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INDEPENDENT CONTRACTOR SAFETY IN THE MINES: A REVIEW AND ANALYSIS OF REGULATORY HISTORY WITH PROPOSALS FOR CHANGE

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I. INTRODUCTION

The mining of coal and other minerals traditionally has been regarded as a uniquely dangerous occupation. While modern mining technology has advanced well beyond the use of rudimentary equipment, the advent of sophisticated mechanization, complex engineering techniques and generally improved working conditions has not eradicated the safety and health hazards to which mine employees are exposed. Recent findings of the President's Commission on Coal show that in 1979, there were 144 fatalities and over 18,000 disabling injuries in coal mining alone.¹ Mine disasters in the early 1970's at the Sunshine Silver, Buffalo Creek and Scotia mines claimed at least 250 lives.² More than 10,000 injuries occurred in the metallic and non-metallic mineral industries in 1977.³

The federal government has attempted to protect miners from these safety and health hazards with a series of federal laws. Each successive law has been directed at holding mine operators accountable for maintaining safe mining conditions. It is believed that mining operators will be more responsible if held accountable for mining conditions. This, in turn, ultimately should result in promoting the safety of the miners.

In 1966, Congress enacted the Federal Metal and Nonmetal-

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¹ President's Commission on Coal. Summary Findings 12.

² S. REP. NO. 181, 95th Cong., 1st Sess. 4, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 3401, 3404.

³ MSHA, DEPT OF LABOR, INFO. REP. NO. 1R1106, INJURY EXPERIENCE IN THE NONMETALLIC MINERAL INDUSTRIES (EXCEPT STONE AND COAL) 1977 (1979); MSHA, DEPT OF LABOR, INFO. REP. NO. 1R1104, INJURY EXPERIENCE IN THE METALLIC MINERAL INDUSTRIES 1977 (1979).

lic Safety Act of 1966.⁴ Three years later, the Federal Coal Mine Health and Safety Act of 1969 was enacted.⁵ These acts were administered by the Department of Interior through the Mining Enforcement and Safety Administration (MESA).⁶

This regulatory scheme was subject to increasing criticism based on charges that the laws were not broad enough to cope with mine safety and health problems. Consequently, in an effort to consolidate all mining regulations under a comprehensive statutory scheme (rather than separate laws for different types of mining), Congress passed the Federal Mine Safety and Health Act of 1977,⁷ which superseded the 1969 and 1966 laws. The Act transferred administration of safety and health regulation for all types of mining to the Department of Labor and established a new Mine Safety and Health Administration (MSHA) to enforce the law.

The express purpose of the 1977 law is "to promote safety and health in the mining industry, [and] to prevent recurring disasters. . . ."⁸ The Act states, "[T]he priority in the industry must be the health and safety of miners and the prevention of death, serious physical harm and occupational diseases."⁹

The Act sets forth various mandatory safety and health standards,¹⁰ and authorizes the Secretary of Labor¹¹ to promulgate and revise improved mandatory standards to protect against injuries and fatalities in coal or other mines.¹² To assure

⁴ Federal Metal and Nonmetallic Mine Safety Act, Pub. L. No. 89-577, 80 Stat. 772 (1967).

⁵ Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 742 (1970).

⁶ Various operations relating to the mining industry but excluding actual "mines", were, and to some extent still are, regulated under the Occupational Safety and Health Act (OSHA). 29 U.S.C.A. §§ 651-78 (West 1975).

⁷ Federal Mine Safety and Health Amendments Act of 1977, Pub. L. No. 95-164, 91 Stat. 1290 (1980), *codified* at 30 U.S.C.A. §§ 801-78 (West Supp. 1981) [hereinafter the 1977 Act].

⁸ H.R. CONFERENCE REP. NO. 655, 95th Cong., 1st Sess. 37, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 3485.

⁹ 30 U.S.C.A. § 801(a)-(c) (West Supp. 1981).

¹⁰ 30 U.S.C.A. §§ 841-2, 861-77 (West 1971 & West Supp. 1981).

¹¹ Hereinafter the Secretary.

¹² 30 U.S.C.A. § 811 (West Supp. 1981).

compliance, federal inspections of mines are authorized.¹³ Furthermore, the 1977 Act prescribes enforcement mechanisms which include the issuance of citations and orders of withdrawal.¹⁴ Civil and criminal penalties can be assessed for violations of the Act and its regulations.¹⁵

II. THE INDEPENDENT CONTRACTOR PROBLEM

The 1977 Act seeks to promote a health and safety consciousness, backed by sanctions, to secure a qualitatively better work environment in all mines. To this end, Congress places "primary responsibility"¹⁶ for maintaining safer and healthier conditions on mine "operators".¹⁷ In this context, a complicated, and as yet unresolved, issue arises as to who is the legally responsible "operator" in those situations where more than one employer is engaged in work at a mine site.

