that things were pretty safe and there was no need to require new safety technologies. Nor were frequent inspections and other forms of enforcement deemed necessary. MSHA's budget and inspector corps were chronically not up to the preventive and remedial demands incumbent upon this agency.

Today, King Coal has its corporate government in Washington, D.C. coddling the industry with what Richard L. Trumka, formerly head of the United Mine Workers of America (UMWA) and now the number two man in the AFL-CIO, decried as Bush's "conversion of MSHA from an enforcement agency to a business consulting group."

MSHA's culture has been, like that of the FAA, operating with a tombstone mentality rather than an across the board preventive, comprehensive human factors design strategy of enforcement. Coal barons still speak of miner training yet keep miners from having available communications, tracking devices and rescue chambers. Their idea is to keep the spotlight on the miner's behavior. Safety systems engineering experts like James T. Reason, probe deeper: Latent errors/conditions, he said, "arise from strategic and other top level decisions made by governments, regulators, manufacturers, designers and organizational managers...human error is a consequence and not a cause. Errors...are shaped and proved by upstream workplace and organizational factors."

Even when MSHA reduces its fines, nearly half of those levied are not even collected. Even when Congress passes a MINER law responding to the Sago mine and other recent disasters, the Act "fails in three significant ways," says Cong. George Miller (D-California). He listed them as inadequate air flows to trapped miners, randomly tested emergency oxygen units and prompt access to wireless communications and electronic tracking devices.

A year after the enactment, in 2006, of the MINER Act, the veteran Democratic West Virginian Congressman, Nick J. Rahall added six serious needs that have not been implemented by the new law. This is a phenomenon in the history of occupational safety and health laws that I have called "the no-law, law."

Congress should no longer solely rely on MSHA issuing adequate regulations. Instead, Congress should insure that the enabling statute actually mandates timetables including effective dates after issuance, for specific improvements directly in its text. In recent years, Congress has done just that in legislation mandating the U.S. Department of Transportation to issue specific safety standards by a set date.

An added layer of safeguards comes with unionized coal workers in their contracts with management. Sadly, the ranks of the UMWA have been declining and the number of non-union miners has been increasing. The consistently better safety record of unionized coal mines speaks for expanding organized workplaces underground and with strip mines.

Mr. Shaw points to another structure for miners' health and safety that Foundations should be originating, just as the Ford Foundation did so successfully in the Seventies for environmental advances. He writes of the need to establish independent, non-profit citizen advocacy groups to help workers and to monitor governmental agencies such as MSHA and OSHA and present solid testimony before Congress and state legislatures. The disinterest over the decades by the Foundation world in matters of workplace health and safety has been deplorable.

Perhaps this well-referenced report—*Undermining Safety*—will stimulate foundation executives to recognize the “other environmental crisis,” which OSHA has estimated takes about 58,000 American lives a year from all work-related trauma and diseases in the U.S. economy.

During the intense weeks and months of work to enact the basic safety and compensatory legislation covering trauma and lung-heart diseases from coal mines in the late Sixties and Seventies, we were fortunate to have several outstanding reporters cover this on-going struggle, in Washington and in the coal regions, where the mobilization of “the hollows,” led by two physicians, was intensifying.

The print and electronic media were critical to keeping the pressure on the federal lawmakers, especially the steadfast digging and reporting of Ben A. Franklin of *The New York Times*. More than any other person, Mr. Franklin's work lit up the way for the television crews who traveled to West Virginia, Kentucky and Pennsylvania to bring the agony and tragedy of coal-mining families to a broader audience of Americans.

Today's media would do well to learn from their predecessors and go beyond the immediate coal mine collapses. Following the recent calamity at the Crandall Canyon Mine in Utah, they need to report, for example, on problems and responses to much deeper mines, using large pillars of coal with “retreat mining” practices.

Finally, MSHA should encourage many officials of coal companies and their Boards of Directors to take a trip down into one of their mines. Years ago, the president of Armco Steel told me he took his entire Board of Directors down into one of the company's coal mines. “Their response,” I asked? He replied, “They told me that they will never again think that coal miners are overpaid.

Ralph Nader  
February 2008  
Washington, D.C.

## CHAPTER ONE

# The Constant Threat

*“The workers in the coal mining industry and their families have too long endured the constant threat and often sudden reality of disaster, disease and death.... Death in the mines can be as sudden as an explosion or a collapse of a roof or ribs, or it comes insidiously from pneumoconiosis, or black lung disease.”*<sup>1</sup>

-- President Richard M. Nixon, 1969

Coalmines are dangerous places – miners are continually engaging in the process of literally tearing the earth apart in order to extract its contents. Miners face the dangers posed by a falling roof underground and a caving high wall in an open-pit mine. Dust and gas create ever-present hazards: explosions can cause injury and death in a spectacular and immediate manner, or silently through persistent exposure that leads to lung disease and illness. “Of all places of work that can fill a worker with fear and anxiety,” observed the noted sociologist Alvin W. Gouldner, “a mine is among the foremost.”<sup>2</sup> Vigilant attention is required to ensure that miners do not fall victim to injury, illness, and death. The human toll exacted by America’s mines is staggering. According to the United States Government, accidents in our coalmines claimed the lives of 104,574 miners between 1900 and 2005.<sup>3</sup> There were at least 365,000 deaths from

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<sup>1</sup> Richard Nixon, *Richard Nixon, 1969* (Washington, D.C.: G.P.O., 1971), 177.

<sup>2</sup> Alvin W. Gouldner, *Patterns of Industrial Bureaucracy* (New York: The Free Press, 1954), 113.

<sup>3</sup> MSHA, “Coal Fatalities for 1900 Through 2005,” <http://www.msha.gov/stats/centurystats/coalstats.htm> Accidents in metal and non-metal mines claimed the lives of an additional 23,513 miners over the same period (MSHA, *Metal/Nonmetal Fatalities for 1900 Through 2005*,” <http://www.msha.gov/stats/centurystats/mnmstats.htm>). Coalmine fatalities in America are one piece of a global crisis of worker death. Currently, every year about two million work-related deaths occur; men constitute two-thirds of these deaths (Paivi Hamalainen, Jukka Takala, and Kaija Leena Savela, “Global

pneumoconiosis (“black lung”) by 1969, and a further 120,000 miners succumbed to the disease over the next thirty years.<sup>4</sup> Wendy B. Davis, a professor at the Appalachian School of Law, writes that “there is no dispute that mining historically has been one of the most dangerous professions, and continues to threaten the lives of those employed in the mines.”<sup>5</sup>

Coalmines may be hidden away in rural areas far from the public eye, but they are by no means relics of the past. The front page of the *New York Times* declares that the venerable black fuel “Has a Bright Future.”<sup>6</sup> It’s all too easy amidst hype about the “New Economy” abounding in such publications as *Fast Company* to forget that the electricity actually stays on in bustling hubs of finance and technology like Manhattan and the Bay Area because coal continues to be mined in such places as West Virginia, Pennsylvania, and eastern Kentucky, southern Illinois, and Wyoming, Montana, and North Dakota.<sup>7</sup> But when disaster strikes, national attention suddenly focuses on coal

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Estimates of Fatal Work-Related Diseases,” *American Journal of Industrial Medicine* 50, no. 1 (2007): 28-41).

<sup>4</sup> Lorin E. Kerr, “Black Lung,” *Journal of Public Health Policy* 1, no. 1 (1980): 56; NIOSH, *Worker Health Chartbook 2004*, September 2004, <http://www2.cdc.gov/niosh-chartbook/imagedetail.asp?imgid=214>

<sup>5</sup> Wendy B. Davis, “Out of the Black Hole: Reclaiming the Crown of King Coal,” *51 American University Law Review* 905, 947 (2002).

<sup>6</sup> Douglas Jehl, “Fuel With a Dark Past Has a Bright Future,” *New York Times*, June 16, 2001, A1. Serious concerns have been raised about the environmental consequences of anticipated increases in coal use. See Sierra Club, “Dirty Coal Power,” <http://www.sierraclub.org/cleanair/factsheets/power.asp>; “Banks, Climate Change & the New Coal Rush,” Rainforest Action Network, 2007; “The Dirty Truth About Coal: Why Yesterday’s Technology Should Not Be Part of Tomorrow’s Energy Future,” Sierra Club, June 2007, 9-12; Bret Schulte, “A Texas Mess Over Coal,” *U.S. News & World Report*, December 4, 2006; Travis Madsen and Rob Sargent, “Making Sense of the ‘Coal Rush’: The Consequences of Expanding America’s Dependence on Coal,” U.S. PIRG Education Fund, July 2006, 13-28; Jeff Goodell, *Big Coal: The Dirty Secret Behind America’s Energy Future* (Boston: Houghton Mifflin Company, 2006), 119-46, 173-225; Bryan C. Banks, “High above the Environmental Decimation and Economic Domination of Eastern Kentucky, King Coal Remains Firmly Seated on Its Gilded Throne,” *13 Buffalo Environmental Law Journal* 125, 135-45 (2006); Mark Clayton, “America’s new coal rush,” *Christian Science Monitor*, February 26, 2004, 1.

<sup>7</sup> In 2005, 637,697 thousand tons of coal were mined west of the Mississippi (where most coal comes from surface mines), and 493,105 thousand tons were mined east of the Mississippi (where the majority of production is from underground mines). More coal was mined in Wyoming alone than in the next three largest coal producing states (West Virginia, Kentucky, and Pennsylvania) combined. Much less labor is



miners. “When it comes to occupational issues,” in the words of consumer advocate Ralph Nader, “the media are very disaster prone.... They will cover a coal mine disaster because people have died.”<sup>8</sup>

In January 2006, the national media descended on West Virginia to cover the mine disaster at Sago. A few years previously news coverage briefly fastened upon the Quecreek disaster in Pennsylvania. Twenty-four hour television news coverage will focus on the human drama of a mining disaster from the moment camera crews first swoop in, to the point where they pack up and leave, scurrying off to the next event.<sup>9</sup> “First the disaster. Then the weeping. Then the outrage. And we are all too familiar with what comes next!” states Senator Robert C. Byrd (D-West Virginia). “After a few weeks, when the cameras are gone, when the ink on the editorials has dried, everything returns to business as usual. The health and safety of America’s coal miners, the men and women upon whom the Nation depends so much, is once again forgotten until the next explosion.”<sup>10</sup>

Significant mine safety legislation can result from these flurries of attention, however. “For decades until 1969,” the *New York Times* reveals, “the industry

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required to extract coal from surface mines: only one fifth of all coal miners are employed west of the Mississippi. There are more miners in West Virginia (18,611 in 2005) than in any other state.

<sup>8</sup> Ralph Nader, “Occupational Safety and Health Act,” 31 *Houston Law Review* 1, 6 (1994).

<sup>9</sup> According to author Neil Postman: “Entertainment is the supra-ideology of all discourse on television” (Neil Postman, *Amusing Ourselves to Death: Public Discourse in the Age of Show Business* (New York: Penguin Books, 1986), 87). Observers frequently decry superficial news coverage. For example, see Dell Champlin and Janet Knoedler, “Operating in the Public Interest or in Pursuit of Private Profits?: News in the Age of Media Consolidation,” *Journal of Economic Issues* 36, no. 2 (2002): 459-68; Trudy Lieberman, *Slanting the Story: The Forces That Shape the News* (New York: New Press, 2000), 151-161; Ben H. Bagdikian, *The Media Monopoly* (Boston: Beacon Press, 2000), xxvii-xxix, 212-218; Robert W. McChesney, *Rich Media, Poor Democracy: Communication Politics in Dubious Times* (New York: New Press, 1999), 48-77; James Fallows, *Breaking the News: How the Media Undermine American Democracy* (New York: Pantheon Books, 1996), 129-81.

<sup>10</sup> *Congressional Record*, January 25, 2006: S58.

successfully fought the passage of stringent federal mine safety laws.”<sup>11</sup> But in 1968 disaster struck at Farmington, West Virginia and claimed the lives of 78 miners. The aftermath was beamed into the television sets of America’s living rooms direct from the site of the tragedy. The Federal Coal Mine Health and Safety Act was enacted the following year. Sago had the same effect: Momentum for Congressional action was insurmountable, and quickly led to passage of the Mine Improvement and New Emergency Response Act of 2006 (MINER Act). While the suffering mine accidents cause can provoke swift action, our challenge as a nation when it comes to mine safety is maintaining a sense of urgency when the media’s cameras aren’t facilitating overwhelming public scrutiny. Tim Baker, deputy administrator for health and safety with the United Mine Workers of America (UMWA), believes that if recent mine fatalities had occurred “one or two at a time we wouldn’t have had the MINER Act.”<sup>12</sup>

The editor of *Mine Safety and Health News*, Ellen Smith, points out that “[m]ining is dangerous, but it can be done safely. You need a safety net.”<sup>13</sup> But for miners employed in an industry, where one constant has been mine operators who jeopardize workers’ lives and wellbeing, achieving health and safety legislation has been no easy feat. “As long as the law didn’t require safety measures,” writes Duane Lockard, professor of politics emeritus at Princeton University, “American mine owners played percentage poker – treating lives as relatively low-cost poker chips and making a bundle in the process.”<sup>14</sup> According to Perry K. Blatz, professor of history at Duquesne

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<sup>11</sup> Ben A. Franklin, “Coal Operators and Union Agree to Improve Safety,” *New York Times*, September 23, 1979, 25.

<sup>12</sup> Interview, August 24, 2006.

<sup>13</sup> Dolores Orman, “Local mine expert suddenly in demand,” *Rochester Democrat & Chronicle*, January 15, 2006, 3B.

<sup>14</sup> Duane Lockard, *Coal: A Memoir and Critique* (Charlottesville, Va.: University Press of Virginia, 1998), 31.

University, nineteenth century Pennsylvania coal operators established a system “in which production, not safety, stood as the paramount goal.”<sup>15</sup> The human toll would mount over the succeeding decades. For every 10,000 American coal miners, an average of 33.5 were killed every year from 1900 through 1906. Comparisons with other nations reveal this figure to be an inexcusably high rate of death, as during this same period the mortality rate was 10.3 in Belgium, 12.9 in Britain, 9.1 in France, and 20.6 in Prussia.<sup>16</sup> Injuries were routine; for example, 29, 172 anthracite miners were injured in 1923, and 30,241 were injured the following year.<sup>17</sup> In a ten-year span from 1935 to 1945 there were a total of 639,000 disabling accidents in the nation’s mines.<sup>18</sup>

In spite of the overwhelming danger made blatantly apparent by numbers such as these, coal operators have staunchly resisted health and safety regulations. They were adamant in their opposition to the Mine Inspection Act of 1941, which gave federal mine inspectors the right to enter mines, inspect them, and make non-binding recommendations to their owners. Operators opposing such federal authority called it an example of “sheer communism.”<sup>19</sup> Likewise, efforts made after Farmington to improve conditions in the mines met with a torrent of opposition. The National Independent Coal Operators’ Association and the Harlan County Coal Operators’ Association joined together in opposition against the push for federal mine health and safety legislation that

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<sup>15</sup> Perry K. Blatz, *Democratic Miners: Work and Labor Relations in the Anthracite Industry, 1875-1925* (Albany: SUNY Press, 1994), 28.

<sup>16</sup> Michael B. Katz, *In the Shadow of the Poorhouse: A Social History of Welfare in America* (New York: Basic Books, 1996), 198.

<sup>17</sup> William Green, “The Need for Safety from the Worker’s Point of View,” *Annals of the American Academy of Political and Social Science* 123 (1926): 4.

<sup>18</sup> Robert H. Zieger, *John L. Lewis, Labor Leader* (Boston: Twayne Publishers, 1988), 151.

<sup>19</sup> Michael Wallace, “Dying for Coal: The Struggle for Health and Safety Conditions in American Coal Mining, 1930-82,” *Social Forces* 66, no. 2 (1987): 340.

coalesced around the Farmington disaster.<sup>20</sup> The *New York Times* reported that “coal operators, or some of them, have taken the position that pneumoconiosis does not exist.”<sup>21</sup> The West Virginia Coal Association denounced proposed state legislation designed to address the debilitating illness as “galloping socialism in one of its purest forms.”<sup>22</sup> In the words of industrial hygienist James L. Weeks, “Mine operators...vigorously opposed the Coal Mine Health and Safety Act of 1969. They said it was unnecessary, unfeasible, and unconstitutional.”<sup>23</sup>

Congress passed the legislation in spite of such opposition; and it had an immediate positive effect on conditions. The 1969 Coal Act’s successor – the Federal Mine Safety and Health Act of 1977 – helped to cement these advances, and established the Mine Safety and Health Administration (MSHA) within the Department of Labor. The National Institute for Occupational Safety and Health reports that “[f]atality rates decreased following the passage of these two Federal mine acts.”<sup>24</sup>

Federal legislation put an end once and for all to industry self-regulation; however, at times operators have flaunted the laws in a flagrant manner. These violations have periodically been endemic and apparently systematic. For instance, in 1991 MSHA fined half of the nation’s coal operators \$7 million for tampering with coal dust samples in 847 underground mines.<sup>25</sup> Labor Secretary Lynn M. Martin stated: “I am appalled by

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<sup>20</sup> *The Independent Coal Operator*, June 1969, 8.

<sup>21</sup> Ben A. Franklin, “The Scandal of Death And Injury In the Mines,” *New York Times Magazine*, March 30, 1969.

<sup>22</sup> Alan Derickson, *Black Lung: Anatomy of a Public Health Disaster* (Ithaca: Cornell University Press, 1998), 160.

<sup>23</sup> James L. Weeks, “The Fox Guarding the Chicken Coop: Monitoring Exposure to Respirable Coal Mine Dust, 1969–2000,” *American Journal of Public Health* 93, no. 8 (2003): 1236.

<sup>24</sup> NIOSH, *Worker Health Chartbook, 2000*, September 2000, <http://www2.cdc.gov/chartbook/chap6/chartbk6.htm>

<sup>25</sup> Frank Swoboda, “Task Force Will Consider Changes In Coal Dust Testing,” *Washington Post*, April 18, 1991, B13.

the flagrant disregard for a law designed to protect coal miners against disabling lung disease that is represented by the widespread tampering we have uncovered. We are talking about tampering with people's lives."<sup>26</sup> "This is not 800 choices by individuals," said mine safety expert J. Davitt McAteer. "This is a systematic approach. This is a scheme."<sup>27</sup> Coal companies pled guilty to criminal charges, including the nation's largest coal producer – Peabody Coal Co., which had admitted tampering with safety devices in 1982 as well.<sup>28</sup> Such corporate actions serve to demonstrate the ugly reality that for coal companies production, not safety, serves as the overriding imperative. And this state of affairs can exist even in the immediate wake of an accident. "I'm always very dismayed when companies are far more concerned about when they can get back on coal – producing again – then on why the accident occurred," says former MSHA official Tony Opegard. "I've known operators who cared far more about producing coal than this guy who got killed yesterday. They say safety is the top priority. In reality it's not in my experience."<sup>29</sup>

Mine safety laws can only provide real protection to miners when they are vigorously enforced by MSHA. "This is not an industry that can be trusted to self-regulate," according to Tim Baker of the UMWA. "History shows that. I've been in mining for 30 years. The only thing most mine operators care about is if you take money

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<sup>26</sup> Frank Swoboda, "Martin Hits Coal Industry in Tampering Probe," *Washington Post*, April 16, 1991, D1.

<sup>27</sup> Frank Swoboda, "Coal Mine Operators Altered Dust Samples," *Washington Post*, April 4, 1991, A1.

<sup>28</sup> Keith Schneider, "Coal Company Admits Safety Test Fraud," *New York Times*, January 19, 1991, 14. In 1984, the *Philadelphia Inquirer* reported that five companies – including Peabody – had been convicted for submitting falsified dust samples. In one instance a safety official at Westmoreland Coal Co. "routinely threw out samples that appeared to have too much dust, and instead sent the government phony clean samples." The *Inquirer* revealed: "In interviews, scores of miners, health experts who have monitored the system and federal investigators have said that this elaborate regulation system is frequently circumvented, often on a daily basis" (Lucinda Fleeson, "The Choice: Health or Job," *Philadelphia Inquirer*, September 18, 1984, A1).

<sup>29</sup> Interview, July 26, 2006.

out of their pocket.”<sup>30</sup> Recently, MSHA has emphasized “cooperation” with industry. Altering the tenor of the agency’s efforts by deemphasizing MSHA’s enforcement tools can compromise the law’s effectiveness. Former MSHA head Davitt McAteer believes that “if we remove from the highways of California the state highway patrol some of us would continue to drive in a responsible way, but others would speed. The presence of the police force helps us keep in compliance....There’s always that 10 to 15 percent who are scofflaws. The same principle applies to the workplace.”<sup>31</sup>

Industry, however, approves of the “cooperation” approach. Bruce Watzman, vice president of safety and health for the National Mining Association, wants MSHA to avoid “policies that inevitably lead to unnecessary and unproductive confrontation.”<sup>32</sup> This statement misleadingly suggests that enforcing the law leads to confrontations that are “unnecessary.” Regulations by definition are intended to be enforced. They require enforcement because otherwise they become hollow, empty, meaningless, and ultimately not worth the paper they’re printed on. Susan P. Baker, professor of public health at Johns Hopkins University, says, “Until the fine for ignoring a hazard is bigger than the cost of fixing the hazard, a lot of employers won’t do anything.”<sup>33</sup>

However, when the George W. Bush Administration assumed office in 2001, it moved to favor industry rather than miners by placing a definite emphasis on MSHA

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<sup>30</sup> Jane M. Von Bergen, “Safety isn’t Priority, Union Executive says,” *Philadelphia Inquirer*, January 5, 2006, A14.

<sup>31</sup> Interview, September 1, 2006. For the safety implications of speed limits see Insurance Institute for Highway Safety, *Status Report* 38, no. 10 (2003); Herbert M. Baum, Adrian K. Lund, and JoAnn K. Wells, “The Mortality Consequences of Raising the Speed Limit to 65 MPH on Rural Interstates,” *American Journal of Public Health* 79, no. 10 (1989): 1392-1395; Willard J. Kemper and Stanley R. Byington, “Safety Aspects of the National 55 MPH Speed Limit,” *Public Roads* 41, no. 2 (1977): 58-67; Brock Adams, *Report to the President on compliance with the 55 mph speed limit* (Washington, D.C.: U.S. Department of Transportation, 1977); Tim M. Borg, *Evaluation of the 55 Mph Speed Limit: Final Report* (West Lafayette, Ind.: Purdue University Engineering Experiment Station, 1975).

<sup>32</sup> House Committee on Education and the Workforce, Subcommittee on Workforce Protections, *Mine Safety*, 109<sup>th</sup> Congress, second session, March 1, 2006.

<sup>33</sup> Mike Casey, “OSHA: Discounted lives,” *Kansas City Star*, December 11, 2005.

avoiding “adversarial regulations.” The administration’s rhetorical application of the word “adversarial” to a proper functioning of the agency, which is designed to ensure compliance with federal mining laws, reflects this change. “What are adversarial regulations?” asks Richard L. Trumka, secretary-treasurer of the AFL-CIO. “Is a speed limit an adversarial regulation?”<sup>34</sup> A speed limit becomes “adversarial” when a driver decides to break the law by going 60 mph in a 30 mph zone because it is at that moment that the police take on an opposing role. Regulations acquire an adversarial or confrontational nature only when they are broken and enforcement becomes necessary.

Enforcing the law and constantly keeping abreast of recent technological developments are the foremost ways MSHA can make mining deaths, injuries, and illnesses less likely. Improving mine safety depends on a continual upgrading of existing standards. Advances in technology and knowledge need to be implemented on an ongoing basis, as they are made available. And once again it falls to government, through such means as active rulemaking, to take the lead in forcing industry to act. Coal companies are not likely to voluntarily choose to invest money in new safety technologies. “[T]he coal mine industry is one where there is often extreme conflict between the public and private goals,” according to Senator Paul Simon. “The industry at times has fallen victim, by some, to a safety versus profit equation.... Competition will instantly push some coal operators to pursue profits over safety.”<sup>35</sup> Operators are in business to make a profit, and are therefore naturally focused on production. Improving safety often requires an investment that does not immediately boost production levels, or

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<sup>34</sup> Interview, July 7, 2006.

<sup>35</sup> House Committee on Education and Labor, Subcommittee on Health and Safety, *MSHA Oversight Hearings on Coal Mine Explosions During December 1981 and January 1982*, 97<sup>th</sup> Congress, second session (Washington, D.C.: G.P.O., 1982), 290.

self-evidently widen profit margins. Regulators, therefore, are obliged to give mine owners a helpful push in the right direction.

Applying a humane approach to occupational safety can reduce much human suffering for the families as well as the victims. “The most important thing is to prevent disasters to begin with,” says Trumka. “These aren’t acts of God. These acts are of man. You don’t have to have disasters: they can be prevented. Either the law was enough and wasn’t followed, or it wasn’t strong enough.”<sup>36</sup> Our challenge as a nation, and our responsibility to our miners, is to ensure that laws are in place that are strong enough to provide adequate protections, and that they are obeyed.

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<sup>36</sup> Interview, July 7, 2006.



## CHAPTER TWO

# Less Safe Than Before

*“How safe are American mining operations and have the policies of the Bush administration made mining more dangerous? The answers now seem to be: less safe than before, and very possibly yes.”<sup>37</sup>*

*-- Philadelphia Daily News, Editorial, January 23, 2006*

The ascendancy of George W. Bush to the presidency was a victory for business interests complaining of “burdensome” regulations, because it entailed a change in regulatory philosophy. The *Washington Post* reports that “President Bush’s closest advisers and sharpest critics agree that the shift in regulatory climate since he took office in January 2001 has been profound.”<sup>38</sup> The new administration wanted to alter the “culture” in Washington, D.C. so that business interests would play a significant role in determining how regulations are implemented, a move that forced supporters of existing regulations on the defensive.<sup>39</sup> Regulations designed to ensure a clean environment and

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<sup>37</sup> “Coal Miner’s Dodgers,” *Philadelphia Daily News*, January 23, 2006, 15.

<sup>38</sup> Amy Goldstein and Sarah Cohen, “Bush Forces a Shift In Regulatory Thrust,” *Washington Post*, August 15, 2004, A01.

<sup>39</sup> Plenty of Democrats are involved in efforts to “streamline” regulations, and to “cooperate” rather than enforce the law. The Democratic Leadership Council (DLC) and its policy arm the Progressive Policy Institute are organizations that made a name for themselves as “New Democrats,” and pushed the party to adopt industry’s desired regulatory framework. The Progressive Policy Institute declares: “In many cases, industry self-regulation can achieve public policy goals in ways that are more flexible and cost effective” (Progressive Policy Institute, “Rules of the Road: Governing Principles for the New Economy,” September 13, 1999). “[T]he DLC message of pro-market moderation is just what organized business wants to hear,” according to journalist Robert Dreyfuss. Business responded favorably: “One by one, Fortune 500 corporate backers saw the DLC as a good investment.” (One of the DLC’s corporate backers included Koch Industries, which has been a member of its “executive council.”) (Robert Dreyfuss, “How the DLC Does It,” *American Prospect*, April 23, 2001, 20). A deregulatory outlook influenced the Clinton Administration, and was manifested in such initiatives as “Reinventing Government,” which was a push to “run government more like a business.” One of the founders of the Progressive Policy Institute, Elaine C. Kamarck, took charge of this initiative, which, in the words of Vice President Al Gore, brought a “new approach to regulation.” “It is about working in partnership with common goals, instead of as adversaries,”

safe workplaces were particular targets of rollback efforts. And the drive to remove these protections has made a noticeable impact. According to a *St. Louis Post-Dispatch* editorial: “Under the banner of ‘freeing business from the heavy hand of regulation’ – as candidate George W. Bush put it during the 2000 presidential campaign – an army of federal bureaucrats has made America’s water and air dirtier, its workplaces more hazardous, its highways more dangerous.”<sup>40</sup> The negative impact on workplace health and safety has been noted by the AFL-CIO, which states: “Under the Bush administration, regulatory activity at both the Occupational Safety and Health Administration (OSHA) and the Mine Safety and Health Administration (MSHA) has ground to a halt.”<sup>41</sup>

#### MSHA’S NEW BOSS

“Today’s mining industry punches above its weight,” says Jack N. Gerard, past-president of the National Mining Association. “To an unprecedented degree that has surprised our opponents and even some of our friends – we can raise money, contribute to helpful candidates.”<sup>42</sup> The industry was excited about the prospects of a Bush

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Gore declared (Office of the Vice President, “Vice President Highlights New OSHA,” press release, September 26, 1995). OSHA got into the spirit of the program by reducing penalties for “conscientious employers” (OSHA, “OSHA’s Quick Fix Equals Lower Penalties For Conscientious Employers,” press release, July 31, 1996). In 2000, Kamarck told an audience at the American Enterprise Institute that Gore “is always looking for market-based ways to do regulation and alternative ways to do regulation” (Elaine Kamarck, remarks at the American Enterprise Institute, Washington, D.C., January 11, 2000). Public interest advocates, however, were not impressed. “What has occurred is not an increase in efficiency, but a decrease in enforcement,” Public Citizen reported. “This is the true legacy of Reinventing Government.” Its Health Research Group determined that in some respects the Clinton Administration’s “OSHA enforcement record...is the worst since the OSH Act was promulgated” (Peter Lurie, Marti Long, and Sidney M. Wolfe, “Reinventing OSHA: Dangerous Reductions in Enforcement During the Clinton Administration,” Public Citizen, September 6, 1999).

<sup>40</sup> Editorial, “Undoing the Rules,” *St. Louis Post-Dispatch*, August 21, 2004, 30.

<sup>41</sup> “Death on the Job: The Toll of Neglect,” AFL-CIO, April 2006.

