



Testimony
Of the
American Society of Safety Engineers
Before the
United States Senate
Committee on Health, Education, Labor and Pensions
“The State of Mine Safety and Health”
MARCH 2, 2006

Chairman Enzi and Members of the Committee:

My name is Mike Neason, and I am a fifth generation miner and a Certified Mine Safety Professional. I manage safety and health for the mining operations of Hanson Aggregates in Kentucky and surrounding states – both surface and underground mining. I come before you today in my role as Administrator of the Mining Practice Specialty of the American Society of Safety Engineers (ASSE). ASSE represents more than 30,000 safety, health and environmental (SH+E) professionals dedicated to seeing that every worker has the best possible opportunity to go home healthy and safe from their jobs each day. The Society is the largest professional safety organization and, founded in 1911, has been in existence the longest.

ASSE’s Mining Practice Specialty – one of thirteen ASSE practice specialties covering the spectrum of safety and health professional interests – currently has more

than 350 members. My colleague members are men and women on the front lines of managing mine safety and health in coal and metal/nonmetal mines, surface and underground, or providing training, auditing and consultation services to the mining industry.

We commend the Committee for looking critically at mine safety and health issues today, both in terms of what can be done to prevent another disaster such as the Sago mine catastrophe two months ago and also to discern what can be done to improve the efficiency and effectiveness of the Mine Safety and Health Administration (MSHA). ASSE shares your concern. We have established a task force to review mining emergency preparedness and communications in response to the recent tragedies. Through ASSE's alliance with MSHA as well as our partnership with the National Institute of Occupational Safety and Health (NIOSH), we intend to help encourage an effective, proactive federal response to the concern many share over this nation's commitment to mine safety and health.

For today's purposes, ASSE reviewed the two pending Mine Act reform measures, S. 2231, introduced by Senator Robert Byrd on February 1, 2006, and S. 2308, introduced by Senator Arlen Specter on February 16, 2006. Our comments here are initial reactions largely to the ideas contained in these bills. Following the work of ASSE's task force examining these same issues, ASSE will be able to provide the Committee with a more elaborate response, which we look forward to doing.

As a preliminary matter, it is important to recognize that, while the loss of life in the Sago disaster was unacceptable to mine safety and health professionals dedicated to doing everything we can to make mines safe and healthy places to work, it is far from indicative of the overall state of mine safety and health in the United States. To the contrary, mine safety has drastically improved over recent decades, and last year marked the lowest number of fatalities in U.S. history, capping a general trend of declining fatalities, injuries and illnesses. The successes should not be overlooked based on this failure.

These strides were achieved, first, through tough and effective enforcement of this nation's mining laws. It should not be overlooked, however, that efforts of government, state and private sector initiatives, often working in cooperation, also played a necessary

role. Because of the commitment from each of these sectors, technology is getting better and better at engineering hazards out of mining and removing miners from exposure to hazards. We are now seeing greater computerization of mining methods having a substantial impact on our ability to manage the safety and health risks within mines, with a substantial promise that even better protections can be achieved.

Duplicating Responsibility for Technology Advancement

Many of the technological advances we already have in place were developed through the efforts of dedicated researchers at the National Institute for Occupational Safety and Health (NIOSH), which houses the former Bureau of Mines. As we indicated in a recent letter to you and Senator Kennedy, ASSE was extremely disappointed that a NIOSH representative was not permitted by his agency – the Department of Health and Human Services – to participate in last month’s roundtable on mine safety technology. NIOSH’s Mine Program is already positioned to conduct effective intramural research, and, by expanding its already proactive outreach to academia and private sector resources, to support extramural research and develop pilot programs that can test the viability of new mine safety technology in real-world situations.

With all due respect to Senator Byrd and his fully understandable effort to examine new approaches for protecting miners – especially since the unacceptable price of Sago tragedy is being paid by citizens of his own state – ASSE cannot support legislative proposals, as included in S. 2231, that would create an Office of Technology within MSHA or in any other way diffuse this nation’s already limited mining safety and health research. Any duplication of NIOSH’s technology transfer and research infrastructure would only spread resources thin and most likely add a needless layer of bureaucracy that would delay the development and implementation of new measures to protect miners.

Significantly, Congress originally tasked NIOSH with performing the research to inform MSHA regulatory decisions in the 1977 Mine Act, in which Section 501 directs NIOSH to “conduct such studies, research, experiments, and demonstrations” necessary, among other things

(T)o improve working conditions and practices in coal or other mines...to prevent accidents and occupational diseases originating in the coal or other mining industry...to develop new or improved

methods of recovering persons in coal or other mines after an accident...and to develop new or improved means and methods of communication from the surface to the underground area of a coal or other mine.

