

TESTIMONY OF STEPHEN A. SANDERS

BEFORE THE SUBCOMMITTEE ON WORKFORCE PROTECTIONS

COMMITTEE ON EDUCATION AND THE WORKFORCE

UNITED STATES HOUSE OF REPRESENTATIVES

PROTECTING AMERICAS WORKERS: REVIEWING MINE SAFETY POLICIES WITH  
STAKEHOLDERS

OCTOBER 21, 2015

Chairman Walberg, Ranking Member Wilson and members of the subcommittee, thank you for allowing me to speak to you today regarding the health and safety of America's miners.

My name is Stephen A. Sanders. I am an attorney and I direct the Appalachian Citizens' Law Center, Inc., a non-profit law office in Whitesburg, Kentucky. The Law Center is based in Whitesburg in Letcher County, Kentucky, which is centrally located in the Appalachian coalfields.<sup>1</sup> We represent disabled miners afflicted with black lung disease and miners' widows whose husbands have died from the disease. We also represent miners who suffer workplace discrimination for making protected safety complaints.

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<sup>1</sup> Whitesburg is in Letcher County, site of the 1976 Scotia Mine Disaster, which killed 26 miners and mine inspectors and led to the passage of the Federal Mine Safety and Health Act of 1977.

There are three points I will address in my testimony:

1. Black lung disease is a serious problem that continues to disable miners. New data shows the most serious form of coal workers' pneumoconiosis is present at an alarming rate. MSHA's new regulations reducing respirable dust levels and requiring Continuous Personal Dust Monitors are critical for protecting miners.
2. Additional safety measures encouraging miners to use their statutory rights as Miners Representative and to be protected from interference and discrimination are needed to protect miners; and
3. The black lung benefits program needs improvements to provide for fairness and the efficient adjudications of claims.

### **Black lung**

I support MSHA's new regulations reducing the level of allowable respirable dust in coal mines and requiring the use of Continuous Personal Dust Monitors [CPDM]. These protections are long overdue and necessary to fulfill the Mine Safety Act's goal of entirely preventing black lung disease.<sup>2</sup> The disease is progressive and irreversible. It is also entirely preventable.

MSHA's new regulations reducing the level of respirable dust and requiring CPDMs provide critical and necessary protections for miners.

For over twenty-five years I have represented coal miners and widows trying to obtain black lung benefits. Miners who are disabled by black lungs get short of breath doing any activity. They climb a set of stairs slowly and must stop to catch their breath. Their shortness of

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<sup>2</sup> The purpose of the law is "to provide, to the greatest extent possible, that working conditions in each underground mine are sufficiently free of respirable coal mine dust concentrations in the mine atmosphere to permit a miner to work underground during his entire working life without incurring any disability from pneumoconiosis or other occupation-related disease." 30 USC 841(b).

breath makes them feel like they are smothering. Often they must use supplemental oxygen at home and if they go out they must take bottled oxygen with them. The disease is real. It causes serious health problems and premature death.

Coal Workers' Pneumoconiosis [CWP] is caused by breathing air containing minute dust particles – so small they are not visible. The dust collects in the lung and destroys the lung tissue. In some individuals CWP results in large areas of destroyed lung tissue which is called complicated pneumoconiosis or progressive massive fibrosis (PMF). The National Institute for Occupational Safety and Health (NIOSH) found that in the last fifteen years there has been an alarming rise in PMF and the prevalence of this disease is at the highest level since the early 1970's.<sup>3</sup> CWP is an irreversible and progressive lung disease. There can be rapid progression in CWP, even after exposure to dust ends.<sup>4</sup>

Miners may also develop chronic obstructive pulmonary disease [COPD] due to coal mine dust exposure and dust-related diffuse fibrosis. COPD causes irritation and damage to the airways and it may cause chronic bronchitis and emphysema, even where there is no x-ray evidence of CWP. Both coal workers' pneumoconiosis and COPD due to coal mine dust exposure are commonly called black lung.