<sup>42</sup> Jack N. Gerard, remarks to SME, February 24, 2005. The coal industry has long exercised impressive political pull. For example, in 1969 the *Courier-Journal & Times* reported: “The people who own and run

presidency. After all, it had donated a record \$3.8 million dollars during the 2000 election, 88 percent of which went to Republicans.<sup>43</sup> Coal executive James H. “Buck” Harless said, “We were looking for friends, and we found one in George W. Bush.” With the assistance of King Coal, for the first time since 1928 a non-incumbent Republican presidential candidate won the state of West Virginia. Shortly after Inauguration Day, the director of the West Virginia Coal Association told fellow industry executives, “You did everything you could to elect a Republican president...you are already seeing in his actions the payback, if you will, his gratitude for what we did.”<sup>44</sup> The coal industry exercised significant influence within the Bush Administration from the outset. Immediately prior to Inauguration Day, the *Washington Post* reported: “The coal industry is particularly well-represented in the Bush transition.”<sup>45</sup>

The coal industry knew it would have a friend exercising authority over MSHA when Elaine L. Chao was named to head the Department of Labor. At the time, Chao was widely recognized to be the wife of a key Republican fundraiser, Senator Mitch McConnell, Jr. (R-Kentucky). Journalist John B. Judis reports that McConnell’s “relentless search for campaign contributions began right after his election in 1984, when, despite Reagan’s easy victory in Kentucky, he won by a mere 5,269 votes.”<sup>46</sup> McConnell needed moneyed friends; and he found them. The coal industry has been especially generous over the years. According to the Center for Responsive Politics, McConnell was the top recipient of coal’s campaign contributions when he faced reelection in 1990,

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the mines still command an amount of lobbying disproportionate with their economic size” (Ward Sinclair, “Coal Seeks a New Image,” *Courier-Journal & Times*, March 23, 1969, F1).

<sup>43</sup> Tom Hamburger, “Political Energy,” *Wall Street Journal*, June 13, 2001, 1.

<sup>44</sup> *Ibid.*

<sup>45</sup> John Mintz, “Transition Advisers Have Much to Gain,” *Washington Post*, January 17, 2001, A15.

<sup>46</sup> John B. Judis, “Sullied Heritage,” *The New Republic*, April 23, 2001, 22.

1996, and 2002.<sup>47</sup> Between 1997 and 2000, when McConnell served as chair of the National Republican Senatorial Committee, Common Cause reports that the coal industry gave \$584,000 to the organization.<sup>48</sup> Those connections haven't gone unnoticed.

“[W]hen the woman who's the head of the Labor Department, which is the head of the Mine Safety and Health Administration, is married to the top senator from Kentucky who has in his stable of supporters some of the top mining interests in the country,” says radio host Laura Flanders. “Conflict of interest hardly comes close to defining what we're talking about.”<sup>49</sup>

In addition to having the right husband, Chao possessed further qualifications of the appropriate sort, including an M.B.A., past employment with American Express Co., Bank of America, the George H. W. Bush administration, and Gulf Oil Corp., and positions as a board member of Clorox Co., Dole Food Co., and Northwest Airlines Inc. And Chao's credentials received a further boost from her time as a “distinguished fellow” at the Heritage Foundation, which had released a report in 1995 titled “How to Close Down the Department of Labor.” Its author, D. Mark Wilson, would join her at the Department of Labor as deputy assistant secretary in the Employment Standards Administration. Chao began diligently fulfilling expectations upon her appointment as Labor Secretary by steering the department in a more pro-business direction. She took the opportunity afforded by the first regulatory report issued under her watch to declare: “In general, [the Labor Department] will try to help employees and employers meet their

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<sup>47</sup> Center for Responsive Politics, “Coal Mining: Top 20 Recipients,” <http://www.opensecrets.org/industries/recips.asp?Ind=E1210>

<sup>48</sup> Clara Bingham, “Under Mined,” *Washington Monthly*, January-February 2005.

<sup>49</sup> Suzy Hansen, “Dubya's Angels,” *Salon.com*, April 12, 2004.

needs in a cooperative fashion, with a minimum of rulemaking.”<sup>50</sup> In 2002, Chao chastised her department because, “The heat has always been on employers.” “[W]e can’t achieve true worker protection through enforcement alone,” she said. “We want to assist...business owners, to be in compliance with government regulations.”<sup>51</sup> “Her goal,” according to Laura Flanders, “and the goal of her Heritage Foundation friends, is to turn the department around to be more business-friendly.”<sup>52</sup>

The new head of MSHA also came from a background in the corporate world. He was former mining industry executive David D. Lauriski. Upon his appointment as a government official Lauriski apparently foresaw little need for adjustment or modification of the general philosophy and approach he had developed during his many years in the corporate sector. He viewed the corporate sector and the public sector as being pretty much the same thing. “In terms of transition between the private and public sectors,” he remarked, “I don’t think there’s a whole lot of difference.”<sup>53</sup> After decades in the mining industry, there were times when the new secretary seemed to forget that he was no longer employed by a for-profit business, such as when he announced, “The coal industry is beginning to flourish after years of declining revenues. Coal demand and prices are at a new high.”<sup>54</sup> And then there was the time when he informed a Senate Committee that “the Agency has not significantly changed its *business* strategy since enactment of the Mine Act in 1977.”<sup>55</sup>

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<sup>50</sup> Tom Brune, “Rule Reversal,” *Newsday*, October 10, 2004, A05.

<sup>51</sup> Elaine L. Chao, address to the National Federation of Independent Business, Washington, D.C., June 14, 2002

<sup>52</sup> Laura Flanders, *Bushwomen: Tales of a Cynical Species* (London: Verso, 2004), 174.

<sup>53</sup> James Nash, “MSHA’s New Administrator Means Business,” *Occupational Hazards* 63, no. 8 (2001): 51.

<sup>54</sup> Dave D. Lauriski, remarks at State Coal Summit 2004, Beckley, W.V., July 22, 2004.

<sup>55</sup> Senate Committee on Appropriations, *Mine disaster at Quecreek*, 107<sup>th</sup> Congress, second session, October 21, 2002 (emphasis added).

Although the law still remained on the books – where it had been for decades – Lauriski was eager to enact major changes. “One challenge is trying to change the culture that has existed for 25 years,” he said. “What I mean by that is keeping the barriers down between industry, labor, and MSHA and trying to work cooperatively together.”<sup>56</sup> The mining industry was pleased to see him assume a new role in government service. After the nomination was announced, Bruce Watzman, vice president of the National Mining Association, “said he was pleased with the choice of Lauriski.”<sup>57</sup> By the end of its first term, the *New York Times* concluded that “the Bush administration’s approach to coal mining” was “a particularly potent example of the blend of politics and policy.”<sup>58</sup>

Lauriski’s appointment to head MSHA was not the first time the spotlight had shown on his role in mine safety. That moment occurred in 1984 while he was the top safety official at Utah Power & Light’s Wilberg Mine when a fire killed 27 workers who were trying to set a 24-hour production record.<sup>59</sup> After the disaster then-UMWA chief Richard L. Trumka stated: “When a coal operator becomes so concerned with setting short-term coal-production records, safety is made an afterthought and miners are needlessly killed.”<sup>60</sup>

Lauriski often emphasized error on the part of workers rather than inadequate safety efforts by industry. “While many – perhaps most – accidents have multiple

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<sup>56</sup> Bill Reid, “Safety as a Value,” *Coal Leader*, November 2003.

<sup>57</sup> Alan Maimon, “Bush Picks Mine Consultant to Head MSHA,” *Courier-Journal*, March 28, 2001.

<sup>58</sup> Christopher Drew, Richard A. Opiel, Jr., and Claire Hoffman, “Friends in the White House Come to Coal’s Aid,” *New York Times*, August 9, 2004.

<sup>59</sup> Ken Ward Jr., “UMW continues attack on Bush record,” *Charleston Gazette*, October 7, 2004, 8A.

<sup>60</sup> Peter Perl, “Mine Agency Criticized,” *Washington Post*, December 22, 1984, A10. Ellen Smith, the editor of *Mine Safety and Health News*, says that Lauriski’s record on safety in the corporate sector had generally been a good one. She states that Lauriski ran some of the safest mines in the country when he was at Energy West Mining Co., and thinks that Lauriski was actually “really naïve about bad operators because he ran such a different company” (Interview, July 28, 2006).

causes,” he said, “human behavior is the biggest part of the equation.”<sup>61</sup> When asked if fatalities were the fault of the miners themselves, his response was, “Behavior plays a role here.”<sup>62</sup> Lauriski apparently viewed the role of coal companies in creating unsafe conditions to be a secondary one. The attitude that worker error, and not operator misfeasance, should receive primary attention has (not surprisingly) long been that of industry. Bill K. Caylor, president of the Kentucky Coal Association, writes: “We firmly believe behavior modification and training are the keys to ensure miners know and want to do their work in a safe manner.”<sup>63</sup> While it is hard to conceive why any miner would not “want to do their work in a safe manner,” the importance of good training is hard to underestimate. “[L]ack of training is a contributing factor in an appreciable number of accidents,” acknowledges mine safety expert Davitt McAteer, “but it is only one factor, and not the primary one at that. Moreover, it is the industry’s responsibility to build into the workplace a tolerance for human error.”<sup>64</sup> Given where Lauriski placed the primary emphasis for accident prevention, it comes as little surprise that he told the West Virginia Coal Association his regulatory agenda was “quite a bit shorter than some past agendas.”<sup>65</sup>

## A NEW ATTITUDE

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<sup>61</sup> Dave D. Lauriski, remarks before the Kentucky Mining Institute, Prestonsburg, Kentucky, August 24, 2001.

<sup>62</sup> Ken Ward Jr., “Mine chief at issue again,” *Charleston Gazette*, October 17, 2004, 1B.

<sup>63</sup> Bill K. Caylor, “Mining is Safer than most realize,” *Courier-Journal*, February 5, 2006, 3H.

<sup>64</sup> *MSHA Oversight Hearings on Coal Mine Explosions During December 1981 and January 1982*, 718.

<sup>65</sup> Dave D. Lauriski, remarks before the West Virginia Coal Association, Charleston, W.V., January 10, 2002.

“Bush converted MSHA from an enforcement agency to a business consulting group,” says Richard L. Trumka, secretary-treasurer of the AFL-CIO.<sup>66</sup> “When Lauriski came to this job,” according to the industry journal *Pit & Quarry*, “the mining industry was hoping for an agency that acted more like a partner and less like a policeman.”<sup>67</sup> It was Lauriski's view that, “Not all fixes for problems need to be regulatory.”<sup>68</sup> “If we want to get to the next level of safety,” Lauriski testified, “we need to recognize industry’s cry for assistance.”<sup>69</sup> Lauriski determined that “assisting employers in complying with the law is every bit as important as enforcement.”<sup>70</sup> His words echoed a claim the Bituminous Coal Operators’ Association made twenty years earlier “that the effectiveness of the enforcement strategy has reached its optimum level.”<sup>71</sup>

Retired MSHA official Jack Spadaro says that the agency was already working to educate employers and miners about safety, and that Lauriski’s stress on “compliance assistance” was actually a smokescreen for reducing enforcement. “We were already doing education,” he says. “Inspectors talk with miners; we even had a group who did education not enforcement. We were providing information to the industry.”<sup>72</sup>

According to mine safety consultant and former chief of safety at the UMWA Joseph A. Main: “The compliance assistance approach was started under Davitt McAteer [the previous head of MSHA]...Although not as widespread or as entrenched within the fabric

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<sup>66</sup> Interview, July 7, 2006.

<sup>67</sup> Mark S. Kuhar, “MSHA under fire,” *Pit & Quarry*, March 1, 2003, 8.

<sup>68</sup> Dave D. Lauriski, remarks before the Rocky Mountain Coal Mining Institute, Breckenridge, Colorado, July 1, 2002.

<sup>69</sup> Senate Committee on Appropriations, *Mine Disaster At Quecreek*, 107<sup>th</sup> Congress, second session, October 21, 2002 (Washington, D.C.: G.P.O., 2003), 27.

<sup>70</sup> Dave D. Lauriski, remarks before the West Virginia Coal Association, Charleston, W.V., January 15, 2004.

<sup>71</sup> *Cong. Rec.*, February 21, 1984: 2817.

<sup>72</sup> Interview, July 26, 2006.



of mine enforcement in lieu of the policeman on the beat.”<sup>73</sup> McAteer states that under his watch MSHA “coupled education, compliance, and enforcement.” However, he adds, “With the new administration enforcement was lessened and there was much more [emphasis] on compliance and cooperation.”<sup>74</sup> Under Lauriski “assistance” was afforded center stage at the agency. He began implementing the administration approach to regulation in which regulatory agencies devote themselves to becoming industry’s safety consultants. Instead of issuing violations, inspectors were supposed to encourage coal companies to comply with the law. MSHA actually changed the title of its mine inspectors to “compliance assistance specialists,” until a public outcry forced a reversion to the traditional title. The results speak for themselves: from 1996 to 2001 the median amount of proposed major fines had been \$47,913 (adjusted for inflation), but it dropped to \$27,139 (inflation adjusted) from 2001 to 2006; comparisons between 1997 to 2000 and 2001 to 2005, reveal that less than a third as many maximum fines were proposed under the Bush Administration, and the average annual number of criminal convictions more than halved.<sup>75</sup> Spadaro concludes, “Lauriski talked about not writing violations, which is a violation of the law because an inspector has to write a violation when he sees it. Lauriski was telling his inspectors to break a law.”<sup>76</sup>

Lauriski didn’t see it that way. “All of our mine visits are now ‘inspections with a purpose,’” he told a group of coal operators. “Inspectors are there to help you determine the root causes of hazards that lead to both violations and accidents. We want these

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<sup>73</sup> Interview, July 27, 2006.

<sup>74</sup> Interview, September 1, 2006.

<sup>75</sup> Democratic Staff, Committee on Education and the Workforce, House of Representatives, *Review of Federal Mine Safety and Health Administration’s Performance from 2001 to 2005 Reveals Consistent Abdication of Regulatory and Enforcement Responsibilities*, 109<sup>th</sup> Congress, second session, January 31, 2006, 7.

<sup>76</sup> Interview, July 26, 2006.

inspections to be a win/win for all the parties involved.”<sup>77</sup> Once again, observers were not impressed. “That’s a nice sentiment,” editorialized the *Charleston Gazette*. “But the fact is that making mines truly safe can cost money, and not all mining companies see that as a win. Some will avoid spending the time and money necessary to correct safety violations if they can.”<sup>78</sup>

According to former MSHA official Tony Oppegard: “The MSHA philosophy [under the Bush Administration] is misplaced because its core belief is wrong: that all coal companies want to do a good job on safety and all they need is encouragement and coaxing.”<sup>79</sup> “The bottom line is this,” he writes, “Every hour that MSHA’s inspectors spend on ‘compliance assistance’ is time taken away from rigorous enforcement... There is nothing more essential to mine safety than having inspectors underground as often as possible – and instructing them not to ‘baby sit’ mine operators, but to do their job of strictly enforcing our mine safety laws.”<sup>80</sup> Inspections are made for a reason – to ensure that operators are following the law. Mine safety consultant Joe Main says, “When you take people away from being the policeman on the beat and take inspectors authority to enforce the law out of their hands and replace it with compliance assistance...that’s a problem.” He adds that “no one has a problem with compliance assistance as long as it’s an add-on.”<sup>81</sup> During Lauriski’s time at MSHA the agency’s budget was falling and staffing was reduced, yet resources were being diverted to compliance assistance. Total staffing at MSHA fell by 7 percent from 2001 to 2006, while coal enforcement staffing

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<sup>77</sup> Dave D. Lauriski, remarks before the West Virginia Coal Association, Charleston, West Virginia, January 15, 2004.

<sup>78</sup> Editorial, “Mine deaths,” *Charleston Gazette*, July 14, 2004, 4A.

<sup>79</sup> Don Hopey, “Coal miner death rate spiking,” *Pittsburgh Post-Gazette*, May 28, 2006, A1.

<sup>80</sup> Tony Oppegard, “Ending ‘carnage’ in the coalfields,” *Courier-Journal*, June 4, 2006, 1H.

<sup>81</sup> Interview, July 27, 2006.

was reduced by 9 percent.<sup>82</sup> The new attitude that MSHA was taking toward its role prompted Senator Robert C. Byrd (D-West Virginia) to remind Lauriski's boss Elaine L. Chao that "MSHA is not a consulting firm. It was created to enforce our mine safety laws. Just as the FBI should not act as a consultant to criminals, MSHA should not act as a consultant to coal companies who willfully violate the laws."<sup>83</sup>

## STREAMLINING

"The Bush administration is doing its corporate contributors big favors," veteran journalist Ben A. Franklin observed in 2004, "by quietly easing or deleting government rules designed to save lives and protect the environment, and replacing them with slacker regulations contrived by the corporate interests that profit from them."<sup>84</sup> Armed with a vision of making MSHA a "win/win" agency, Dave D. Lauriski's MSHA killed a total of 17 proposed rules designed to protect miners' health and safety. "We had twenty-six agenda items on the books," said Lauriski. "We streamlined them down to eleven."<sup>85</sup> Efforts to make the operation of large equipment – such as hauling vehicles and front-end loaders – safer by improving lighting and restraint systems and eliminating blind spots were terminated on the basis of cost after coal operators' objections. The rule had been proposed because accidents involving large vehicles had accounted for nearly a third of fatal surface accidents in the late 1990s. In December 2001, a rule that would

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<sup>82</sup> *Review of Federal Mine Safety and Health Administration's Performance from 2001 to 2005 Reveals Consistent Abdication of Regulatory and Enforcement Responsibilities*, 7. MSHA's 2006 budget was \$280 million, which constituted a funding reduction from 2005 levels when adjusted for inflation. Following the media attention garnered by the mining tragedies of 2006, a \$313.5 million budget was proposed for MSHA in 2008, which was an increase of \$35.8 million from the previous year.

<sup>83</sup> Ken Ward, Jr., "Byrd questions Labor secretary on mine safety," *Charleston Gazette*, April 11, 2003.

<sup>84</sup> Ben A. Franklin, "Bush & Co. Preach the Gospel of Deregulation," *Washington Spectator*, September 15, 2004.

<sup>85</sup> Dave D. Lauriski, address at the 2004 Georgia Mining Association Annual Convention, Hilton Head, S.C., July 24, 2004.

have introduced a service life for self-contained self-rescue emergency oxygen devices, established inspections for them, and evaluated the adequacy of training miners receive in their use was withdrawn. Another rule that would have increased the annual number of hours of refresher safety training for supervisors was similarly withdrawn. July 2002 saw the withdrawal of a proposal that would have required operators to purchase flame resistant conveyor belts within one year. In September 2002, a rule designed to reduce gaps in mine rescue team coverage by increasing the number of teams was withdrawn in favor of “nonregulatory alternatives.”<sup>86</sup>

Raising permissible dust levels was something of a pet project of Lauriski’s: In 1997 while he was still wearing his coal executive hat Lauriski had unsuccessfully pushed for such a measure. Five years later as head of MSHA he saw to it that a proposed rule intended to reduce coal dust levels was withdrawn. It would have cut the amount of coal dust miners can be exposed to in half – reducing the likelihood of black lung, and making dust related combustion less likely. Lauriski actually proposed increasing the amount of permissible float coal dust. He wanted workers to wear respirators rather than improving ventilation in the mines. “The whole [administration] proposal was aimed at having miners wear these Star Wars helmets and breathe through that,” explained a spokesman for Representative Nick J. Rahall II (D-West Virginia).<sup>87</sup> Columnist David Rossie asked his readers to “try to imagine wearing one [a respirator] for eight hours in a sweltering mine tunnel hundreds of feet beneath the earth’s surface.”<sup>88</sup> MSHA acknowledged that miners would not consistently wear the helmets correctly, and their

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<sup>86</sup> A list of withdrawn rules is available at <http://www.minesafety.com/pdfs/MSHAWithdrawn.pdf>

<sup>87</sup> Cindy Skrzycki, “Mining Safety Rules Got the Shaft, Workers Union Says,” *Washington Post*, November 16, 2004, E01.

<sup>88</sup> David Rossie, “Bush team turns back on miners,” *Press & Sun-Bulletin*, August 18, 2004, 6A.

manufacturer, 3M, went so far as to state: “This appears to be an abdication of the responsibilities delegated by Congress to M.S.H.A.”<sup>89</sup> MSHA was eventually pressured to back off from this proposal. Industry expressed their approval for the thrust of Lauriski’s actions. Jack N. Gerard, past-president of the National Mining Association, concluded, “We’ve been successful in changing some of the more damaging regulatory proposals that were handed down in the final days and hours of the Clinton Administration.”<sup>90</sup>

The Bush Administration’s MSHA was stocked with mining industry executives; John R. Correll, formerly of Amax Mining Co. and Peabody Coal Co., observed: “We have witnessed a great change in the relationship between MSHA and the mining industry.” Correll said that he found the “change” so exciting that he “left the mining industry after nearly 30 years there and joined him [Lauriski].”<sup>91</sup> Correll became MSHA’s deputy assistant secretary. Other former mining executives filled leading agency jobs, including Deputy Assistant Secretary John R. Caylor, who previously held management positions with Amax Mining Co., Cyprus Minerals Co., and Magma Copper Co.; Special Assistant Mark G. Ellis, former legal counsel to the American Mining Congress; and Chief of Health for Coal Melinda Pon, who came from BHP Minerals Group. “When MSHA’s top leaders sit down to decide agency policy,” said Cecil E. Roberts, president of the UMWA, “it is now a meeting of former mine managers.”<sup>92</sup> An MSHA top-heavy with industry officials is an agency whose leadership is inclined to possess a set of priorities that oppose MSHA’s mission of protecting miners. According

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<sup>89</sup> *New York Times*, August 9, 2004.

<sup>90</sup> Jack N. Gerard, remarks February 24, 2005.

<sup>91</sup> John R. Correll, address at the Rocky Mountain Coal Mining Institute, Snowbird, Utah, June 28, 2004

<sup>92</sup> “What’s going on at MSHA?,” *UMW Journal*, May-June 2003, 5.

to Tony Oppgaard: “Industry officials bring a different perspective on mine safety where the first priority is production and safety is second. They won’t say that, but basically that’s what it boils down to. There’s no safety innovations or improvements in safety practices if it takes away from production.”<sup>93</sup>

Furthermore, placing industry appointees in charge of the very agency entrusted with regulating their former – and perhaps future – employers is a recipe for conflict of interest and corruption. “Rogue mine operators under Lauriski thought they could avoid strong enforcement because they could call a friend in D.C. and the inspector would be pulled back, the district manager would be pulled back,” says Jack Spadaro. “Industry used its lobbying power with top officials of MSHA to undermine the inspection program.”<sup>94</sup> Former MSHA District Manager Lee D. Ratliff says, “It doesn’t take a fool to figure out, ‘I’d better not write this citation or I’ll be in a bunch of trouble.’”<sup>95</sup> Robert E. Murray – who ranks among the top dozen coal operators in the nation – informed MSHA inspectors that “Mitch McConnell calls me one of the five finest men in America, and the last I checked, he was sleeping with your boss [Elaine Chao].”<sup>96</sup> Murray has had safety issues at his mines. In one instance Murray told a crew of about 40 men that he would fire any one of them “on the spot” if they were to shut down the belt line that takes coal up to the surface. A few weeks later Thomas M. Ciszewski was doing maintenance on the line at the Powhattan No. 6 Mine in Alledonia, Ohio while it was still running, which is against the law. The sleeve of his flannel shirt was caught in the belt, his arm

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<sup>93</sup> Interview, July 26, 2006.

<sup>94</sup> Interview, July 26, 2006.

<sup>95</sup> Steve Twedt, “Will bigger fines reduce mine safety violations?,” *Pittsburgh Post-Gazette*, March 25, 2007.

<sup>96</sup> Phillip Babich, “Dirty business,” *Salon.com*, November 13, 2003.

was ripped off, and he bled to death before rescuers could get him to the surface.<sup>97</sup> On May 14, 2002, Murray met with Lauriski and made it clear that he wanted enforcement to be relaxed at his Maple Creek mine. Days later three MSHA inspectors were transferred. Four months after that Murray decided enforcement was too strict at his Powhattan No. 6 Mine. Shortly thereafter the MSHA district manager was transferred.

Lauriski may have reflected the thoughts of MSHA's entire leadership when he remarked, "The industry has always been good to me.... I just hope that I've given back as much as I've received."<sup>98</sup> Elaine L. Chao was pleased with Lauriski's work. "Dave Lauriski has provided outstanding leadership to MSHA," she said after he had been on the job for over two years. Instructively, upon the occasion of her glowing appraisal the industry journal "*Coal Leader* took the opportunity of thanking Secretary Chao for her support of the mining industry."<sup>99</sup> There were no complaints from industry about how Secretary Chao was handling MSHA.

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<sup>97</sup> Ellen Smith, E-mail to author, August 23, 2006.

<sup>98</sup> Steve Wedel, "Regulatory official talks safety issues with Oklahoma miners," *Journal Record*, June 19, 2003.

<sup>99</sup> Bill Reid, "Chao attends Mine Rescue Contest," *Coal Leader*, October 2003.

## CHAPTER THREE

# Retreat From Regulation

*Among the regulatory proposals no longer being worked on, some of them spanning years and administrations, are those addressing safety issues with self-rescue respiratory devices for miners, the shortage of mine rescue teams, problems with huge trucks that are the leading cause of mine fatalities, fire-resistant conveyer belts in mines, and improved air quality rules.*<sup>100</sup>

-- *Washington Post*, November 16, 2004

Extensive collaboration between industry and the Bush Administration's MSHA led to warnings from a number of sources that the mission of MSHA, and therefore the safety of miners, was being jeopardized. Observers noted that neither MSHA nor its new "partners" in industry were actively pursuing safety improvements. Senators Edward M. Kennedy (D-Massachusetts) and Paul Wellstone (DFL-Minnesota) convened a hearing in July 2002 that was designed to address what they perceived to be efforts to "gut" MSHA.<sup>101</sup> In September 2002, the *Chicago Tribune* observed that "America's Appalachian coal cradle is plagued by rising injury rates and growing numbers of safety violations linked to company negligence."<sup>102</sup> One year later, a *Courier-Journal* editorial stated: "In perhaps no other place is the Bush administration's retreat from effective government regulation more dangerous than in America's coal

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<sup>100</sup> *Washington Post*, November 16, 2004.

<sup>101</sup> *Charleston Gazette*, October 17, 2004.

<sup>102</sup> David Jackson and Geoff Dougherty, "Safety is casualty as firms chase profits in coal country," *Chicago Tribune*, September 24, 2002, 1.



mines.”<sup>103</sup> Cecil E. Roberts, president of the UMWA, expressed concern that “mine operators are having undue sway over this agency and are promoting public policies aimed at increasing coal production at the expense of miners’ safety and health.”<sup>104</sup>

## THE SPADARO CASE

Problems at MSHA attracted additional scrutiny when the case of whistleblower Jack Spadaro, superintendent of the National Mine Health and Safety Academy (which trains mine inspectors), began to be unraveled. In October 2000, Spadaro had been assigned to investigate the cause of an environmental disaster in eastern Kentucky caused by the collapse of a reservoir containing liquid waste from coal processing (“slurry”). The Environmental Protection Agency called the event – which released over 300 million gallons of thick toxic liquid containing such hazardous materials as mercury and arsenic into 100 miles of waterways (dwarfing the Exxon Valdez spill) – the largest environmental catastrophe in the history of the eastern United States.<sup>105</sup> There had been a previous spill at the same site back in 1994, and Spadaro discovered that at least five employees of Massey Energy Co., the owner of the slurry impoundment, knew there would be another incident.<sup>106</sup> The corporation had actually covered up just how likely such a recurrence was by telling the government that the wall containing the impoundment was a solid 70-80 foot wide barrier, when in fact it was less than 20 feet wide. But despite the apparent inevitability of further problems, Spadaro concludes, “It

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<sup>103</sup> Editorial, “Coddling coal’s outlaws,” *Courier-Journal*, September 28, 2003, 2D.

<sup>104</sup> *UMW Journal*, May-June 2003, 5.

<sup>105</sup> *Washington Monthly*, January-February 2005.

<sup>106</sup> Massey Energy Co. has yet to clean up its act. In January 2008, the Environmental Protection Agency assessed Massey a \$20 million fine for repeatedly fouling Appalachian waters with mine waste. The corporation dumped ten times the amount of sediment and toxic materials permitted by law from 2000 through 2006 (Judy Pasternak, “Producer agrees to pay fine,” *Los Angeles Times*, January 18, 2008, A21).

would have been expensive to find another site. And I think they were willing to take the risk.”<sup>107</sup>

A harsh report was in the making, but fortunately for Massey the Bush Administration arrived to its rescue. Spadaro recalls, “We were continually interfered with by Dave Lauriski, the new appointee to run the Mine Safety and Health Administration, to weaken the report.”<sup>108</sup> “The Bush administration came in and the scope of our investigation was considerably shortened,” he says, “and we were told to wrap it up in a few weeks.” Spadaro was understandably shocked by the turn of events. “I had never seen anything so corrupt and lawless in my entire career,” he told CBS’s *60 Minutes*, “as what I saw regarding interference with a federal investigation of the most serious environmental disaster in the history of the Eastern United States.”<sup>109</sup> Spadaro went public about his experience. MSHA demoted Spadaro and transferred him to the Pittsburgh office; government credit card violations were cited to help justify the action. Apparently, although Spadaro always paid his bills on time, he had racked up a grand total of \$22.60 in processing fees for work related cash advances. This was deemed a “serious offense” by MSHA. Spadaro’s fees paled beside 50 other agency employees who had charged, and never repaid, a total of \$51,001 on their government credit cards. Ellen Smith, editor of *Mine Safety and Health News*, wrote, “it appears as though the alleged ‘credit card offenses’ might be an attempt to get rid of a whistleblower.”<sup>110</sup> If so, they were successful, because rather than accept demotion and transfer Spadaro resigned from the agency in October 2003 after decades of service.

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<sup>107</sup> “A Toxic Cover-Up?,” *60 Minutes*, CBS, April 4, 2004.