The same legislation created MSHA, and the rationale for assigning these responsibilities to NIOSH rather than MSHA was to keep research independent and distinct from regulatory and enforcement influences. The reason to for keeping these functions separate still exists. ASSE could not support creation of a duplicative effort within MSHA. MSHA should have every resource necessary to focus on enforcement and reaching out, not only to NIOSH, but the private sector as well to help ensure that its methods and the expertise of its staff keeps current with technological advances and incorporates ongoing change into its culture. A new commitment to outreach, not a new department, is not needed for that to occur.

If any change is needed, it is the current Administration's commitment to NIOSH. For Fiscal Year 2007, \$5 million has been proposed to be taken from NIOSH, this after many of its essential capabilities were taken away in the name of Centers for Disease Control and Prevention reorganization. We urge the Senate to reject this reduction in commitment and increase NIOSH's resources so that NIOSH can better fulfill its mandate to conduct mine safety and health research, develop technology and provide training support materials.

Mine Safety Technology

With respect to mine safety technology, the Sago disaster has pointed out that gaps exist in protections for underground miners – both coal and metal/nonmetal. Although many mines, such as the ones that I oversee, go beyond compliance with MSHA's mandatory standards, others unfortunately adhere to the bare minimum standards, with the result that lives may be lost due to inadequate respiratory protection and technologically obsolete communication systems.

As indicated at the February 15 Subcommittee on Employment and Workplace Safety hearing, the market makes readily available products that function in the same manner as the one-hour Self-Contained Self-Rescuers (SCSRs) but provide expanded protection from toxic gases that can be created in mine fires or present in gassy mines

even without an accident. Promising technologies also exist for locating or communicating with miners underground, such as the text messaging technology currently being tested in approximately 140 mines throughout the world. We agree that redundant communications systems that can demonstrate effectiveness make a great deal of sense.

However, when considering what is and may not be feasible, focus must be placed on post-incident functionality when electrical systems may not be working. We urge both NIOSH and MSHA to investigate this issue thoroughly and to explore the utility of technologies developed by the U.S. Department of Defense, the National Aeronautics and Space Agency, and the fire service industries post-911 for communication with firefighters in emergencies. Although we understand that there may be real promise in current communication advances, the transfer of such technology to the underground mining industry is very much in question. Neither Congress nor MSHA should rush to force solutions by assuming the viability of these products before in-mine tests and research can be conducted and such products become commercially available. At this point in time, there simply is no one-size-fits-all solution to underground mine communication, respiratory protection, or mine rescue, as much as we all would wish it.

Although, as Senator Specter suggests, some mines might easily adopt oxygen stations that provide a four-day supply of clean air for all mines in each working area of a mine, this might not be readily accomplished in some smaller mines such as those in the anthracite sector, or those with low passageways. There may, in the alternative, be other ways of achieving the goal more feasibly in such mines. Until the information is available, such regulations should not be congressionally mandated. While the Mine Act has historically been considered a “technology forcing” statute, there are realistic limits as to what can be achieved. To be truly effective, any action meant to improve safety – whether mines or any workplace – through technology must fully consider whether appropriate “off the shelf” technology is readily available before mandates are put in place.

Incentives for Technology

Congress must also be aware that, in the metal/nonmetal sector, approximately 98 percent of underground mines are classified as “small business entities” under U.S. Small

Business Administration criteria. Many coal mines especially are small business enterprises with as few as five employees.

ASSE hopes the Committee will consider this reality and look for creative solutions, such as establishing new tax incentives, giving operators some credit against citation penalties to encourage them to adopt new technology quickly, or making establishing small business loans for the purchase of mine rescue, communications and personal protective equipment. Such measures should help expedite the necessary protection of miners without unnecessarily diminishing the economic viability of these mining businesses, many of which are located in economically deprived areas of our nation.

Effective Penalties

Both legislative proposals offered by Senators Specter and Byrd would increase significantly penalties for violations of MSHA standards. ASSE fully supports strong enforcement and the role meaningful penalties can play in focusing an employer's attention toward safety and health of its workers.

From the popular reaction to the Sago tragedy, it is apparent that many outside the mining industry may not be aware that MSHA already has more enforcement power than any other federal agency, including: mandatory quarterly inspections of all underground mines; warrantless search authority and automatic right of entry under Section 103(a) of the Mine Act; strict liability enforcement powers; mandatory civil penalties for all citations; and civil penalties that have been increased from \$10,000 to \$60,000 in the past decade. Under Section 110(c) of the Mine Act, individual agents of management can be personally fined up to \$60,000 for actions or omissions that constitute aggravated conduct – a power lacking in the Occupational Safety and Health Act covering every other industry. Moreover, the current Mine Act has felony criminal enforcement provisions of up to five years of incarceration, and, unlike OSHA, no injuries need occur for MSHA to recommend criminal prosecution by the U.S. Department of Justice.