One particular aspect of this problem, and the focus of this discussion, is the situation where a mine operator contracts with independent contractors who perform various services at the mine site.¹⁸ The assignment of liability becomes problematic where the independent contractor, as opposed to the mining company, violates the Act or regulations on mine property.

The scope and existence of this problem is the result of widespread reliance in the mining industry on independent contractors. Generally, independent contractors are retained to provide services which the company is unable or unwilling to perform itself. Most commonly contracted out is work requiring highly specialized or technical services such as electrical work,

¹³ The 1977 Act requires at least four full inspections annually for underground mines and at least two annual inspections for surface mines. Additional inspections are authorized under certain conditions. 30 U.S.C.A. § 813 (West Supp. 1981).

¹⁴ 30 U.S.C.A. § 814 (West Supp. 1981).

¹⁵ Civil penalties are mandatory for all violations of a mandatory health or safety standard. 30 U.S.C.A. § 820(a) (West Supp. 1980). Criminal penalties are to be assessed only for willful violations. 30 U.S.C.A. § 820(d) (West Supp. 1981).

¹⁶ 1977 Act, *supra* note 7.

¹⁷ *Id.*

¹⁸ To avoid confusion from use of the word "operator," which has legal significance, the primary mine operator will be referred to as the "mining company".

specialized machine maintenance, blasting and drilling. Additionally, contractors are hired to perform haulage and other transport services as well as many types of construction work. Consequently, at any given time, there can be numerous employees of independent contractors on mine property engaged in a multitude of services which may or may not be functionally related to the primary mining operation.

This operator/independent contractor issue has important ramifications in the public health and safety context. Since the Act is premised on the use of sanctions to ensure compliance with mandatory health and safety standards, citation of the appropriate party for violations is crucial to sensible, efficient enforcement of the law. It necessarily follows that the business entity responsible for the hazards it creates should be the party against whom the sanctions are imposed. Only by sanctioning the business entity in the best position to control the affected employees and work environment can maximum compliance with the 1977 Act be obtained. Moreover, this entity is in the best position to quickly abate any violation.

If the goal of compliance with the mandatory health and safety standards is to be effectuated, a rational enforcement policy should have the utmost priority. When determining who should be cited for an independent contractor's violations, the following policy aims should be considered:

(1) The source of the violation should be isolated so that it will be properly and quickly abated.

(2) Enforcement should be aimed at all operators (companies and contractors) so that the need for prevention of violations becomes instilled in the consciousness of all operators.

(3) Incentives to establish safe and healthy work practices should be provided.

(4) Optimum cooperation between mine companies and contractors should be fostered so as to assure that training requirements are met and violations are prevented.

(5) Employees of mining companies and contractors should be protected from needless exposure to hazards.

(6) The undue penalization of any party should be prevented.

(7) The employment of independent contractors to perform work which mining companies are unable to perform should be promoted.¹⁹

In light of these considerations, the question arises as to whether the traditional enforcement policies followed by MSHA comport with the remedial intent of the statute. In the past, only the mining company has been cited for violations of the Act or regulations regardless of the circumstances. Since this policy is now in a state of flux, the viability of such a policy should be analyzed.

III. STATUTORY PROVISIONS OF THE 1977 ACT

A. Definitions

The Act defines "operator" as "any owner, lessee or other person who operates, controls or supervises a coal or other mine or any independent contractor performing services or construction at such mine."²⁰ A "miner" is "any individual working in a coal or other mine."²¹ A "coal or other mine" is broadly defined to include not only the area from which minerals are extracted, but also areas appurtenant to mine property and "lands, excavation, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools or other property . . . used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits . . . or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals. . . ."²² These definitions indicate that the Act contemplates the broadest possible scope of coverage.

For the purposes of this discussion, the definition of "operator"²³ is most relevant. Independent contractors are expressly

¹⁹ While this consideration may seem tangential, it is mentioned as a blanket heading for the following other factors: (1) contractors may be able to work more safely than mining companies unfamiliar with such work, (2) promotion of employment for the general welfare of the economy, and (3) prevent mining companies from leaving the industry rather than subjecting themselves to statutory liability due to an inability to contract out work.