<sup>108</sup> “Whistleblower Warns the Bush Administration Is Cutting Back Mining Safety Regulations,” *Democracy Now!*, January 5, 2006.

<sup>109</sup> *60 Minutes*, April 4, 2004.

<sup>110</sup> *Washington Monthly*, January-February 2005.

## LAGGING ENFORCEMENT

The Spadaro case was a blatant example of the transformation occurring at MSHA. In 2002, *In These Times* reported: “Since taking office in January 2001, Bush has proposed mine safety budget cuts, halted regulatory improvements and reduced enforcement efforts.”<sup>111</sup> The administration seems to have concluded that MSHA had more money than it needed, because it proposed cutting the agency’s budget for four straight years – even though this was a time when coal production was increasing, and one of the reasons commonly cited by MSHA to justify pulling proposed rules was “resource constraints.” Mark D. Hansen and Gary L. Buffington of the American Society of Safety Engineers voiced their concern about the budget cuts taking place at MSHA, and urged those involved, “Let’s not turn the clock backward.”<sup>112</sup> When the administration sought to cut 5.7 percent of MSHA’s funding for fiscal year 2003, the *Wall Street Journal* reported, “The White House is putting the squeeze on spending by regulators that are unpopular with the administration’s business backers.”<sup>113</sup>

Cutting back MSHA’s activities meant the agency was left with fewer employees: it lost 170 staff members between 2001 and 2005, 100 of whom were engaged in coal mine enforcement. The agency’s investigative arm was being effectively hamstrung.

“When you cut resources there’s more strain on inspectors who have a certain number of

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<sup>111</sup> Ken Ward, Jr., “Action, Not Words,” *In These Times*, September 16, 2002, 5.

<sup>112</sup> Mark Hansen and Gary L. Buffington, “Bush budget cuts imperil mine safety,” *Chicago Tribune*, August 20, 2002, 14.

<sup>113</sup> Kathy Chen, Jill Carroll, Greg Ip, and John J. Fialka, “Bush’s Blueprint: Regulators Face Tight Curbs on Spending,” *Wall Street Journal*, February 5, 2002, A8.

mines to inspect,” says Jack Spadaro. “More mines means you can’t devote time to each mine, you can’t do as thorough an inspection because of the strain.”<sup>114</sup>

Not only did MSHA face the prospect of having to do more with less, it was not actively ensuring that operators complied with the law. Millions of dollars in fines have gone uncollected, and in a majority of cases negotiations between MSHA and operators resulted in fine reductions.<sup>115</sup> That is if the reductions were high enough to be worth seeking in the first place, after all many were merely a slap on the wrist – such as nominal fines as low as \$60. According to the *Washington Post*: “Large fines are rare, and the most serious sanctions – such as mine closure – are almost never used.”<sup>116</sup> The *New York Times* reported that “the Bush administration has decreased major fines for safety violations since 2001, and in nearly half the cases, it has not collected the fines.”<sup>117</sup> The Government Accounting Office reveals that from 1996 to 2006 a full 47 percent of penalties contested by operators were reduced after appeal by an average of 47 to 66 percent.<sup>118</sup> Retired inspector Francis “Shorty” Wehr says that fine reductions “have really killed the morale of inspectors....[Inspectors] figure, ‘Why should I write it up? They are not going to penalize them for it.’”<sup>119</sup> “Operators know that it’s cheaper to pay the fine than to fix the problem,” said Wes Addington of the Appalachian Citizens Law Center.

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<sup>114</sup> Interview, July 26, 2006. Spadaro now resides in West Virginia where he serves as a consultant on environmental and mine health and safety matters.

<sup>115</sup> MSHA issued \$40.3 million in fines over a ten year period from January 1996 to January 2006. An analysis by the *Lexington Herald-Leader* revealed that only 61 percent of these fines – \$24.6 million – were actually collected (Bill Estep, Jim Warren, and Linda J. Johnson, “Unpaid mining fines mount,” *Lexington Herald-Leader*, February 17, 2006). MSHA inaugurated a new approach to collecting fines from delinquent operators in February 2006, when it began filing lawsuits in federal court. To date, MSHA has gone to court a total of five times (“Feds Sue Kentucky Coal Company Over Unpaid Fines,” *Insurance Journal*, May 29, 2007).

<sup>116</sup> Joby Warrick, “Sago Puts Spotlight On Safety Strategy,” *Washington Post*, January 8, 2006, A3.

<sup>117</sup> Ian Urbina and Andrew W. Lehren, “U.S. Is Reducing Safety Penalties For Mine Flaws,” *New York Times*, March 2, 2006, A1.

<sup>118</sup> G.A.O., *Mine Safety: Better Oversight and Coordination by MSHA and Other Federal Agencies Could Improve Safety for Underground Coal Miners* (Washington, D.C.: G.P.O., May 2007), 37.

<sup>119</sup> *Pittsburgh Post-Gazette*, March 25, 2007.

“But they also know the cheapest of all routes is to not pay at all. It’s pretty galling.”<sup>120</sup>

Coal operator Harold K. Simpson was fined \$1.1 million by MSHA over the past ten years, but actually paid less than one twentieth of this sum – a mere \$50,352.<sup>121</sup> There are operators who have simply declared bankruptcy to avoid paying their fines. They can then move on and establish a new corporation. Coal operator Jody Samons was assessed \$220,000 for violations that resulted in the death of a miner. “I’ll just have to declare bankruptcy,” Samons said. “It’s just easier to go ahead and form a new corporation,” he explained.<sup>122</sup>

Coal companies have discovered additional means to evade MSHA’s scrutiny. The *Wall Street Journal* reports that “mining companies increasingly use independent contractors for their work.”<sup>123</sup> As the *Chicago Tribune* reports, one of the benefits coal companies gain when they hire contractors to mine their coal is that outside firms provide companies with a means of “insulating themselves from the cost of worker accidents and deaths.”<sup>124</sup> Independent contractor workers actually experience higher rates of accident and death than mine operator workers. The reporting requirements for independent contractor workers are less than those of operator workers, which complicates direct comparisons between the two sectors. Despite less stringent reporting, however, according to the National Institute for Occupational Safety and Health the average rate of

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<sup>120</sup> *New York Times*, March 2, 2006. MSHA’s uncollected fines are reflective of a broader problem in which a total of \$35 billion in outstanding fines is owed to the national government. Senator Byron L. Dorgan (Dem.-NPL—North Dakota) says, “Fines and orders to pay restitution are an important part of how we punish convicted criminals. When so little effort is made to collect that money, we allow convicted criminals to avoid punishment for their crimes, weaken our criminal justice system and ultimately deny justice to the victims of crimes” (Martha Mendoza and Christopher Sullivan, “Amount of unpaid federal fines up sharply,” *San Jose Mercury News*, March 18, 2006).

<sup>121</sup> Bill Estep, “One coal operator’s fines show lax system,” *Herald-Leader*, April 9, 2006.

<sup>122</sup> *Chicago Tribune*, September 24, 2002.

<sup>123</sup> Joi Preciphs and Emily Ann Brown, “Politics & Economics: Mine-Safety Agency’s Record-Keeping Is Criticized,” *Wall Street Journal*, February 28, 2006, A8.

<sup>124</sup> *Chicago Tribune*, September 24, 2002.

lost-workday injuries occurring underground for coal miners employed by independent contractors was almost 50 percent higher than for operator miners from 1998 to 2002, and fatalities were also higher.<sup>125</sup> MSHA acknowledges that, “Contractor deaths constitute a disproportionate number of the fatal accidents in the mining industry.”<sup>126</sup> Given the record, it is no surprise that following the Sago disaster the *Charleston Gazette* editorialized that “the Bush administration in Washington has been undercutting mine safety.”<sup>127</sup>

## REAGAN REDUX

The Bush Administration’s approach to mine health and safety was strikingly similar to that of the Reagan Administration. For instance, take the following statement: “MSHA initiatives have made important strides toward making ‘cooperation’ more than a catchword.”<sup>128</sup> These words sounds a lot like something that Dave D. Lauriski or perhaps Elaine L. Chao would say, but they are actually the words of the head of MSHA under Reagan, Ford B. Ford. There are many other similarities the Bush Administration’s MSHA shares with its Reagan-era predecessor. For instance, industry appointees like Deputy Assistant Secretary Kenneth P. Katen, who said “he was there with an agenda from the Kentucky operators and was going to see it approved.”<sup>129</sup> The *Wall Street Journal* reported that shortly after Ford assumed his new role, he told MSHA supervisors “that coal operators and regulators shouldn’t be adversaries, and he criticized issuing

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<sup>125</sup> NIOSH, *Worker Health Chartbook 2004*, Tables 4-2, 4-1.

<sup>126</sup> MSHA, “MSHA Launches New Safety and Health Initiative,” press release, July 13, 2005.

<sup>127</sup> Editorial, “Mine Safety,” *Charleston Gazette*, January 5, 2006, 4A.

<sup>128</sup> *Cong. Rec.*, February 21, 1984: 2816.

<sup>129</sup> Ben A. Franklin, “Mine Safety Agency Accused of Lax Enforcement,” *New York Times*, March 12, 1987, A29.

penalties for offenses he considered ‘too technical’ or ‘nitpicky.’”<sup>130</sup> In 1982 the *Los Angeles Times* stated that Ford “wants to ‘mitigate’ the adversary relationship between coal-mine operators and federal inspectors, and establish a ‘self-certification’ or honor system for operators.”<sup>131</sup> During his tenure, Ford oversaw a reduction in enforcement: Between 1980 and 1982 the agency issued 20 percent fewer violation notices, and coal operators’ fines dropped 54 percent.<sup>132</sup> In 1983, the *Washington Post* reported, “Ford narrowed the criteria for significant violations and established a flat \$20 fine for all other transgressions.”<sup>133</sup> The proposed 1984 MSHA budget included a cut of around \$4 million and the elimination of over 200 employees from the agency.<sup>134</sup> Representative Nick J.

Rahall II (D-West Virginia) concluded that

with less money and manpower, along with new mines being opened, it is obvious that the agency cannot be responsible to those who it protects, and that by not being responsive, MSHA is jeopardizing the inherent rights of the citizens of this Nation to seek protection from our Government.<sup>135</sup>

Unfortunately, he could have just as easily made the same statement two decades later.

At the close of his first year on the job Ford said, “[g]enerally, there may have been fewer inspections in the past year, but I just don’t find a diminution of safety.”<sup>136</sup>

Under the Reagan Administration the number of mining disasters increased for the first time since passage of the Coal Act in 1969. Failure under the Bush Administration

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<sup>130</sup> Bryan Burrough, “Critics Accuse The Mine-Safety Agency Of Mismanagement, Endangering Lives,” *Wall Street Journal*, June 1, 1987, 10.

<sup>131</sup> “The High Risk Deep Down,” *Los Angeles Times*, January 27, 1982, C4.

<sup>132</sup> Michael Isikoff, “Federal Officials Warned By UMW Before Virginia Coal Mine Disaster,” *Washington Post*, July 4, 1983, A1. During the Reagan Administration OSHA’s enforcement record similarly suffered, as inspections, citations, and penalties all dropped (James Donahue, “Workers at Risk: A Survey of OSHA’s Enforcement Record Against the 50 Largest U.S. Corporations,” Essential Information, 1991, 20).

<sup>133</sup> Pete Earley, “Mine Safety and Health Administration,” *Washington Post*, May 2, 1983, A11.

<sup>134</sup> Colman McCarthy, “Tunnel Vision in the Mines,” *Washington Post*, March 12, 1983, A17.

<sup>135</sup> House Committee on Government Operations, Subcommittee, *Mine Safety and Health Act*, 97<sup>th</sup> Congress, second session, February 18 and 19, 1982 (Washington, D.C.: G.P.O., 1983), 2.

<sup>136</sup> Bill Prochnau, “Fund Cuts Impair Mine Safety, Union Says,” *Washington Post*, December 10, 1981, A14.

would be made readily apparent by the Sago and Darby disasters. The *New York Times* editorialized: “The tragedies have laid bare the passivity and pro-industry bias in the Bush administration's stewardship of the Mine Safety and Health Administration.”<sup>137</sup> The administration’s approach to rulemaking left the 12 miners who died in the International Coal Group Inc.’s (ICG) Sago mine less safe. Ellen Smith charges that “in fact, they [Bush Administration] did withdraw rules that would have saved these miners.”<sup>138</sup> It soon came to light that enforcement at Sago had been severely lacking. The mine’s owner had been cited for safety violations 273 times in the preceding two years, and 16 of these fines were considered to be “unwarrantable failures.” However, the citations didn’t serve as much of a deterrent. “None of the fines exceeded \$460,” reported the *New York Times*, “roughly one-thousandth of 1 percent of the \$110 million net profit reported last year by the current owner of the mine, the International Coal Group.”<sup>139</sup>

Nothing MSHA did brought home the severity of the situation to the operator. Following the disaster, ICG’s owner Wilbur L. Ross, Jr. set off on a round of “whirlwind party-hopping.” “Mr. Ross moves in different circles than coal miners,” observed a UMWA spokesman. “That’s been evident since he founded ICG, and it remains evident today.”<sup>140</sup> Jennifer Boggs, the widow of a miner, once suggested that “[i]f the inspectors would shut these mines down for a week or so and let them lose some of that precious money, then just maybe they would see how important it is for our men to come home to us.”<sup>141</sup> But Sago was another instance where a mine never was shut down; it kept on

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<sup>137</sup> Editorial, “Tolerating Death in the Mines,” *New York Times*, February 5, 2006, 11.

<sup>138</sup> “Asst. Labor Secretary Dye Walks Out of Mine Safety Hearing As West Virginia Mine Deaths Reach 14,” *Democracy Now!*, January 24, 2006.

<sup>139</sup> *New York Times*, March 2, 2006.

<sup>140</sup> Lloyd Grove with Katherine Thomson, “Old King Coal Still A Merry Old Soul,” *New York Daily News*, January 26, 2006, 23.

<sup>141</sup> *MSHA Oversight Hearings on Coal Mine Explosions During December 1981 and January 1982*, 259.



producing coal and kept on generating profits for the corporation. “The [Sago] mine should have simply been closed,” said Jack Spadaro. “The fines were absolutely absurd, but that’s all the inspectors can do. The only other option they have is a closure order, and the managers in Washington won’t let them close a mine.”<sup>142</sup>

## WEAKENING MINE SAFETY INFRASTRUCTURE

In the words of Richard L. Trumka: “Even a blind squirrel finds an acorn in a forest.” MSHA declared that in 2004, “Mining fatalities in the United States fell to a new low.”<sup>143</sup> But in reality the situation was not so rosy. According to the UMWA’s Director of Governmental Affairs Bill Banig: “Fatality numbers were declining but enforcement was starting to be lax, and there were hundreds and hundreds of near misses. The writing was on the wall that it was going to lead to what happened this year.”<sup>144</sup> Mine safety expert Ellen Smith says that “something’s happened now where all of the sudden we’re getting very serious accidents and it points to [the question] ‘what’s happened in recent years?’”<sup>145</sup> “In just the last few years,” testifies UMWA President Cecil E. Roberts, “MSHA has recorded hundreds of mine fires, ignitions, explosions and inundations that far too-easily could have developed into significant disasters and fatalities; many other incidents likely went unreported.”<sup>146</sup> Mine safety consultant Joe Main believes that there was a “perception in the mining industry that the Bush Administration was probably going to be softer on enforcement and perception becomes reality sometimes.”

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<sup>142</sup> *Washington Post*, January 8, 2006.

<sup>143</sup> MSHA, “MSHA Announces Mining Fatalities Decline to New Record Low,” press release, January 5, 2005.

<sup>144</sup> Interview, July 28, 2006.

<sup>145</sup> Interview, July 28, 2006.

<sup>146</sup> House Committee on Education and Labor, *Mine Worker Safety*, 110<sup>th</sup> Congress, first session, March 28, 2007.

According to Main, operators determined that “this agency is not going to be that tough and it’s going to start giving us breaks...[and] when industry got the picture that the feds ain’t coming they took advantage of this.”<sup>147</sup> Vermiculite miner David Pinter testified that “on Inauguration Day, 2001,” he heard a mine manager say: “We don’t have to worry about MSHA any more. From now on they’ll be behind us every step of the way. They won’t cause us any more trouble.”<sup>148</sup> Fortunately, events have generated needed scrutiny of this arrangement. Mark N. Savit, a coal industry attorney with K Street powerhouse Patton Boggs, told a group of operators that on the heels of the public attention Sago brought to safety in the mines, “MSHA can’t afford to write the kind of citations they did” before the disaster. “MSHA, for political reasons, can no longer give us a break,” he warned.<sup>149</sup> As a result of unfavorable publicity, MSHA appears to be tightening down on lax enforcement, which provides further support for claims that enforcement had slipped in recent years. At *Mine Safety and Health News* they always investigate an operator’s safety record following a mine injury or fatality, and Ellen Smith has observed that ever since Sago “citations have gone up two or three-fold when we look at an operator’s citation record.”<sup>150</sup>

It seems that because the coal industry had helped install a friend in the White House, it expected MSHA to be more of a buddy than a government agency entrusted to enforce the law. Unfortunately, a misguided emphasis on “assistance” allowed the industry to be less concerned with the consequences of neglecting to adhere to the law. Joe Main says that there was a “weakening of the mine safety infrastructure in terms of

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<sup>147</sup> Interview, July 28, 2006.

<sup>148</sup> Senate Committee on Health, Education, Labor, and Pensions, *Asbestos Contamination*, 107<sup>th</sup> Congress, first session, July 31, 2001.

<sup>149</sup> Dorothy Kosich, “Savit: Public No Longer Believes Mining Industry,” *Mineweb*, June 12, 2006.

<sup>150</sup> Interview, July 28, 2006.

not putting the kinds of protections in we once did, slacking off in terms of controlling coal dust in the mine, changing ways of doing examinations, not installing seals properly.”<sup>151</sup> Additionally, Main explains that

One thing that’s benefited both the Clinton Administration and the Bush Administration during the last ten years is we’ve probably had the most experienced, savvy bunch of miners that the industry has ever seen. There were not a lot of new miners coming into the industry and the more you know about the hazards of mining the more you’re going to be able to stay out of harms way. That inexperience factor didn’t come into play as much.<sup>152</sup>

Absent an aggressive posture at MSHA the coal industry was not placing the same stress on safety measures that it had in the past. It was easier to get away with such an approach, however, because the workforce was composed of experienced miners. Injuries and fatalities were, therefore, less likely. But a situation such as this one could not last.

Dave D. Lauriski would leave MSHA amidst a scandal arising from cronyism in the awarding of no-bid contracts, and return to industry as an executive director for mining consultants John T. Boyd Co. A few months before his departure he said:

One thing we need to change is some views and misconceptions about the mining industry. When you talk to people and you tell them what you do for a living, I know their initial and immediate reaction is, ‘Oh my, how dangerous that is!’ And how wrong they are! How wrong they are, but the public doesn’t know that. Twenty-five years ago, it was true - how dangerous this was! Not today! *How safe we are!* How healthy we are as an industry! And our mines are safe for those who work there!<sup>153</sup>

Lauriski apparently thought that improvements over the years had made safety a less pressing issue. Many observers disagree with this position. “If you don’t have strict enforcement in this industry,” says Bill Banig, “you’re sitting on a time bomb.”<sup>154</sup> Sago showed the entire nation what the Bush Administration’s MSHA had become – an

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<sup>151</sup> Interview, July 27, 2006.

<sup>152</sup> Interview, July 27, 2006.

<sup>153</sup> Dave D. Lauriski, remarks July 24, 2004.

<sup>154</sup> Interview, July 28, 2006.

example of a regulating agency that had been influenced to an excessive degree by the industry it is intended to regulate. Jack Spadaro says,

Lauriski destroyed the inspection and enforcement program, and we saw the extent of his work this year.... The great tragedy is that people have died because of the shenanigans of Lauriski and his deputies and there are people within the agency who are really disturbed by this. Morale has really plummeted. One of the most effective government agencies has been nearly destroyed in a very short period of time.<sup>155</sup>

In the first five months of 2006 there were multiple coal mine disasters in the same year for the first time since 1981. “We predicted this would happen,” says Trumka. “We told them this would happen.”<sup>156</sup> They didn’t listen.

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<sup>155</sup> Interview, July 26, 2006.

<sup>156</sup> Interview, July 7, 2006.

## CHAPTER FOUR

# Safety Costs Money

*“[I]mproving safety conditions in mines costs money, and until the companies are willing to make a financial commitment or governmental agencies require it, major improvements in health and safety will not be had.”<sup>157</sup>*

-- J. Davitt McAteer, future Assistant Secretary of Labor for Mine Safety and Health, 1973

As corporations are quick to point out, they are in business to make a profit. It’s not surprising therefore that corporations are organized in such a way that decision-making within the corporate structure is directed by the drive to increase short-term profit margins.<sup>158</sup> The pursuit of profits, however, can conflict with efforts to improve worker safety, because although greater safety is not an unattainable goal, it comes with a price.

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<sup>157</sup> J. Davitt McAteer, *Coal Mine Health and Safety: The Case of West Virginia* (New York: Praeger Publishers, 1973), 21.

<sup>158</sup> Management focus on short-term profit can oppose long-term decision making and investment. For instance, see Narain Gehami, *Bell Labs: Life in the Crown Jewel* (Summit, N.J.: Silicon Press, 2003) 45-6; Toni Feder, “Bell Labs Research Regroups as Parent Lucent Shrinks,” *Physics Today* 54, no. 10 (2001): 26-7; Thomas F. O’Boyle, *At Any Cost: Jack Welch, General Electric, and the Pursuit of Profit* (New York: Alfred A. Knopf, 1998), 121-41; Tim Poor, “Gephardt Makes Plea For A New Capitalism,” *St. Louis Post-Dispatch*, June 9, 1994, 1C; Don Ritter, “The curse of the quarterly report,” *Directors & Boards* 16, no. 3 (1992): 36; William S. Dietrich, *In the Shadow of the Rising Sun: The Political Roots of American Economic Decline* (University Park, Penn.: The Pennsylvania State University Press, 1991), 38-9; Douglas Frantz and Catherine Collins, *Selling Out: How we are letting Japan buy our land, our industries, our financial institutions, and our future* (Chicago: Contemporary Books, 1989) 123-4; Clyde V. Prestowitz, Jr., *Trading Places: How We Are Giving our Future to Japan and How to Reclaim It* (New York: Basic Books, 1989), 360-4; Jack Sheinkman, “Labor, Shareholders: A Mutuality of Interests,” *Los Angeles Times*, September 5, 1988; Alan Hall and Evert Clark, “Deregulation Drags Bell Labs Out of Its Ivory Tower,” *Business Week*, December 3, 1984, 116; Lee Iacocca with William Novak, *Iacocca: An Autobiography* (New York: Bantam Books, 1984), 163-4; Chalmers Johnson, *MITI and the Japanese Miracle: The Growth of Industrial Policy, 1925-1975* (Stanford, Calif.: Stanford University Press, 1982), 313-4.

“To run coal the right way – the safe way,” says retired mine foreman Leon Napier, “you won’t run as much coal.”<sup>159</sup>

Tony Mazzocchi of the Oil, Chemical, and Atomic Workers International Union was a path-breaking figure in the movement to improve workplace health and safety.<sup>160</sup> He believed that a straight-forward equation determined short-sighted corporate decision makers’ actions in regard to worker health and safety: “You either diminish profit or you diminish health.” Moreover, Mazzocchi added: “Right now, profit is supreme and health is secondary.”<sup>161</sup> There simply is little incentive within the corporate structure compelling it to pursue improvements in workplace health and safety for their own sake. Chicago School economist Milton Friedman says, “I believe most of the claims of social responsibility are pure public relations.”<sup>162</sup> Eric Frumin, UNITE-HERE’s health and safety director, once remarked “[a]nyone who believes employers like to spend money on safety and health hasn’t spent much time in the workplace.”<sup>163</sup> Donald D. Stull, professor of anthropology at the University of Kansas, writes that in meatpacking, “production quotas...take precedence over other considerations, including safety.”<sup>164</sup> Corporate management’s decisions are propelled by the paramount goal of inflating profit margins.

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<sup>159</sup> “Longtime miners say safety hinges on attitudes,” *Belleville News-Democrat*, July 9, 2006.

<sup>160</sup> Les Leopold, *The Man Who Hated Work and Loved Labor: The Life and Times of Tony Mazzocchi* (White River Junction, Vermont: Chelsea Green Publishing Company, 2007).

<sup>161</sup> “A Union View of Worker Safety,” *Multinational Monitor* 16, no. 10 (1995): 19. Industrial hygienist Lisa Cullen writes that “the issue is profit versus health. The same people making the bottom line possible are the ones sacrificed” (Lisa Cullen, *A Job to Die For: Why So Many Americans Are Killed, Injured, or Made Ill at Work and What to Do About It* (Monroe, Maine: Common Courage Press, 2002), 141).

<sup>162</sup> “Social Responsibility: ‘Fundamentally Subversive’?,” *Business Week Online*, August 15, 2005.

<sup>163</sup> Michael Wines, “Auchter’s Record at OSHA Leaves Labor Outraged, Business Satisfied,” *National Journal* 15, no. 4 (1983): 2009.

<sup>164</sup> Donald D. Stull, “Knock ‘em Dead: Work on the Kill Floor of a Modern Beefpacking Plant,” in *Newcomers in the Workplace: Immigrants and the Restructuring of the U.S. Economy*, Louise Lamphere, Alex Stepick, and Guillermo Grenier, eds. (Philadelphia: Temple University Press, 1994), 67.

Profit-driven decisions focusing on the short-run can allow production to trump safety, creating the risk of a race to the bottom in which the miner will feel the squeeze. Government regulations, therefore, are necessary to reign in industry's tendency to act in short-sighted ways that increase private profits at the expense of the general public welfare. By enforcing the law, MSHA can help prevent managers in the mining industry from being pushed into a position where there is potential latitude for compromising decisions about safety.

#### A LEVEL PLAYING FIELD

The corporation is specifically designed to jettison responsibilities that do not serve to maximize profits. Consequently, broader obligations can be invisible to corporate decision makers. Nevertheless, Susan J. Stabile, a law professor at St. John's University, observes that "[m]any corporate executives clearly have come to the view that ethical business conduct and more socially responsible behavior can be good for business."<sup>165</sup> Indeed, firms have emerged that place social responsibility at the core of their business model.<sup>166</sup> And there have long been employers who take a paternalistic interest in the welfare of their employees.<sup>167</sup> "There *is* a place in the market economy for

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<sup>165</sup> Susan J. Stabile, "A Catholic Vision of the Corporation," 4 *Seattle Journal for Social Justice* 181, 199 (2005).

<sup>166</sup> Esther Addley, "Boom in green holidays as ethical travel takes off," *Guardian*, July 17, 2006, 9; "Forging a Link Between Shareholder Value and Social Good," Knowledge@Wharton, May 19, 2003, <http://knowledge.wharton.upenn.edu/index.cfm?fa=viewarticle&id=774>; David Goodman, "Culture Change," *Mother Jones*, January-February 2003; Lewis D. Solomon, "On The Frontier of Capitalism: Implementation of Humanomics By Modern Publicly Held Corporations: A Critical Assessment," 50 *Washington & Lee Law Review* 1625 (1993).

<sup>167</sup> Michael D'Antonio, *Hershey: Milton S. Hershey's Extraordinary Life of Wealth, Empire, and Utopian Dreams* (New York: Simon & Schuster, 2006); Lawrence G. Foster, *Robert Wood Johnson: The Gentleman Rebel* (State College, Penn.: Lillian Press, 1999); Gerald Zahavi, *Workers, Managers, and Welfare*

responsible firms,” affirms University of California at Berkeley business professor David Vogel. “But there is also a large place for their less responsible competitors.”<sup>168</sup> And these competitors can ply their irresponsibility into a market advantage if regulators do not practice effective enforcement. Hence an inherent flaw with voluntary compliance measures. Cornell University economist Robert H. Frank states that “heavy emphasis on voluntary compliance...overlooks the critical role that enforcement measures have always played in society’s efforts to curb narrow self-interest for the common good. Without such measures, we must ask those who comply voluntarily to shoulder an unfair burden.”<sup>169</sup> The possibility of a reckless coal operator paying little heed to the safety of its workforce in order to gain advantage over its more responsible competitors has long been acknowledged. “It is plain that safety equipment, training and education cost money,” stated Senator Lee Metcalf. “Mining is a highly competitive business. The companies that spend more to regulate the lives and health of their employees...are placed at a competitive disadvantage to the less conscientious.”<sup>170</sup> Representative Alan B. Mollohan (D-West Virginia) has testified that, therefore, “everybody, on a level playing field, needs to be made to make the expenditures necessary to get up to the safe operating level and safe operating practices.”<sup>171</sup>

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*Capitalism: The Shoeworkers and Tanners of Endicott Johnson, 1890-1950* (Chicago: University of Illinois Press, 1988); Robert W. Ozanne, *A Century of Labor-Management Relations at McCormick and International Harvester* (Madison: University of Wisconsin Press, 1967); Gordon M. Philpott, *Daring Venture: The Life Story of William H. Danforth* (New York: Random House, 1960); Allan Nevins with Frank Ernest Hill, *Ford: The Times, the Man, the Company* (New York: Charles Scribner’s Sons, 1954); Herbert Adams Gibbons, *John Wanamaker* (New York: Harper & Brothers, 1926).

<sup>168</sup> David Vogel, *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility* (Washington, D.C.: Brookings Institution Press, 2005), 3.

<sup>169</sup> Robert H. Frank, *What Price the Moral High Ground?: Ethical Dilemmas in Competitive Environments* (Princeton, N.J.: Princeton University Press, 2004), 186.

<sup>170</sup> *Cong. Rec.*, June 23, 1966: 14151.

<sup>171</sup> House Committee on Education and the Workforce, Subcommittee on Workforce Protections, *Mine Safety and Health: A Congressional Perspective*, 109<sup>th</sup> Congress, second session, March 16, 2006.



