

# Black lung and compliance:

The great divide



*“The first priority and concern of all in the coal mining industry must be the health and safety of its most precious resource – the miner.”*

*Section 2(a), Federal Coal Mine Safety and Health Act of 1969. USA*

## Introduction

Black lung, or Coal Workers’ Pneumoconiosis (CWP) to use its formal name, is most often found in the coal mining industry or where graphite or man-made carbon products are manufactured. The disease is commonly known as “Black lung” because those diagnosed with it typically have lungs which look black instead of the pink associated with healthy individuals.

### The “Black lung, white lies” report

CWP was the subject of a report tabled in the Queensland parliament in May 2017 after 27 public hearings, conducted from October 2016 to March 2017. The government pulled no punches in the *‘Black lung, white lies’* report, saying the illness has not “re-emerged”, describing the re-identification of the disease as a “catastrophic failing” of public administration in the state.

With at least 22 cases confirmed in Queensland in the past two years, and more diagnoses expected to come, the government acted swiftly to determine how the regulatory environment and health and safety systems had failed, and how to better protect workers exposed to coal dust in the workplace.

### The failure of the regulatory system in Queensland

While all mining companies look to protect the health and safety of their workers, ultimately this crisis has revealed the “great divide” between what is considered to be compliance

with health and safety obligations and effective workplace protection. The parliamentary report was scathing, finding “a catastrophic failure, at almost every level of the regulatory system, intended to protect the health and safety of coal workers in Queensland”.

As the human tragedy of this plays out, there are implications for the mining industry, the way its workplace health and safety is audited and, of course, risk management, mitigation and transfer – particularly when it comes to Workers’ Compensation coverage and Directors’ and Officers’ liability.

### Court filings inevitable

A key finding of the situation in Queensland is that no person or entity has ever been prosecuted for failing to meet a health and safety obligation in relation to respirable dust in this state. Court filings, whether for individual cases or a class action, are therefore only a matter of time.

### What about the medical fraternity?

The *‘Black lung, white lies’* report was also highly critical of Queensland medical professionals. Chair Jo-Ann Miller was quoted as saying the systemic failure also applied to doctors and radiologists:

“There have been 30 years whereby the doctors have been asked to look after the coal miners’ health and they have failed catastrophically as well as the Department (of Health). The failure in relation to the health scheme is something that every single officer of that department should be ashamed of.”

## So you're compliant – but are you effective?

The lesson to be learned here for all mining jurisdictions is simple. There needs to be a renewed focus on the effectiveness of Health and Safety protocols in the workplace, rather than merely checking with and adhering to compliance.

### Clear lack of protocols

A report prepared for the Queensland Department of Natural Resources and Mines, by the Monash Centre for Occupational and Environmental Health and the University of Illinois School of Public Health had an equally blunt assessment. The Coal Mine Workers' Health Scheme "revealed major system failures at virtually all levels of the design and operation" when it came to respiratory health, including a lack of clear protocols to report cases of Coal Mine Dust Lung Disease (CMDLD) to the department.

## Too much focus on catastrophe scenarios?

One of the issues in Queensland and Western Australia, unlike other Australian states and territories, is that specific mining safety regulations exist outside the main workplace Health and Safety laws. These regulations could have been construed as being more focused on the 'big bang' that is, avoiding scenarios that could lead to explosion, mine collapse or other major disasters. The Queensland government has now clearly signalled that CWP is no less a catastrophe.

All mine operators have a responsibility to implement suitable dust suppression. Clearly, in many cases, that hasn't worked.

### 2017 changes

In Queensland at least, legislation to reform the regulatory framework



for coal mining has been introduced and made effective as of 1 January 2017. Employers in the industry are on notice to ensure the health surveillance of their workers is carried out by a medical practitioner with the requisite expertise to diagnose CWP.

### **What about the US?**

In the US, Black Lung has continued to be cited as a cause of death on former coal workers' death certificates. US expert Dr Robert Cohen, the principal investigator at the University of Illinois at Chicago's Black Lung Centre of Excellence, gave evidence at the Queensland parliamentary inquiry. In response to a question from the inquiry's deputy chair Lawrence Springborg MP on whether as many as 70,000 US workers had CWP listed as contributing to their death, he said that was a "significant underestimate".

### **Fully independent compliance auditing?**

A major part of the problem is the auditing of compliance. The Queensland report called for a "truly independent" Mine Safety and Health Authority that would report to a parliamentary committee, have an expert medical advisory panel (with US expert Dr Robert Cohen as a consultant) and a full-time expert medical director.

But what happens on the ground needs to change. In the wider health and safety process we see inspectors come from many sources – some from the industry, others from law enforcement. If we look at Queensland's Mines Inspectorate, inspectors are almost invariably ex-miners. While there's no doubt they have specialist knowledge, they have never seen safety from any other point of view.

Ultimately, it is the employer who must be held to account and what we have seen in the Queensland parliamentary

report is a willingness to strengthen laws to ensure an 'eradicated' disease stays that way.

## **The risk management implications**

So we're seeing something of a "Brave New World" here – the very real likelihood that a number of Workers' Compensation claims may be revisited and the need to re-assess whether these workers are entitled to access benefits.