²⁰ 30 U.S.C.A. § 802(d) (West Supp. 1981).

²¹ 30 U.S.C.A. § 802(g) (West Supp. 1981).

²² 30 U.S.C.A. § 802(h)(1) (West Supp. 1981).

²³ 30 U.S.C.A. § 802(a) (West Supp. 1981).

included in the category of operators. This provision marked a significant change from the 1969 Act which defined an operator as any "owner, lessee, or other person who operates, controls, or supervises a coal mine"²⁴ and the 1966 Act which included in its definition "the person, partnership, association, or corporation, or subsidiary of a corporation operating a mine, and owning the right to do so, and includes any agent thereof charged with the responsibility for the operation of such mine."²⁵

Under the 1969 Act, there was no consistent interpretation of the former definition of "operator". Administrative and judicial decisions varied as to whether independent contractors could be penalized for the violations they committed.²⁶ The broader definition under the 1977 Act was adopted because of these inconsistencies. At first glance, it appears that the new definition of operator should have put the "independent contractor issue" permanently to rest. However, legislative history of the provisions shows that only one part of the problem was resolved. The Senate Report states that:

Similarly, the definition of mine 'operator' is expanded to include 'any independent contractor performing services or construction at such mine.' It is the Committee's intent to thereby include individuals or firms who are engaged in the extraction process for the benefit of the owner or lessee of the property and to make clear that the employees of such individuals or firms are miners within the definition of the Federal Mine Safety and Health Act of 1977. In enforcing this Act, the Secretary *should* be able to issue citations, notices, and orders, and the Commission *should* be able to assess civil penalties against such independent contractors as well as against the owner, operator, or lessee of the mine. The Committee notes that this concept has been approved by the federal circuit court in *Bituminous Coal Operators' Assn. v. Secretary of the Interior*, 547 F.2d 240 (C.A. 4, 1977).²⁷

²⁴ 30 U.S.C.A. § 802(d) (West 1971) (amended 1977).

²⁵ 30 U.S.C.A. § 721(c) (West 1971) (repealed 1977).

²⁶ Though the original House bill for the 1977 Act did not include independent contractors within the definition of "operator", the Senate bill did. Compare H.R. 4287, 95th Cong., 1st Sess. (1977) with S. 717, 95th Cong., 2nd Sess. (1977). Ultimately, the Senate version was adopted in conference. For a detailed discussion of the relevant case law, see *infra* notes 54-128 and accompanying text.

²⁷ LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH AMENDMENTS ACT OF 1977 at 602 (1978) (emphasis added).

The Conference Committee Report follows along the same lines, noting that:

The Senate bill modified the definition of 'operator' to include independent contractors performing services or construction at a mine. This was intended to *permit* enforcement of the Act against such independent contractors, and to *permit* the assessment of penalties, the issuance of withdrawal orders, and the imposition of civil and criminal sanctions against such contractors who may have continuing presence at the mine. The House amendment had no comparable provision. The conference substitute conforms to the Senate Bill.²⁸

The foregoing passages lend substantial support to the proposition that while the new definition *permits* holding independent contractors liable under the law, it by no means precludes the Secretary from taking enforcement action against the mining companies. Moreover, the language mandates no particular enforcement policy.

In addition to the foregoing, the Conference Report injects another element into the calculus in that the Secretary is given discretion as to *which* independent contractors will be liable under the Act.²⁹ Hence, while section 3(d) of the Act settles that independent contractors *may* be liable for their violations, it by no means settles under what circumstances they *must* be liable. Resolution of this important question will have an important effect on the enforcement of the Act since all statutory enforcement actions are taken against "operators".³⁰ Only the party

²⁸ *Id.* at 1315 (emphasis added). In an amendment proposed by Senator Hatch, "operator" was defined to include "any independent contractor therewith and any agent thereof in cases where such contractor is charged with responsibility for the operation of such mine or for the supervision of the miners in such mine." *Id.* at 832. This definition, which may have obviated the confusion over the independent contractor issue, was not finally adopted by Congress.

²⁹ The Senate bill modified the definition of 'operator' to include independent contractors performing services or construction at a mine. This was intended to permit enforcement of the Act against such independent contractors, and to permit the assessment of penalties, the issuance of withdrawal orders, and the imposition of civil and criminal sanctions against such contractors who may have a *continuing presence at the mine*.

H.R. CONFERENCE REP. NO. 655, 95th Cong., 1st Sess. 37, reprinted in [1977] U.S. CODE CONG. AND AD. NEWS 3485 (emphasis added).