The Continuous Personal Dust Monitors [CPDM] required by MSHA's new regulations will allow miners to monitor their own exposures, with the hope that they can prevent black lung.

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<sup>3</sup> Blackley D, Halldin C., Laney S. Resurgence of a Debilitating and Entirely Preventable Respiratory Disease among Working Coal Miners, *Am J Respir Crit Care Med* 2014; 190 (6): 708. NIOSH surveillance reports indicate that there is a 10-fold increase in the incidence of the most severe forms of black lung disease.

<sup>4</sup> Petsonk EL, Rose C, Cohen R. Coal Mine Dust Lung Disease: New Lessons from an Old Exposure. *Am J Respir Crit Care Med* 2013;187(11):1178-85.

Miners tell me all the time that the dust was thick in the mine where they worked. There were no dust monitors which could tell them whether the dust levels were safe and in compliance with the law. When dust sampling monitors were used, the results were not available until days or weeks later. In addition, miners frequently tell me that dust sampling devices were not placed where coal was actually mined but instead were put in the fresh air intake entry. CPDMs need to be put into use immediately. The CPDM gives miners the information to protect themselves from the dust that causes black lung.

Because CPDM monitoring data is immediately available to the miners and mine operators, the device will help ensure that dust levels are safe at every shift of work. The CPDM will provide miners with real time information about the level of respirable dust in the atmosphere. If there is too much respirable dust the miner can remove himself from that place and the mine operator can take action to correct the situation and reduce the level of dust. In addition to the reduced level for respirable dust and the use of the CPDM, the new MSHA rule also prevents other methods which have been use to manipulate the respirable dust rules. I support requiring MSHA's new requirement that dust sampling be done at no less than 80% of average production and sampling be done for the full working shift. These measures will help to prevent black lung by reducing miners' exposure to excessive respirable dust.

Some mistakenly believe that black lung disease, like many occupational diseases, is a thing of the past. That is absolutely not true. Black lung disease is still very much a problem. CWP was found in 71% of the Upper Big Branch victims during autopsies after the explosion. The West Virginia state medical examiners obtained sufficient lung tissue for postmortem

examination in 24 of the 29 victims, and 17 were noted to have pathologic findings of CWP.<sup>5</sup> The 17 miners whose lungs showed CWP ranged in age from 25 to 61 years, including five who had less than 10 years mining experience; nine had been miners for over 30 years. Of note, 16 of the 17 miners with CWP had started working after the modern dust limits were put into effect. All the evidence points to a resurgence of black lung: NIOSH data, MSHA data, even the Upper Big Branch autopsies.<sup>6</sup>

I know the devastation that black lung is causing, not just from the studies I cite here, but also from my clients. One of my clients, Wayne Ison, born in 1952, stopped working in 2003 after working in underground mining in eastern Kentucky for 27 years. He filed a claim for black lung and was determined to have clinical and legal pneumoconiosis in the form of interstitial pulmonary fibrosis. In 2012 Mr. Ison had a lung transplant due to his extensive lung damage.<sup>7</sup>

Another client, Rick Huff, who was born in 1965, worked as a roof bolter for 17 years.<sup>8</sup> Mr. Huff was seriously injured in a rock fall in 2000 and was not able to return to work. He has massive fibrosis with 3 cm nodules in his lungs as a result of his coal mine dust exposure. All of Mr. Ison's coal mining work and all of Mr. Huff's coal mining work occurred after the adoption of the 2 mg/m<sup>3</sup> standard.

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<sup>5</sup> *Upper Big Branch, Report to the Governor, Governor's Independent Investigation Panel*, McAteer and Associates, May, 2011, p. 32.

<sup>6</sup> Ellen Smith, Five Year Snap-Shot: The Terrible Numbers of Black Lung Disease, collecting data filed with MSHA by mine operators under 30 CFR §50.20 and finding 701 cases of black lung between October 1, 2010 and September 28, 2015. *Black Lung Special Report*, Mine Safety and Health News, October 15, 2015.

