

**WRITTEN STATEMENT OF
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Good morning, Mr. Chairman and Members of the Committee, I appreciate the opportunity to discuss the Office of Inspector General's (OIG) report of inquiry regarding allegations of retaliation and intimidation related to the Upper Big Branch (UBB) accident investigation.

As you know, the OIG is an independent entity within the Department of Labor (DOL); therefore, the views expressed in my testimony are based on the findings of my office's work and not intended to reflect the Department's views.

Background

Following the April 5, 2010, underground explosion at the UBB mine in West Virginia, the Mine Safety and Health Administration (MSHA) initiated an investigation into the causes of the accident. At the time of the explosion, Performance Coal Company operated the UBB mine as a subsidiary of Massey Energy Company.

On March 16, 2011, the OIG received a complaint from the United Mine Workers of America (UMWA) alleging that the attorneys for Performance Coal, and the attorneys for MSHA in the DOL's Office of the Solicitor (SOL), were excluding other parties involved in the investigation by holding private meetings to discuss "issues of importance to the investigation." The complaint also alleged that MSHA's attorneys in SOL were inappropriately "making deals" with Performance Coal attorneys, resulting in MSHA vacating legitimate safety citations and orders. In a subsequent phone call, UMWA clarified that this allegation had to do specifically with MSHA's attorneys in SOL forcing MSHA to vacate a citation and order involving Dr. Pedro Reszka, one of Performance Coal's expert consultants for the accident investigation.

On April 29, 2011, while we were reviewing the UMWA complaint, we received a complaint from an attorney representing Performance Coal. This complaint alleged that MSHA's District 6 Manager, Norman Page, who was leading the accident investigation for MSHA, had engaged in misconduct by launching a campaign of intimidation and retaliation against the company's accident investigation team and, in particular, its expert consultants. The complaint alleged that Mr. Page had repeatedly ordered the withdrawal of the company's scientific experts from the mine without a good faith basis; attempted to intimidate the company's experts with retaliatory citations and orders; and threatened future retaliatory orders against one of the company's experts in an attempt to influence the expert's work product and opinions.

OIG's Review

The OIG decided to address these two complaints by looking at five incidents referenced in the Performance Coal complaint, of which one was also referenced in the UMWA complaint, albeit from a different perspective. The OIG's Office of Legal Services reviewed pertinent documents, and conducted in-person and/or telephone interviews with 26 individuals from MSHA, SOL, UMWA and Performance Coal Company.

It is important to note that this review was limited to the specific allegations made against Mr. Page. This review did not include any matters related to the causes of the explosion, MSHA's inspection and enforcement activities at the UBB mine prior to the explosion, or any aspects of the accident investigation other than the five matters cited by Performance Coal and/or UMWA:

- The first incident involved MSHA's issuance of a citation and order requiring Dr. Christopher Schemel, Performance Coal's lead scientific consultant with respect to the UBB investigation, to withdraw from the mine until he received 40 hours of "new miner" training. We found that Mr. Page was not the impetus for the citation and order and he was only marginally involved in the matter. Other MSHA officials informed us that the issue of Dr. Schemel's training was not addressed for several months, and simply "fell through the cracks," due to the hectic and busy atmosphere surrounding the first few months of the accident investigation.
- The second incident involved MSHA's issuance of a citation and order requiring Dr. Pedro Reszka, another scientific consultant hired by Performance Coal, to withdraw from the mine until such time as he could receive refresher safety training. Performance Coal alleged that the citation and order were issued in retaliation for a complaint which Performance Coal raised regarding an incident which occurred in the mine wherein a UMWA representative dislodged a piece of roofing and allegedly endangered Dr. Reszka's safety. We found that the citation and order were not issued as the result of any retaliatory intent by any MSHA officials. Rather, the decision to issue the citation and order was made independently by an MSHA inspector based on his personal observations of Dr. Reszka, and upon input he received from other MSHA inspectors who had spent time with Dr. Reszka in the mine, at a time when the inspector was unaware that any complaint had even been raised about the actions of the UMWA representative. Notably, the citation and order were similarly cited by the UMWA, but from the perspective of alleging that MSHA's attorney's in SOL were inappropriately "making deals" with Performance Coal attorneys, resulting in MSHA vacating legitimate safety citations and orders, including the one relating to Dr. Reszka.
- The third incident involved a meeting between Mr. Page and Dr. Schemel, who met to discuss the Reszka citation and order. During the meeting Mr. Page allegedly threatened Dr. Schemel with further citations and orders, with increased scrutiny by MSHA, and with other negative effects on his company, if he did not accept the citation issued with respect to Dr. Reszka, who was a subcontractor for Dr. Schemel. We did not find that Mr. Page intended to retaliate against Performance Coal or Dr. Schemel. Although MSHA officials and attorneys from the Office of the Solicitor had tentatively agreed to vacate the citation and order, we found that Mr. Page's contention that his objective was

