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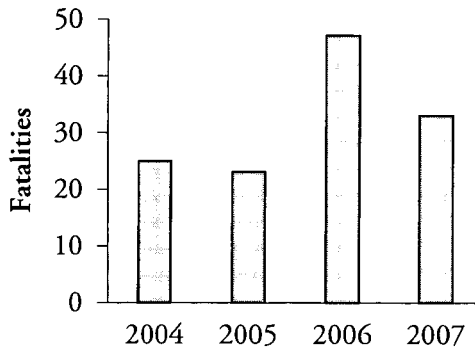
# FAMILIES OF MINE DISASTER VICTIMS SEEK ACCOUNTABILITY

*by* ANGIE ROBERTSON

**T**he 2006 Sago mine disaster in West Virginia, which killed twelve miners, and the 2007 mine disaster at Crandall Canyon in Utah, which killed nine miners, once again revealed the dangerous working conditions in coal mines and brought renewed national attention to the need for thorough mine inspections.<sup>1</sup>

Mining remains one of the most dangerous occupations in America, with a fatality rate more than seven times higher than the average for all private industries.<sup>2</sup> Because coal remains the source of 50 percent of the energy used in the United States, and energy use continues to rise, this fatality rate could potentially increase.<sup>3</sup>

#### U.S. COAL MINE FATALITIES<sup>4</sup>



Source: U.S. Mine Safety and Health Administration, available at <http://www.msha.gov/stats/daily/d2008bar.pdf>

Organized labor and mining families are fighting for increased scrutiny of working conditions in coal mines, while coal industry leaders and the Bush Administration continue to oppose more regulations in the mining industry.<sup>5</sup>

Under the Mine Safety and Health Act of 1977, the U.S. Mine Safety and Health Administration (MSHA) is charged with performing underground mine inspections at each mine four times per year.<sup>6</sup> The MSHA is also the acting investigatory body for mine accidents, claims of discrimination and hazardous working conditions, as well as criminal violations of safety standards.<sup>7</sup>

Members of Congress and labor leaders question whether the MSHA was negligent in its inspection of Sago and Crandall Canyon and, if so, how the federal agency can be held accountable for its negligence.<sup>8</sup>

“MSHA also unconscionably failed to protect [Crandall Canyon] miners by hastily rubber-stamping the [safety] plan,” said Senator Edward Kennedy (D-MA). “This is a clear case of callous disregard for the law and for safety standards, and hardworking miners lost their lives. This deserves a full criminal investigation by the Department of Justice.”<sup>9</sup>

## WHEN THE FEDERAL COURTS GET INVOLVED

Federal government agencies like MSHA are supposed to be held accountable by the Federal Torts Claims Act (FTCA).<sup>10</sup> However, federal courts are split over whether the discretionary clause of FTCA bars action against MSHA for negligent mine inspections.<sup>11</sup>

All Federal Circuit Courts generally follow a two prong test promulgated in *Berkovitz v. US* and *US v. Gaubert*. This test denies government liability to tort claims if: 1) the decision made by the federal worker was discretionary and 2) the decision was in furtherance of public policy.<sup>12</sup>

On one hand, the Fourth and Seventh Circuits have held that the government cannot be held liable for mining accident deaths caused by MSHA's negligent inspection. These two circuits based their reasoning on their determination that inspection is a discretionary activity.<sup>13</sup> The courts then presumed that because the decision was discretionary, it met the second part of the test and that the inspection was in the furtherance of public policy.<sup>14</sup> These holdings affect families of victims of the Sago mine disaster since West Virginia is within the Fourth Circuit.<sup>15</sup>

On the other hand, the Fifth, Sixth and Tenth Circuits have held that the discretionary function exception does not immunize the government from liability when a negligent MSHA inspection results in the injury or death of a miner.<sup>16</sup> These Circuit Courts agreed inspections are discretionary activities, but did not presume that the discretionary decisions of federal employees necessarily promoted public policy.<sup>17</sup> Families of victims of the Crandall Canyon disaster may be able to bring successful tort claims against MSHA because of these holdings, as they are within the jurisdiction of the Tenth Circuit.<sup>18</sup>