³⁰ See notes 7, 16, and 17 *supra* and accompanying text.

who is deemed to be the operator will be subject to liability under the Act.

B. Enforcement Mechanisms

There are three basic enforcement mechanisms available to the Secretary to ensure compliance with the Act and regulations: (1) citations, (2) orders, and (3) civil penalties. Citations are the least severe sanction; orders the most severe. Civil penalties are levied against the operator in both instances. The amount of the penalty is computed by application of the statutory criteria.³¹ In all cases, enforcement action is taken against the operator as determined by the Secretary.³²

Two types of citations can be issued under the 1977 Act. A section 104(a) citation can be issued when a federal inspector "believes that an operator . . . has violated this Act, or any mandatory health or safety standards, rule, order, or regulation promulgated pursuant to this Act."³³ A section 104(d)(1) citation,³⁴ often referred to as an "unwarrantable failure"³⁵ citation, is issued when a federal inspector finds a violation of the Act which does not create an "imminent danger",³⁶ but which could "significantly and substantially"³⁷ contribute to the cause and effect of a mine health or safety hazard. A prerequisite to the is-

³¹ 30 U.S.C.A. § 820(i) (West Supp. 1981).

³² 30 U.S.C.A. § 820(a)-(d) (West Supp. 1981). *But cf.* 30 U.S.C.A. § 820(g) (West Supp. 1981).

³³ 30 U.S.C.A. § 814(a) (West Supp. 1981).

³⁴ 30 U.S.C.A. § 814(d)(1) (West Supp. 1981).

³⁵ "Unwarrantable failure" is not defined in the Act, but is interpreted to mean "conditions or practices the operator knew or should have known existed and therefore should have abated prior to discovery by the inspector." *Consolidation Coal Co. v. Secretary of Labor and United Mine Workers of America*, MORG 79-70, 1 MSHC 2127, 2128 (1979) *citing* *Zeigler Coal Co.*, 7 IBMA 280 (1977).

³⁶ "Imminent danger" means the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." 30 U.S.C.A. § 802(j) (West Supp. 1981).

³⁷ There is some dispute as to precisely what is meant by "significant and substantial". However, a recent administrative decision states that *all* violations are significant and substantial except those which "pose no risk of injury at all" and those which "pose a source of injury that only has a remote or speculative chance of happening." *Sunbeam Coal Corp. v. Secretary of Labor*, PITT 79-210 *et seq.*, 1 MSHC 2314, 2316 (1980), *citing* *Alabama By-Products Corp.*, 7 IBMA 85 (1977).

suance of a section 104(d)(1) citation is that the violation be caused by an "unwarrantable failure" of the *operator* to comply with the Act.

The type of citation issued has important legal consequences for an operator. Where an operator is issued a section 104(a) citation, if the alleged violation is abated within the time set in the notice, the operator is not subject to further sanctions.³⁸ However, once an operator is cited under section 104(d)(1), the operator is subject to a withdrawal order if, within ninety days of the citation, a federal inspection discloses another "unwarrantable" violation, regardless of whether the original citation was timely abated.³⁹

Withdrawal orders, which are authorized by five sections of the Act, provide for harsher sanctions than citations.⁴⁰ Withdrawal orders mandate the removal of all persons from the affected area except those necessary to eliminate the condition.⁴¹ Section 103 orders are issued to evacuate a mine accident site.⁴² Orders are issued under section 104(b) upon failure of an operator to abate a section 104(a) citation and remain effective until abatement is completed.⁴³ Section 104(d)(1) orders are issued if *any* unwarrantable violation is found to exist within ninety days of the issuance of a section 104(d)(1) citation. An operator's records can be cleared only if an inspection of the entire mine reveals no unwarrantable violations.⁴⁴ Orders may be issued under section 107 if an inspector finds the existence of an "imminent danger".⁴⁵ Finally, a "pattern order" may be issued pursuant to section 104(e).⁴⁶ This is the most stringent civil sanc-

³⁸ The operator would still be liable for the mandatory civil penalty assessed for the violation. 30 U.S.C.A. § 820(a) (West Supp. 1981).

³⁹ 30 U.S.C.A. § 814(d)(1) (West Supp. 1981).

⁴⁰ 30 U.S.C.A. §§ 813(d), 814(b), 814 (d), 814(e), 817 (West Supp. 1981).

⁴¹ 30 U.S.C.A. § 814(c) (West Supp. 1981).