However much we would like to think that increases in maximum penalties may be appropriate, in the day-to-day reality of the mining industry that I work in, the heightened penalty levels of \$500,000 for high negligence violations (compared with OSHA's \$70,000 maximum), the \$10,000 minimum penalty for "serious" violations --

especially when compared with OSHA's maximum of \$7,000 for similar violations – and the other enhanced penalties and “user fees” suggested in S. 2308 and S. 2231 could very well put the average, well-meaning mine out of business with a single penalty.

Moreover, as drafted, the legislation offering these increases is often ambiguous. For example, “habitual violators” would be subject to a minimum penalty of \$20,000 for “significant and substantial” citations. However, the legislation does not define “habitual” and includes no statute of limitations after which a repeated violation would no longer trigger this mandatory minimum. Because MSHA does not “group” violations into a single citation as OSHA commonly does, it is not unusual for a mine to have multiple guarding or equipment violations in a single inspection. If each individual citation were assessed at \$20,000 because these triggered the “habitual” provision, most mines could not withstand the penalty burden and continue to operate. This area must be more critically explored before any new categories of penalties are created.

Unintended Consequences

We also want to caution the Committee that some provisions of the proposed bills, though well intended, should be reconsidered following this hearing to ensure that unintended consequences do not result in everyone's understandable eagerness to prevent another Sago from occurring.

For example, provisions that would deny the Federal Mine Safety and Health Review Commission (FMSHRC) authority to modify penalties, or requiring abatement action on all citations within 24 hours – have critical due process implications that cannot be overlooked by this Committee if it is to move forward an effective program of reform.

It also appears that, while the technology provisions of the proposed legislation largely concentrate on underground coal mines, the penalty provisions would cover all categories of mines, including surface aggregate operations that do not involve the same level of hazards as do underground operations. Such action appears unwarranted at this time. In particular, Section 7 of Sen. Byrd's bill incorporates the definition of “coal mine” from the 1977 Act, which expands coverage to surface and underground metal/nonmetal mines and to all independent contractors performing any work at any mine, surface or underground Congress' intent with respect to the proposed Senate

legislation must be more clearly articulated to prevent inadvertent expansion of the provisions to those outside the underground coal mining sector.

Other suggested provisions, such as a \$100,000 minimum fine for failure to notify MSHA of an accident within fifteen minutes, are simply unachievable and may result in unintended consequences in individual situations. In many cases, especially in small mines with few workers, those who would make the call to MSHA must also be involved in immediate rescue activities longer than this time period would allow. Current provisions state “immediately,” which the FMSHRC has interpreted this to mean “two hours or less.” Moreover, there are eleven categories of accidents where this fifteen-minute notification requirement would apply, as set forth in 30 CFR 50.2(h), so it could very well not be apparent within fifteen minutes that an incident such as a mine fire or a non-fatal injury falls into the immediately-reportable category. Clearly, we all like the response to mine tragedies to be immediate, but fifteen minutes is probably less than can be mandated effectively, especially given the enormity of fine for failure without regard to the impact of the accident. We urge the Committee to work with MSHA, NIOSH and stakeholders to reexamine this provision in order to determine a more meaningful way to ensure emergency response.

With regard to mine rescue teams, Sen. Byrd’s legislation would direct all coal mines to have rescue teams consisting of their own employees. If this is to be achieved, the consequences of either closed mines or a market for coal that bears this cost must be understood. Many small mines have too few workers to field a team. This is why MSHA has for many years permitted mines to join together to form area rescue teams of highly trained personnel. This practice has been demonstrated to work effectively over many years and can remain as an effective option.

Conclusion

ASSE commends the Committee for its consideration of these various issues as well as Senators Specter and Byrd for their efforts in defining specific solutions to issues with which we all struggle. This leadership is needed if we are to move forward and help prevent another Sago tragedy. However, we urge the Committee not simply to assume a lack of MSHA enforcement powers or too weak penalties are the root cause of the failures we have seen. Along with an examination of penalties and more stringent

requirements, the Committee must consider other factors that may not be readily apparent.

It could be that the most effective solution is that MSHA make better, smarter use of its current powers and target enforcement resources more directly at the proven “bad actors” rather than being required to inspect all mines in exactly the same way, regardless of their compliance history or safety and health performance. It may be appropriate, if the Mine Act is reopened, to provide the agency with more flexibility in terms of these mandatory inspections so it can deploy its inspectors where they are most needed. More effective and not merely more severe enforcement may very well be the answer we all seek. Again, we urge the Committee to work with MSHA, NIOSH and stakeholders, both within industry and organizations like ASSE to help make these determinations. .

ASSE thanks the Committee for including us in your deliberations. We stand prepared to provide further technical assistance through our Mining Practice Specialty as the Committee continues to explore these critical mine safety and health issues. We also pledge our support in working with MSHA and NIOSH as they look for new methodologies to protect miners and to improve existing standards, programs and outreach efforts.