<sup>7</sup> See *Wayne Ison v. Enterprise Mining Company, Inc.*, BRB No. 14-0227 BLA (June 15, 2015).

<sup>8</sup> Mr. Huff's case is presently in litigation.

Mr. Huff said he often was required to install roof bolts in the return section. The fresh air blew past where the continuous miner was cutting coal to the area where Mr. Huff was working with the roof bolter. Consequently the air which was used to carry the dust away from the mining machine went to the area where Mr. Huff was working to support the mine roof. As he worked Mr. Huff breathed dust from drilling into the mine roof with the roof bolter and dust from the continuous miner.

There are thousands of miners just like Mr. Huff — often the youngest, ablest-bodied miners who are called upon to roof bolt in the very dustiest of conditions. These are the miners whose lives would be lengthened by the CPDM, giving them a real-time signal to know that “hey, that’s too much dust for today, better move into fresh air.”

Black lung kills. This terrible fact was why the 1969 Coal Mine Act required that the concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings is exposed be at “a level of personal exposure which will prevent new incidences of respiratory disease and the further development of such disease in any person.” 30 U.S.C. § 842(d).

The Act was in response to the tragic disability and early deaths of miners who had developed crippling lung disease. Miners could not protect themselves from the insidious harm caused by the minute particles of respirable dust they were exposed to as they worked, and history had shown that the coal mining industry would not adopt a sufficiently protective dust standard on its own.

Under the Mine Act, the Secretary of Labor, through the Mine Safety and Health Administration, must promulgate standards to assure that miners won't suffer a material impairment of health even if exposed to coal mine dust their whole working life.

For many years the respirable dust standard was 2.0 mg/m<sup>3</sup>. Extensive medical research has shown that this standard is not adequate to protect the respiratory system and the health of coal miners. The National Institute of Occupational Safety and Health [NIOSH], issued a Criteria Document in 1995, established this level should be 1.0 mg/m<sup>3</sup> average concentration for up to 10 hours per day during a 40-hour workweek. Moreover, NIOSH recommended that MSHA use single, full-shift samples to determine compliance with the exposure limit and that no upward adjustment in the limit be made to account for measurement uncertainties.

In 1999 MSHA stated in the Federal Register: "Respirable coal mine dust is one of the most serious occupational hazards in the mining industry. Long-term exposure to excessive levels of respirable coal mine dust can cause black lung and silicosis, which are both potentially disabling and can cause death."<sup>9</sup> While MSHA recognized the hazard, it did not act to reduce the level of respirable dust.

In 2008 I filed a petition for mandamus in the United States Court of Appeals asking the court to order the Secretary of Labor to perform the statutory duty and reduce the level of respirable dust so that miners did not develop pneumoconiosis.<sup>10</sup> The petition was dismissed but soon after the petition was dismissed MSHA began the process of making a rule to reduce

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<sup>9</sup> 64 FR 21519-01, 1999 WL 543989 (F.R.) Unified Agenda, April 26, 1999, Occupational Exposure To Coal Mine Dust (Lowering Exposure Limit).

<sup>10</sup> *In re Scott Howard v. Elaine Chao*, Case No. 08-5799, U.S. Court of Appeals for the Sixth Circuit.

miners' exposure to respirable dust. Nearly five years later, after several public hearings and a lengthy comment period, MSHA announced the final rule in April, 2014.<sup>11</sup>

The uncontroverted evidence establishes that there is an unacceptable risk of black lung. NIOSH regularly reviews x-rays to determine whether miners have CWP.<sup>12</sup> In the past 5 years, NIOSH reports show that miners have developed CWP at a greater rate than was previously believed true. NIOSH reported that a study in 2006 of 85 working coal miners in Letcher County, Kentucky found 12% had x-ray evidence of CWP; 1% had PMF; 7% had chronic bronchitis and 5% had emphysema.<sup>13</sup> A study of 68 miners in neighboring Knott County, Kentucky found 15% had x-ray evidence of CWP; 1% had PMF; 9% had chronic bronchitis and 7% had emphysema. This data shows that MSHA needed to reduce the level of exposure to respirable dust to protect miners from lung disease.