Coal operators simply cannot be relied upon to take requisite safety measures on their own accord. While he was head of MSHA, Davitt McAteer became aware of a problem he deemed to be “appalling”: “At huge surface mines big trucks run over little trucks.” McAteer proposed a solution: “I suggested that we put these back-up cameras on these trucks, and I got hammered. They even have them on mobile homes. We went to manufacturers – Caterpillar, Drexel, and others – and they said they would do it, but they won’t install them until there’s a market. Unfortunately industry didn’t step up to the plate.” The coal industry was resistant to making an investment in safer trucks. In McAteer’s words, it is “a situation where you got a problem, you got a solution, and industry wouldn’t take it on themselves to fix it.”<sup>172</sup> As this example demonstrates, government is often needed to force industry into action on the health and safety front.

The coal industry, however, has expressed an interest in reducing government’s ability to influence mine safety. Michael Peelish of Foundation Coal Corp. states: “OSHA, by virtue of its expansive jurisdiction, has had to target its enforcement resources in order to address those worksites and those conditions that need the most attention. MSHA should consider adopting similar targeted compliance programs.”<sup>173</sup> But OSHA’s value as a model for MSHA in this instance is questionable. The proximate cause of OSHA’s need to “target” is actually its severe lack of means rather than its “expansive jurisdiction.” In fact, OSHA is so starved for resources that it would take 117 years for the agency to inspect every work site in America. “May you live to see that work cycle,” says Richard L. Trumka, secretary-treasurer of the AFL-CIO. In Trumka’s view OSHA has been so far cut-back that it is literally toothless: “OSHA reminds me of

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<sup>172</sup> Interview, September 1, 2006.

<sup>173</sup> Senate Committee on Health, Education, Labor, and Pensions, *Mine Safety*, 109<sup>th</sup> Congress, second session, March 2, 2006.

an 18-year-old Mexican Chihuahua that's lost its teeth and hides behind the furniture going 'bark, bark, bark,'" he says.<sup>174</sup>

Although elements of the mining industry may argue that they are overregulated, observers who come to the issue from a background in safety rather than profit-maximization see the issue differently. "Four underground and two surface inspections [per mine] a year is a bare bones program," states retired MSHA official Jack Spadaro.<sup>175</sup> "Targeting needs to be on top of regular inspections," says former MSHA official Tony Opegard. "Don't take from coal company 'A' to inspect coal company 'B' more often."<sup>176</sup> Although there are some operators who act more responsibly than others, placing the emphasis on "targeted" enforcement efforts jeopardizes the integrity of the overall regulatory system. Peter Lurie of Public Citizen says it entails "letting the less targeted employers off the hook."<sup>177</sup>

Absent the deterrent provided by enforcement, even the most conscientious operator may be tempted to cut corners and to let standards slide. "The attitude of a commission toward its enforcement responsibilities affects its entire regulatory program," writes political scientist Marver H. Bernstein. "Those who discover that violations go undetected and unpunished will have little respect for the commission and will violate regulations with impunity if it is to their financial or commercial advantage."<sup>178</sup> Moreover, research reveals that inspections' positive influence on workplace safety can extend beyond compliance with existing standards. Economists John Mendeloff and

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<sup>174</sup> Interview, July 7, 2006.

<sup>175</sup> Interview, July 26, 2006. Spadaro adds, "under Lauriski the agency didn't even meet these requirements because the number of inspectors had been cut back" (ibid.).

<sup>176</sup> Interview, July 26, 2006.

<sup>177</sup> Interview, July 21, 2006.

<sup>178</sup> Marver H. Bernstein, *Regulating Business by Independent Commission* (Princeton, N.J.: Princeton University Press, 1955), 224.

Wayne B. Gray write, “it does appear that OSHA penalty inspections often induce managers to pay more attention to safety issues in a manner that is not limited to compliance with OSHA standards.”<sup>179</sup> A coal industry operating without strictly enforced federal protections would not only jeopardize the positive impact of enforcement, but also risk a return to the bad old days. “We tried cooperation and voluntary compliance until 1950,” says Davitt McAteer, “and we had a murderous industry.”<sup>180</sup>

In a competitive industry, regulators must maintain particularly vigilant enforcement efforts.<sup>181</sup> According to historian William Graebner, during the early twentieth century the competitive nature of the coal industry encouraged mine owners to resist measures that would have improved working conditions. “Fearful of losing ground in the competitive struggle,” Graebner writes, “operators opposed state legislation and administrative regulation, made much of the great expense entailed by safety legislation, and were reluctant to undertake experimental mine-safety projects requiring heavy

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<sup>179</sup> John Mendeloff and Wayne B. Gray, “Inside the Black Box: How do OSHA Inspections Lead to Reductions in Workplace Injuries?,” *27 Law & Policy* 219, 221 (2005).

<sup>180</sup> Daniel Wagner, “Their safety on the line,” *Newsday*, January 22, 2006, A16.

<sup>181</sup> According to economist Frederick C. Thayer, “in an environment of all-out competition, social regulation cannot work well.” He adds, “social regulation of health and safety standards cannot be effective (or can become effective only at very high costs) unless it is accompanied by economic regulation” (Frederick C. Thayer, *Rebuilding America: The Case for Economic Regulation* (New York: Praeger Publishers, 1984), 73). Efforts to regulate coal, therefore, could prove to be beneficial to the health and safety of miners, and would not be unprecedented: in the 1930s there were legislative proposals such as the Guffey-Snyder Act to stabilize the coal industry. According to miner Chuck Knisell, “as the price of coal fluctuates, so does the price of miners’ lives. At times of high prices, companies tend to want to produce as much as they can, putting production ahead of safety. This is especially true in smaller mines and mines where there is no union to make them focus on safety. They spend less on safety so they can put more in their pockets” (*Mine Worker Safety*, March 28, 2007). For the public safety implications of competitive pressures see Dan Milmo and Duncan Campbell, “Crash highlights crucial shift in railway culture,” *Guardian*, March 3, 2007, 16; Stephen Franklin and Darnell Little, “Bone-Weary Haulers Raise Stakes on Road,” *Chicago Tribune*, December 10, 2006, 1; Editorial, “ValuJet Crash Chain of Failure Leads to FAA,” *Post-Standard*, August 22, 1997; Tom Steighorst and Angela Bradbery, “Crash Raises Concerns About Contract Maintenance,” *Sun-Sentinel*, May 31, 1996, 4B.

financial commitments.”<sup>182</sup> A survey of these years does reveal exceptional firms that did make strides in health and safety. Graebner cites U. S. Steel as an example, noting that the establishment of “United States Steel’s substantial reputation in safety was achieved in large, captive mines, isolated from the coal industry’s competitive markets.”<sup>183</sup> In subsequent decades, the safety record of so-called “captive mines” – those mines that produce coal for the consumption of the owner not the marketplace – continued to stand out from the rest of the pack. In 1973, the *Wall Street Journal* reported “a very few coal producers – particularly U.S. Steel Corp. and Bethlehem Steel Corp. among the big ones – have consistently operated mines that have been considerably safer to work in than those of their competitors.”<sup>184</sup> The Harvard School of Public Health’s Leslie I. Boden analyzed safety during the mid-1970s, and determined that “[c]aptive mines are safer than others.”<sup>185</sup>

To a significant degree, a company’s safety record is related to the firm’s culture. Producing for a captive market, U.S. Steel adopted a culture that made safety a priority. On the other hand, Consolidated Coal Co. was not a captive producer, and it was widely

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<sup>182</sup> William Graebner, “The Coal-Mine Operator and Safety: A Study of Business Reform in the Progressive Period,” *Labor History* 14, no. 4 (1973): 487. When the eminent historian R. H. Tawney addressed the early twentieth century British coal industry, he observed that its “managers...primary concern, however personally humane and careful they may desire to be, is necessarily to make the business as profitable as possible” (R. H. Tawney, *The Radical Tradition* (London: Pelican Books, 1966), 131). A 1950s study of a coal community reported that “some of our informants believed that mining management’s speculative interest made it prone to extract as much coal as possible in the shortest period of time. Thus management was often careless in mining methods” (Herman R. Lantz with the assistance of J. S. McCrary, *People of Coal Town* (New York: Columbia University Press, 1958), 189).

<sup>183</sup> William Graebner, *Coal-Mining Safety in the Progressive Period: The Political Economy of Reform* (Lexington: University Press of Kentucky, 1976), 10.

<sup>184</sup> John V. Conti, “Safety Underground,” *Wall Street Journal*, January 18, 1973, 1. When U.S. Steel sold its West Virginia Pinnacle Mine in 2003 the new owners eliminated two-thirds of the fire bosses (the miners who enter the mine immediately prior to the beginning of each shift to ensure its safety) (Bob Withers, “Miners worried about finances,” *Herald-Dispatch*, January 15, 2006).

<sup>185</sup> Leslie I. Boden, “Government Regulation of Occupational Safety: Underground Coal Mine Accidents 1973-75,” *American Journal of Public Health* 75, no. 5 (1985): 500.

known to have a remarkably poor safety record.<sup>186</sup> (More recently CONSOL Energy Inc. has regularly ranked among the safest operators in the nation.) The explanation for captive mines' superior achievements seems to stem from their insulation from direct competition. A coal executive once told the *New York Times* that the pressure to produce profits was less in captive mines than their competitive counterparts. He explained that ownership by a steel company meant, "Production costs in the mines, are a paper transfer against the ultimate cost of steel."<sup>187</sup> The fact that these operators compiled superior safety records from a position somewhat removed from competitive pressures suggests that extreme demands for profit-maximization may precipitate decisions that compromise safety. Such a situation serves to reiterate the necessity for regulations in a market system in order to help create a situation where employers are not punished for giving attention to worker safety. In the early 1970s, mine safety expert Davitt McAteer concluded that the lesson to be learned from captive mines was that "safety can be bought, and at a much more reasonable price that many operators would lead us to believe."<sup>188</sup>

## OPERATOR ERROR

A recent upturn in the coal market has raised the price of coal, triggering developments in the industry that are cause for concern. Bituminous coal prices rose over 38 percent in real dollars from 2000 to 2005.<sup>189</sup> "The big push is to get the black stuff out of the ground," says Davitt McAteer. "You neglect infrastructure, maintenance, education

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<sup>186</sup> Milton Moskowitz, Michael Katz, Robert Levering, eds., *Everybody's Business, An Almanac: The Irreverent Guide to Corporate America* (San Francisco: Harper & Row, 1980), 498.

<sup>187</sup> Ben A. Franklin, "New Effort to Make Mines Safer," *New York Times*, November 22, 1980, 29.

<sup>188</sup> *Coal Mine Health and Safety*, 21.

<sup>189</sup> Energy Information Administration, "Table 7.8 Coal Prices, 1949-2005," <http://www.eia.doe.gov/emeu/aer/txt/ptb0708.html>

and (safety-law) compliance. It begins to catch up with you.”<sup>190</sup> In response to heightened demand and the potential for greater profits, American coalmines set a nine month production record from January through September of 2006. Retired UMWA official Joe Main says, “I just have a fear that the industry is in such fast motion that things like training to make sure miners and supervisors are up to speed may not be getting the emphasis that it should be.”<sup>191</sup> An increase in production to meet rising demand has miners working more and longer shifts. Miner John Cox reports that he frequently has to work ten or twelve hour shifts six days a week.<sup>192</sup> “About every mine is working six days a week,” says miner James Jarrett. “I may get 60 to 70 hours a week, or I may go home in 48.”<sup>193</sup> Long hours can lead to fatigue, which increases the likelihood that accidents may occur.<sup>194</sup> Further safety problems arise when increased demand causes coal seams posing significant geological challenges to be brought into production. The UMWA’s administrator for occupational health and safety, Dennis O’Dell, says that mining is occurring in more marginal areas such as “older seams that are tougher, more gassier, the conditions are worse.”<sup>195</sup> According to former general counsel for the Kentucky Department of Mines and Minerals Tony Opegard: “In eastern Kentucky they

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<sup>190</sup> Thomas Frank, “Coal mine deaths spike upward,” *USA Today*, January 1, 2007, 3A.

<sup>191</sup> Edward Peeks, “Mines richer but not safer,” *Charleston Gazette*, July 11, 2006.

<sup>192</sup> Episcopal Diocese of Missouri, “Religious leaders back effort by coal miners to unionize,” April 27, 2006, <http://www.missouri.anglican.org/miners.doc>

<sup>193</sup> Roger Alford, “Mine deaths rise with coal price,” *Boston Globe*, May 31, 2006.

<sup>194</sup> Anne-Marie Feyer, “Fatigue: time to recognise and deal with an old problem,” *BMJ (British Medical Journal)* 322, no. 7290 (2001): 808-809; J. M. Harrington, “Health effects of shift work and extended hours of work,” *Occupational and Environmental Medicine* 58, no. 1 (2001): 68-72; Richard Perez-Pena, “N.J. Transit May Drop Split Shifts at Night in Wake of Crash,” *New York Times*, February 14, 1996, B1; Elisa R. Braver, et. al., “Long Hours and Fatigue: A Survey of Tractor-Trailer Drivers,” *Journal of Public Health Policy* 13, no. 3 (1992): 341-366; Presidential Commission on the Space Shuttle Challenger Accident, *Report to the President by the Presidential Commission on the Space Shuttle Challenger Accident*, vol. II (Washington, D.C.: NTIS, 1986), G1-G6; Frances Perkins, “Labor Standards and War Production,” *Annals of American Academy of Political and Social Science* 224 (1942): 54-57.

<sup>195</sup> “Dangers of Mining,” *Insight*, CNN, May 3, 2006.

are mining coal seams that people wouldn't have thought about 10 years ago. Some mines are marginal and some are undercapitalized.”<sup>196</sup>

Small, and frequently short-lived, “doghole” mines are recognized as the source of the most dangerous jobs in the industry.<sup>197</sup> Often working under contract for larger coal companies, these operators show a greater willingness to hire workers who lack experience and training. Dennis O'Dell says that these operations “try to make a quick profit because the coal market is high right now.”<sup>198</sup> Contract operators will extract coal from other companies' land and then sell it back to them at prices that undercut the general market. They, therefore, present an example that is the polar opposite of the situation in “captive” mines: contract mines' very existence is based on temporary fluctuation in the price of coal.

Small mines such as these are creatures of the competitive coal market and have added incentive to cut corners – the result can be “outlaw” operators who scratch by through externalizing their full production costs onto, among others, their workers by neglecting safety. According to union leader Tony Mazzocchi: “We [workers] essentially give a subsidy in terms of our health and years of our lives to the corporation.”<sup>199</sup> In an outlaw mine there are tragic instances when this arrangement is made overpoweringly apparent. One week after Sago, Cornelius Yates was operating a roof-bolting machine in a mine that employs nine men and had become active only three months earlier, when the

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<sup>196</sup> *Pittsburgh Post-Gazette*, May 28, 2006.

<sup>197</sup> The fatality rate at mines that employ fewer than 50 workers has been over four times that of mines with more than 250 workers (Kris Maher, “As Demand for Coal Rises, Risky Mines Play Bigger Role,” *Wall Street Journal*, June 1, 2006, A1). The eminent economist John Kenneth Galbraith writes that “the employee of the small firm [is] in particular need of the support of a union. It is this employee whose bargaining position is weakest; it is his employer who survives because of that weakness” (John Kenneth Galbraith, *Economics and the Public Purpose* (Boston: Houghton Mifflin Company, 1973), 257).

<sup>198</sup> *Wall Street Journal*, June 1, 2006.

<sup>199</sup> *Multinational Monitor* 16, no. 10 (1995): 18.

roof suddenly collapsed and killed him. An investigation by MSHA concluded that “management had several opportunities to notice and correct the obvious hazardous roof condition that was exposed during the mining process.... Even though management had this first hand knowledge, they failed to take appropriate measures to identify and correct these conditions.”<sup>200</sup> In this instance, the operator was aware of a safety issue that could have been corrected but chose not to act. “To developing countries fighting corruption and struggling to establish the rule of law the movement from enforcement sounds like an invitation to even more corruption,” maintains Elaine C. Kamarck, a co-founder of the Progressive Policy Institute. “However, in countries where the rule of law is effective, there are huge gains to be made in the ultimate goal of regulatory policy by moving to a greater emphasis on compliance [assistance].”<sup>201</sup> Contrary to her assertion, events such as this one suggest that “movement from enforcement” on MSHA’s part poses significant risks to miners.

It has been pointed out that these small operators have less capital to spend on equipment and training. But former MSHA Special Assistant Celeste A. Monforton cautions against arguments that small mines can’t afford safety because there are also aspects of a smaller operation that make it easier to institute such measures. “A small mine can be a simpler operation,” she explains, “so safety systems won’t be as complicated.”<sup>202</sup> MSHA has bent over backwards to accommodate small mines. The agency even has a regulation that allows small mines and financially strapped mines to pay reduced fines. “A penalty can be \$1 million,” states Ellen Smith, editor of *Mine*

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<sup>200</sup> MSHA, “Report of Investigation: Fatal Fall of Roof Accident January 10, 2006,” <http://www.msha.gov/fatals/2006/ftl06c13.asp>

<sup>201</sup> Elaine C. Kamarck, *The End of Government...as we know it: Making Public Policy Work* (Boulder, Col.: Lynne Rienner Publishers, 2007), 70.

<sup>202</sup> Interview, July 25, 2006.



*Safety and Health News*, “but if a company is small and having financial hardships, the penalty can go down to \$100.”<sup>203</sup> Smith says that there is “no excuse to have an unsafe operation just because you’re small.... If a small operator can’t do this or that then they shouldn’t be in business.”<sup>204</sup> “All miners deserve the same level of protection,” says Tim Baker, deputy administrator for health and safety at the UMWA. “No operator deserves any special treatment.”<sup>205</sup>

### TECHNOLOGICAL ADVANCES

Upon being confronted with new safety regulations, coalmine operators have been known to raise reasons for foot dragging. In 2006, Kentucky’s legislature started to consider more frequent state mine inspections. Industry lobbyist Bill K. Caylor’s reaction was that “what you’re seeing is a knee-jerk to the disaster in West Virginia. We really need to take a deep breath, and look at things objectively.”<sup>206</sup> New safety technologies began to be proposed at this time, and the National Mining Association’s president, Kraig R. Naasz, claimed that “some devices might impart a false sense of security and lead miners to take unnecessary risks.”<sup>207</sup> Such objections, however, can serve as a pretext for opposition that may boil down to cost considerations. Caylor writes,

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<sup>203</sup> Ellen Smith, E-mail to the author, August 23, 2006. MSHA fined Massey Energy Co. a record \$1.5 million for 25 violations associated with a fire that killed two miners at its Alma No. 1 Mine in January 2006. This fine is the largest MSHA has issued an operator; it eclipsed the previous record fine of \$540,000 which was handed out in 1991.

<sup>204</sup> Interview, July 28, 2006.

<sup>205</sup> Interview, August 24, 2006.

<sup>206</sup> Roger Alford, “Bill mandates more mine inspections,” *Courier-Journal*, January 20, 2006.

<sup>207</sup> Kraig R. Naasz, “Solutions, not quick fixes,” *USA Today*, February 3, 2006, 10A.

“To provide each Kentucky underground coal miner with *one* additional SCSR [self-contained self-rescuer] would cost \$8.35 million.”<sup>208</sup>

Although safety precautions do incur costs, if there wasn't money to be made in coal, operators wouldn't be in the business. “I was raised in the coalfields,” said former UMWA President Arnold Miller, “and I've been a coal miner all my life. But I've never heard a coal operator claim he was making any money. To hear the operators tell it, the coal industry is the oldest, non-profit organization in the nation.”<sup>209</sup> There are indeed large profits to be made in coal: Peabody Energy Co. posted a net income of \$600,697,000 in 2006, while CONSOL Energy Inc. recorded a net income of \$408,880,000. Any excuses about the cost of safety equipment are just that, excuses. “They don't want any laws that make them spend money,” says former miner Butch Sebok. “That's what I've seen after 26 years in the mines.”<sup>210</sup> Although proper safety precautions may cost money, in former MSHA chief Davitt McAteer's opinion: “Strong safety and health standards will not drive responsible mine operators out of business.”<sup>211</sup> Claims that the cost is too high to justify adequate safety measures are not just ethically troubled, they are also financially suspect.

Wheeling Jesuit University recently received funding from the National Institute for Occupational Safety and Health to explore the possibility of improving self-contained self-rescuers by making them lighter, smaller, and capable of delivering more oxygen.

“What we found is that there are technologies that can be used to improve the system to

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<sup>208</sup> Bill K. Caylor, “Comments on March 9, 2006 Emergency Temporary Standard,” <http://www.msha.gov/regs/comments/06%202255/AB46-COMM-30.pdf>

<sup>209</sup> *Cong. Rec.*, December 11, 1973: 40926.

<sup>210</sup> Bob Withers, “New technology could improve mine safety,” *Herald-Dispatch*, January 15, 2006.

<sup>211</sup> J. Davitt McAteer, “Let's Not Abandon Safety For Our Nation's Miners,” *Christian Science Monitor*, February 6, 1996, 19.

do all three,” says Michelle Dougherty, the university’s director of technology transfer. “I can’t answer why no one in the private sector has thought of this before.” It seems likely that there had been little incentive to make a better product because the coal industry was not demanding improvements. The National Mining Association’s Bruce Watzman, explains, “We’re not in the self-rescuer manufacturing business.”<sup>212</sup> Bill K. Caylor acknowledged that in Kentucky a recent inspection found that 119 self-contained self-rescuers were defective. However, he added: “I don’t think it indicates a problem.”<sup>213</sup> “It’s not a problem unless you’re one of those 119 miners with a defective device,” replies Ellen Smith.<sup>214</sup>

Mining experts informed the *Christian Science Monitor* that, “Despite society’s technological advances, few new major emergency or rescue technologies have been deployed widely in coal mines in recent years.”<sup>215</sup> Davitt McAteer is one expert who agrees that “products exist that are out there and are not being put into the mines.”<sup>216</sup> “We are in the 21st century in terms of the way we can produce the coal,” he says. “We simply haven’t brought the health and safety aspects of mining into the 21st century.”<sup>217</sup> Past experience suggests that regulation tends to lead to technological innovation.<sup>218</sup>

When the Environmental Protection Agency prohibited the manufacture of polychlorinated biphenyls (PCBs) in 1980, due to public health concerns, industry

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<sup>212</sup> Gardiner Harris, “Endemic Problem of Safety in Coal Mining,” *New York Times*, January 10, 2006.

<sup>213</sup> James R. Carroll, “119 mine breathing devices defective,” *Courier-Journal*, July 8, 2006.

<sup>214</sup> Interview, July 28, 2006.

<sup>215</sup> Mark Clayton, “Ahead, high-tech help for mine rescues,” *Christian Science Monitor*, January 11, 2006, 3.

<sup>216</sup> Senate Committee on Appropriations, Subcommittee Labor, Health and Human Services, Education, and Related Agencies, *Sago Mine Disaster and an Overview of Mine Safety*, 109<sup>th</sup> Congress, second session, January 23, 2006.

<sup>217</sup> “Probes Under Way In Mine Tragedy,” *CBS News*, January 10, 2006, <http://www.cbsnews.com/stories/2006/01/10/national/main1194742.shtml>

<sup>218</sup> Nicholas A. Ashford, Christine Ayers, and Robert F. Stone, “Using Regulation to Change the Market for Innovation,” 9 *Harvard Environmental Law Review* 419, 432-43 (1985).

quickly responded by developing five substitutes.<sup>219</sup> MSHA can use its regulatory function to better protect miners' health and safety by creating markets for safety which encourage both the dissemination of existing technologies and the development of new ones. Representative Shelley Moore Capito (R-West Virginia) says, "I believe that where a serious will exists to develop a new technology the goal can be achieved."<sup>220</sup>

The agency's failure to use rulemaking in a technology-forcing manner was revealed during the scrutiny that followed Sago. One example is found by looking at tracking devices designed to help locate trapped miners and allow them to communicate with the surface. These instruments were being employed internationally to a degree far surpassing their use in this country. "It's unforgivable that we allow other countries to get ahead of us in the area of technology, any technology," says Representative Major Owens (D-New York). "Mine safety technology certainly should be one of them."<sup>221</sup> Back in the 1980s Stolar Research Corp. discovered how to transmit voices through coal seams under the right geological conditions. But although MSHA approved the use of this new technology it was never mandated, so no market developed, and therefore any further advances in the technology were halted.<sup>222</sup>

When the MINER Act placed a deadline for the implementation of communication devices on the horizon, new products with impressive capabilities began to appear. Kutta Consulting demonstrated a system that made a "cell-phone quality transmission" available two miles beneath the earth's surface.<sup>223</sup> Industry has not rushed

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<sup>219</sup> Ibid., 432-33.

<sup>220</sup> *Mine Safety and Health: A Congressional Perspective*, March 16, 2006.

<sup>221</sup> Ibid.

<sup>222</sup> *Herald-Dispatch*, January 15, 2006.

<sup>223</sup> Steve Twedt, "Initial two-way tests for wireless mine communicators show promise," *Pittsburgh Post-Gazette*, June 9, 2006.

to embrace these new developments. “The technology just is not there to give them what they want,” according to Caylor. “I can’t even get my cell phone to work in the cafeteria of the Capitol annex. How do they expect to get these devices to work a mile inside a mine? It’s not that we’re opposed. We just have concerns about whether it’s functional.”<sup>224</sup> “I think everyone in the industry is willing to do what they can do to make it safer,” says Don L. Blankenship, CEO of A.T. Massey Energy Co. “It’s just that, a lot of times, it is easy for the public to be misled about how doable some of these technologies are.”<sup>225</sup> Naturally there is no way of ever knowing how feasible and effective these technologies are unless we give them a chance. As Davitt McAteer writes: “If we insist on waiting for perfect technological answers to the challenges facing us, we will wait forever.... Incremental improvements should be adopted immediately while the search for better technologies goes forward.”<sup>226</sup>

Mine rescue chambers provide a further example of MSHA sitting by the sidelines while potentially life-saving technologies are developed. Stocked with oxygen, food, and water, these rooms would provide miners who become trapped a site to await rescue teams. The 1969 Coal Act gave regulators the ability to mandate the installation of rescue chambers in mines, but MSHA never acted to make this happen. Apparently in the 1970s it had been determined that they were technologically infeasible because they could not withstand a powerful explosion, and they were subsequently forgotten.

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<sup>224</sup> Roger Alford, “Kentucky follows West Virginia’s lead, moves to stiffen mine safety laws,” *Lexington Herald-Leader*, January 26, 2006.

<sup>225</sup> Ken Ward, Jr., “States following Manchin on new mine safety rules,” *Sunday Gazette-Mail*, January 28, 2006. Blankenship also resisted reducing the time lag between an accident’s occurrence and the notification of authorities. This January two miners died in a fire at a Massey mine. State regulators were not notified about the accident until two hours after it had occurred. “You don’t want a lot of wolf things — you know, crying wolf before you know you’ve got a problem — and the 15-minute requirement that was introduced runs that risk,” Blankenship said (*ibid.*).

<sup>226</sup> J. Davitt McAteer and associates, “The Sago Mine Disaster: A Preliminary Report to Governor Joe Manchin III,” July 2006, 3.

However, in the 1970s operators Frank and Dusty Williams took it upon themselves to install an 18 by 90 foot rescue chamber in a West Virginia mine. “[T]he coal paid for the work,” according to Dusty Williams.<sup>227</sup> The rescue of 72 Canadian potash miners who found refuge in a chamber stocked with food and water in the weeks after Sago brought renewed attention to their potential.

It is widely acknowledged that vast improvements in material strength and durability have occurred since the 1970s. And the UMWA’s Bill Banig says that “mine rescue chambers need to be put in the mines now.”<sup>228</sup> Davitt McAteer believes that miners “should have the option of safe refuge in a chamber capable of sustaining life for days if necessary.”<sup>229</sup> When Representative Nick J. Rahall II (D-West Virginia) heard about Australian mines that contained rescue chambers with three days worth of oxygen he asked, “Why can’t we have that?” But he already knew the answer: “it’s expensive.”<sup>230</sup> “The shelters would be costly,” the *Toledo Blade* editorializes, “but then Canadian mining companies manage to afford them. The families of 12 dead Sago miners would certainly say such an investment by coal companies would be just and justified.”<sup>231</sup>

There is room for bringing greater pressure to bear upon manufacturers of mining equipment to integrate safety technology into their products. Davitt McAteer would like “to shift responsibility for incorporating safety and health remedies into the production cycle, that is, away from the regulatory agencies and onto the mine machinery manufacturers. This is akin to requirements for the installation of safety equipment on

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<sup>227</sup> *Ibid.*, 80.

<sup>228</sup> Interview, July 28, 2006.

<sup>229</sup> “The Sago Mine Disaster: A Preliminary Report to Governor Joe Manchin III,” 80.

<sup>230</sup> *Herald-Dispatch*, January 15, 2006.

<sup>231</sup> Editorial, “Mine safety lags,” *Toledo Blade*, July 26, 2006.

automobiles is part of the automobile manufacturers' responsibility, and not the responsibility of the automobile driver." McAteer gives the following example of safety features that currently are not, but easily could be, incorporated into mining equipment: "Video cameras providing side and rear viewing for haulage truck drivers sitting 25 feet off the ground, are not standard on all equipment, nor are harden[ed] cabs with air supply systems. Despite being technologically available, these common sense protections are not designed into new pieces of equipment sold to the mining industry."<sup>232</sup> Fully developing the safety potential of equipment used to produce coal presents significant opportunities for enhancing safety.

The imperative to maximize short-term profits encourages coal companies to cut corners and be risk averse when presented with new safety technologies. Therefore, the government's role in ensuring mine safety is an essential one. It falls on government to monitor operators and ensure that they follow the law. Appropriate penalties play an important role here. "Pressure on regulatory agencies to allow unsafe businesses to operate is enormous," attests Emily A. Spieler, dean of Northeastern University's School of Law, "and the incentives to comply with regulations are small if the regulatory agency does not issue large fines."<sup>233</sup> Government is also the force most capable of seeing that new technologies are incorporated into mine safety programs. Government action provides our most effective mechanism for seeing that society's obligations to miners are met.

