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Black Lung on the Rise: A Call for Greater Protection of Miners

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The Mine Safety and Health Administration (MSHA) should not eliminate or relax enforcement of the 2014 rule^[2] that reduces miner’s exposure to coal dust, and instead should strengthen the regulation because of overwhelming evidence published by the Journal of the American Medical Association (JAMA) detailing the largest cluster of severe form of black lung, known as progressive massive fibrosis (PMF), reported in scientific literature.^[3]

In 2014, MSHA revised the agency’s standards on miners’ occupational exposure to respirable coal mine dust.^[4] The goal was to reduce a miner’s risk of developing black lung by lowering prior exposure limits, and requiring the “operator to continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift.”^[5] Almost two years later, the outcomes of the rule yielded positive results with MSHA announcing that approximately 99 percent of the respirable coal mine dust samples collected from April 1, 2016 through June 30, 2016 were in compliance with the agency’s coal mine dust standards.^[6] Despite the success, evidence indicates that more still needs to be done as miners—including young miners—continue to be diagnosed with the disease.^[7] Some of that evidence became available on February 6, 2018 when JAMA published a research letter confirming “416 cases of progressive massive fibrosis (PMF) or complicated black lung in three clinics in central Appalachia from 2013 to 2017.”^[8]

Shortly after the 2016 Presidential Election, then President-Elect Donald Trump stated that his goal was to cancel restrictions on American energy and reduce regulations.^[9] As promised, President Trump’s administration indicated in a regulation reformation agenda that MSHA would be revisiting the 2014 rule that reduces coal miner’s exposure to coal dust.^[10] To head MSHA, President Trump nominated—and the senate confirmed—David G. Zatezalo to serve as the Assistant Secretary of Labor for MSHA.^[11] Zatezalo was a controversial choice due to his history in the coal mining industry where he served as President, CEO, and Chairmen of Rhino Eastern Eagle mine,^[12] a company that received more than \$2.1 million in fines for safety or health violations since 2000.^[13] Since December 2017, MSHA has asked for public comments on whether standards “could be improved or made more effective or *less burdensome* by accommodating advances in technology, innovative techniques, or *less costly methods*,” and if “requirements could be streamlined or *replaced in frequency*.”^[14]

While some coal miner advocates noted that a retrospective review is not inherently problematic, concerns for the future enforcement of the regulation have risen in recent weeks because of Assistant Secretary David Zatezalo’s industry ties to Bob Murray—a coal mining executive lobbying the Trump administration.^[15] During a congressional oversight hearing, Assistant Secretary Zatezalo testified that



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the agency will not roll back any portion of the 2014 rule limiting coal dust exposure to mine workers.^[16] Despite Zatezalo's testimony, Senator Sheldon Whitehouse remains unconvinced and has voiced concerns over Zatezalo's true position; pointing to Zatezalo's previous opposition to safety rules and his industry ties to Murray—who sent the action plan to deregulate the coal industry.^[17] However, Zatezalo has publicly attempted to distance himself from Murray by stating, "I don't really know [Bob Murray] all that well. There's scarcely anybody in the valley here who doesn't know [him]. But I don't know him all that well."^[18] Murray's action plan seeks a revision of the 2014 rule, calling it arbitrary and providing no health benefit to coal miners,^[19] but that statement is not consistent with medical research and the 2014 regulation's purpose.^[20] The likely cause of PMF is the toxic dust that coal miners are exposed to,^[21] which is precisely what the regulation seeks to reduce.^[22]

The JAMA research letter, published by the National Institute for Occupational Safety and Health (NIOSH), confirmed 416 cases of PMF in central Appalachia from 2013 to 2017—the largest cluster of advanced black lung disease ever reported.^[23] The likely cause of the epidemic is miners working long shifts while mining thinner coal seams that cause the mining machines to cut rock with coal, which results in silica dust that is far more toxic than coal dust.^[24] This causes miners to develop black lung at a much younger age; the disease now affecting miners in their 50s, 40s, and even 30s, who have mined coal for fewer years, rather than miners in their 60s, 70s and 80s.^[25] The 2014 rule reduces the amount of dust coal miners are exposed to, and its strict procedures ensure maintenance of the safest possible air quality for miners.^[26] Without strict enforcement of the 2014 federal rule, those numbers are likely to continue to increase. In fact, those numbers are believed to be an underestimate of the actual number of miners with PMF.^[27]