The NIOSH data was based on x-ray surveillance. The miners participated voluntarily, and many miners did not choose to participate. The data also did not take into account the miners who have obstructive impairment due to coal mine dust exposure but do not have x-ray evidence of pneumoconiosis.

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<sup>11</sup> 79 FR 24813.

<sup>12</sup> Attfield MD. Centers for Disease Control and Prevention. Current Intelligence Bulletin 64: *Coal Mine Dust Exposures and Associated Health Outcomes - A Review of Information Published Since 1995*. DHHS (NIOSH) Publication No. 2011-172; 2011 April.

<sup>13</sup> Attfield MD, Petsonk EL. *Advanced pneumoconiosis among working underground coal miners-- Eastern Kentucky and Southwestern Virginia, 2006*. *MMWR Morb. Mortal. Wkly. Rep.* 2007;56(26):652-655.

According to a recent NIOSH study, emphysema severity was significantly elevated in coal miners compared to non-miners.<sup>14</sup> Lead author and senior NIOSH scientist Eileen Kuempel said: “Based on our findings, exposure to respirable coal mine dust for a full working lifetime at the current 2 mg/m<sup>3</sup> standard would increase the emphysema severity index by 99 points on average. This provides additional evidence of the need to reduce dust exposures to 1 mg/m<sup>3</sup> or less as NIOSH has recommended.”

The method of measuring respirable dust in coal mines has long been a source of concern. The measurement of respirable dust must provide the miner and mine operator with readily available real-time information as to dust levels in the working environment where the miner works. Using the Continuous Personal Dust Monitor will enable the miner to be sure that he is not exposed to excessive amounts of harmful dust.

### **Mine Safety**

Miners work in dangerous conditions. Underground miners are in danger from roof falls and rib bursts. The air can be gassy and explosive. The equipment is powered with high voltage electricity. The work space is dark and it may be cramped, resulting in poor visibility.

Surface mines are also dangerous. In eastern Kentucky the strip mines are located on the tops and sides of mountains. The miners operate powerful heavy equipment, like bulldozers and end-loaders, on very steep hillsides. The rock trucks and coal trucks use gravel and dirt roads which descend down the hill precipitously. Surface miners work blasting the rock loose with powerful explosives.

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<sup>14</sup> Kuempel ED, Wheeler MW, Smith RJ, Vallyathan V, Green FH. *Contributions of dust exposure and cigarette smoking to emphysema severity in coal miners in the United States.* Am J Respir Crit Care Med 2009; 180(3):257-64.

These miners know they work in dangerous conditions. They have a special courage to perform their jobs in these conditions.

The miner should be the most precious resource in any strategy to improve mine safety in America and prevent future disasters. Miners know the conditions present in their mines, more so than inspectors and operators, and they can provide invaluable information to the federal regulators working to ensure their protection. Congress realized long ago that “mine safety and health will generally improve to the extent that miners themselves are aware of mining hazards and play an integral part in the enforcement of the mine safety and health standards.”<sup>15</sup>

Miners should feel encouraged to report unsafe conditions without hesitation. However, recent mine disasters and scores of individual mining fatalities show that this is not happening frequently enough. Unfortunately, in too many mines, miners who complain about unsafe conditions are harassed, interfered with, or even discharged. Many miners feel that those who complain put a “target on their back”. They aren’t supported or protected. MSHA must do a better job of publicizing miners’ safety rights under current law and increasing support of miners that exercise those rights.