Additionally, recent cases in the Ninth Circuit have chipped away at immunity for government agencies under the FTCA for government employee negligence that results in death or injury.<sup>19</sup> Ninth Circuit courts have done so by placing the burden of proving that a discretionary decision was based in policy on the government instead of on the injured plaintiff.<sup>20</sup>

## WILL NEW LAWS MAKE MINES MORE SAFE?

As the prospect for success in a tort claim against the federal government is unclear, labor advocates have focused efforts on promoting laws that would prevent mine disasters in the future.<sup>21</sup>

After the West Virginia Sago mine disaster in 2006, Congress enacted 2006 MINER, a bipartisan measure which mandated changes in electronic tracking and communication devices within three years.<sup>22</sup> These safety improvements were aimed at improving communication with trapped miners during a major explosion, as happened at the Sago mine disaster.<sup>23</sup>

Congress also passed the Supplemental Mine Improvement and New Emergency Response (S-MINER) by a partisan margin of 214 to 199.<sup>24</sup> The Crandall Canyon mine disaster occurred after S-MINER's introduction in the House.<sup>25</sup>

Among its provisions, S-MINER would add a requirement for an independent inspection of multi-fatality disasters.<sup>26</sup> The bill also gives MSHA subpoena authority, increases penalties for safety violations and places MSHA completely in control of a rescue site, including communication with mining families and the media.<sup>27</sup>

### REACTIONS TO S-MINER

S-MINER has generally received high marks by the United Mine Workers of America (UMWA), families of mine workers and workers' rights advocates. The UMWA emphasized that 2006 MINER primarily focused on reaction to disaster while S-MINER provides strategies for prevention and accountability.<sup>28</sup>

"American coal miners are still dying just because they [go] to work," said UMWA President Cecil Roberts in a press release. "We need the enhanced protections [S-MINER] provides. The terrible events at Crandall Canyon must never be forgotten and never be repeated."<sup>29</sup>

"Miners, particularly non-union miners, do not have the ability to speak out because there are not other opportunities for high-wage work in rural areas,"

said Judith Rivlin, attorney with UMWA. "There must be strong safety regulations in place to protect these workers, and there must be a strong enforcement mechanism in place to enforce them."<sup>30</sup>

However, S-MINER has faced harsh criticism from the coal industry and the Bush administration. Opponents argue that S-MINER comes too soon after 2006 MINER and that it would burden the mining industry, possibly leading to job cuts in the industry it seeks to protect.<sup>31</sup>

"[R]ather than allow current law [2006 MINER] to be fully implemented, Democrats voted in favor of more bureaucratic red tape and new regulations that will only undermine the efforts already made by the mining community," said Rep. Joe Wilson (R-SC).<sup>32</sup>

The National Mining Association (NMA), the leading trade and lobbying organization for the mining industry, echoed disapproval of S-MINER, emphasizing the amount of resources already being spent on 2006 MINER.<sup>33</sup> The NMA believes that the increased safety requirements of S-MINER will add even more of a financial burden to the industry than 2006 MINER has.<sup>34</sup>

"[A]dditional legislation is unwarranted until the [2006] MINER Act is fully implemented and its effectiveness properly assessed," according to NMA President Kraig Naasz.<sup>35</sup>

President Bush vowed to veto S-MINER, and the bill may not have the support it needs to get through the senate.<sup>36</sup> However, the UMWA wants to see this legislation pressed forward so members and the public can hold politicians accountable for their votes.