⁴² 30 U.S.C.A. § 813(j) (West Supp. 1981).

⁴³ 30 U.S.C.A. § 814(b) (West Supp. 1981).

⁴⁴ Essentially, once an unwarrantable failure order has been issued, the operator is subject to a succession of orders, skipping the citation stage and resulting in somewhat of a chain reaction. 30 U.S.C.A. § 814(d)(1), (2) (West Supp. 1981).

⁴⁵ This type of order need not be preceded by a citation. 30 U.S.C.A. § 817 (West Supp. 1981). See generally, note 36 *supra*.

tion. Once an operator is deemed to have established a "pattern" of significant and substantial violations the operator is notified that such a pattern exists.⁴⁷ Following this notice, if another "significant and substantial" violation is found within ninety days, an order of withdrawal is issued and remains effective until the violation is abated. Once this first order is issued, further orders of withdrawal follow each time a "significant and substantial" violation is found. The result is a chain of orders. Only a complete inspection of the entire mine yielding no "significant and substantial" violations will break the chain.⁴⁸

In addition to the foregoing enforcement mechanisms, a mandatory civil penalty⁴⁹ is assessed for *every violation* cited in a citation or order.⁵⁰ The penalty calculation is based on six statutory criteria: (1) the operator's history of previous violations, (2) the appropriateness of the penalty to the size of the operator's business, (3) the operator's negligence, (4) the effect of the penalty on the operator's ability to stay in business, (5) the gravity of the violation, and (6) the operator's good faith in abating the violation.⁵¹

C. *Problems With the Application of the Enforcement Mechanisms*

If these enforcement actions are to be effective, it is suggested that they should be taken against the party in the best position to respond to them. The party who exercises direct control over the employees and area involved should be subject to the penalties. If citations and orders are to foster a safety and health consciousness, citing the mining company rather than the contractor who caused the violation may be counter-productive. The contractor, free from penalty liability if not directly cited, has no incentive to either abide by the regulations or to become familiar with them. Consequently, the mining company becomes strictly liable for conditions and practices which it cannot con-

⁴⁷ MSHA has not yet promulgated final rules interpreting this section of the 1977 Act. Proposed rules have been published. See 45 Fed. Reg. 54, 656 (1980).

⁴⁸ 30 U.S.C.A. § 814(e)(3) (West Supp. 1981).

⁴⁹ The Act also provides for criminal sanctions. They are not relevant here, however, since they are only levied for knowing and willful violations, dependent on a requisite state of mind. 30 U.S.C.A. § 820(d) (West Supp. 1981).

⁵⁰ 30 U.S.C.A. § 820(a) (West Supp. 1981).

⁵¹ 30 U.S.C.A. § 820(i) (West Supp. 1981).

trol, resulting in the mining company acting as an insurer for independent contractors.

Moreover, under the Act, the sanctions are progressive and interrelated. Orders follow citations, and an operator can be penalized for a pattern of violations. In this respect, independent contractors assigned to the mining company are factored into the mining company's history of violations. The result may be that stricter sanctions are applied against the mining company despite the fact that it was never responsible for those earlier violations. Further, if the independent contractor's violations are "significant and substantial" they will be considered as significant and substantial violations of the mining company and can eventually result in a pattern order against the mining company.

The argument favoring such strict liability is that the burden is placed on the mining company to make certain that the independent contractor does not violate the Act or regulations in the first place. According to this view, the company has the "incentive"⁶² to instill safety consciousness in contractors and oversee their operations. Since the contractor's violations will be imputed to the mining company, the company has more reason to exercise control over the contractor's work to avoid progressively harsher sanctions.

The problem with such a strict liability theory may be best illustrated by a hypothetical. Assume that Company contracts with XYZ to build Company's first mine. With the exception of one Company official, all personnel at the construction site are employed by XYZ. XYZ has its own work rules and the terms of the contract preclude Company from exercising direction or control over XYZ's work force. The construction lasts six months during which time federal inspectors issue numerous citations and orders relating to the construction activity. Pursuant to standard MSHA policy, Company is cited as the "operator".