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<sup>232</sup> House Committee on Education and Labor, *Evaluating the Effectiveness of MSHA's Mine Safety and Health Programs*, 110<sup>th</sup> Congress, first session, May 16, 2007.

<sup>233</sup> *Washington Post*, January 8, 2006.

## CHAPTER FIVE

# A Balance Sheet of Life

*“Is it not dangerous to rely upon a balance sheet of life and death when there are so many chances of error in our calculations? Is it not enough to urge expenditures for the preservation of health because the happiness of mankind will be promoted thereby?”*<sup>234</sup>

-- Charles V. Chapin, public health pioneer, 1912

Business continually bemoans the necessity of complying with regulations that protect the public from corporate externalities. In 1997, Jim Chapin, chief executive of Brush Creek Mining and Development Co., said, “if we get any more regulated it will be difficult to take three steps without bumping into an inspector.”<sup>235</sup> A manager for Consolidation Coal Co. once claimed that an increase in inspections “creates uneasiness,” and one of the company’s former CEOs testified that “areas of overregulation should be carefully examined.”<sup>236</sup> James E. Baker, former president of the Harlan Coal Operators Association, testified, “there are too many law and regulations.”<sup>237</sup> “I would argue we have enough laws,” says Bill K. Caylor, president of the Kentucky Coal Association.<sup>238</sup>

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<sup>234</sup> Charles V. Chapin, “The Value of Human Life,” *American Journal of Public Health* 3, no. 2 (1913): 105. For Chapin’s life and work see James H. Cassidy, *Charles V. Chapin and the Public Health Movement* (Cambridge, Mass.: Harvard University Press, 1962).

<sup>235</sup> Cathleen Ferraro, “Miners’ Deaths Set Grim Record In State,” *Daily News of Los Angeles*, October 12, 1997, N22.

<sup>236</sup> Thomas Petzinger, Jr., “As Slump Hits Coal Mines, Owners Gripe About Excessive Inspectors,” *Wall Street Journal*, September 22, 1980, 27; Committee on Education and Labor, Subcommittee on Labor Standards, *Oversight Hearings on the Coal Mine Health and Safety Act of 1969 (Excluding Title IV)* 95<sup>th</sup> Congress, first session, June 1977 (Washington, D.C.: G.P.O., 1977), 318.

<sup>237</sup> House Committee on Government Operations, *Mine Safety and Health Act*, 97<sup>th</sup> Congress, second session, February 18-19, 1982 (Washington, D.C.: G.P.O., 1983), 179.

<sup>238</sup> *Belleville News-Democrat*, July 9, 2006.



A deregulatory impulse was the central article of faith for Dave D. Lauriski's "win/win" MSHA. "MSHA is a small group of political appointees, both inside the agency and more importantly, in the Office of the Secretary of Labor," observes Michael J. Wright, director of Health, Safety, and Environment for the United Steelworkers of America. "Unfortunately, the decisions they make can negate the effectiveness of the law, and frustrate the work of the career MSHA staff. Too often those decisions are ideological, poorly informed by actual facts, and seem designed to protect mine operators at the expense of miners."<sup>239</sup> Rigged corporatist tools such as a "market for risk" and "Cost-Benefit Analysis" that purportedly demonstrate how health and safety regulations are actually detrimental to those they are designed to protect attempt to obscure the ugly reality Wright describes.

#### A "FREE" MARKET PERSPECTIVE

Deputy Secretary of Labor D. Cameron Findlay states that he and Elaine L. Chao "both tend to come at issues from a free-market perspective."<sup>240</sup> A "free-market perspective" is a term that is frequently applied to a belief that while the government should actively regulate the economy in order to favor corporate interests, it should "deregulate" activities that are most important to protecting workers, consumers, and the environment. There are a number of corporate-funded "think-tanks" that promote this perspective, including the AEI-Brookings Joint Center on Regulatory Policy, the Cato Institute, the Heritage Foundation, and the Mercatus Center. Gary Ruskin, director of the

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<sup>239</sup> Democratic Members of the House Education and the Workforce Committee, *Forum on Mine Safety*, 109<sup>th</sup> Congress, second session, February 13, 2006.

<sup>240</sup> Piper Fogg, Jason Ellenburg, and Mark Murray, "Labor Department," *National Journal* 33, no. 25 (2001): 1969.

Congressional Accountability Project, says, “There are mercenary groups that function as surrogates when industry feels it’s not advantageous for it to speak directly.”<sup>241</sup> At its most extreme such a perspective rejects all government efforts to ensure safe workplaces, and portrays the “market” as a mechanism which “naturally” ensures safety. Such a naive attitude is expressed by the following soundbite from a corporatist who receives a great deal of exposure, television personality John Stossel: “Market forces protect us even where we tend most to think we need government.”<sup>242</sup> As David Callahan, senior fellow at Demos, observes, “Extreme laissez-faire thinking has held, foolishly, that the business world can police itself – that the ‘hidden hand’ of market competition will enforce moral behavior.”<sup>243</sup>

On behalf of the Cato Institute, mining industry lawyer C. Gregory Ruffennach has used this ideological premise to suggest that the market makes MSHA not merely useless, but actually detrimental. It is his recommendation that “[t]he federal government should get out of the mine safety business.”<sup>244</sup> This perspective directly contradicts University of Missouri-Rolla Professor of Mining R. Larry Grayson’s observation that “without doubt the agency [MSHA] has played a major role over the past 37 years in improving the safety of miners.”<sup>245</sup> Ruffennach writes that federal mine safety law not only “creates a miner’s entitlement to a safe workplace, [and] largely exempts miners

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<sup>241</sup> Dan Morgan, “Think Tanks: Corporations’ Quiet Weapon,” *Washington Post*, January 29, 2000, A1.

<sup>242</sup> John Stossel, remarks to Hillsdale College Seminar, Fort Myers Florida, February 20, 2001. Corporate watchdogs Russell Mokhiber and Robert Weissman state that there is an “issue he [Stossel] cares about deeply – protecting and preserving corporate power in America.” Stossel started out as a consumer reporter but he says that along the way “I got sick of it...I also now make so much money I just lost interest in saving a buck on a can of peas. Twenty years was enough” (Russell Mokhiber and Robert Weissman, “Stossel Tries to Scam His Public,” April 8, 2004).

<sup>243</sup> David Callahan, *The Cheating Culture: Why More Americans Are Doing Wrong to Get Ahead* (New York: Harcourt, 2004), 19.

<sup>244</sup> C. Gregory Ruffennach, “How Not to Protect Workers,” *Forbes*, February 27, 2006, 40.

<sup>245</sup> *Evaluating the Effectiveness of MSHA’s Mine Safety and Health Programs*, May 16, 2007.

from responsibility for their own and others' safety," but it also, "created a moral hazard, whereby miners have reduced incentives to provide for their own safety."<sup>246</sup> He apparently believes that laws, which prevent explosions, falling roofs, and chronic fatal illnesses, have improperly shifted the responsibility away from where he thinks they belong – individual miners. It is his opinion that "[f]ederal inspections give miners a false sense of security."<sup>247</sup> Shortly after Sago, Ruffennach asked "is it that because we have a federal system in place that this disaster occurred in the first place?"<sup>248</sup> Decrying the mitigation of safety hazards in this manner is a line of reasoning similar to one put forth by the often-cited deregulatory advocate W. Kip Viscusi for eliminating child-safe bottle caps. Most Americans likely view these caps as a sensible precautionary measure for preventing deadly accidents. Not Viscusi, in his opinion, "consumers have been lulled into a less-safety-conscious mode of behavior by the existence of safety caps."<sup>249</sup> This deleterious view is further repeated when coal industry spokesmen warn of the "false sense of security" provided by new safety technologies.

## NOT SO FREE TO CHOOSE

Ruffennach apparently believes that there is a "market for safety" in which individuals freely choose the level of safety they wish. Presumably in Ruffennach's framework those who do not want to work in an unhealthy and unsafe environment simply find employment elsewhere, leaving those jobs to be filled by those who actively

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<sup>246</sup> C. Gregory Ruffennach, "Saving Lives or Wasting Resources?: The Federal Mine Safety and Health Act," Cato Institute, September 19, 2002, 19, 20.

<sup>247</sup> *Forbes*, February 27, 2006.

<sup>248</sup> Monisha Bansal, "W.Va. Senators Push for Federal Mine Safety Probe," *CNSNews.com*, January 25, 2006.

<sup>249</sup> W. Kip Viscusi, "The Lulling Effect: The Impact of Child-Resistant Packaging on Aspirin and Analgesic Ingestion," *American Economic Review* 74, no. 2 (1984): 327.

seek out work in unsafe, unhealthy conditions. Workers in dangerous occupations, therefore, simply want a lower level of safety. Following this twisted logic, these workers' favorite hobby is in all probability Russian roulette. "I'm from West Virginia," states mine safety expert Davitt McAteer, "and it used to be that the answer for why miners died in the mines in our country was 'cultural.' In other words, those stupid bastards don't care about life, and in West Virginia, they're hillbillies anyway, and so that's the answer."<sup>250</sup> No one, with the possible exception of an individual such as professional daredevil Evel Knievel, actually willingly opts for dangerous work.<sup>251</sup>

The suggestion has been made that like the notoriety Knievel achieved for his stunts, there are compensating factors at work, which induce individuals to choose hazardous occupations (although multiple appearances on ABC's *Wide World of Sports* may be out of the question). "If a worker takes a job he knows is risky," writes Viscusi, "there must be some other aspect to compensate for the risk."<sup>252</sup> The Environmental Law Institute states, "Viscusi assumes...that the employer-employee relationship is characterized by full information on both sides and perfect competition – patently absurd premises to anyone familiar with dangerous workplaces."<sup>253</sup> The very assumption that workers are fully aware of the risks they face at work is unsound. Davitt McAteer states:

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<sup>250</sup> J. Davitt McAteer, "Globalization and the Environment," *Journal of Public Health Policy* 23, no.2 (2002): 234.

<sup>251</sup> Knievel died at the age of 69 on November 30, 2007. His later years were marred by pain. The man who once vaulted over 14 Greyhound buses found it difficult to get out of bed in the morning ("Evel Knievel Daredevil: 1938-2007," *The People*, December 2, 2007, 20).

<sup>252</sup> W. Kip Viscusi, *Risk By Choice: Regulating Health and Safety in the Workplace* (Cambridge, Mass.: Harvard University Press, 1983), 37.

<sup>253</sup> Thomas O. McGarity, Sidney Shapiro, and David Bollier, *Sophisticated Sabotage: The Intellectual Games Used to Subvert Responsible Regulation* (Washington, D.C.: Environmental Law Institute, 2004), 164. A study funded by the World Health Organization states: "The existence of asymmetric information works toward the advantage of the employers: revealing high-risk unsafe work environment might signal higher wages which the employers like to avoid" (Supriya Lahiri, Charles Levenstein, Deborah Imel Nelson, and Beth J. Rosenberg, "The Cost Effectiveness of Occupational Health Interventions: Prevention of Silicosis," *American Journal of Industrial Medicine* 48, no. 6 (2005): 512).

“I’ve been in mines with guys who are very responsible who don’t see or understand the risks.”<sup>254</sup> In the real world workers are not in a position to “bargain” with their employers as equals. In the words of one worker: “You can never balance the wage against the risk; you balance the wage against the alternative. The alternative is starving.”<sup>255</sup> And as the distinguished political scientist Harold J. Laski pointed out: “liberty of contract has no meaning in the absence of equality of bargaining power.”<sup>256</sup>

The great political economist John Stuart Mill observed: “The really exhausting and the really repulsive labors, instead of being better paid than others, are almost invariably paid the worst of all, because [they are] performed by those who have no choice.”<sup>257</sup> People are just not that free to choose their occupations, bound as they are by their particular social, economic, and geographic context. And some folks are the least free of all. Jerry Avorn, professor of social medicine at Harvard Medical School, once stated: “If you are a guy with just a high school education and you have worked in a chemical plant before and that is all that you know how to do and you live in an area where there are not many jobs around, then dammit, you are going to go work in a chemical plant.”<sup>258</sup> In response to a comment that going into mining was “an interesting career choice,” Representative Major Owens (D-New York) pointed out that, “These mine workers don’t necessarily see it as a choice. They, in those dangerous jobs, earn a

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<sup>254</sup> Interview, September 1, 2006. Economist Frank Ackerman and Georgetown University law professor Lisa Heinzerling point out that in fact “workers do not always understand the dangers they face at work” (Frank Ackerman and Lisa Heinzerling, *Priceless: On Knowing the Price of Everything and the Value of Nothing* (New York: New Press, 2004), 76).

<sup>255</sup> Dorothy Nelkin and Michael S. Brown, *Workers at Risk: Voices from the Workplace* (Chicago: University of Chicago Press, 1984), 180.

<sup>256</sup> Harold J. Laski, “The Present Position of Representative Democracy,” *The American Political Science Review* 20, no. 4 (1932): 631.

<sup>257</sup> John Stuart Mill, *Principles of Political Economy* (Amherst, N.Y.: Prometheus Books, 2004), 372.

<sup>258</sup> Pete Earley, “What’s a Life Worth?,” *Washington Post Magazine*, June 9, 1985, 11.

living wage where they could not earn it otherwise for their families.”<sup>259</sup> Take the case of miner Shone Sublett. The *Philadelphia Inquirer* reports that he “was 23, with a pregnant wife and little other opportunity for making money in central West Virginia.”<sup>260</sup> Sublett chose to go work in the mines. Given other options he may have made a different decision, but regardless of why he became a miner, as the beneficiaries of his and other miners’ labor, our nation has an obligation to provide them a safe workplace. “Mine safety is a moral imperative,” says Senator Robert C. Byrd (D-West Virginia). “These miners ought not to be considered expendable.”<sup>261</sup> Being in the possession of means to make mine work safer, our society has a moral obligation to use them. As an editorial broadcast by the radio station WTOP once stated: “Black lung and mine disasters...are symptoms of a social disease, and so long as they continue needlessly they will diminish our claim to be a civilized nation.”<sup>262</sup> People should never be forced to make an unnecessary choice between safety in the workplace and earning a living.

### A MARKET FOR RISK

According to individuals such as Viscusi, the market for risk not only aligns an individual with a job fitting their particular risk preference; it provides a general incentive for employers to make workplaces safer. “If the other nonmonetary aspects of the [more risky] job are equivalent to those for less risky jobs,” he writes, “this compensation [for added risk] will take the form of a higher wage rate. The need to pay higher wages in

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<sup>259</sup> *Mine Safety and Health: A Congressional Perspective*, March 16, 2006.

<sup>260</sup> Tina Moore, “Living With Risk,” *Philadelphia Inquirer*, January 7, 2006, A01.

<sup>261</sup> *Sago Mine Disaster and an Overview of Mine Safety*, January 23, 2006.

<sup>262</sup> Norman Davis, “A Brutalizing System,” *WTOP*, February 24 and 25, 1969.

turn provides a financial incentive for the employer to reduce the risk.”<sup>263</sup> Really, how curious then that every year in America there are thousands of workplace deaths and millions of injuries and illnesses. It appears that while employers may have an economic incentive to prevent accidents, it is a limited one. Viscusi points to assumed wage “premiums,” however, in the coal industry accidents leading to property damage and lost production time are perhaps motivating factors of greater importance. But, as Viscusi acknowledges, “making workplaces safer typically involves substantial costs.”<sup>264</sup> The employer’s market-based incentives, therefore, are circumscribed by the fact that economic considerations provide only a limited degree of motivation to make workplaces safer. In the words of Wake Forest University law professor Sidney A. Shapiro and attorney Randy Rabinowitz, “A firm will prevent health and safety risks to the point where the cost of further risk reductions exceeds the expected compensation that the firm will pay for injuries or illnesses.”<sup>265</sup> According to industrial hygienist Lisa Cullen: “History has proven that, on the whole, industry does not voluntarily manage safety and health to the uniform degree desired by society.”<sup>266</sup>

Preventative regulation is preferable to after the fact compensation because preemptive abatement of hazards serves to avert injury, illness, death, and suffering. Tort remedies encourage employers to be aware of workplace hazards in order to address potential liability issues.<sup>267</sup> Few workers, however, are fully compensated through

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<sup>263</sup> *Risk By Choice*, 37.

<sup>264</sup> *Ibid.*, 39.

<sup>265</sup> Sidney A. Shapiro and Randy Rabinowicz, “Voluntary Regulatory Compliance in Theory and Practice: The Case of OSHA,” 52 *Administrative Law Review* 97, 105 (2000).

<sup>266</sup> *A Job to Die For*, 141.

<sup>267</sup> On tort remedies for societal injuries see Thomas H. Koenig and Michael L. Rustad, *In Defense of Tort Law* (New York: New York University Press, 2001).

litigation.<sup>268</sup> Workers' compensation insurance gets needed benefits to workers.<sup>269</sup> But this no-fault compensation system also reduces employers' liability and provides little incentive for an overall improvement of occupational safety. Dean J. Haas, former counsel to the North Dakota Workers' Compensation Bureau, writes that workers' compensation "serves to shield employers from the consequences of allowing an unsafe work environment," and that it "has not provided sufficient incentive to take necessary safety precautions."<sup>270</sup> Professor Emily A. Spieler reports: "Neither aggregate safety data nor more focused empirical studies give strong support to the notion that the high costs of workers' compensation in the aggregate, or enterprise-specific costs, have motivated large number of employers to take injury prevention seriously."<sup>271</sup>

Abandoning matters of worker health and safety to the market's whims provides no assurance that employers will protect employees to the standard that society deems appropriate.<sup>272</sup> Mine operators act on the incentive to increase their profits by

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<sup>268</sup> Elinor P. Schroeder and Sidney A. Shapiro, "Responses to Occupational Disease: The Rise of Markets, Regulation, and Information," *72 Georgetown Law Journal* 1231, 1250 (1984).

<sup>269</sup> The ability of workers' compensation to meet the needs of workers is being undermined. See Marlys Harris, "Workers Comp: Falling Down on the Job," *Consumer Reports*, February 2000, 29.

<sup>270</sup> Dean J. Haas, "Falling Down on the Job: Workers' Compensation Shifts From a No-Fault to a Worker-Fault Paradigm," *79 North Dakota Law Review* 203, 217, 294 (2003).

<sup>271</sup> Emily A. Spieler, "Perpetuating Risk? Workers' Compensation and the Persistence of Occupational Injuries," *31 Houston Law Review* 119, 123 (1994). Professor Emily A. Spieler and Glenn M. Shor of California's Division of Workers' Compensation state: "As costs are spread among insured employers, individual employers' financial incentives to prevent injuries decline. Experience rating systems, theoretically intended to focus costs on employers with higher rates of injury, often fail to accomplish this goal: they are slow to respond and unresponsive to injuries with long latency periods; encourage claims suppression, rather than injury prevention; and, due to various insurance principles, are designed to shield smaller employers from fluctuations in rates. Despite the presence of the elaborate social insurance structure of workers' compensation, reduced benefits and spreading of costs transfer the economic risks and costs of injuries to workers." (Emily Spieler and Glenn Shor, "Editorial: The Continuing Struggle for Adequate Compensation for Injured Workers," *New Solutions* 10, no. 3 (2000): 200).

<sup>272</sup> In 2005, 15 refinery workers at the oil company BP's operations outside Galveston, Texas were killed by an explosion. When Carolyn Merritt of the U.S. Chemical Safety Board was asked if she thought the accident was preventable she replied: "Absolutely." BP blamed the explosion on "operator error," however, *60 Minutes* "found evidence that BP ignored warning after warning that something terrible could happen at Texas City." Although BP had cleared \$19 billion in profit the previous year, it was cutting maintenance costs at the plant. As Brent Coon, a lawyer representing victims' families, says, "the deal is



reducing their costs. And they will behave in shortsighted manners that increase their exposure to risk of property damage and lost production. For instance, instead of using traditional cinder blocks to seal off previously mined areas, isolating them from areas of the mine that are still being worked, some operators have substituted cheaper synthetic blocks. These foam seals were used at the recent Sago and Darby disaster sites, and in both instances they failed to contain explosions.<sup>273</sup> “We opposed the use of the alternative material block seals from the beginning,” says Dennis O’Dell, administrator for occupational health and safety for the UMWA. “The material isn’t what it should be for the manner in which it is being used.”<sup>274</sup> A report commissioned by the State of West Virginia in the wake of Sago states that the blocks “were constructed of a material...that should never have been approved for the purpose of containing an explosion.”<sup>275</sup>

John Henson, managing editor of the *Harlan Daily Enterprise*, believes that “[c]oal miners are still nothing more than another piece of equipment for some officials in the coal industry.” Henson cites a memorandum from Massey Energy Co. CEO Don L. Blankenship as an example of the attitude he describes. “If any of you have been asked by your group presidents, your supervisors, engineers or anyone else to do anything other than run coal,” stated the memo, “you need to ignore them and run coal.” In the words of Blankenship, “coal pays the bills.”<sup>276</sup> Coal executives seek to extract the maximum amount of coal as quickly and cheaply as possible, which is an approach that can negatively impact miners’ safety.

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you want to make a billion dollars or do you want to make \$998 million? They chose to make a billion dollars” (“The explosion At Texas City,” *60 Minutes*, CBS, October 29, 2006).

<sup>273</sup> Samira Jafari, “Ky. Mine Investigators Look at Gas Seals,” *Yahoo! News*, May 23, 2006, [http://news.yahoo.com/s/ap/20060523/ap\\_on\\_re\\_us/mine\\_explosion](http://news.yahoo.com/s/ap/20060523/ap_on_re_us/mine_explosion)

<sup>274</sup> *Pittsburgh Post-Gazette*, May 28, 2006.

<sup>275</sup> “The Sago Mine Disaster: A Preliminary Report to Governor Joe Manchin III,” 41.

<sup>276</sup> John Henson, “Miners’ safety not a priority for coal industry,” *Harlan Daily Enterprise*, February 25, 2006, 4.

Dave Mlakar, health, safety, and environment advisor for USWA District 11, explains what can happen when corners are cut by reducing the number of workers. “We’ve got safety issues,” he says of the Minnesota metal mine where he works. “One of the main problems is they’ve cut our work force back. For such things as housekeeping, you don’t have the people to do the job. They could be hiring a lot of people just to do the basic stuff.”<sup>277</sup> Proper “housekeeping” in a coalmine requires that workers spend time on tasks which are not directly connected with production – such as ensuring that items are in their proper place, removing extraneous objects, and coating the walls with ground limestone to help prevent coal dust accumulation. Prior to the explosion that killed five miners at Darby Mine No. 1, MSHA awarded the operator 47 citations dating back to 2001 for allowing coal dust and other explosive materials to build up. “For an operator not to do that is pure neglect,” says O’Dell. “They shouldn’t be in business and MSHA should be enforcing those laws strictly.” He adds, “[t]hey’re [the coal industry] not going to make the mines clean and safe unless someone makes them do it.”<sup>278</sup>

## COST-BENEFIT ANALYSIS

Opponents of health and safety regulations have fashioned a number of other ideological arguments to support their push to diminish regulation. A corporatist formula for cost-benefit analysis – based on the premise that regulations create vast burdens, which exceed their benefits to society – is one of the chief tools employed to justify

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<sup>277</sup> Lee Bloomquist, “Violations Soared in ’05,” *Duluth News-Tribune*, February 5, 2006, 1.

<sup>278</sup> *Pittsburgh Post-Gazette*, May 28, 2006.

undoing these protections.<sup>279</sup> This instrument allows corporatists to depict regulations as a waste of money, a drain on society's resources, and a brake on economic growth.

Typically the monetary "burden" is asserted to be astronomical. Such attacks on the allegedly high cost of government regulation owe their origins to Murray L.

Weidenbaum, founder of the corporate-funded Center for the Study of American

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<sup>279</sup> Cost-Benefit Analysis gained significant leverage over policy making when it began to be applied by OMB. The recent political trajectory has caused new regulations to be regularly referred to OMB for a review of their economic efficiency. The passage of legislation establishing agencies designed to protect workers and our environment, such as MSHA, EPA, and OSHA, in the late 1960s and early 1970s precipitated an industry backlash, and the forerunners of today's OMB oversight. The Nixon Administration placed these newly created agencies' significant new regulations under the review of other departments and agencies. President Gerald R. Ford issued Executive Order 11821, which required analysis of rules' economic effects. But it was the Carter Administration that first applied Cost-Benefit Analysis in a systematic manner by requiring agencies to apply the mechanism to their regulations. President Jimmy Carter was convinced by those who claimed that regulations were a significant cause of the era's high rate of inflation (because they allegedly led to higher prices) to take action on the matter (Martin Tolchin and Susan J. Tolchin, "The Rush to Deregulate," *New York Times Magazine*, August 21, 1983, 34). He established the Regulatory Analysis Review Group to evaluate regulations, with economic efficiency serving as the decisive factor.

Upon the election of President Ronald Reagan, anti-regulatory forces had an entirely sympathetic figure in the White House. Gary Cross, professor of history at Pennsylvania State University, states that Reagan sought "to transform the regulators into deregulators and to turn the public interest over to the market" (Gary Cross, *An All-Consuming Century: Why Commercialism Won in Modern America* (New York: Columbia University Press, 2000), 203). Reagan instituted Cost-Benefit Analysis as the arbiter of regulation when he issued Executive Order 12291, which required regulations to both meet a cost test and be approved by OMB. Journalist Martin Tolchin and his wife Susan J. Tolchin, a public policy professor at George Mason University, concluded that "OMB's capture of the regulatory process represented a victory for the President over the agencies," as the President was now empowered to interfere in their daily affairs (Martin Tolchin and Susan J. Tolchin, *Dismantling America: The Rush to Deregulate* (New York: Oxford University Press, 1983), 71). The Reagan Administration took specific actions that harmed MSHA's ability to enforce the law. The Heritage Foundation gave new Administration officials a "blueprint" for governance – *Mandate for Leadership* (Kevin Phillips, *Boiling Point: Republicans, Democrats, and the Decline of Middle-Class Prosperity* (New York: Random House, 1993), 41). This document foresaw "redirecting the agency's focus from an adversarial one to a cooperative one" (Charles, L. Heatherly, ed., *Mandate for Leadership: Policy Management in a Conservative Administration* (Washington, D.C.: The Heritage Foundation, 1981) 484). Reagan's appointee to head MSHA, Ford B. Ford, took exactly that approach. Industrial hygienist James L. Weeks and Maier Fox felt compelled to state:

While it is currently popular to criticize government regulation designed to protect workers' health and safety as being too costly, we do not share this view. On the contrary, the experience in coal mining has been that regulations initiated in 1969 have resulted in a significant decline in the risk of accidental death for underground and surface coal miners (James L. Weeks and Maier Fox, "Fatality Rates and Regulatory Policies in Bituminous Coal Mining, United States, 1959-1981," *American Journal of Public Health* 73, no. 11 (1983): 1280).

By the end of Reagan's second term, the *Washington Post* reported that "observers have said the agency is in turmoil" (David S. Hilzenrath, "Mine Safety Nominee Defeated," *Washington Post*, August 6, 1987, A19).

Business, who claimed in 1978 that regulations cost over \$100 billion annually. Julius W. Allen, former chief of the economics division of the Library of Congress' Congressional Research Service, analyzed this assertion and found "enough questionable components to make the totals arrived at suspect and of doubtful validity."<sup>280</sup> "He [Weidenbaum] was the economist as lobbyist," writes journalist John B. Judis.<sup>281</sup> According to Thomas O. McGarity, a law professor at the University of Texas, and Ruth Ruttenger, an economist at the George Meany Center for Labor Studies, "it is fair to conclude that Weidenbaum's widely cited \$100 billion-per-year figure had very little empirical basis."<sup>282</sup> Judis states that Weidenbaum did research intended "to advance business's war on regulation."<sup>283</sup> Journalists Ronald Brownstein and Nina J. Easton called Weidenbaum "a leading apologist for American business" whose "rallying cry" was "Free the Fortune 500."<sup>284</sup> Weidenbaum's successors continue his work today: the Competitive Enterprise Institute estimated the cost of regulation in the United States to be \$1.13 trillion in 2005.<sup>285</sup> Such numbers would be almost comic were they not devised to advance the harmful notion of industry self-regulation that failed so miserably for so long.

Economist Lester C. Thurow writes, "in the United States...there are no strong political forces arguing for regulation for the sake of regulation. Regulations occur

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<sup>280</sup> Timothy B. Clark, "The Costs and Benefits of Regulation – Who Knows How Great They Really Are?," *National Journal* 11, no. 48 (1979): 2023.

<sup>281</sup> John B. Judis, *The Paradox of American Democracy: Elites, Special Interests, and the Betrayal of Public Trust* (New York: Pantheon Books, 2000), 170.

<sup>282</sup> Thomas O. McGarity and Ruth Ruttenger, "Counting the Cost of Health, Safety, and Environmental Regulation," 88 *Texas Law Review* 1997, 2013 (2002).

<sup>283</sup> *The Paradox of American Democracy*, 171.

<sup>284</sup> Ronald Brownstein and Nina Easton, *Reagan's Ruling Class: Portraits of the President's Top 100 Officials* (Washington, D.C.: The Presidential Accountability Group, 1982), 68.