*Representatives of Miners* are working miners that are selected by at least two other miners to represent them in safety and health matters at their mine.<sup>16</sup> Far too many miners aren’t even aware that they can designate one of their co-workers as a Miner’s Representative to travel with inspectors during inspections and receive copies of all citations, orders, and notices issued

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<sup>15</sup> S. Rep. No. 95-181, 95<sup>th</sup> Cong. 1<sup>st</sup> Sess. 36 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95<sup>th</sup> Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977

<sup>16</sup> 30 U.S.C. § 813(f).

to the operator. MSHA should encourage miners who become Miners' Representatives because of the valuable help the Miners Representative can provide in making the mine safer. This will require affirmative training of MSHA inspectors. In one mine in Western Kentucky where we worked with Miners Representatives who were trying to look out for the health and safety of their fellow miners, MSHA inspectors were unhelpful to the miners' efforts and tried in various ways to discourage or impede the Miners Representatives.

Even if miners have some understanding of their statutory rights, many will not exercise those rights for fear of retaliation. They lack confidence in MSHA's ability to protect them from retaliation and do not know where to turn for assistance otherwise. A miner who finds himself working in unsafe or unhealthy conditions usually is silent about the unsafe conditions and hopes that no harm occurs or he finds work at another mine.

As the CPDM becomes a tool for miners to use to detect high levels of respirable dust, it is important that miners know and use their statutory safety rights. With the CPDM, it is now even more important that MSHA strengthen the role of the Miners Representative and the protection available to miners who are retaliated against for insisting on their right to a safe working place. If the CPDM indicates a higher than acceptable level of respirable dust, miners must know that they can act on that information without interference, retaliation or harassment.

At my office we represent miners who have been discriminated against for being a Miners Representative or for complaining about unsafe conditions or practices. A few years ago we represented Scott Howard, a miner who was required to inspect the seals in an underground mine.<sup>17</sup> Seals are built to shut off old abandoned mines from current working areas because of the danger of gas or oxygen deficient air, and to assure adequate ventilation to the working area.

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<sup>17</sup> *Howard v. Cumberland River Coal Co.*, No. KENT 2008-736-D, 2010 WL 3616453 (FMSHRC OALJ Aug. 13, 2010)

Mr. Howard repeatedly wrote in the preshift and onshift books about the poor condition of the seals but nothing was done. After the explosion at the Sago mine, MSHA held a series of public hearings on mine seals. Mr. Howard drove 3 hours to Lexington, Kentucky to attend the hearing. He showed the MSHA officials at the public hearing a video he had taken with his cell phone of the poor condition of the seals at his mine. Although Mr. Howard did not name the mine during the hearing, before he was home that night his superintendent knew he had shown a video of the mine at the MSHA hearing. Mr. Howard was issued a letter of reprimand, ostensibly for violating a company policy about taking photos on the mine property. An ALJ later found that the company had violated Mr. Howard's Section 105(c) rights in disciplining him.

This ruling in Mr. Howard's video case did not deter the company from its efforts to terminate Mr. Howard's employment. When the company attempted to discharge Mr. Howard later, after he was off work due to an injury, the Sixth Circuit Court of Appeals affirmed the ALJ's finding that the discharge was pretextual and in retaliation for Mr. Howard's exercise of his rights under Section 105(c).<sup>18</sup>

In another case we represented Reuben Shemwell. He was sued by Armstrong Coal Company in Kentucky state court solely because he filed a discrimination complaint with MSHA.<sup>19</sup> Armstrong Coal filed suit against Mr. Shemwell despite an earlier determination from an administrative law judge that "Shemwell's discrimination complaint [had] not been frivolously brought."<sup>20</sup> After Mr. Shemwell was sued in state court, he filed a second

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<sup>18</sup> *Cumberland River Coal Co. v. Federal Mine Safety and Health Review Com'n [Howard]*, 712 F.3d 311 (6th Cir. 2013).

<sup>19</sup> *Secretary of Labor, MSHA, on behalf of Reuben Shemwell v. Armstrong Coal Company, Inc. and Armstrong Fabricators, Inc.*, 35 FMSHRC 1865 (June 19, 2013)(ALJ).