Because these violations are attributable to Company, it must bear the costs of the penalty assessments. Moreover, even if Company is reimbursed by XYZ for the costs of the penalties, Company's future penalty assessment will be inflated because of

⁶² However, the avoidance of strict liability for the violations of its contractors only provides a negative incentive for the mining company.

the prior history of violations which were actually caused by XYZ. Thus Company will begin operations with an extensive history of prior violations which will subject Company to progressive sanctions. It is even possible that Company can be deemed to have a "pattern" of violations upon *its* first citation. The possibility of the imposition of unfair and undue penalties is not the only problem. Unexperienced and non-expert supervision may result. It is unrealistic to expect Company to supervise XYZ. The very purpose for hiring XYZ was that Company lacked the expertise to perform the construction or services.⁵³

IV. CASES BEFORE THE AGENCY AND THE COURTS

A. *Statutory Construction of the Earlier Acts*

Cases involving independent contractor violations first arose under the 1969 Coal Act. In two early decisions, the Interior Board of Mine Operations Appeals⁵⁴ held that an independent contractor was an "operator" within the meaning of section 3(d) of the 1969 Act,⁵⁵ and that as an "operator", the contractor, not

⁵³ There are two key statutory provisions which impact upon the independent contractor issue. Section 104(g)(2) requires miners idled by a withdrawal order to be compensated for their lost time. 30 U.S.C.A. § 814(g)(2) (West Supp. 1981). Section 116 requires mine operators to provide paid safety and health training for miners, including initial training, annual refresher training, hazard training and operator certification that training has been completed. 30 U.S.C.A. § 825 (West Supp. 1981).

Payment for idle time becomes important in the situation where an independent contractor violation results in a withdrawal order issued to the mining company. The operator to whom the order is issued is technically liable to pay for the idle time. As a practical matter, however, this probably would not occur. More importantly, however, if the order affects an area occupied by the mining company's employees as well as the independent contractor's employees, the mining company will be forced to pay its own employees for idle time due to no fault of its own.

The training requirements create another troublesome situation. Under the implementing regulations, a mining company is required to train "non-employees" which includes training employees of independent contractors. 30 C.F.R. § 48 (1980). While these regulations have been upheld by the Third Circuit, they point out the administrative confusion inherent in not functionally distinguishing contractors from the mining companies. *National Industrial Sand Corp. v. Marshall*, 601 F.2d 689 (3d Cir. 1979).

⁵⁴ The predecessor of the current Federal Mine Safety and Health Review Commission [hereinafter the Board].

⁵⁵ Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 742 (1980).

the mining company, was liable for the construction company's violations of mandatory health and safety standards.⁵⁶

In *Affinity Mining Co.*, the Board maintained that responsibility for violations was a *factual* determination based on a number of considerations including whose employees committed the violation, whose employees were exposed to the hazards, and which party had control over the work area involved. The Board added that, ". . . while more than one person may fall technically within the definition of 'operator', only one responsible for the violation and the safety of employees can be the person [against whom enforcement action is taken]."⁵⁷ An owner/operator would not be immune from liability, however, where it "materially abetted violations of its independent contractors."⁵⁸

In another case,⁵⁹ the Board dismissed a proceeding against a mining company where the company had a contract with an independent contractor which indicated "on its face that [the company] was not responsible for the health and safety of the personnel at the mine"⁶⁰ and the government had no evidence to the contrary.⁶¹

The *Affinity* rule was soon modified. In *NICOA v. Brennan*,⁶² the court held that for purposes of Title IV of the 1969 Act, pertaining to black lung compensation, independent contractor construction companies did not fall within the definition of "operator." Following the district court's lead, the Board began to modify its position in subsequent cases. In *Peggs Run Coal Co., Inc.*,⁶³ it held that a mining company could be held liable for violations of its contractors if the violation endangered mining company employees and the mining company could have pre-

⁵⁶ *Affinity Mining Co.*, 2 IBMA 57 (1973) (construing 30 U.S.C.A. § 802(d) (West 1971) (amended 1977)) [hereinafter *Affinity*]; *Wilson v. Laurel Shaft Constr. Co.*, 1 IBMA 217 (1972) (construing 30 U.S.C.A. § 802(d) (West 1971) (amended 1977)).

⁵⁷ *Affinity*, *supra* note 56 at 60.

⁵⁸ *Id.* at 61.

⁵⁹ *Ohio Mining Co.*, 4 IBMA 121 (1975).

⁶⁰ *Id.* at 125.

⁶¹ *But see Rushton Mining Co.*, 5 IBMA 367, 369 (1975).

⁶² 372 F. Supp. 16 (D.D.C. 1974) [hereinafter *NICOA*].