<sup>285</sup> Clyde Wayne Crews, "Ten Thousand Commandments: An Annual Snapshot of the Regulatory State," Competitive Enterprise Institute, June 28, 2006, <http://www.cei.org/gencon/025,05407.cfm>

because the market fails to perform some task that the population wants performed.”<sup>286</sup> MSHA came into existence because there was wide recognition that without enforcement of health and safety regulations the mining industry would not act to ensure that miners came home safely to their families at the end of their shifts. Cato’s C. Gregory Ruffennach charges, “From a cost/benefit perspective, the Mine Act is simply not a wise use of the resources that society chooses to commit to lifesaving.”<sup>287</sup> Statistics, however, demonstrate that the Coal Mine Health and Safety Act of 1969 and the Federal Mine Safety and Health Act of 1977 have been extraordinarily successful at achieving reductions in mine injuries and fatalities. When compared to the thirty years prior to enactment of the Coal Act in 1969, the succeeding thirty years witnessed 86 percent fewer coal mining fatalities.<sup>288</sup> Former Bituminous Coal Operators Association President Joseph P. Brennan stated in 1979: “No one can seriously question the value of the current Coal Mine Health and Safety Act.”<sup>289</sup> Furthermore, arguments of “scarcity” in a society where a corporate criminal, the vastly compensated former CEO of Tyco, L. Dennis Kozlowski, spent \$6,000 on a shower curtain, \$15,000 on an umbrella stand, and \$2.1 million on a birthday party (replete with that memorable ice sculpture), are suspect.<sup>290</sup> The issue at hand is about allocation of resources, rather than general dearth.

Even serious cost-benefit studies are often burdened with severe flaws; beginning with the data used itself. Public Citizen reports that “[a]gencies rely heavily on industry

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<sup>286</sup> Lester C. Thurow, *The Zero-Sum Society: Distribution and the Possibilities for Economic Change* (New York: Basic Books, 2001), 136.

<sup>287</sup> “Saving Lives or Wasting Resources?: The Federal Mine Safety and Health Act,” 23.

<sup>288</sup> Committee on Education and the Workforce, Subcommittee on Workforce Protections, *A Review of Mine Safety & Health: The State of the Industry Today*, 106<sup>th</sup> Congress, second session, September 14, 2000.

<sup>289</sup> Ben A. Franklin, “Top Coal Official Backs Mine Health and Safety Act,” *New York Times*, August 29, 1979, A14.

<sup>290</sup> Greg Farrell, *Corporate Crooks: How Rogue Executives Ripped Off Americans...and Congress Helped Them Do It!* (Amherst, N.Y.: Prometheus Books, 2006), 116, 119-22.

self-reporting, which often leads to limited and biased data.”<sup>291</sup> University of Connecticut law professor Richard W. Parker writes, “we simply do not know how ‘efficient’ or ‘rational’ government regulation is, from a cost-benefit perspective, because the principal tests that have been used to reach such judgments are invalid.”<sup>292</sup> Regulatory agencies frequently overestimate the cost of regulations to a significant degree. Economists Eban Goodstein and Hart Hodges looked at a dozen regulatory cost estimates and found that not only were they greater than actual costs, but “[i]n all cases but one, the initial estimate was at least double the actual costs.”<sup>293</sup> The chemical industry once opposed the introduction of a federal standard for the carcinogen vinyl chloride on the grounds that it would cost \$65-90 billion and two million people would lose their jobs. No jobs were lost upon adoption of the standard, and it cost twenty times less than industry had claimed it would.<sup>294</sup> Contrary to corporatists’ assertions, Professor Lisa Heinzerling concludes that “the overall picture is of a system striving to achieve a broad range of regulatory purposes and doing so at a reasonable cost.”<sup>295</sup>

Unsophisticated as cost analysis studies are, quantitative appraisals of benefits are even more rudimentary. “In most agency cost-benefit analyses,” writes Lynn E. Blais, a law professor at the University of Texas, “the quantified component of the benefit side is strikingly limited.” To paraphrase Vice President Walter F. Mondale, “Where’s the benefit?” Blais states that the majority of “criticisms of the current [regulatory] system are premised on...the most narrow possible concept of regulatory benefit – premature

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<sup>291</sup> Ruth Ruttenberg and Associates, “Not Too Costly After All: An Examination of the Inflated Cost-Estimates of Health, Safety and Environmental Protections,” Public Citizen, February 2004, 3.

<sup>292</sup> Richard W. Parker, “Grading the Government,” 70 *University of Chicago Law Review* 1345, 1357 (2003).

<sup>293</sup> Eban Goodstein and Hart Hodges, “Polluted Data: Overestimating Environmental Costs,” *American Prospect*, November-December 1997, 64.

<sup>294</sup> Mark Green, “The Faked Case Against Regulation,” *Washington Post*, January 21, 1979, C1.

<sup>295</sup> Lisa Heinzerling, “Regulatory Costs of Mythic Proportions,” 107 *Yale Law Journal* 1981, 2069 (1998).

cancer deaths averted.” A “measure [that] does not come close to capturing the range of regulatory goals of most environmental, health, and safety measures.”<sup>296</sup> The aesthetic benefit of reducing smog to the millions of visitors who travel to Yosemite National Park every year, for instance, is not easily quantified using Cost-Benefit Analysis.

Cost-Benefit Analysis’ crude approach to evaluating benefits attempts to fasten a monetary figure on human life. \$6.1 million is one of the numbers frequently cited. This particular valuation was arrived at by the Environmental Protection Agency when it was trying to determine how to regulate arsenic in drinking water. Not all lives, however, are assessed at equal value. Poorer people may be found to have cheaper lives because their future earning potential is lower and they are prepared to take greater risks for less compensation. Older peoples’ lives have been assessed at a lesser rate, and future lives are similarly devalued. There is something inherently repulsive to such commodification of human lives. Author Jim Holt states, “No one should be knowingly sacrificed for a sum of money: that’s what we mean when we say that human life is priceless.”<sup>297</sup> Placing a monetary value on life transforms human beings into merely another item with price tags attached – commodities like a pound of iron or a lump of coal. On the other hand, “If we proclaim that something is not for sale,” writes Steven Kelman, professor of public policy at Harvard University, “we make a once-and-for-all judgment of its special value.”<sup>298</sup> “Many, if not most, aspects of life can never be, and should never be, decided by the economists’ yardstick,” argues Mark Green, former public advocate of the City of New York. “The abolition of slavery or child-labor laws certainly would never have

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<sup>296</sup> Lynn E. Blais, “Counting Costs and Calculating Benefits,” 88 *Texas Law Review* 2059, 2063-4 (2002).

<sup>297</sup> Jim Holt, “The Human Factor,” *New York Times*, March 28, 2004, 13.

<sup>298</sup> Steven Kelman, “Cost-Benefit Analysis: An Ethical Critique,” in *The Ford Pinto Case: A Study in Applied Ethics, Business, and Technology*, Douglas Birsch and John H. Fielder, eds. (Albany: SUNY Press, 1994), 133.

passed a cost-benefit test.”<sup>299</sup> Economist Frank Ackerman and Professor Lisa Heinzerling conclude that “Cost-benefit analysis cannot overcome its fatal flaw: it is completely reliant on the impossible attempt to price the priceless values of life, health, nature, and the future.”<sup>300</sup>

The value of Cost-Benefit Analysis is further compromised by its lack of impartiality. It is not the mechanism for arriving at disinterested judgment that its promoters present. “[M]athematical cost-benefit analyses,” according to Mark Green, “...are often ideological documents designed to prove preconceived notions.”<sup>301</sup> These “notions” are almost invariably that regulations should be weakened if already in existence, and not introduced if they do not yet exist. Professor Thomas O. McGarity points out that “in the real political world the strongest advocates of cost-benefit analysis are large corporations, trade associations and associated think tanks, not exactly entities cut in the mold of Mother Teresa.”<sup>302</sup>

Take the Mercatus Center, an aggressive exponent of Cost-Benefit Analysis that has exerted considerable sway in regulatory affairs under the Bush Administration. It was guided into existence by Wendy L. Gramm, an Office of Management and Budget (OMB) official during the Reagan Administration who has served on the boards of such corporations as Enron and Iowa Beef Processors. The *Wall Street Journal* reports that “Mercatus’s rise owes much to the oil-and-gas company Koch Industries Inc.,” which gave \$10 million to get Mercatus up and running.<sup>303</sup> Koch Industries is a privately held

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<sup>299</sup> *Washington Post*, January 21, 1979.

<sup>300</sup> Frank Ackerman and Lisa Heinzerling, “Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection,” 150 *University of Pennsylvania Law Review* 1553, 1584 (2002).

<sup>301</sup> *Washington Post*, January 21, 1979.

<sup>302</sup> Thomas O. McGarity, “A Cost-Benefit State,” 50 *Administrative Law Review* 7, 34 (1998).

<sup>303</sup> Bob Davis, “Rule Breaker,” *Wall Street Journal*, July 16, 2004, A1.



oil company that pumps vast sums of money into political advocacy work aligned with its interests.<sup>304</sup> Public Citizen describes Mercatus as “a wholly-owned subsidiary of Koch Industries and other corporate interests.”<sup>305</sup> The Center for Public Integrity notes that “Mercatus has been effective in its political goals – and those of Koch Industries.”<sup>306</sup> Koch is no fan of regulations such as the environmental ones that it was fined \$40 million for violating in 2000 and 2001. At the beginning of President George W. Bush’s first term OMB asked for public input on regulations that could be “rescinded or changed.” Mercatus’ submitted 44 regulations, and 14 of these were selected for “high priority review.”<sup>307</sup> Mercatus’ friends in the Administration included the chief of OMB, John D. Graham, who had served on its advisory board. Joan Claybrook, president of Public Citizen, made the following statement about Graham’s nomination: “The president has nominated someone intent on eradicating basic government safeguards to head the very office charged with overseeing them.”<sup>308</sup> In the summer of 2006, Susan Dudley of Mercatus was tapped to run the Office of Information and Regulatory Affairs.<sup>309</sup> The Senate, however, refused to confirm her, so the White House bypassed them through a recess appointment.

Arguments against health and safety regulations are politically motivated, and corporate power and profits have been primary beneficiaries of such deregulatory actions. Corporatist formulas for cost-benefit analysis are rigged to consistently favor the

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<sup>304</sup> Curtis Moore, “Rethinking the Think Tanks,” *Sierra* 87, no.4 (2002): 56.

<sup>305</sup> *Wall Street Journal*, July 16, 2004.

<sup>306</sup> Bob Williams and Kevin Bogardus, “Koch’s Low Profile Belies Political Power,” Center for Public Integrity, <http://www.publicintegrity.org/oil/report.aspx?aid=347>

<sup>307</sup> G.A.O., *Rulemaking* (Washington, D.C.: G.A.O., September 2003), 103.

<sup>308</sup> Andrew Schneider, “A safety blast for asbestos agencies,” *Seattle Post-Intelligencer*, March 27, 2001.

<sup>309</sup> “Scholar Is Named To White House Post,” *Wall Street Journal*, August 1, 2006, A4. For further information on Susan Dudley see Public Citizen and OMB Watch, “The Cost Is Too High: How Susan Dudley Threatens Public Protections,” September 2006.

corporate position against that of the worker. The AFL-CIO's Health and Safety Director Margaret M. Seminario states: "Cost-benefit calculations are political documents. They always get used as a way not to protect people."<sup>310</sup>

Health and safety regulations serve the higher values of preserving human life and preventing suffering. The market is simply not a reliable mechanism for ensuring these values are met. Furthermore, biased forms of analysis that attempts to eliminate regulations are not only flawed methodologically, they miss the big picture: that some things – such as human beings – ought not be treated as commodities.<sup>311</sup> In 1983, Representative Austin J. Murphy stated: "Worker safety laws like the Federal Coal Mine Health and Safety Act have greatly improved the work environment for our miners."<sup>312</sup> Our mine safety laws *have* been effective. As Richard L. Trumka, past-president of the UMWA, has explained, mining "needs its own watchdog agency because mining presents unique risks to its workers that must be constantly monitored to protect workers against inherent hazards."<sup>313</sup> Even setbacks occurring under the watch of such MSHA administrators as Dave D. Lauriski have not done away with the significant improvements in occupational safety standards for miners that have been achieved. With a modest annual budget (\$325 million for 2007) to monitor the safety of all workers in

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<sup>310</sup> Interview, July 26, 2006.

<sup>311</sup> On the commodification of everything see James Ridgeway, *It's All For Sale: The Control of Global Resources* (Durham, N.C.: Duke University Press, 2004).

<sup>312</sup> House Committee on Education and Labor, Subcommittee on Health and Safety, *Hearing on Norton, Virginia Southmountain Coal Mine Explosion*, 103<sup>rd</sup> Congress, first session, May 26, 1983 (Washington, D.C.: G.P.O., 1993), 1.

<sup>313</sup> Anicj Jesdanun, "Mine Safety Advocates Fight Agency-Closing Plan," *Times Leader*, July 28, 1995, 12A.

the multi-billion dollar mining industry (metal and non-metal mines in addition to coal mines), MSHA has achieved remarkable success at reducing injuries and fatalities.<sup>314</sup>

## CHAPTER SIX

# Countervailing Authority

*“In the market economy the natural focus of power is the employer, most often the business firm. The right of workers to join together and assert a countervailing authority must be central and accepted.”*<sup>315</sup>

-- John Kenneth Galbraith, economist, 1996

It is essential that a wide range of groups be allowed representation within our democratic system. The Pulitzer Prize winning historian Arthur M. Schlesinger, Jr., once wrote, “American democracy has come to accept the struggle among competing groups for the control of the state as a positive virtue.”<sup>316</sup> In the realm of health and safety regulation, business interests habitually oppose government oversight, while workers have lent support to such measures, and unions most commonly fill the role of worker advocate. According to Justice Louis D. Brandeis: “The parties to the labor contract must be nearly equal in strength if justice is to be worked out, and this means that the workers must be organized and that their organizations must be recognized.”<sup>317</sup> For miners to receive the level of representation and influence they deserve and require unions are

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<sup>314</sup> Office of Management and Budget, *Budget of the United States Government, Fiscal Year 2009* (Washington, D.C.: G.P.O., 2008), 757.

<sup>315</sup> John Kenneth Galbraith, *The Good Society: The Humane Agenda* (Boston: Houghton Mifflin Company, 1996), 66.

<sup>316</sup> Arthur M. Schlesinger, Jr., *The Age of Jackson* (Boston: Little, Brown and Company, 1946), 505.

<sup>317</sup> Osmond K. Fraenkel, ed., *The Curse of Bigness; Miscellaneous Papers of Louis D. Brandeis* (New York: The Viking Press, 1935), 43.

indispensable.<sup>318</sup> The Reverend Teresa K. Mithen says: “The company has all the money and can use it to wield power over the miners.... The only way the miners can balance the power of the company’s money is by organizing.”<sup>319</sup>

There are numerous examples of instances where industry has fought against efforts to improve health and safety in the workplace. And the coal industry does not stand alone in this respect: The Chemical Manufacturers Association once placed OSHA’s carcinogen policy toward the top of a proposed “hit list.”<sup>320</sup> Political scientist Robert E. Botsch writes that the textile industry discounted byssinosis (“brown lung”) “by simply denying that the disease existed and ignoring challenges to that position,” until under the weight of a mountain of evidence the issue finally blew up in its face during the 1970s.<sup>321</sup>

It is worth noting that workplace safety issues frequently intersect with the safety of the general public. Back in the 1960s, railroad companies removed firemen from trains, on the premise that technological advances had made them unnecessary. The unions representing the firemen argued that elimination would increase accidents, while the industry claimed it would not.<sup>322</sup> A study analyzing the effects of reducing the number of firemen between 1962 and 1967 found that train accidents increased.<sup>323</sup>

“Instead of five-men crews of two decades ago,” the *Chicago Tribune* reported in 1996,

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<sup>318</sup> Paul F. Clark, professor of Labor Studies and Industrial Relations at Penn State University, writes: “At their heart, unions exist to serve as a countervailing power to employers” (Paul F. Clark, “Look for the union influence,” *Pittsburgh Post-Gazette*, August 31, 2003, B2).

<sup>319</sup> “Religious leaders back effort by coal miners to unionize,” April 27, 2006.

<sup>320</sup> Thomas O. McGarity and Sidney A. Shapiro, *Workers at Risk: The Failed Promise of the Occupational Safety and Health Administration* (Westport, Conn.: Praeger, 1993), 79.

<sup>321</sup> Robert E. Botsch, *Organizing the Breathless: Cotton Dust, Southern Politics, and the Brown Lung Association* (Lexington: The University Press of Kentucky, 1993), 120. In 1971, Ralph Nader wrote: “The reaction of the industry to warnings of brown lung has been to deny existence of the disease and to block attempts to study it” (Ralph Nader, “The Cotton-Mill Killer,” *The Nation* 212, no. 11 (1971): 336).

<sup>322</sup> “Rails and Union Clash on Safety,” *New York Times*, June 20, 1965, 54.

<sup>323</sup> Franklin M. Fisher and Gerald Kraft, “The effect of the removal of the firemen on railroad accidents, 1962-1967,” *Bell Journal of Economics and Management Science* 2, no. 2 (1971): 70-94.

“most trains carry only an engineer and conductor.”<sup>324</sup> A spate of railroad accidents that same year prompted James M. Brukenhoefer, legislative representative of the United Transportation Union, to point out: “We had a firemen or an assistant engineer in the cab with the engineer, but we decided *they* were redundant. Now it falls down to one human being. To save money we have taken away the layers of safety.”<sup>325</sup>

Labor unions have long been at the forefront of efforts to improve health and safety standards in America’s workplaces. Labor historian Nelson N. Lichtenstein states that “no consistent [health and safety] regulation is really possible without hearing from the workers themselves, and their voice will remain silent unless they have some institution – such as a union – that protects them from the consequences of speaking

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<sup>324</sup> Fred Bayles, “Overworking on the Railroad,” *Chicago Tribune*, June 23, 1996, 1.

<sup>325</sup> Matthew L. Wald, “Officials Split On Improving Train Safety,” *New York Times*, February 28, 1996, A14. Hours-of-service rules provide an illustrative example of an instance where advocates for workers and the public have had to battle employers to ensure safety. These rules are designed to prevent exhausted truckers from operating large commercial vehicles on our nation’s highways. “[T]he hours-of-service rules in trucking ought to prohibit competition among carriers based on overwork of human beings,” states Michael H. Belzer, professor of urban and labor studies at Wayne State University. According to Belzer trucking deregulation meant that “[t]rucks have become rolling sweatshops during the 1990s” (Michael H. Belzer, *Sweatshops on Wheels: Winners and Losers in Trucking Deregulation* (New York: Oxford University Press, 2000), 166). The National Transportation Safety Board has estimated that 750 to 1,500 deaths occur on our roads annually because truck drivers fall asleep at the wheel (Matthew L. Wald, “Truckers Are Driving With Too Little Sleep, Research Shows,” *New York Times*, September 11, 1997, A22). In 1997, an article in the *New England Journal of Medicine* reported that driver fatigue is the single greatest problem in commercial transportation (Michael M. Mitler, et al., “The Sleep of Long-haul Truck Drivers,” *New England Journal of Medicine* 357, no. 11 (1997): 755-62). In fact, fatigue plays a role in 57 percent of fatal truck driver crashes (Michael H. Bonnet and Donna L. Arand, “We Are Chronically Sleep Deprived,” *Sleep* 18, no. 10 (1995): 908-11). William C. Dement, professor of psychiatry and behavioral sciences at Stanford University, states: “Recent studies comparing performance impairment caused by alcohol and sleep deprivation imply that our roads contain huge vehicles traveling at high rates of speed whose drivers are as impaired as those whose blood alcohol levels exceed the legal limit” (Scripps Research Institute, “Study at The Scripps Research Institute Indicates that Long-Haul Truckers Obtain Less Sleep than is Necessary for Alertness on the Job,” press release, September 11, 1997). In an effort to wring as much work as possible from its drivers, the trucking industry has successfully pushed for truckers to be allowed to spend longer stretches behind the wheel during any given time period. A 2003 rule permitted driving time without a break to rise from ten to eleven hours, and increased the amount of time a trucker could spend behind the wheel in a seven-day period by over 25 percent. “Some greedy employers,” says James P. Hoffa, president of the International Brotherhood of Teamsters, “are trying to squeeze drivers to enrich their bottom line at the expense of public safety on America’s highways” (International Brotherhood of Teamsters, “Teamsters Oppose New Drive Rule as Threat to Highway Safety,” press release, August 19, 2005).

up.”<sup>326</sup> W. Kip Viscusi acknowledges that “[u]nions have traditionally played a major role in promoting occupational safety.”<sup>327</sup> Historically, there has been ample evidence of union action in defense of worker health and safety; and miners’ unions have played a particularly important role on this front. In the nineteenth century, anthracite miners’ first industry-wide union – the Workingmen’s Benevolent Association – achieved passage of a local mine-safety law in Pennsylvania.<sup>328</sup> At the turn of the twentieth century, states where the UMWA was strong – like Pennsylvania and Illinois – had the best mine safety laws. According to Professor Barbara Ellen Smith of Virginia Polytechnic Institute the presence of the UMWA had a significant and positive effect on fatality rates in the mines. “[I]n 1907, there were 2,47 fatalities per 1,000 employed miners in the completely unionized states, 5.07 per 1,000 miners in those that were partially unionized, and 9.49 in the nonunionized states.”<sup>329</sup> In the 1910s the Molder’s Union took the lead in identifying the increasing threat of silicosis created by new sandblasting technologies.<sup>330</sup> Meanwhile, the Western Federation of Miners led the struggle to purge silica dust exposure from western mines.<sup>331</sup>

Labor historians Melvyn Dubofsky and Warren Van Tine write that during the 1930s UMWA President John L. Lewis began lobbying the Roosevelt Administration about “the need for more stringent federal laws to compensate for weak controls in those

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<sup>326</sup> Nelson Lichtenstein, *State of the Union: A Century of American Labor* (Princeton, N.J.: Princeton University Press, 2002), 209.

<sup>327</sup> *Risk By Choice*, 53-4.

<sup>328</sup> Harold W. Aurand, “The Workingmen’s Benevolent Association,” *Labor History* 7, no. 1 (1966): 30.

<sup>329</sup> Barbara Ellen Smith, *Digging Our Own Graves: Coal Miners and the Struggle over Black Lung Disease* (Philadelphia: Temple University Press, 1987), 40.

<sup>330</sup> David Rosner and Gerald Markowitz, *Deadly Dust: Silicosis and the Politics of Occupational Disease in Twentieth-Century America* (Princeton, N.J.: Princeton University Press, 1991), 63.

<sup>331</sup> Alan Derickson, *Workers’ Health, Workers’ Democracy: The Western Miners’ Struggle, 1891-1925* (Ithaca: Cornell University Press, 1988), 162.

states where legislatures were subject to the influence of coal operators.”<sup>332</sup> The UMWA served as a lonely voice keeping the issue of black lung alive in the 1940s, a time when medical literature had reached a consensus that inhaled coal dust did not pose significant health problems.<sup>333</sup> Similarly, medical and scientific experts neglected the detrimental effects of silica exposure during the 1950s, and the issue was left to the International Union of Mine, Mill, and Smelter Workers, which managed to put silicosis back on the national radar.<sup>334</sup>

The UMWA’s determined pursuit of an enforceable law that would provide for federal inspection of mines finally paid off when they achieved their goal in 1952 upon passage of the Federal Coal Mine Safety Act. Although the legislation was far from perfect, it set a new precedent and included provisions that for the first time authorized mine inspectors to close dangerous mines. In 1956, economist Jack Barbash wrote: “The unions have been, perhaps, the most active element in enlisting the aid of federal and state government to provide safe and healthful workplaces.”<sup>335</sup> Upon his retirement as head of the UMWA in 1960, John L. Lewis received a letter from former President Herbert Hoover acknowledging that the union leader had “insisted upon constantly greater safety measures.”<sup>336</sup>

In the 1960s under the leadership of W. A. “Tony” Boyle the UMWA stumbled in its efforts to protect miners’ health and safety.<sup>337</sup> At the time, the United States was the

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<sup>332</sup> Melvyn Dubofsky and Warren Van Tine, *John L. Lewis: A Biography* (New York: Quadrangle, 1977), 376.

<sup>333</sup> *Black Lung*, 112-3.

<sup>334</sup> *Deadly Dust*, 198.

<sup>335</sup> Jack Barbash, *The Practice of Unionism* (New York: Harper & Brothers, 1956), 250.

<sup>336</sup> *John L. Lewis: A Biography*, 517.

<sup>337</sup> Ralph Nader charged that under Tony Boyle the union had “deteriorated into a state of sycophancy toward the coal operators on such crucial matters as health and safety” (Morton Mintz, “Nader Asks Lewis To Fight UMW Rules,” *Washington Post*, May 23, 1969). John L. Lewis said that appointing Boyle to be

sole major coal producer lacking any governmental standard for coal dust.<sup>338</sup> Boyle's unresponsiveness to miners' concerns about black lung disease precipitated rank-and-file miners to form the West Virginia Black Lung Association, which initiated a wildcat strike that effectively forced action on the issue. It is notable that, in the words of political scientist Robert E. Botsch, "one of the greatest resources of the black lung movement in West Virginia was the union experience of those who built the movement."<sup>339</sup> However, a survey of the union's historical record leads the historian of the black lung movement, Alan Derickson, to conclude that "from its founding, the United Mine Workers of America (UMW) fought to protect its membership against work-induced disease."<sup>340</sup>

While unions have long advocated on behalf of their members' safety at work, the emergence of the environmental movement during the 1960s significantly raised public awareness about toxins and other industrial health issues. Workers' health advocates successfully ensured passage of the Occupational Safety and Health Act of 1970.<sup>341</sup> As knowledge of the risks workers encountered on a daily basis became common

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his successor was "the worst mistake I ever made" (*John L. Lewis: A Biography*, 526). In 1969, at a packed press conference in Washington, D.C.'s Mayflower Hotel, Joseph "Jock" Yablonski announced his candidacy for the union's presidency. "When I see my union moving in a direction of unconcern for men who have to engage in the dangerous conditions of coal mining," he said, "then it's time that somebody speaks up...regardless of what the sacrifice may be!" (Paul F. Clark, *The Miners' Fight for Democracy: Arnold Miller and the Reform of the United Mine Workers* (Ithaca: Cornell University Press, 1981), 25). Boyle responded to this challenge of his power by arranging for the murder of Yablonski. His wife and his daughter were also killed. A few years later reformer Arnold Miller won the union's presidency. Boyle was sentenced to life in prison, where he died. By 1991, union lawyer Thomas Geoghegan stated that "the UMW is probably the stablest, most adult, most democratic union in all of labor" (Thomas Geoghegan, *Which Side Are You On?: Trying to Be for Labor When It's Flat on Its Back* (New York: Plume, 1991), 37).

<sup>338</sup> Donald L. Rasmussen, "Black Lung in Southern Appalachia," *American Journal of Nursing* 70, no. 3 (1970): 511.

<sup>339</sup> *Organizing the Breathless*, 50

<sup>340</sup> *Black Lung*, 23.

<sup>341</sup> Judson MacLaury, "The job safety law of 1970: its passage was perilous," *Monthly Labor Review* 104, no. 3 (1981): 18-24. For a view of the state of occupational health and safety at OSHA's establishment see Joseph A. Page and Mary-Win O'Brien, *Bitter Wages* (New York: Grossman Publishers, 1973).



knowledge, unions stepped up their agitation on behalf of health and safety issues. The Oil, Chemical, and Atomic Workers International Union (OCAW) was at the forefront of these efforts. In 1973, 4,000 Shell Oil Co. workers demanded a voice over safety conditions in their workplaces when the union launched the first official strike over an industry's potential health hazards. "It's not a bunch of workers going out on strike for a dime an hour," said Tony Mazzocchi of OCAW.<sup>342</sup> The union wanted to implement a system that would make the industry safer. "What we are asking is that that the company from time to time bring an expert consultant – an industrial hygienist – chosen by Shell but acceptable to the union to check certain areas of the plant," said union spokesman Roy Barnes. "In addition, we want Shell to pay for appropriate physical exams and medical tests so that the effects of the chemicals we work with can be determined as soon as possible. We also want Shell to provide the data on the sicknesses that affect workers in the plants."<sup>343</sup> The strike lasted for five months, and in the end Shell relented and OCAW was able to achieve a collective bargaining agreement with the oil industry that included groundbreaking health and safety provisions.<sup>344</sup> In the following year unions achieved further health and safety advances: OCAW, the United Rubber Workers, the USWA, and the Industrial Union Department of the AFL-CIO joined with public interest groups to pressure OSHA to issue a vinyl chloride standard.<sup>345</sup> That same year the

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<sup>342</sup> Stuart Auerbach, "The First Strike Over Potential Hazards to Health," *San Francisco Examiner*, March 4, 1973, 21.

<sup>343</sup> John A. Grimes, "Environmental Strike," *Washington Star*, April 1, 1973, C2.

<sup>344</sup> Tony Mazzocchi, "Crossing Paths: Science and the Working Class," *New Solutions* 8, no. 1 (1998): 31.

<sup>345</sup> Jacqueline Karnell Corn, "Vinyl Chloride, Setting a Workplace Standard: An Informal Perspective on Assessing Risk," *Journal of Health Policy* 5, no. 4 (1984): 503.

USWA negotiated a program at U.S. Steel's Clariton, Pennsylvania coke plant that reduced workers' exposure to carcinogenic emissions.<sup>346</sup>

The decrease in workplace health and safety that accompanied a reduction of union strength in the meatpacking industry further demonstrates the important role unions play in making workplaces safe. Charles Craypo, professor of economics emeritus at Notre Dame University, writes:

At the turn of the century, meatpacking was characterized by relatively low wages, immigrant labor, and dangerous working conditions. That changed as a result of collective bargaining and government regulation. By the 1960s meatpacking wages were high, production jobs stable, and conditions much safer.<sup>347</sup>

Labor relations in the industry were subsequently dramatically altered, however, as the position of the workers' union was weakened. New arrival Iowa Beef Processors (IBP) set the tone for how the industry would come to operate with an approach that included refusing to negotiate the master contracts with the union which set industry standards. Using immigrants as a cheap pool of labor only strengthened the company's position.<sup>348</sup>

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<sup>346</sup> Lawrence S. Bucow, *Bargaining for Job Safety and Health* (Cambridge, Mass.: The MIT Press, 1980), 68.

<sup>347</sup> Charles Craypo, "Meatpacking: Industry Restructuring and Union Decline," in *Contemporary Collective Bargaining in the Private Sector*, Paula B. Voss, ed. (Madison: Industrial Relations Research Association, 1994), 64.