UMWA Secretary-Treasurer Daniel Kane admonished, "If the President wants to reinforce his administration's record of indifference to the fate of coal miners, a veto will surely do the trick."<sup>37</sup>

S-MINER was sent to the Senate Committee on Health, Education, Labor and Pensions for review on January 22nd, 2008.<sup>38</sup> No further action on this bill has been taken.<sup>39</sup>

## NOTES

- 1 Jesse J. Holland, *House OKs Bill that Targets 'Retreat' Mining; Bush Administration Threatening a Veto*, CHARLESTON DAILY MAIL (W. Va.), Jan. 17, 2008, at 7A.
- 2 Press Release, U.S. House of Representatives Committee on Education and Labor, House Approves Comprehensive Legislation to Make Work Safer for Miners (Jan. 16, 2008)(on file with author).
- 3 Steve Kral, *Coal's Future May be Bright, But More Mandates Loom*, Mining Engineering, Feb 1, 2008, at 4, available at 2008 WLNR 3215431.
- 4 U.S. Mine Safety and Health Administration, available at <http://www.msha.gov/stats/daily/d2008bar.pdf>.
- 5 Holland, *supra* note 1.
- 6 Sara Lubbes, *HR2768 - Supplemental Mine Improvement and New Emergency Response (S-MINER) Act of 2007*, Congressional Quarterly Bill Analysis, Feb. 1, 2008, available at 2008 WLNR 2179572.
- 7 *Id.*
- 8 Press Release, Senator Theodor Edward M. Kennedy, Kennedy Releases New Report on Crandall Canyon Mine Disaster (Mar. 6, 2008)(on file with author)
- 9 *Id.*
- 10 Jay Lapat & James P. Notter, *Inspecting the Mine Inspector: Why the Discretionary Function Exception Does Not Bar Government Liability for Negligent Mine Inspections*, 23 HOFSTRA LAB. & EMP. L.J. 413, 413-443 (2006).
- 11 *Id.* at 415.
- 12 *Id.*, citing *Berkovitz v. United States*, 486 U.S. 531 (1988); and *United States v. Gaubert*, 499 U.S. 315 (1991).
- 13 *Id.*
- 14 *Id.*
- 15 <http://www.uscourts.gov/courtlinks/index.html>
- 16 Lapat & Notter, *Supra* note 10.
- 17 *Id.* at 421
- 18 <http://www.uscourts.gov/courtlinks/index.html>
- 19 Andrew Hyer, *The Discretionary Function Exception to the Federal Torts Claims Act: A Proposal for a Workable Analysis*, 2007 BYU L. REV. 1091, 1118-1150 (2007)
- 20 *Id.*
- 21 A letter from family members of the victims of the Sago Mine Disaster in support of S-Miner is available at [http://edlabor.house.gov/micro/mine\\_letters.shtml](http://edlabor.house.gov/micro/mine_letters.shtml).
- 22 Lubbes, *supra* note 6.
- 23 *Id.*
- 24 Holland, *supra* note 1.
- 25 *Id.*
- 26 *Id.*
- 27 *Id.*
- 28 Press Release, United Mine Workers of America, UMWA President Roberts statement on Senate HELP report on Crandall Canyon disaster (Mar. 6, 2008)(on file with author)
- 29 *Id.*
- 30 Telephone Interview with Judith Rivlin, Associate General Counsel, United Mine Workers of America, in Chicago, Ill. (March 7, 2008).

31 Press Release, Republicans on the House Education & Labor Committee, Labor Committee Republicans Decry House Passage of Bill to Roll Back Bipartisan Mine Safety Reforms (Jan. 16, 2008)( on file with author)

32 *Id.*

33 Jesse J. Holland, *Bush may veto mine safety bill Law is an addition to reforms passed after 2006 Sago*, CHARLESTON DAILY MAIL (W. Va.), Jan. 16, 2008, at 3A.

34 *Id.*

35 *Id.*

36 Geof Koss, *An Industry Under Assault: Democratic Congress Spells Bad News for Mining Companies*, Jan. 28, 2008, available at 2008 WLNR 1614974

37 *House Passes S-Miner Act*, United Mine Workers Journal, Jan./Feb. 2008, at 18, available at <http://www.umwa.org/journal/pdfs/UMWJr1JanFeb08.pdf>

38 Holland, *supra* note 33.

39 <http://www.thomas.gov/cgi-bin/bdquery/D?d110:2:./temp/~bdeFqp:—/bss/110search.html>—