⁶³ 5 IBMA 175 (1975).

vented the violation with a "minimum of diligence".⁶⁴ This new standard was affirmed in *West Freedom Mining Corp.*,⁶⁵ where the operator would have been able to prevent a violation with a "minimum of effort".⁶⁶

Eventually, in a declaratory judgment action brought by the Association of Bituminous Contractors, the *Affinity* rule was struck down.⁶⁷ The district court declared that construction companies were not operators under the 1969 Act, and hence could not be cited for violations. However, the District of Columbia Circuit determined that the Secretary could cite the mining companies for the violations of the contractors.

To implement the district court's decision, MESA⁶⁸ issued an unpublished internal policy memoranda on June 3, 1975 to all MESA district managers directing that citations be issued only to coal mining companies or lessees for violations of the 1969 Act. Additionally, on June 17, 1975, MESA district managers were directed, in connection with all unresolved civil penalty cases, to issue to the mining companies all notices and orders previously issued to contractors.

The Secretary of the Interior appealed the *ABC* case, but in the interim, issued Secretarial Order No. 2977.⁶⁹ The order,

⁶⁴ *Id.* at 183.

⁶⁵ 5 IBMA 329 (1975).

⁶⁶ *Id.* at 335. See also *ARMCO Steel Corp.*, 6 IBMA 64 (1976).

⁶⁷ *Association of Bituminous Contractors, Inc. v. Morton*, No. 74-1058 (D.D.C. May 23, 1975).

⁶⁸ See note 54 *supra*.

⁶⁹ Secretarial Order No. 2977 was issued by Acting Secretary Frizell and reads as follows:

Subject: Issuance of citations to operators pursuant to the Federal Coal Mine Health and Safety Act of 1969.

Sec. 1 *Purpose.* (a) The purpose of this order is to direct Mining Enforcement and Safety Administration to continue to inspect construction work conducted on coal mine property, and to issue appropriate citations for violations of the Federal Coal Mine Health and Safety Act of 1969 and/or for hazardous conditions or practices committed and/or created by contractors on such property on and after May 24, 1975 to the operator of the coal mine on whose behalf the contractor is performing work.

(b) This order is issued to comply with the declaratory judgement order in *Association of Bituminous Contractors, Inc. v. Rogers C. B. Morton, Secretary of the Interior*, Civil Action No. 1058-74, U.S. District Court

issued on August 21, 1975, but retroactive to May 24, 1975, officially set forth a departmental policy in compliance with ABC. Accordingly, mine operators were to be charged with their contractor's violations.

Meanwhile, on August 4, 1975, Republic Steel Corp., a mine owner, received a withdrawal order for failing to collect respirable dust samples for employees of its independent contractor. Republic appealed for review of the order on the strength of the Board's *Affinity*⁷⁰ decision. An Administrative Law Judge agreed with Republic, holding that Republic was not the responsible party.⁷¹ On appeal, the Board reversed.⁷² The Board determined that Secretarial Order 2977 was binding upon the Board itself and therefore, under the departmental policy, "the owner or lessee of a coal mine is the *sole* party to be held absolutely liable for violations of the mandatory standards committed by a coal mine construction contractor *regardless of the circumstances.*"⁷³

At this point, with Secretarial Order 2977 still in effect, the Bituminous Coal Operators' Association sought declaratory relief from the Secretary's order in federal district court in Virginia. The court dismissed the suit and held that the order was valid on the theory that independent contractors were "statutory agents" of owner/operators. Consequently, it was proper to hold mining companies vicariously liable for the statutory violations of their agents, the independent contractors.⁷⁴

for the District of Columbia, and to carry out the mandate of Congress announced in the Federal Coal Mine Health and Safety Act of 1969 to enforce the provisions of the Act in all coal mines subject to the Act. Sec. 2 *Effective Date*. This order shall be effective as of May 24, 1975. This order will remain in effect until rescinded by subsequent order of the Secretary.

⁷⁰ *Affinity*, *supra* note 56.

⁷¹ Republic Steel Corp., No. MORG 76-21 (1975).

⁷² 5 IBMA 306 (1975), *rev'd* 581 F.2d 868 (D.C. Cir. 1978) [hereinafter Republic].

⁷³ 5 IBMA at 310-11 (emphasis added). *See also* Secretary of Labor v. U.S. Steel Corp., PITT 76X232-P and 76X235-P, 1 MSHC 2278 (1980) and Webster County Coal Corp., 7 IBMA 264 (1977) (mining company held liable despite absence of its own negligence for contractor's violations resulting in fatality).

⁷⁴ Bituminous Coal Operators' Association, Inc. v. Hathaway, 406 F. Supp. 371 (W.D. Va. 1975), *aff'd sub nom.* Bituminous Coal Operators' Association, Inc. v. Secretary of the Interior, 547 F.2d 240 (4th Cir. 1977) [hereinafter BCOA].