<sup>20</sup> *See Secretary of Labor, MSHA, on behalf of Reuben Shemwell v. Armstrong Coal Company, Inc. and Armstrong Fabricators, Inc.*, 34 FMSHRC 1464 (June 21, 2012)(ALJ).

discrimination complaint with MSHA, alleging that the Kentucky lawsuit was solely in retaliation for filing his original discrimination complaint. The ALJ ruled that Armstrong Coal’s civil suit was “both objectively baseless and motivated by the unlawful purpose of violating the anti-retaliation provisions of section 105(c)(1) [of the Mine Act] with impunity.” *Id.* at 1883.

Mr. Shemwell’s case illustrates how motivated some coal companies are to discourage miners from making safety complaints and how they retaliate to miners that do complain. As the ALJ noted, “the primary effect of the civil suit [was] to discourage future complaints” from other miners.

These companies’ heavy-handed responses to concerns of their miners are not unique. The responses send a chilling message to the miners to be silent. The miner who does speak up risks retaliation—from assignments of undesirable work, to threats from management, and to outright discharge.

Congress’ opening declaration in the Federal Mine Safety and Health Act of 1977 is that “the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource—the miner.”<sup>21</sup> Miners should be encouraged to speak up for health and safety.

To meet Congress’s goals under the Mine Act, miners need more robust and more frequent training of their statutory rights. To remedy the problems outlined above, MSHA must change not only the frequency of miners’ statutory rights training, but also the quality of and methods by which miners receive such training.

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<sup>21</sup> 30 U.S.C. § 801 *et seq.* (“Mine Act”).

MSHA requires statutory rights training for new miners. Even if new miners received the most dynamic statutory rights training, such knowledge fades over time. Statutory rights training should be part of the required annual refresher training.

There should also be changes in the methods by which miners receive statutory rights training, and the substance and quality of that training. Operators and management personnel should not be permitted to provide the required statutory rights training to miners. There is simply too great a conflict of interest to permit mine management to conduct statutory rights training. The training should encourage miners to understand their rights and the key role which Congress envisioned miners playing in regulation of the workplace and the particulars of how miners can most effectively and fairly exercise such rights in the face of operator obstinacy and wrongdoing. Miners should receive statutory rights training only from trainers who are independent of mine management, such as trainings provided by federal or state mine safety agencies.

While there has been a great improvement in the last two years, in MSHA's representation of miners who complain of retaliation and discrimination, some companies will go to great lengths to intimidate and isolate miners. In instances where miners become Miners Representatives under the Act, MSHA inspectors must be supportive of those miners.

Some mines obtain their own counsel in proceedings under Section 105(c). MSHA needs to provide substantive and timely responses to FOIA requests and provide more timely and complete disclosures of Section 105(c) investigation files to the miner and his counsel.

### **Black lung benefits**

As I explained in my opening, our office frequently represents miners and widows who applied for black lung benefits. This program provides much needed financial support for miners

who are unable to work and their families and their survivors. It also pays for medical treatment for the miner's disabling respiratory and pulmonary condition.

To make a claim for black lung benefits, a miner applies to the District Office of the Department of Labor's Division of Coal Mine Workers Compensation. The claims examiner at the district office identifies the coal mine employer where the miner last worked for at least one year and that operator is responsible for payment of benefits if the miner is awarded. Both the miner and the operator have time to submit evidence to the claims examiner, then the claims examiner makes a decision to award or deny benefits. On average it will probably be 8 or 9 months before the claims examiner issues a decision.

After the claims examiner decision, either party may request a hearing. In my experience probably 98% of awards at the District Director level result in the coal company requesting a hearing with the Office of Administrative Law Judges (OALJ). If a hearing is requested the parties may develop additional evidence. It is common during this time to depose medical experts -- pulmonary specialists, radiologists or pathologists -- who have either examined the miner or reviewed x-rays, CT scans, tissue samples or reports from other doctors. Presently, if a hearing is requested, it will be 2 or 3 years after the case is referred to OALJ before the case is heard by an administrative law judge and likely another year before the ALJ issues a decision.