<sup>348</sup> For the impact of immigration on labor markets see Byron Dorgan, "Unlabor day," *National Review Online*, June 7, 2007; Philip Martin, "Farm Labor Shortages: How Real, What Response?," *Agricultural and Resource Economics Update* 10, no. 5 (2007): 9; Steven A. Camarota, "Immigrant Employment Gains and Native Losses, 2000-2004," in *Debating Immigration*, Carol M. Swain, ed. (Cambridge: Cambridge University Press, 2007); Dean Baker, *The Conservative Nanny State: How the Wealthy Use the Government to Stay Rich and Get Richer* (Washington, D.C.: Center for Economic and Policy Research, 2006), 23-5; Lou Dobbs, *War on the Middle Class: How the Government, Big Business, and Special Interest Groups are Waging War on the American Dream and How to Fight Back* (New York: Viking, 2006), 139-40; Paul Krugman, "North of the Border," *New York Times*, March 27, 2006, A23; Robert J. Samuelson, "We Don't Need 'Guest Workers,'" *Washington Post*, March 22, 2006, A21; Thom Hartmann, "Illegal Workers: the Con's Secret Weapon," March 8, 2006; Donald L. Bartlett and James B. Steele, "Who Left the Door Open?," *Time*, September 20, 2004, 51; "Ralph Nader: Conservatively Speaking," *American Conservative* 3, no. 12 (2004): 7-8; Robert Kuttner, "Bush's Cynical Immigration Gambit," *Business Week*, February 9, 2004, 20; Lou Dobbs, "The politics of immigration," *U.S. News & World Report*, January 12, 2004, 40; George J. Borjas, "The Labor Demand Curve is Downward Sloping: Reexamining the Impact of Immigration on the Labor Market," *Quarterly Journal of Economics* 118, no. 4 (2003): 1335-74; Philip L. Martin, *Promise Unfulfilled: Unions, Immigration, and the Farm Workers* (Ithaca: Cornell University Press, 2003), 175-9; Vernon M. Briggs, Jr., *Immigration and American Unionism* (Ithaca:

IBP became notorious for its disregard of worker health and safety, and its willingness to break the law and even lie about its criminal actions. Representative Tom Lantos (D-California) called IBP “clearly one of the most irresponsible and reckless corporations in America in terms of workers’ health and safety.”<sup>349</sup> Weak government enforcement only served to worsen the situation and encourage the industry to follow IBP’s lead.

“For most of the 1980s OSHA’s relationship with the meatpacking industry was far from adversarial,” writes author Eric Schlosser. “While the number of serious injuries rose, the number of OSHA inspections fell.”<sup>350</sup> The result according to Craypo was that “[b]ad labor standards drove out good. Earnings and employment reverted to the earlier periods – low wages, immigrant labor, unsafe conditions.”<sup>351</sup> Today, Lance Compa of Cornell University reports that “meatpacking has become the most dangerous factory job in America, with injury rates more than twice the national average.”<sup>352</sup> And whatever costs the companies incur as a result of these injuries are not high enough to force improvements. Anthropologists Donald D. Stull, Michael J. Broadway, and Ken C. Erickson report: “Packers readily admit that injuries cost them money – but the loss is

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Cornell University Press, 2001), 174-6; George J. Borjas, *Heaven’s Door: Immigration Policy and the American Economy* (Princeton, N.J.: Princeton University Press, 1999), 62-86; Roy Beck, *The Case Against Immigration: The Moral, Economic, Social, and Environmental Reasons for Reducing U.S. Immigration Back to Traditional Levels* (New York: W. W. Norton & Company, 1996), 105-35; Herman E. Daly, *Beyond Growth: The Economics of Sustainable Development* (Boston: Beacon Press, 1996), 120, 155-6; William Julius Wilson, *When Work Disappears: The World of the New Urban Poor* (New York: Vintage Books, 1996), 34; Richard Mines and Jeffrey Avina, “Immigrants and Labor Standards: The Case of California Janitors,” in *U.S.-Mexico Relations: Labor Market Interdependence*, Jorge A. Bustamante, Clark W. Reynolds, and Raul A. Hinojosa Ojeda, eds. (Stanford, Calif.: Stanford University Press, 1992).

<sup>349</sup> Donald Woutat, “Meatpacker IBP Fined \$3.1 Million In Safety Action,” *Los Angeles Times*, May 12, 1988.

<sup>350</sup> Eric Schlosser, *Fast Food Nation: The Dark Side of the All-American Meal* (Boston: Houghton Mifflin Company, 2001), 178.

<sup>351</sup> *Contemporary Collective Bargaining in the Private Sector*, 64.

<sup>352</sup> Lance Compa, “Blood, Sweat, and Fear: Workers’ Rights in U.S. Meat and Poultry Plants,” *Human Rights Watch*, January, 2005, 14.

minor and apparently acceptable.”<sup>353</sup> Worker suffering in the meatpacking plants has paralleled union decline within the industry.

## UNION VS. NON-UNION MINES

Union mines are widely recognized as safer places than their non-union counterparts. In 1985, John Braithwaite, a fellow at Australian National University, wrote, “union members are less likely to be killed in American mines than are nonunionists.”<sup>354</sup> One reason union mines are safer is that the union contract extends employment protections to workers who voice concerns about health and safety issues. The very effectiveness of these protections can actually cause union mines to receive more citations than their non-union counterparts. The UMWA’s Phil Smith explains: “Statistically in terms of citations many union mines will have a higher number because our guys aren’t afraid to get the inspectors in there.”<sup>355</sup> According to Ellen Smith, editor of *Mine Safety and Health News*, “generally we can say that union mines are safer because the mine workers are not afraid to complain. They’ve got the backing of the union, and it is highly unlikely that they would be fired for making a complaint about safety and health conditions in their mine.”<sup>356</sup>

At a non-union mine workers may be intimidated, and not raise safety concerns due to apprehension about being branded a “troublemaker” and possibly losing their jobs as a result. “In non-union mines there’s a great deal of intimidation that goes on against

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<sup>353</sup> Donald D. Stull, Michael J. Broadway, and Ken C. Erickson, “The Price of a Good Steak: Beef Packing and Its Consequences for Garden City, Kansas,” in *Structuring Diversity: Ethnographic Perspectives on the New Immigrants*, Louise Lamphere, ed. (Chicago: University of Chicago Press, 1992), 49.

<sup>354</sup> John Braithwaite, *To Punish or Persuade: Enforcement of Coal Mine Safety* (Albany: SUNY Press, 1985), 8.

<sup>355</sup> Interview, July 31, 2006.

<sup>356</sup> “Asst. Labor Secretary Dye Walks Out of Mine Safety Hearing As West Virginia Mine Deaths Reach 14,” *Democracy Now!*, January 24, 2006.

the workers,” affirms Representative George Miller (D-California).<sup>357</sup> Union members, on the other hand, have extensive contractual safeguards, which help to remove obstructions to speaking up about safety issues. The *Courier-Journal* reports that according to miners “[n]on-union miners who complain are often fired and blackballed, which makes it almost impossible to get another job in a nearby mine.... So most don’t complain.”<sup>358</sup> Kentucky miner Wade Damron raised safety concerns after a coal scoop’s brakes failed. He later lost his job.<sup>359</sup> Miner Scott Lepka testified that

In the union mines, you have the right to a safe workplace, you have the right to withdraw yourself from a dangerous situation.... In the non-union mines, you have the right to withdraw yourself under federal law. However, I can tell you from experience, most men won’t due to fear for their jobs, and most men don’t feel comfortable pointing out safety issues because if they complain too much, they’re singled out and given less attractive jobs or even fired.<sup>360</sup>

This intimidation factor can be magnified in Appalachian coal regions because of the surrounding area’s depressed economic conditions.<sup>361</sup> Former general counsel to the

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<sup>357</sup> “What’s Being Done to Prevent Mine Deaths?,” *ABC News*, May 20, 2006, <http://abcnews.go.com/WNT/print?id=1985898>

<sup>358</sup> Gardiner Harris, “Black lung, cheating worse at small, non-union mines,” *Courier-Journal*, April 21, 1998.

<sup>359</sup> *New York Times*, January 10, 2006.

<sup>360</sup> *Forum on Mine Safety*, February 13, 2006.

<sup>361</sup> Robert Baumann, “Changes in the Appalachian Wage Gap, 1970 to 2000,” *Growth and Change* 37, no. 3 (2006): 416-43; Amy K. Glasmeier, “Living in Coal Country: A Profile of Upshur County,” Poverty in America Project, January 8, 2006, <http://www.povertyinamerica.psu.edu/2006/01/08/living-in-coal-country-a-profile-of-upshur-county/>; Evelyn Nieves, “Scrapping for a Living in Old Coal Country,” *Washington Post*, October 29, 2005, A3; Dan A. Black and Seth G. Sanders, “Labor Market Performance, Poverty, and Income Inequality in Appalachia,” Appalachian Regional Commission, September 2004; Alan Maimon, “The war on poverty,” *Courier-Journal*, February 11, 2004, 1A; Susan Sarnoff, “Central Appalachia – Still the *Other* America,” *Journal of Poverty* 7, no. 1/2 (2003): 123-39; Shawn Reeves, “Decades of Progress Have Overlooked Parts of Appalachia,” *Habitat World*, February-March 2002; Cynthia M. Duncan, *Worlds Apart: Why Poverty Persists in Rural America* (New Haven: Yale University Press, 1999), 1-72; Mark Ferenchik and Jill Riepenhoff, “Mountain Money Federal Tax Dollars Miss the Mark in Core Appalachia,” *Columbus Dispatch*, September 26, 1999, 1A; Joe Frolik, “Appalachia Still Waiting to Share America’s Bounty,” *Plain Dealer*, May 2, 1999, 1A; Dwight Billings and Ann Tickamyer, “Uneven Development in Appalachia,” in *Forgotten Places: Uneven Development in Rural America*, Thomas A. Lyson and William W. Falk, eds. (Lawrence, Kansas: University Press of Kansas, 1993), 7-29; Jeffrey Fleishman, “A Cold Poverty Shrouds Coal Country,” *Philadelphia Inquirer*, January 12, 1993, A1; Cynthia M. Duncan, “Persistent Poverty in Appalachia: Scarce Work and Rigid Stratification,” in *Rural Poverty in America*, Cynthia M. Duncan, ed. (New York: Auburn House, 1992); J. Wayne Flynt, *Dixie’s Forgotten People: The South’s Poor Whites* (Bloomington, Ind.: Indiana University Press, 1979), 126-161; Harry M. Caudill, *Night Comes to the Cumberland: A Biography of a Depressed*

Kentucky Department of Mines and Minerals Tony Oppegard says: “You’ve got this permanent base of unemployed people in eastern Kentucky. You’ll always have people who are willing to work under whatever conditions that you impose.”<sup>362</sup> “Has MSHA ever wondered why virtually no non-union miners from eastern Kentucky ever appear at MSHA-sponsored public hearings to voice their opinion?” he asks. “The answer is not complicated: If a miner did so, he would soon find himself without a job ... just as miners in Eastern Kentucky are routinely discharged or discriminated against in other ways for making safety complaints or for refusing to work in unsafe conditions.”<sup>363</sup> “With no union to protect them,” writes author Jeff Goodell, “and in area where hundreds of out-of-work men are waiting in line for jobs, a miner who complains about dangerous conditions will soon find himself stocking yo-yos at the Wal-Mart.”<sup>364</sup>

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*Area* (Boston: Little, Brown and Company, 1963); Michael Harrington, *The Other America: Poverty in the United States* (New York: The Macmillan Company, 1962), 40-3.

<sup>362</sup> *Wall Street Journal*, June 1, 2006. Apparently the coal operators’ power to unilaterally determine workplace conditions is not absolute enough for their liking even in such a chronically economically depressed region. “In eastern Kentucky there’s thousands of miners who have work permits who are unemployed,” according to Tony Oppegard. “And industry’s saying they don’t have enough miners and are bringing them in from Mexico and the Ukraine” (Interview, July 26, 2006). Decrying the people of eastern Kentucky for drug use and having a poor work ethic, Massey recently sought to import Mexican labor to staff an entire mine in the region. The state regulatory agency turned down Massey’s application. UMWA president Cecil Roberts says, “There are thousands of people in Kentucky and Southern West Virginia who are eager to go to work in the coal mines. All they’re asking for is a decent job, with fair treatment and safe working conditions. If Massey is having trouble hiring qualified miners, perhaps the company needs to look at how it treats its workers and what the safety conditions are in its mines” (UMWA, “Massey insult to Kentucky workers ‘outrageous,’ UMWA President Roberts says,” press release, February 16, 2006). Charlie Bearse, president of Sidney Coal Co., states: “It is common knowledge that the work ethic of the Eastern Kentucky worker has declined from where it once was.” Miner Shannon Gibson says, “They’re just looking for more workers who’ll work cheaper and work longer” (Allen G. Breed, “Plan rattles miners,” *Richmond Times Dispatch*, February 18, 2006, A4). “These people have a great work ethic,” said Bill K. Caylor, president of the Kentucky Coal Association, about imported Ukrainian miners (Alan Maimon, “State coal industry recruits miners from Ukraine,” *Courier-Journal*, June 7, 2001, 1A). “They’re trying to perpetuate the myth that we can’t find coal miners,” says Richard Trumka. “They don’t want union miners, that’s what they don’t want” (Interview, July 7, 2006). Kentucky state officials recently counted over 7,000 people actively seeking work in the state’s coalmines. Peter B. Lilly, chief operating officer for CONSOL Energy Inc., apparently sees no pressing need to import foreign miners. He says, “we have never had a better-trained, better educated, or more skilled workforce in the coal industry than we have today” (“Opportunities and Challenges for Coal,” *Coal Leader*, March 2004).

<sup>363</sup> *Pittsburgh Post-Gazette*, March 25, 2007.

<sup>364</sup> *Big Coal*, 68.

Union contracts provide additional mechanisms for making mines safer. “The level of health and safety in union mines is far superior to non-union,” says the AFL-CIO’s Richard L. Trumka. “You know why? Because we have our own safety experts, plus contractually a union safety committee, and any miner has the right to call the safety committee and a federal inspector.”<sup>365</sup> Miner Randy Duckworth has testified: “when I was at a union-represented mine, I was greeted with a safety committee appointed by the union to oversee the health and welfare of those employees.”<sup>366</sup> Wade Damron testified that union miners “have a safety committee that you can address about safety concerns or problems.”<sup>367</sup> According to Oppegard: “Union mines are typically safer. That’s not debatable. It’s because they have another layer of protection. Non-union [mines] don’t have committeemen.”<sup>368</sup> Retired MSHA official Jack Spadaro agrees that “because unions have a trained safety representative there’s another level of examination of mine enforcement.”<sup>369</sup>

The *Courier-Journal* reports that “[o]perators of union mines who scrimp on safety must deal with determined union stewards, who often call government inspectors if a problem isn’t corrected.”<sup>370</sup> Similar to the safeguards unions afford miners from fear of reprisal for objecting to unsafe conditions, protections for members of safety committees promote aggressive advocacy. “The only thing that can happen to a member of the safety committee,” says Trumka, “is if a complaint is determined to be ‘arbitrary and egregious’ they’d have to go to an arbitrator to remove them from the committee. It doesn’t affect

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<sup>365</sup> Interview, July 7, 2006.

<sup>366</sup> *Forum on Mine Safety*, February 13, 2006.

<sup>367</sup> *Ibid.*

<sup>368</sup> Interview, July 26, 2006.

<sup>369</sup> Interview, July 26, 2006.

<sup>370</sup> *Courier-Journal*, April 21, 1998.

their job.”<sup>371</sup> Former MSHA Special Assistant Celeste A. Monforton adds that “at union mines with active safety committees all workers are more aware of taking care of problems before someone’s injured.”<sup>372</sup> After the non-union Sago disaster Ellen Smith began to look at other West Virginia coalmines in order to see how Sago’s accident rate compared. Smith found a number of mines that all had significantly better accident records, and she kept noticing that they tended to be union mines such as Robinson Run Mine No. 95, Blacksville No. 2, Harris No. 1, and Federal No. 2.<sup>373</sup>

“Non-union miners,” concludes Leslie I. Boden of the Harvard School of Public Health, “do not have the backing of a union to support their efforts to gain a safe workplace, nor do they have the protection of the safety provisions of a union contract and the help of safety experts that a union can provide.”<sup>374</sup> Recent events have highlighted the difference unions make in the mines. Of the 47 miners killed in 2006, 42 were non-union.<sup>375</sup> Columnist Joe Conason points out that “the Sago miners lacked the protection of a strong, vigilant union, as did the Quecreek miners before them.”<sup>376</sup> Some of the most adamant proponents of the safety advantages inherent to union mines live in the coalfields, where they witness the difference. Former miner Earl Casto lost a cousin, Junior Hamner, at Sago. “If it’d been a union mine this never would have happened,” Casto said.<sup>377</sup> John Bennett, the son of one of the miners killed at Sago, says, “The worst thing that ever happened to West Virginia coal miners is when the coal companies went

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<sup>371</sup> Interview, July 7, 2006.

<sup>372</sup> Interview, July 25, 2006.

<sup>373</sup> Interview, July 28, 2006.

<sup>374</sup> *American Journal of Public Health* 75, no. 5 (1985): 497.

<sup>375</sup> UMWA, “UMWA President Cecil Roberts comments on U.S. House passage of the Employee Free Choice Act,” press release, March 2, 2007.

<sup>376</sup> Joe Conason, “Will the Media Forget Tragedy in the Mines?,” *New York Observer*, January 16, 2006, 5.

<sup>377</sup> Amanda Paulson, “A mining town faces tragedy – together,” *Christian Science Monitor*, January 5, 2006, 1.



to working non-union, instead of letting the union control the safety in the mines.”<sup>378</sup> He believes, “We need to get the United Mine Workers (UMW) back in these coal mines.”<sup>379</sup> As Richard Peterson, a business school professor at the University of Washington, states: “Democracies suffer when there is an absence of countervailing power in the society.”<sup>380</sup>

The distinguished economist Robert L. Heilbroner observed that “if a century of regulatory history tells us anything, it is that the rule-making agencies of government are almost invariably captured by the industries which they are established to control.”<sup>381</sup> During the Reagan years MSHA was more of an advocate for employers than a protector of workers – which reflected the administration’s broader political impact. According to economists Bennett Harrison and Barry Bluestone: “The Reagan administration greatly accelerated the shift against the federal protection of the right of workers, and especially unions.”<sup>382</sup> A new breed of businessmen had influence within the administration, and in the words of economic commentator Louis Rukeyser, “[t]hey opposed the kind of government intervention that the old guard had accepted.”<sup>383</sup> President George W. Bush’s appointees to the Labor Department hearken back to the Reagan Administration. Richard L. Trumka says, “There isn’t any Department of Labor anymore; it’s Commerce-lite.”<sup>384</sup>

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<sup>378</sup> Rita Cosby *Live & Direct*, MSNBC, January 3, 2006.

<sup>379</sup> Larry Gabriel, “The Dangers Below,” *Solidarity*, May/April 2006.

<sup>380</sup> Richard Peterson, “Who speaks for employees? It’s certainly not management,” *Seattle Times*, April 21, 2005.

<sup>381</sup> Robert L. Heilbroner, “Controlling the Corporation,” in *In the Name of Profit* (Garden City, N.Y.: Doubleday & Company, 1972), 239.

<sup>382</sup> Bennett Harrison and Barry Bluestone, *The Great U-Turn: Corporate Restructuring and the Polarizing of America* (New York: Basic Books, 1988), 101.

<sup>383</sup> Louis Rukeyser, ed., *Louis Rukeyser’s Business Almanac 1991* (New York: Simon & Schuster, 1991), 142

<sup>384</sup> Interview, July 7, 2006.

“Economic democracy,” according to Vice President Henry A. Wallace, “means that the various economic groups must have equality of bargaining power.”<sup>385</sup> Diminished union strength is cause for concern.<sup>386</sup> A significant offensive was launched against the UMWA during the 1980s. “A. T. Massey Coal,” reports journalist Paul J. Nyden, “began a major crusade to keep the UMW out of new mines and bust the union at existing operations.” “Massey fired UMW strike leaders and refused to sign new union contracts.” The company also hired strikebreakers and “used barbed wire, German shepherd dogs, armed guards, and video cameras to intimidate miners from entering company property during protests.”<sup>387</sup> Union miners produced 70 percent of the nation’s coal in 1972, but half that amount twenty years later. The center of national coal production has shifted away from the UMWA’s traditional Appalachian heartland toward non-union mines in the West. Moreover, automation has contributed to employment in underground mines falling below 50,000, and the UMWA’s active membership is only a tenth of what it was in 1980.<sup>388</sup>

Unions help to provide some potential for equality of bargaining power – an effective countervailing force – that for miners has meant not only enhanced safety protection for members, but improved conditions for non-union miners as well. By demanding contracts with higher standards for its own members, unions have helped

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<sup>385</sup> Henry A. Wallace, *Democracy Reborn* (New York: Reynal & Hitchcock, 1944), 128.

<sup>386</sup> On causes of union decline see, for example, John Schmitt and Ben Zipperer, “Dropping the Ax: Illegal Firings During Union Election Campaigns,” Center for Economic and Policy Research, January 2007; Chirag Mehta and Nik Theodore, “Undermining the Right to Organize: Employer Behavior During Union Representation Campaigns,” *American Rights at Work*, December 2005; Vernon M. Briggs, “Immigration Policy and American Unionism: A Reality Check,” Cornell University, 2004; Kate Bronfenbrenner, “Uneasy Terrain: The Impact of Capital Mobility on Workers, Wages, and Union Organizing,” Cornell University, September 6, 2000.

<sup>387</sup> Paul J. Nyden, “Rank-and-File Rebellions in the Coalfields, 1964-80,” *Monthly Review* 58, no. 10 (2007).

<sup>388</sup> Dale Russakoff, “In Second Coal Rush, New Mind-Set in the Mines,” *Washington Post*, November 16, 2006, A01.

raise standards throughout the industry. Unions have also served as the legal representatives of non-union miners. For example, surviving Sago miners tapped the UMWA to adopt this role during the ensuing investigation. Additionally, unions such as the UMWA have provided important oversight of MSHA. America's miners would be less safe without a consistent advocate monitoring the political machinations undercutting the agency's enforcement role.

## CHAPTER SEVEN

# The Need to Continue to Strengthen Safety

*“Miners cannot afford for Congress to stand still in its efforts to continue to strengthen mine safety laws, nor can they afford for upper management at MSHA to continue its coddling of mine operators who violate the law.”*<sup>389</sup>

-- Cecil E. Roberts, president of the United Mine Workers of America, 2006

After the Sago disaster the *Buffalo News* editorialized: “Coal miners, at the very least, should have the best-possible safeguards in the mines, and emergency policies that ensure rapid responses and reduced risks in the aftermath of accidents.”<sup>390</sup> Congress began to act immediately following Sago, and bipartisan support soon developed for the first significant piece of mine safety legislation since 1977. On June 15, 2006, the MINER Act was signed into law at a ceremony in the Dwight D. Eisenhower Executive

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<sup>389</sup> UMWA, “UMWA hail passage of MINER Act in House, calls for strong enforcement,” press release, June 7, 2006.

<sup>390</sup> Editorial, “Probe mine accident, violations,” *Buffalo News*, January 5, 2006, A6.

Office Building next to the White House. It contained a number of advances, and was widely hailed as “a step forward.” However, as many observers have pointed out there is still work to be done.

Under the new law, mines are required to assemble an emergency response plan. Operators must address both escape, and continued survival and rescue efforts on behalf of those unable to get out. A very basic technology – but no less effective for its simplicity – lifelines, will be required along escape routes in mines. A lifeline with directional cones can be very effective during a disaster, when visibility in mines can be so low that it becomes impossible even to see objects when they are directly in front of one’s own face. Furthermore, these lifelines are to be constructed of flame-resistant materials. Breathing apparatuses will be made available that provide at least two hours worth of oxygen, and extra supplies of oxygen will be placed along escape routes at 30-minute intervals. Additional caches of oxygen will be stored for the use of trapped miners.<sup>391</sup> There is a requirement that two-way wireless communication and electronic tracking devices must be adopted within three years. Timely arrival of mine rescue teams is yet another subject addressed by the legislation. They will need to be on site within one hour in the event of an emergency. Additionally, standards of team training and qualification have been raised.

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<sup>391</sup> In February 2007, MSHA issued a bulletin advising operators that a 96-hour supply of oxygen would meet the MINER Act’s standards for emergency air. The National Mining Association filed a lawsuit in U.S. District Court in Washington, D.C. seeking withdrawal of the advisory because they were concerned it could be construed as binding. After MSHA issued a Procedure Instruction Letter stating the non-binding nature of the bulletin the NMA made a motion to dismiss, which was granted by the court (Steve Twedt, “Coal group, feds at odds over emergency oxygen,” *Pittsburgh Post-Gazette*, April 10, 2007, A1; Matthew Faraci, E-mail to Marcia Carroll, February 11, 2008).

Given the abject failure of foam block seals as demonstrated by the Sago disaster, it is notable that the standard for the strength of materials used to seal off abandoned areas of mines has been increased. MSHA has promulgated a rule requiring that seals be capable of resisting blast pressures of up to 50 pounds per square inch (psi), and 120-psi if the atmosphere in the area being sealed off will not be monitored to ensure that it remains inert. Operators have voiced concern about expenses associated with this measure. “I’m scared that this provision will add a pretty significant cost,” says Bill K. Caylor, president of the Kentucky Coal Association. “You’re going to see a lot of the small guys just close up shop.”<sup>392</sup> “All of these things,” states William B. Raney, president of the West Virginia Coal Association, “of course, continue to increase the cost of doing business.”<sup>393</sup> Despite such objections, the need to increase the strength of these seals is demonstrated by the events at Sago where the force of the explosion reached at least 93-psi.

Steps designed to prevent accidents from occurring in the first place were part of the legislation as well: ineffective fines as low as \$60 for insignificant violations have been simply eliminated, while minimum penalties have been hiked up to \$2,000 and \$4,000. Some observers wonder if these fines aren’t still too low. As journalist Ken Ward, Jr. reports, “minimum penalties of \$10,000 for each safety violation, [would be] an amount that would make mining companies pay attention.”<sup>394</sup> Moreover, UMWA President Cecil E. Roberts warns that

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<sup>392</sup> “Sago explosion continues to force changes,” *International Herald Tribune*, May 18, 2007.

<sup>393</sup> *Ibid.*

<sup>394</sup> Ken Ward, Jr., “Shafted,” *Washington Monthly*, March 2007.

the Agency must do a better job of tracking and collecting fines once they are imposed. It should also escalate the pressure on mine operators who become delinquent or refuse to pay a final penalty. Finally, to the extent MSHA claims it does not have the authority to suspend mining operations for non-payment of fines, Congress should pass legislation to correct that problem.<sup>395</sup>

“Following the Sago tragedy and others like it around the country,” said Representative Shelley Moore Capito (R-West Virginia), “we made a promise to our coal miners and their families that we would do whatever it takes to better ensure their safety. This new law is the first step towards fulfilling that promise, but there is still more work to be done.”<sup>396</sup> Roberts stated: “This legislation is a step toward making mines safer in America, but there is still much more to do.”<sup>397</sup>

Upon the MINER Act’s passage, Representative George Miller (D-California) warned that it had significant flaws. “It fails in three significant ways,” he stated. “It does not guarantee that miners trapped underground will have enough air.... It does not give miners prompt access to wireless communications and electronic tracking devices.... It does not guarantee that the emergency oxygen units...would be tested at random by the Federal Government to ensure that they work properly.” Miller concluded at the time of the MINER Act’s passage that based on its deficiencies “if another Sago mine disaster were to happen, this bill does not ensure that we would not have the same tragic deaths, because it does not address what killed the miners in the Sago mine disaster.”<sup>398</sup> For example, stationing self-contained self-rescuers along escape routes and caching them in rescue chambers and other strategic points could prove to be a useless exercise if they cannot be operated. Random governmental testing, as Representative Miller proposed,

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<sup>395</sup> *Mine Worker Safety*, March 28, 2007.

<sup>396</sup> Office of Congresswoman Shelley Moore Capito, “MINER Act is First Step Towards Fulfilling Promise to West Virginia Miners,” press release, June 15, 2006.

<sup>397</sup> “UMWA hail passage of MINER Act in House, calls for strong enforcement,” June 7, 2006.

<sup>398</sup> *Cong. Rec.*, June 7, 2006: H3453.

combined with regular training in the environment where they will be used could help prevent a situation like Sago's in which miners could not depend on these devices.

Representative Nick J. Rahall II (D-West Virginia) observed serious shortcomings in implementation after the MINER Act was signed into law. He testified that

One-third of coal mines still do not have at least two SCSRs [self-contained self-rescuers] for every miner underground.

Truly wireless communications and tracking is still not available.

Emergency response plans are still not fully approved by MSHA.

Evacuation drills and training remain inadequate.

Pre-shift examinations are too often incomplete.

There are still too few mine rescue teams.<sup>399</sup>

The MINER Act “contained many needed protections for our miners,” said Representative A. B. “Ben” Chandler, III (D-Kentucky), “and I am deeply disappointed to learn that some of these protections have not been implemented.”<sup>400</sup> This lack of follow through is made all the more problematic by the insufficiencies of the legislation as outlined by Representative Miller.

One major outstanding issue that has yet to be resolved is presented by MSHA's 2004 approval of widespread use of so-called “belt-air” – a practice in which coal conveyer-belt tunnels serve the dual purpose of ventilation intakes. Spaces around

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<sup>399</sup> *Evaluating the Effectiveness of MSHA's Mine Safety and Health Programs*, May 16, 2007.