to reach a compromise between Performance Coal and the UMWA was credible and corroborated. In particular, Mr. Page hoped that such a compromise would prevent the UMWA from initiating a campaign of filing multiple safety complaints against Performance Coal that would require significant MSHA resources to investigate. Although we did question Mr. Page's judgment with respect to how he proceeded with this meeting and some of the things which he said to Dr. Schemel, we did not find any support for the claims of intimidation or retaliation.

- The fourth incident involved MSHA's allegedly retaliatory scheduling of an inspection of the mine rescue station that serviced the UBB mine since, according to Performance Coal, that same mine rescue station already had been inspected several times after the UBB accident by District 4 inspectors. We found that the decision to schedule the inspection of the mine rescue station was made by two District 6 MSHA inspectors at a time when neither of them knew that a recent inspection of the rescue station had been done by District 4 and, when they learned of the recent inspection, they appropriately cancelled their own planned inspection of the rescue station.
- The fifth incident involved MSHA's issuance of an order banning John Montoya, an employee of another consultant hired by Performance Coal, from entering the mine until he completed the 40-hour new miner training. We found that Mr. Page was not involved in the decision to issue the order relating to Mr. Montoya, and we were therefore unable to conclude that the order was part of a pattern of intimidation or retaliation on Mr. Page's part, or by MSHA officials in general.

In summary, our review of these five incidents did not substantiate the allegation that Mr. Page engaged in a campaign or pattern of intimidation or retaliation. Further, we found no evidence that MSHA, as an entity, engaged in such a campaign or pattern, at Mr. Page's behest or otherwise. However, during our review, we did identify three questionable management actions:

- We found that the ultimate decision made by officials from MSHA and the Office of the Solicitor to vacate the citation and order related to Dr. Reszka was not based on the merits, but rather was made to avoid an appearance of retaliation and any potential congressional scrutiny.
- We found that Mr. Page used poor judgment when he met with Dr. Schemel to discuss the Reszka citation and order, without any other individuals being present, and when he made statements that could have been perceived and/or interpreted as intimidating.
- We also found that it may have been appropriate for MSHA to consider other, less punitive approaches, short of issuing a citation and order, with respect to the order and citation issued against Dr. Schemel, given that MSHA allowed him to go underground in this mine for some three months before realizing he did not have the proper training.

DOL's Response

In responding to our report, the Department indicated that the Office of the Solicitor had conducted its own review of the allegations against Mr. Page, and that its conclusions were in agreement with the OIG conclusions.

Regarding the specific management actions questioned by the OIG, the Department stated that MSHA decided to vacate the citation and order related to Dr. Reszka on the condition that he receive additional safety training prior to returning to the mine, which he did. The Department stated that this result was appropriate, and therefore planned no further action for this finding.

Further, the Department agreed with the OIG finding that Mr. Page had used poor judgment when he met with Dr. Schemel without any other individuals being present. The Department stated that while Mr. Page's actions could be viewed as imprudent, he had no intention to intimidate Dr. Schemel or engage in retaliation; therefore, the Department planned no further action for this finding.

Regarding the citation and order related to Dr. Schemel, the Department stated that it could not comment on the OIG finding that MSHA could have considered less punitive measures to resolve this situation because the order and citation were still in litigation. However, the Department agreed to provide guidance to assure consistency of enforcement regarding the applicability of its training regulations.

Conclusion

In conclusion, Mr. Chairman, I would reiterate that our primary objective was to review the allegations against Mr. Page, and we did not substantiate these allegations. Thank you, Mr. Chairman, for the opportunity to present the results of our review. I would be pleased to answer any questions that you or other Members of the Committee may have.