Either side can appeal from the ALJ decision to the Benefits Review Board. Companies generally appeal awards. Written arguments addressing the law and the facts are filed with the Board. An appeal to the Board takes a year to decide. The Board can affirm or reverse the ALJ. In some cases the Board will return the case to the ALJ for further findings or additional explanation, which results in an ALJ decision which can again be appealed to the Board. While

final decisions of the Board are reviewable in the U.S. Courts of Appeals, generally the Board decision is the last action in the case.

There are areas where the black lung benefits program needs improvement. One area of concern is the disclosure of medical evidence. The *Black Lung Benefits Improvement Act of 2015* (H.R. 3625) would help level the playing field for miners by requiring the disclosure of medical evidence. This rule would not only make the claims process more fair for disabled miners who need information about their health, but also would improve the quality of decisions in black lung benefits claims by increasing the likelihood that the most relevant information is available to the decision-maker.

The tragic case of Gary Fox as an example demonstrating the need to disclose medical evidence.<sup>22</sup> Mr. Fox developed progressive massive fibrosis, but did not know it. He applied for black lung benefits after a lung surgery. Some doctors said Mr. Fox's x-rays showed complicated pneumoconiosis but other doctors did not make that diagnosis. Lung tissue removed during the surgery was reviewed by at least two pathologists at the request of the lawyers who represented the responsible coal company. When these pathologists reported finding large lesions of pneumoconiosis, their reports were not shared, even with other pulmonary specialists who helped to prepare the coal company's defense. After the company succeeded in denying the claim, Mr. Fox continued to work as a miner and have more dust exposure. It was only when Mr. Fox filed a second claim for black lung benefits a few years later and retained a lawyer that the deception which had occurred in the first claim was discovered.

The rules need to be changed to ensure that no family has to endure what the Fox family has suffered. If a coal operator defending a black lung benefits claim requires a miner to submit

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<sup>22</sup> *Fox v. Elk Run Coal Co.*, 739 F.3d 131 (4th Cir. 2014).

to a medical examination, the coal miner should receive a complete copy of the physician's report, including the physician's diagnoses, conclusions, and the results of any tests performed on the miner soon after the examination is complete. Any medical information concerning the miner's physical condition, regardless of whether the party intends to submit that information as evidence in the proceeding, should be disclosed.

It is often difficult for claimant to obtain representation in a black lung benefits claim. The legal and medical complexities faced when pursuing claims under the Act, and the fact that such claims often are in litigation for 5 years and often longer, and the miner cannot pay the lawyer and the miner's lawyer cannot recover a fee until the benefits award is final at the end of the litigation, discourages lawyers from representing miners. Another area of concern is the difficulty that miners have paying for pulmonary evaluations and other medically sophisticated evidence and depositions of medical experts.

The black lung benefits program is an adversarial system. An adversarial system only works to deliver justice when both parties to the dispute have equal resources. Too often miners do not have legal representation and, being disabled and not working, do not have the financial ability to pay for sophisticated medical testing to support their claim that they have been disabled due to black lung.

To correct this imbalance, H.R. 3625 authorizes progress payments to provide miners' attorneys with legal fees of up to \$1,500 for work at the District Office level and up to \$3,000 at the Administrative Law Judge level, for a total of up to \$4,500, provided that the claimant prevails at such level. In addition, attorneys may seek reimbursement up to \$1,500 for medical costs at each level. The legal fees and medical costs under this program would initially be paid from the Black Lung Disability Trust Fund; however, if the miner ultimately prevails in his or

her claim for benefits, the responsible coal operator would be required to reimburse the Trust Fund for the legal fees and costs that were paid. This provision is likely to encourage attorneys to represent miners on their claims and to enable miners to obtain the testing and medical opinion evidence needed to prove their case.

Processing black lung benefits claims has been slow. There is a backlog of cases pending before the Department of Labor's Office of Administrative Law Judges (OALJ). In part this is due to the shortage of ALJs. Whatever the cause, black lung cases languish for years. I have represented more than a few miners who died before the hearing was held on their claim. Congress should exercise its oversight authority to improve address this delay and help miners obtain a fair hearing in a timely manner.