### **Workers' Compensation scheme failings**

The Queensland report found significant failings in the Workers' Compensation scheme affecting coal mine workers diagnosed with, or concerned about CWP. Among them was no mechanism for workers with CWP to access lump sum payments if there is no permanent impairment and no capacity to re-open claims if impairment progresses. It made a number of recommendations that will also no doubt be looked at by other states, should cases of CWP come to light in their mines:

- Transitional one-off medical assessments at no cost for retired or former coal workers (six months' exposure to coal dust in Queensland)
- Provision to reopen a claim if the disease progresses
- Lump sum compensation payment awarded even if there is no permanent impairment
- Enhanced rehabilitation (including pulmonary) and retraining
- CWP and Coal Mine Dust Lung Disease (CMDLD) to be 'Notifiable' diseases under the *Public Health Act 2005*
- Qld Chief Health Officer to report to Parliamentary Committee annually on CWP and CMDLD
- Permanent Parliamentary Committee on Public Administration

Queensland's Office of Industrial Relations was moved to issue advice for workers diagnosed with CWP, outlining workers' compensation for a successful claim. It stated that workers will be entitled to weekly compensation for lost wages, among other benefits, but this does not insure the worker against a drop in income if they are redeployed to a lower grade or where additional loadings are paid for specific tasks.

### **Entitlements relate level of worker's incapacity**

WorkCover has also issued advice that, after a successful claim, entitlements relate to the level of the worker's incapacity and how this might be reassessed over time/progression of the disease. It does outline that cases of permanent impairment could be eligible for statutory lump-sum payments of up to A \$314,920. If the degree of permanent impairment is 30% or more, there could be additional lump-sums of up to that amount, plus other possible allowances.

WorkCover's advice notes that workers diagnosed with CWP may have the right to sue their employer, or former employer under common law and suggests contacting their union or a solicitor. While Australian plaintiff lawyers have not yet filed any class action suits with regard to CWP, the volume of cases suggests this may not be far off.

### **The need to audit**

Ultimately, to ensure compliance and minimise risk, the auditing regime in mining and other industries where dust suppression is required, must be robust and timely. Under Australian standards there are 100 elements to an audit process in mining and these must all be captured within an optimal timeframe. Healthy companies look to do four or five audits within an 18-month period to capture all the elements that are required. Other companies may take appreciably longer.

We believe mining, like many other industries, needs appropriately qualified and certified auditors. A degree in safety or a related discipline should be a minimum, but it's important for the mining industry, in the light of what has happened with CWP, to attract auditors with the widest possible experience base. Companies need to satisfy themselves that they have the right people auditing their practices. The health of their employees, and their businesses, depends on it.



**Scott Kirkwood** is  
*global client relationship  
director, mining at  
Willis Towers Watson  
Australia*



**Graham Kenafacke** is  
*national WHS manager  
at Willis Towers Watson  
Australia*

### Bangkok

Multi-Risk Consultants (Thailand) Ltd.  
21st Floor, Vongvanij B Building  
100/64-66 Rama 9 Road,  
Bangkok 01320, Thailand  
T: +66 2 645 0040

### Beijing

18th Floor, West Tower  
Twin Towers  
B-12 Jian Guo Men Wai Avenue  
East Chang'an Street  
Chaoyang District  
Beijing, PRC 100022  
T: +86 21 3887 9988

### Brisbane

Level 1, 10 Eagle Street  
Brisbane, Queensland 4000  
Australia  
T: +61 7 3167 8500

### Calgary

350 7th Avenue S.W.  
West Office Tower, Suite 2200  
Portion of Floor 22  
Calgary, Alberta T2P 3N9  
Canada  
T: +1 403 263 6117

### Johannesburg

Illovo Edge, 1 Harries Road  
Illovo, Johannesburg 2196  
South Africa  
T: +27 11 535 5400

### Knoxville

265 Brookview Centre Way  
Brookview Promenade  
Suite 505  
Knoxville, Tennessee 37919  
United States  
T: +1 865 588 8101

### Lima

Avenida De La Floresta 497  
San Borja 602, 603, 604  
Lima  
Peru  
T: +51 1 700 0202

### London

51 Lime Street  
London, EC3M 7DQ  
United Kingdom  
T: +44 (0)20 3124 6000

### Melbourne

Level 4, 555 Bourke Street  
Melbourne, Victoria 3000  
Australia  
T: +61 3 8681 9800

### Miami

1450 Brickell Avenue  
Suite 1600 Floor 16  
Miami, Florida 33131  
United States  
T: +1 305 421 6227

### Perth

Willis CKA  
Level 4  
88 William Street  
Perth, Western Australia 6000  
Australia  
T: +61 8 9214 7400

### Singapore

6 Battery Road  
Floors 05-01, 06-01, 06-02  
Singapore 049909  
T: +65 6 591 8000

### Toronto

100 King Street West  
1 First Canadian Place  
Suite 4700, Floor 47  
Toronto, Ontario M5X 1E5  
Canada  
T: +1 416 368 9641

Follow us on LinkedIn.com (search for 'Willis Towers Watson Natural Resources Industry Group')

Download our 2016 Natural Resources Risk Index:

<https://willistowerswatson.com/en/insights/2016/06/natural-resources-risk-index-2016>

## About Willis Towers Watson

Willis Towers Watson (NASDAQ: WLTW) is a leading global advisory, broking and solutions company that helps clients around the world turn risk into a path for growth. With roots dating to 1828, Willis Towers Watson has 40,000 employees serving more than 140 countries. We design and deliver solutions that manage risk, optimize benefits, cultivate talent, and expand the power of capital to protect and strengthen institutions and individuals. Our unique perspective allows us to see the critical intersections between talent, assets and ideas – the dynamic formula that drives business performance. Together, we unlock potential. Learn more at [willistowerswatson.com](http://willistowerswatson.com).



[willistowerswatson.com/social-media](http://willistowerswatson.com/social-media)

Copyright © 2017 Willis Towers Watson. All rights reserved.  
20502/09/17

[willistowerswatson.com](http://willistowerswatson.com)

Willis Towers Watson