It is widely known that coal jobs have been in sharp decline and miners are suffering from an unprecedented upsurge in the rate of black lung.^[28] While the dust rule will not bring back coal jobs, the Court of Appeals has held that the rule will not "threaten the existence or the competitive structure of the industry."^[29] As a result, "miners are working in less dust than at any point in American history and miners will be equipped with a device that will empower them to know the level of dust where they are working and to refuse to work if the level is unsafe."^[30] Any reduction to current practices would undermine this current protection for miner's health and exacerbate a growing and historic problem for miners in central Appalachia. Considering this evidence, Zatezalo, MSHA, and the Trump administration should not relax enforcement of this regulation, but should reinforce the rule to reduce coal miner's risk of developing black lung.

^[1] J.D. Expected May 2019.

^[2] 30 C.F.R § 70.100 (2014).

^[3] DAVID J. BLACKLEY ET AL., [J]AMA, PROGRESSIVE MASSIVE FIBROSIS IN COAL MINERS FROM 3 CLINICS IN VIRGINIA (Feb. 6, 2018).

^[4] 30 C.F.R § 70.100 (2014).

^[5] *Id.*

^[6] MSHA Finds Nearly All Respirable Coal Dust Samplings Comply With New Standards to Lower Levels of Respirable Coal Dust, MSHA, (July 18, 2016), <https://www.msha.gov/msha-finds-nearly-all-respirable-coal-dust-samplings-comply-new-standards-lower-levels-respirable>.

^[7] *Id.*

^[8] Howard Berkes, *Black Lung Study Finds Biggest Cluster Ever of Fatal Coal Miner's Disease*, NHPR (Feb. 6, 2018), <http://nhpr.org/post/black-lung-study-biggest-cluster-ever-fatal-coal-miners-disease#stream/0>.

^[9] Transition 2017, *A Message From President-Elect Donald J. Trump*, YOUTUBE (Nov. 21, 2016), https://www.youtube.com/watch?v=7xX_KaStFT8.

^[10] Ken Ward Jr., *Trump Regulatory Initiative Targets Black Lung Protections*, CHARLESTON GAZETTE-MAIL (Dec. 14, 2017), <https://www.wvgazette.com/news/politics/trump-regulatory-initiative-targets-black-lung-protections>.

lung-protections/article_0710897c-7059-5343-a586-88fbfa0afaa8.html.

^[11] See Ken Ward Jr., *Trump Nominates Former Coal Exec to Run MSHA*, CHARLESTON GAZETTE-MAIL (Sept. 2, 2017), https://www.wvgazette.com/news/politics/trump-nominates-former-coal-exec-to-run-msha/article_1e2af1d5-0346-5198-8e7b-74521327fe2a.html; see also Suzy Khimm, *Senate Confirms Trump's Controversial Pick to Lead Mine Safety*, NBC NEWS (Nov. 15 2017, 2:14 PM), <https://www.nbcnews.com/politics/congress/senate-confirms-trump-s-controversial-pick-lead-mine-safety-n821081>.

^[12] Ward, *supra* note 11.

^[13] Nicole Goodkind, *Trump Says He 'Saved Coal,' But Miner Deaths Nearly Doubled in His First Year*, NEWSWEEK (Jan. 27, 2018), <http://www.newsweek.com/2018/02/23/coal-miners-safety-health-trump-788576.html>.

^[14] The Assoc. Press, *Trump Reconsiders Rules Protecting Miners From Black Lung*, BLOOMBERG (Dec. 15, 2017), <https://www.bloomberg.com/news/articles/2017-12-15/trump-reconsiders-rules-protecting-miners-from-black-lung> (one could infer from the language used in the request for public comments that the agency is seeking ways to cut corners to reduce the costs of complying with the 2014 rule).