<sup>400</sup> James R. Carroll, “U.S. lack of advancement on mine safety is decried,” *Courier-Journal*, February 2, 2007, 5B.



conveyor-belts are prone to fire due to the potentially dangerous combination of large amounts of combustible coal dust and the friction caused by the high speeds at which the belts themselves are traveling. The National Institute for Occupational Safety and Health (NIOSH) has concluded that, “Belt air usage represents the least expensive method of increasing ventilation to the [coal] face not the best for worker health or safety.”<sup>401</sup> Former Assistant Secretary of Labor for Mine Safety and Health Davitt McAteer is opposed to the practice. “Belt air – using your belt entry as your air supply – that’s a regulation that needs to be rolled back and that needs to be stopped.”<sup>402</sup> Critics point to the fact that use of belt-air for ventilation means that if a fire should occur smoke and flames will be directed toward the coal face where the miners are at work. Former MSHA official Celeste A. Monforton says that “air over the belt transports that fire right down to the face where the men are....The original Act was very specific against using belt air so I don’t even see why it’s an issue.”<sup>403</sup>

The question of belt-air reveals a broader problem: namely it is an instance where MSHA has strayed from the 1969 Coal Act, which prohibited the practice unless a special waiver had been issued. Tim Baker, deputy administrator for health and safety at the UMWA, believes “MSHA has got to get back to following the legislation rather than

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<sup>401</sup> James Lamont, comments at MSHA Hearing on Underground Coal Mine Ventilation, Washington, Penn., April 10, 2003.

<sup>402</sup> Adam Townsend, “Making mining safer,” *Times Leader*, March 9, 2006.

<sup>403</sup> Interview, July 25, 2006. The MINER Act appointed a Technical Study Panel that issued a report on the issue of belt-air. See Technical Study Panel on the Utilization of Belt Air and the Composition and Fire Retardant Properties of Belt Materials in Underground Coal Mining, “Final Report of the Technical Study Panel on the Utilization of Belt Air and the Composition and Fire Retardant Properties of Belt Materials in Underground Coal Mining,” December 2007, <http://www.cdc.gov/niosh/mining/mineract/technicalstudypanelonbeltairandbeltmaterials.htm>

promulgating rules that weaken it.”<sup>404</sup> Operators generally approve of the use of belt-air. Joseph A. Lamonica of the Bituminous Coal Operators Association and Bruce Watzman of the National Mining Association write: “let us state our unequivocal support for the practice of using air coursed through belt entries to ventilate working sections.”<sup>405</sup>

Efforts to mitigate the harmful effects of coal dust need to be stepped up. Black lung is incurable, and it is caused by inhaling small coal dust particles that scar the lungs and decrease pulmonary functioning. Government mandated dust mitigation measures have resulted in a significant decline in black lung fatalities since the late 1960s.<sup>406</sup> However, the *Washington Post* reports that “an estimated 4 percent of working miners will be stricken with the disease.”<sup>407</sup> “Black lung is a totally preventable disease,” according to Anita L. Wolfe, public health adviser for NIOSH. “In this day and age for it still to be occurring is ludicrous.”<sup>408</sup> MSHA’s current standard for coal dust exposure is two milligrams per cubic meter over an eight-hour period. It should be reduced. Longtime miners’ advocate and UMWA Director of Occupational Health Dr. Lorin E. Kerr recommended over a quarter century ago that the standard be lowered to one

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<sup>404</sup> Interview, August 24, 2006. It is noteworthy that nations which are not celebrated for thoroughgoing occupational safety regulations, such as China, India, and Russia, actually surpass the United States in certain conveyor belt flammability standards (Bill Reid, “Belt Air Technical Study Panel Report Released,” *Coal News* 5, no. 1 (2008): 1).

<sup>405</sup> Joseph A. Lamonica and Bruce Watzman to Marvin Nichols, June 30, 2003, <http://www.msha.gov/regs/comments/03-1307/posthearing/aa76-comm-103phc.pdf>

<sup>406</sup> “Changing Patterns of Pneumoconiosis Mortality – United States, 1968-2000,” *Morbidity and Mortality Weekly Report* 53, no. 28 (2004): 627-32.

<sup>407</sup> Joby Warrick, “Into the Darkness,” *Washington Post Magazine*, January 21, 2007, W10.

<sup>408</sup> Samira Jafari, “Group identifies black lung ‘hot spots,’” *Yahoo! News*, August 15, 2006, [http://news.yahoo.com/s/ap/20060816/ap\\_on\\_he\\_me/black\\_lung](http://news.yahoo.com/s/ap/20060816/ap_on_he_me/black_lung)

milligram per cubic meter of air.<sup>409</sup> Likewise, in 1995 NIOSH suggested a one milligram standard. MSHA has yet to act on this recommendation.

NIOSH recently revealed the existence of black lung “hot-spots” in Alabama, Colorado, Kentucky, Pennsylvania, Virginia, and West Virginia, where rapidly progressing cases are developing in younger miners. Miners in their 30s and 40s are developing black lung, which is decades earlier than past cases. Dr. Vinicius Antao concludes that “there’s inadequate dust control.”<sup>410</sup> Retired miner George Massey points out that “[t]he main objective of the companies is to get as much coal as they can.... Some will [illegally] mine without water and without ventilation.”<sup>411</sup> Stephen A. Sanders of the Appalachian Citizens Law Center says that “the regulations are not observed or enforced effectively.”<sup>412</sup> The UMWA’s Tim Baker would like to see miners given the opportunity to stop production and make necessary corrections when their personal dust monitors reveal that they have been overexposed to coal dust. For this practice to be effective, however, Baker states that miners would need to be “protected [from possible retaliation] if they take initiative to correct the problem.”<sup>413</sup> Exploring the benefits of machine mounted dust monitors that automatically shut down equipment operating in spaces that exceed a particular dust threshold would provide another possible means for ensuring that levels do not rise above legal standards, and should be an MSHA priority. Moreover, MSHA’s current asbestos exposure standard of 2,000,000 fibers per cubic meter must be reduced, and the sooner the better. The Environmental Working Group

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<sup>409</sup> *Journal of Public Health Policy* 1, no. 1 (1980): 61.

<sup>410</sup> *Yahoo! News*, August 15, 2006.

<sup>411</sup> James R. Carroll, “Study finds concentration of severe black lung in Appalachian miners,” *Courier-Journal*, August 16, 2006, 4B.

<sup>412</sup> *Yahoo! News*, August 15, 2006.

<sup>413</sup> Interview, August 24, 2006.

estimates that there were about 230,000 asbestos caused deaths in America from 1979 to 2001.<sup>414</sup> By way of comparison, OSHA's exposure limit for this carcinogen is a significantly lower 100,000 fibers per cubic meter.

Recent evidence suggests that the manner in which disaster investigations are conducted, and MSHA's handling of such investigations, is an area that needs a second look. Former MSHA official Celeste A. Monforton would like to see "a reassessment of the prudence of having the agency evaluate itself...[because] to have the agency doing them is problematic."<sup>415</sup> According to retired MSHA official Jack Spadaro, "there's never been any internal review that's ever shown any of the real problems in the agency. They almost always exonerated top management."<sup>416</sup> As the UMWA's Tim Baker points out: "If I want to find myself innocent every time I'll just do my own investigation."<sup>417</sup> Documents produced by independent bodies provide a greater likelihood of producing candid, critical evaluation. Observers point to the National Transportation Safety Board – which investigates significant transportation accidents – as an existing example of an independent government agency that effectively investigates disasters.

Many observers look forward to the possibility of miners' families being granted a greater role in the investigative process. "The family members at Sago really knew a

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<sup>414</sup> EWG Action Fund, "Asbestos: Think Again," March 2004, <http://www.ewg.org/reports/asbestos/> See also Rory O'Neill, "ILO to promote global asbestos ban," *New Solutions* 16, no. 4 (2006): 449-53; P.W.J. Bartrip, *Beyond the Factory Gates: Asbestos and Health in Twentieth Century America* (London: Continuum, 2006); Public Citizen, "Federal Asbestos Legislation: The Winners are..." May, 2005; Andrew Schneider and David McCumber, *An Air That Kills: How the Asbestos Poisoning of Libby, Montana, Uncovered a National Scandal* (New York: G.P. Putnam's Sons, 2004); Michael Bowker, *Fatal Deception: How Big Business is Still Killing Us with Asbestos* (Emmaus, Penn.: Rodale Books, 2003); Paul Brodeur, *Outrageous Misconduct: The Asbestos Industry on Trial* (New York: Pantheon, 1985).

<sup>415</sup> Interview, July 25, 2006.

<sup>416</sup> Interview, July 26, 2006.

<sup>417</sup> Interview, August 24, 2006.

lot about what was going on at the mine,” says Monforton. “A husband would say last week this happened at the mine, and this information could be useful to the investigation.”<sup>418</sup> Former MSHA official Tony Oppgard believes that “it should be in federal law that in accident investigations family members have the right to participate.” In fact, he would like to see an advocate for families become an integral part of MSHA itself. “Make a family advocate a full-time MSHA employee,” he suggests. Not only do families possess potentially valuable information, says Oppgard, “they have more interest than anyone in what happened.”<sup>419</sup>

Increasing the input and involvement of miners in safety matters opens up further possibilities for improvements in mine health and safety because they are actually on the ground in the mines on a daily basis, and therefore frequently possess insights that ought to be heard. Representative Artur Davis (D-Alabama) remarked, “I was struck, and I know my colleagues here are struck, when you talk to the miners, they are incredibly informed. They have an incredible knowledge and grasp of engineering issues.... It would benefit the National Mine Safety Administration to listen to these people.”<sup>420</sup> There is room for greater involvement of miners and their families in both investigations and policy formulation. Establishment of an Ombudsman at MSHA would provide access and representation for interested parties outside of the agency.<sup>421</sup>

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<sup>418</sup> Interview, July 25, 2006.

<sup>419</sup> Interview, July 26, 2006.

<sup>420</sup> *Mine Safety and Health: A Congressional Perspective*, March 16, 2006.

<sup>421</sup> The Ombudsman is addressed by Donald C. Rowat, ed., *The Ombudsman; Citizen's Defender* (London: Allen & Unwin, 1965); Alfred Bexelius, “The Origin, Nature, and Functions of the Civil and Military Ombudsmen in Sweden,” *Annals of the American Academy of Political and Social Science* 377 (1968): 10-19; Frank Stacey, *Ombudsmen Compared* (New York: Oxford University Press, 1978).

Traditionally, state regulators have often been pushovers for coal companies.<sup>422</sup> “In Kentucky, historically the Department of Mines and Minerals was very weak,” says Tony Oppegard, “and operators regarded it as a joke.”<sup>423</sup> When state legislatures in Illinois, Kentucky, Pennsylvania, Tennessee, Virginia, and West Virginia, all began exploring tougher safety measures in the wake of disasters at Sago, Aracoma, and Darby, an alarmed Bruce Watzman of the National Mining Association cried, “We have governors run amok.”<sup>424</sup> When states take the initiative in enacting legislation they can produce models for other states, and perhaps ultimately for the national government. State action is not a substitute for federal standards, however. The UMWA’s Bill Banig points out that there have also been instances where “budget pressures on individual states has meant that they cut back, leaving inspections up to MSHA.”<sup>425</sup> Representative Davis states that despite the 2001 Brookwood disaster, which killed thirteen Alabaman miners, the state legislature took no action to improve safety measures. “We don’t have a strong mine safety law today,” he says.<sup>426</sup> Miners depend on the national government to set uniform standards that will help prevent operators from gaining advantage over one another by marginalizing safety. But the states can play an important role by promoting productive reforms and establishing pioneering practices. Recently, West Virginia has been particularly active on this front. In March 2007, the state approved five rescue chamber models and required operators to submit plans for installing them in their mines by April 15th. MSHA, however, has taken no such action. “MSHA could benefit from

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<sup>422</sup> Colman McCarthy, “Lifeline For the Miners,” *Washington Post*, August 12, 1995, A21.

<sup>423</sup> Interview, July 26, 2006.

<sup>424</sup> “States Have ‘Run Amok,’ in Legislating Mine Safety Says NMA Official,” *Mine Safety and Health News* 13, no. 13 (2006): 336.

<sup>425</sup> Interview, July 28, 2006.

<sup>426</sup> *Mine Safety and Health: A Congressional Perspective*, March 16, 2006.

an injection of the sense of urgency that has taken hold in my state,” Representative Nick J. Rahall II (D-West Virginia) testifies. “Unfortunately, MSHA has not committed itself to any timeline that would mandate the use of refuge chambers.”<sup>427</sup>

MSHA needs additional inspectors to allow for more frequent, more thorough inspections. There were 634 inspectors in 1997 but only 584 in 2005, while the number of mines had increased over this period from 2,053 to 2,620. The more often MSHA inspects mines the safer they are likely to be for miners. “The most important safety measure Congress could pass is getting more inspectors on site on a more frequent basis,” says Tony Oppgard, “We need to go to six inspections a year – bimonthly.”<sup>428</sup>

Absent strong Congressional oversight, a MSHA heavily influenced by industry can act to negate any legislative advances. Consumer advocate Ralph Nader believes that “the ability of corporations to nullify regulatory programs is inestimable.”<sup>429</sup> MSHA does appear to have responded to recent media and congressional scrutiny: a survey of the latest fines indicates that it has stepped up enforcement activities. For example, a record \$1.5 million fine was awarded as a result of the fire at Aracoma Coal Co.’s Alma No. 1 Mine that killed two miners.<sup>430</sup> Moreover, the number of fines over \$10,000 issued to coal operators jumped from 59 in 2005 to 131 in 2006. While these are positive developments, inasmuch as they indicate that MSHA is placing new emphasis on enforcing the law, they also point to past deficiencies. A regulatory agency is more

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<sup>427</sup> *Evaluating the Effectiveness of MSHA's Mine Safety and Health Programs*, May 16, 2007.

<sup>428</sup> Interview, July 26, 2006.

<sup>429</sup> 31 *Houston Law Review* 1, 3 (1994).

<sup>430</sup> *Corporate Crime Reporter* states: “The Nuremberg defense is widely known – sorry, just carrying out orders. Now comes the reverse Nuremberg defense – sorry, just giving the orders, not carrying them out.” In response to a lawsuit concerning the deaths at Aracoma, the company’s CEO, Don L. Blankenship, “argue[d] something akin to a reverse Nuremberg defense – I am not guilty because I was only giving the orders, not carrying them out” (“Massey Energy’s CEO Blankenship and the Reverse Nuremberg Defense – Just Giving Orders, Not Carrying Them Out,” 21 *Corporate Crime Reporter* 16 (2007)).

likely to be reactive, rather than proactive, if its leadership comes from the very industry that is being monitored. Regulatory agencies, therefore, should not be run by corporate executives. As Bill Banig says, “We need someone running the agency that’s actually a health and safety advocate and not just there to increase production.”<sup>431</sup>

The present administration, however, insists on mining industry executives running MSHA. The agency is currently headed by Richard E. Stickler, who is a former Massey Energy executive. Due to intense Congressional opposition, Stickler received his position from the Bush Administration through a recess appointment. In January 2006, Stickler had testified to Congress that he thought “generally the laws are adequate.”<sup>432</sup> OMB Watch stated that Stickler had “little background in health and safety issues and strong ties to industry.”<sup>433</sup> The UMWA requested that President George W. Bush withdraw his nomination.

Mr. Stickler spent the overwhelming part of his career as a coal mine executive. That is the same background that former Assistant Secretary Dave Lauriski brought to the Mine Safety and Health Administration (“MSHA”), with disastrous results. The nation’s miners cannot tolerate having another mine executive running the Agency responsible for protecting their health and safety. For too many years, miners have endured an Agency directed by coal mine executives. Too often these mining executives place a priority on productivity, but fail to focus on miners’ health and safety.<sup>434</sup>

Senator Robert C. Byrd called Stickler’s nomination “unacceptable.” “At this critical time,” said Senator Edward M. Kennedy, “miners and their families need a strong leader at MSHA. Mr. Stickler does not have the record or the vision to meet this challenge.”<sup>435</sup>

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<sup>431</sup> Interview, July 28, 2006.

<sup>432</sup> Senate Committee on Health, Education, Labor, and Pensions, Subcommittee on Health and Safety, *Richard Stickler, of West Virginia, To Be Assistant Secretary of Labor for Mine Safety And Health, U.S. Department of Labor*, 109<sup>th</sup> Congress, second session (Washington, D.C.: G.P.O., 2006).

<sup>433</sup> OMB Watch, “Foxes in the Henhouse: OSHA, MSHA Nominees Appear Pro-Industry, Anti-Worker,” <http://www.ombwatch.org/article/articleview/3276/1/85?TopicID=2>

<sup>434</sup> Cecil E. Roberts to George W. Bush, January 24, 2006, <http://www.umwa.org/pressreleases/opposeStickler.pdf>

<sup>435</sup> U.S. Senate Committee on Health, Education, Labor, and Pensions, “Senate Will Again Send MSHA Nomination Back to White House,” press release, September 29, 2006.



Time will reveal if Assistant Secretary Stickler will take actions that prove his critics wrong.

The Bush Administration's proposal to cut MSHA's coal enforcement budget for 2009 from \$155 million to \$145 million does not bode well for the agency's effectiveness under Stickler. This latest budgetary setback prompted Senator Byrd to remark, "It is absolutely absurd that the president is attempting to cut MSHA's budget while Congress is trying to help the agency back on its feet – absolutely absurd." Representative Rahall's response was that he "just cannot see how in the blazes this administration can continue to be so dunderheaded when it comes to how its budget cuts affect the lives of the American people." "For years," he points out, "MSHA's budget was slashed and the numbers of inspectors dropped. As a result, conditions in the mines grew worse and the toll of miners who died on the job climbed." Rahall believes that the "president should be ashamed to send a budget to Capitol Hill that cuts funding for mine safety enforcement when so many mines in my district went without full quarterly inspections last year and the fines for hundreds of violators have fallen through the cracks."<sup>436</sup> UMWA President Cecil E. Roberts states:

Mandatory inspections of coal mines aren't getting done because MSHA doesn't have enough trained, qualified inspectors to do them. Fines for over 4,000 of those who did get caught violating the law weren't assessed – and even when they are assessed, they frequently aren't collected.

Roberts concludes that "President Bush has told America's coal miners that he doesn't care about making the improvements so clearly needed to keep them safe and healthy on the job."<sup>437</sup>

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<sup>436</sup> Ken Ward Jr., "Budget to cut coal mine safety funds," *Charleston Gazette*, February 5, 2008, 3A.

<sup>437</sup> UMWA, "Bush budget cuts to MSHA coal enforcement 'absurd,' UMWA's Roberts says," press release, February 4, 2008.

A series of failures at MSHA suggest that Congress should consider taking a more hands on approach with issues of mine health and safety. The UMWA cites a number of ways in which MSHA directly contributed to the tragedy at Sago: “the coal companies and the regulatory agencies decided not to pursue enhanced two-way communications underground”; “MSHA decided to mitigate the law as passed by Congress and not require that there be a sufficient number of mine rescue teams available at all times when miners are underground at every mine in America”; “the failure by MSHA over the past 30 years to require the development of a new generation of SCSRs [self-contained self-rescuers]”; “MSHA decided not to follow up on Congress’ mandate in 1969 to require safety chambers in mines”; “MSHA did not require the use of tracking devices to locate trapped miners underground, even though such technology has been available for over 30 years and is used widely in other countries.”<sup>438</sup> At a hearing, Representative Major Owens (D-New York) observed that miners had been placed at “greater danger because of the failure of this Congress to conduct appropriate oversight of MSHA’s conduct since 2001.”<sup>439</sup> The first oversight hearing during the Bush Administration occurred after the Sago disaster. Regular hearings can help to ensure consistent oversight, uncover agency failings, and awaken public attention. Bill Banig says, “Congress needs to do their job and pay attention. Do thorough oversight. Do thorough appropriations that make sure budgets are adequately funded.”<sup>440</sup> When agency leaders do not fear that members’ critical words will be followed by tough oversight (including demands for officials’ removal in event of failure) they will be more prone to resist needed reforms.

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<sup>438</sup> United Mine Workers of America, “Report on the Sago Mine Disaster of January 2, 2006,” 2007, iv.

<sup>439</sup> *Mine Safety and Health: A Congressional Perspective*, March 16, 2006.

<sup>440</sup> Interview, July 28, 2006.

Congress could conceivably play an active role in ensuring adequate health and safety measures. Representative Rahall's justified concern over MSHA's lethargic implementation of the MINER Act suggest the utility of such action. Such a move would certainly reduce the ability of ill-conceived agency appointees to undermine MSHA. "Congress could follow the model adopted in the landmark 1969 Coal Act," says Davitt McAteer, "and instruct the industry directly on what is expected for miners' safety and health in the law, rather than directing MSHA to regulate." He points out that "direct Congressional intervention...was done in 1969 in adopting dust standards...[and] may be justified, and would not be unprecedented."<sup>441</sup>

One innovative proposal that deserves serious consideration because it could make mines safer would be to empower miners themselves to enforce the law. This pathbreaking approach would allow for more inspections. The experience at union mines already demonstrates how active worker involvement and representation through safety committee makes for safer workplaces. OCAW's Tony Mazzocchi believed, "Workers have to be empowered to inspect their own workplaces and cite the employer for violations."<sup>442</sup> Enhancing workers' rights at work in this manner should not be arbitrarily dismissed simply because it departs from current practice. Worker inspection is a subject worthy of further investigation as such worker enforcement of health and safety requirements presents definite potential for augmenting MSHA's existing inspection program. Professor Thomas O. McGarity has made suggestions for reform of OSHA along these lines which are equally applicable to those workplaces that fall under MSHA's jurisdiction. He would like to see Congress "deputize workers as private

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<sup>441</sup> *Evaluating the Effectiveness of MSHA's Mine Safety and Health Programs*, May 16, 2007.

<sup>442</sup> *Multinational Monitor* 16, no. 10 (1995): 18.

attorney generals to enforce OSHA standards.” Additionally, seeing as operators have the right to contest fines issued by MSHA, employees should gain the ability to participate in settlement negotiations in order to serve a watchdog role so that fines are not reduced for unwarranted reasons.<sup>443</sup>

Increasing the criminal consequences of corporate crime is another measure that should be explored. Author Thom Hartmann writes: “The risk to a person who kills another person is high: prison, and, in some states, execution. But the risk of killing people is relatively low to a corporation, and industry lobbies to keep it that way.”<sup>444</sup> Ellen Smith, editor of *Mine Safety and Health News*, reports that presently in the event that any coal company employee goes to jail for endangering workers’ lives it is always foremen, supervisors, and plant managers, because they are on-site and technically have the authority to withdraw workers in the event of unsafe conditions. She states that these sentences are never very long, and that upper management figures like mine owners and executives escape prosecution because they “aren’t down in the mines to see the conditions – so the logic goes....”<sup>445</sup> Prosecution of top decision-makers and penalties better aligned with the severity of corporate crimes that lead to death and injury on the job would provide a powerful incentive for operators to stress safety. “White-collar offenders,” attorney John N. Gallo has observed, “generally are motivated by profit, and are usually rational, informed actors who will assess the risks versus the benefits of

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<sup>443</sup> Thomas O. McGarity, “Reforming OSHA: Some Thoughts for the Current Legislative Agenda,” 31 *Houston Law Review* 99, 115, 114 (1994).

<sup>444</sup> Thom Hartmann, *Unequal Protection: The Rise of Corporate Dominance and the Theft of Human Rights* (Emmaus, Penn.: Rodale, 2002), 186.

<sup>445</sup> Ellen Smith, E-mail to author, June 6, 2007.

engaging in criminal conduct.”<sup>446</sup> Criminal prosecution, therefore, can have a particularly salutary effect on corporate crime. According to Terry L. Leap, professor of management at Clemson University: “Once people realize that you might be a multimillionaire or billionaire executive, but if you commit these crimes, you may spend time in federal prison, that’s not something people want to do.”<sup>447</sup>

Russell Mokhiber, editor of the *Corporate Crime Reporter*, states that his general “preference would be to have the states bring reckless homicide charges against the coal companies and their executives in appropriate cases.”<sup>448</sup> He points to the State of Indiana’s case against Ford Motor Company in connection with the misdesigned vehicle that Clarence Ditlow, executive director of the Center for Auto Safety, refers to as “the infamous exploding Ford Pinto.”<sup>449</sup> The state charged Ford with three counts of reckless homicide after three teenage girls were killed in a fire when their fire-prone Pinto was rear-ended.<sup>450</sup> “It’s very similar to reckless homicide prosecutions being brought against drunk drivers,” Mokhiber observes. “The drunk drivers don’t intend to kill, but their recklessness results in death.”<sup>451</sup>

The present regulatory model itself needs review. Davitt McAteer has worked to improve safety in the nation’s mines since the late 1960s, and has come to the conclusion

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<sup>446</sup> John N. Gallo, “Effective Law-Enforcement Techniques for Reducing Crime,” 88 *Journal of Criminal Law and Criminology* 1475, 1476-7 (1998).

<sup>447</sup> “The White-Collar Criminal as Thug,” *The Chronicle of Higher Education*, September 28, 2007, A10.

<sup>448</sup> Russell Mokhiber, E-mail to author, June 1, 2007.

<sup>449</sup> Senate Committee on Commerce, Science, and Transportation, *Hearing on Firestone Tire Recall*, 106<sup>th</sup> Congress, second session, September 12, 2000. The Ford Pinto is addressed by Douglas Birsch and John H. Fielder, eds. *The Ford Pinto Case: A Study in Applied Ethics, Business, and Technology* (Albany: SUNY Press, 1994); Russell Mokhiber, *Corporate Crime and Violence: Big Business Power and the Abuse of the Public Trust* (San Francisco: Sierra Club Books, 1988), 373-82.

<sup>450</sup> Reginald Stuart, “Ford Pinto Case Jury Gets Case After Eight Weeks,” *New York Times*, March 11, 1980, A16.

<sup>451</sup> E-mail to author, June 1, 2007.

that the current regulatory model should be significantly revamped. “MSHA, like its sister-agency OSHA,” he says, “finds itself hidebound by a multilayered system which slows the process, and thus, the implementation of much needed worker protections.” According to McAteer, the present arrangement has created a “harsh reality” where “those interest groups, which have a stake in avoiding or postponing new workplace rules, have the financial resources and political clout to impede and/or bog down the current rulemaking system.”<sup>452</sup> Alternatively, McAteer says “we should go to best practices” in order to improve the current state of affairs. “That is, if there’s a widget out there that would make mines safer you have an obligation to buy it.... If someone has developed a best practice you’re responsible to put the best practices into your mine. If you don’t follow that responsibility you’re liable.”<sup>453</sup> Such an approach would also serve to shift some of the burden for ensuring appropriate health and safety conditions from the regulator to the corporation itself. McAteer would like to see an annual “National Report to Congress on Health & Safety, and Best Practices” that would “assess how MSHA, as well as other agencies, are doing in achieving their core mission of saving lives and preventing injuries and illnesses” and “also describe Best Practices in a particular industry, that is, what is being done right, as well as deficiencies. These best practices then would become the norm to help establish the ‘Duty of Care’ against which an individual company’s efforts would be judged.”<sup>454</sup>

Foundation support could provide the backing necessary to establish an independent non-profit sector dedicated to promoting occupational health and safety.

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<sup>452</sup> *Evaluating the Effectiveness of MSHA’s Mine Safety and Health Programs*, May 16, 2007.

<sup>453</sup> Interview, September 1, 2006.

<sup>454</sup> *Evaluating the Effectiveness of MSHA’s Mine Safety and Health Programs*, May 16, 2007.

Numerous organizations work to protect our environment by performing such important services as conducting valuable research on environmental issues and keeping a watchful eye on environmental policies, including those of the relevant government regulator – the Environmental Protection Agency. Meanwhile, on issues of coal mine safety there has only been one independent organization, the UMWA, that consistently performs such important functions as providing research on mine disasters, producing testimony for hearings on mine safety, and lobbying for improved mine safety legislation. The Ford Foundation supplied key seed money for the environmental movement; and foundations continue to offer necessary financial support for the efforts of environmentalists.<sup>455</sup> Similar foundation support for non-profit organizations focusing on worker health and safety could create a new impetus for ensuring safe workplaces, and launch permanent organizations that would provide needed scrutiny of both MSHA and OSHA.

MSHA exists to protect miners. MSHA must, therefore, actively enforce the laws already in place by applying and collecting sufficient financial penalties and closing mines when appropriate. MSHA should use its regulatory function in a technology-forcing manner to promote continuing progress in mining equipment and rescue devices. And MSHA must receive funding adequate to allow the agency to fulfill its mission. For miners to be best protected MSHA must at all times organize its activities and orient its

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<sup>455</sup> Marshall Robinson, "The Ford Foundation: sowing the seeds of a revolution," *Environment* 35, no. 3 (1993): 10-20; Steven Schindler, "Environmental Public Interest Law Centers," in *Casebook for the Foundation: A Great American Secret*, Joel L. Fleishman, J. Scott Kohler, and Steven Schindler, eds. (New York: Public Affairs, 2007), 111-3; John B. Judis, "Top Down," *The New Republic*, March 27, 2000, 17; Tom Turner, "Common names, common aims, yet distinctly different," *Sierra* 80, no. 2 (1995): 18; Ray Sotero, "Carrots, cucumbers, and cancer – Food Safety: Mother Nature's Lawyer," *California Journal*, March 1, 1990; Edward A. Ames, "Philanthropy and The Environmental Movement in the United States," *The Environmentalist* 1, no. 1 (1981): 9.

efforts on the basis of advancing miners' health and safety, not protecting operators' profits.

## APPENDIX

### **Some questions for interested parties:**

1. Are coal executives qualified to be MSHA officials?
2. Why are miners still contracting black lung disease?
3. When will serious attention be devoted to adoption of "best practices"?
4. Why isn't there an Ombudsman at MSHA?
5. When will the number of MSHA inspectors be significantly increased?
6. Why isn't workers' expertise on workplace safety issues more fully utilized?
7. Given the failures at MSHA, why is Elaine L. Chao, the only member of President Bush's cabinet remaining since his first inauguration in 2001, still on the job?