^[15] Compare Mark Hand, *Trump Claims He's Fighting for Coal Miners, But He's Reevaluating the Rule Protecting Them From Black Lung*, THINKPROGRESS (Dec. 15, 2017), <https://thinkprogress.org/trump-to-review-coal-dust-rule-4544384daede/> with The Assoc. Press, *supra* note 14 and Goodkind, *supra* note 13. See also Nicole Einbinder, *A Coal Executive's "Action Plan" for Trump is Made Public*, PBS (Jan. 10, 2018), <https://www.pbs.org/wgbh/frontline/article/a-coal-executives-action-plan-for-trump-is-made-public/>; Sara Ganim, *Senator Questions Mine Safety Official's Industry Ties*, CNN (Feb. 22, 2018), <https://www.cnn.com/2018/02/22/politics/whitehouse-mine-safety-zatezalo/index.html>.

^[16] See Vin Gurrieri, *No Changes to Obama-Era Coal Dust Rule, MSHA Chief Says*, LAW360 (Feb. 6, 2018), <https://www-law360-com.ezproxy.law.uky.edu/articles/1009200/no-changes-to-obama-era-coal-dust-rule-msha-chief-says>. See also Olgetree Deakins, *Assistant Secretary of Labor David Zatezalo Testifies on MSHA's Policies and Priorities for 2018*, LEXOLOGY (Feb. 7, 2018), <https://www.lexology.com/library/detail.aspx?g=3f2ed60b-3330-40fe-b32b-f53403d47331>; House Committee on Education and the Workforce, *Hearing on "Reviewing the Policies and Priorities of the Mine Safety and Health Administration."*, YOUTUBE (Feb. 6, 2018), https://www.youtube.com/watch?v=Ke_z5vEH5ls&feature=youtu.be.

^[17] Ganim, *supra* note 15.

^[18] Ken Ward Jr., *Bob Murray Encouraged Zatezalo to Seek Mine Safety Post*, CHARLESTON GAZETTE-MAIL (Sept. 5, 2017), https://www.wvgazette.com/news/politics/bob-murray-encouraged-zatezalo-to-see-mine-safety-post/article_6f201062-ace1-5304-9e4d-5d9947f277ba.html.

^[19] Letter from Robert E. Murray, Chairman, President, and CEO, Murray Energy Corp. to Michael R. Pence, Vice President of the United States of America (March 1, 2017) (on file with author).

^[20] 30 C.F.R. § 70.100 (2014); see also BLACKLEY ET AL., *supra* note 3, at 1.

^[21] A. Scott Laney, Edward L. Petsonk, & Michael D. Attfield, *Pneumoconiosis Among Underground Bituminous Coal Miners in the United States: Is Silicosis Becoming More Frequent?*, 67 OCCUPATIONAL ENVTL MEDICINE 652, 652 (2009).

^[22] 30 C.F.R. § 70.100 (2014).

^[23] Berkes, *supra* note 8.

^[24] *Id.*

^[25] See *id.*; see also Nadja Popovich, *Black Lung Disease Comes Storming Back in Coal Country*, THE NEW YORK TIMES (Feb. 22, 2018), <https://www.nytimes.com/interactive/2018/02/22/climate/black-lung->

resurgence.html.

^[26] 30 C.F.R 70.100 (2014).

^[27] Berkes, *supra* note 23.

^[28] Fusioncorp, *New Coal Dust Regulations Take Effect After Long Fight for Safer Mines*, APPALACHIAN CITIZEN'S L. CTR. (Feb. 1, 2016), <https://appalachianlawcenter.org/2016/02/01/new-federal-coal-dust-regulations-take-effect-after-long-fight-for-implementation/>.

^[29] Nat'l Mining Ass'n v. Sec'y, U.S. Dept. of Labor, 812 F.3d 843, 882 (11th Cir. 2016).

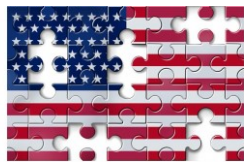
^[30] Fusioncorp, *supra* note 28.

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