In 1977, three independent contractor cases were pending in the courts of appeals. *Republic*⁷⁵ and *ABC*⁷⁶ were pending in the District of Columbia Circuit, while *BCOA*⁷⁷ was pending in the Fourth Circuit.

The Fourth Circuit adopted a position midway between the district court's decision in *ABC* and the Board's early decisions.⁷⁸ The appellate court rejected the earlier position of the *NICOA* case⁷⁹ reading it as limited to liability for black lung compensation.⁸⁰ Rather, the court reasoned that since the 1969 Act defined "operator" to include "other persons" who controlled or supervised a coal mine, an independent contractor who "exercises, controls and supervises over a specific area of land while it is constructing one of the facilities mentioned in the Act, is functioning as an operator of a coal mine." However, "[b]ecause the definition of operator also includes the owner or lessee, we further hold that the Secretary can impose liability on a mining company for a construction company's violation."⁸¹ The court also stated that a contractor could be considered a statutory agent of the mining company.⁸²

The result of the Fourth Circuit's decision was that a mining company and an independent contractor could be held jointly and severally liable for violations of the contractor. The court did, however, expressly reserve decision on how, and according to what criteria, liability was to be allocated between the parties.⁸³

Republic and *ABC* were decided simultaneously. In *ABC*, the appellate court, reversing the district court, held that "an independent company engaged to do construction work at a coal mine is with respect to his contractual work an 'operator of a coal mine' and is liable for violating mandatory health and safety regulations imposed in accordance with the Act."⁸⁴ It was fur-

⁷⁵ *Republic*, *supra* note 72.

⁷⁶ *ABC*, *supra* note 67.

⁷⁷ *BCOA*, *supra* note 74.

⁷⁸ 547 F.2d 240 (4th Cir. 1977).

⁷⁹ *NICOA*, *supra* note 62.

⁸⁰ 547 F.2d at 245.

⁸¹ *Id.* at 246.

⁸² *Id.* at 247.

⁸³ *Id.* The Fourth Circuit determined that this responsibility could "best be initiated by the Secretary through regulations and adjudication."

⁸⁴ 581 F.2d 853, 861 (D.C. Cir. 1978).

ther noted that "[i]t is not a stretching of the statute to hold that companies who profess to be as independent of the coal mine owners as these construction companies purport to be, do *control* and *supervise* the construction work they have contracted to perform over the area where they are working."⁸⁵ The court reasoned that holding owners liable would be inefficient because it would force them to constantly interfere in the work of the contractors in order to minimize their own liability.

In *Republic*, the District of Columbia Circuit recognized that Republic Steel was cited in accordance with Secretarial Order 2977 which relied on the district court's decision in *ABC*. Since *ABC* was now reversed, the court remanded *Republic* to the Board,⁸⁶ hastening to add that the matter was now left to the discretion of the Secretary.⁸⁷

The Board may then determine what enforcement course it will follow: whether to proceed, as in the past, only against construction contractors and therefore dismiss the present action against Republic; or to proceed against Republic on the basis of the Board's own interpretation of how best to effectuate the purposes of the Act.⁸⁸

On remand, the Federal Mine Safety and Health Review Commission⁸⁹ held that "as a matter of law under the 1969 Act an owner of a coal mine can be held responsible for any violations of the Act committed by its contractors,"⁹⁰ regardless of who creates the danger and whether the owner was in a position to prevent the violations. The Commission went on to say that:

A mine owner cannot be allowed to exonerate itself from its statutory responsibility for the safety and health of miners merely by establishing a private contractual relationship in which miners are not its employees and the ability to control the safety of its workplace is restricted.⁹¹

⁸⁵ *Id.* at 862-62 (emphasis in original).

⁸⁶ Since the Board was disassembled by the 1977 Act, the case was actually remanded to the Federal Mine Safety and Health Review Commission, the Board's successor.

⁸⁷ 581 F.2d 868 (D.C. Cir. 1978).

⁸⁸ *Id.* at 870.

⁸⁹ Hereinafter the Commission.

⁹⁰ *Secretary of Labor v. Republic Steel Corp.*, MORG 76-21 and 76X95-P, 1 MSHC 2002, 2005 (1975) [hereinafter *Republic II*].

⁹¹ *Id.* at 2006.

The Commission reserved comment on the scope of its review of Secretarial discretion in deciding which party to hold liable.⁹²

In an extremely persuasive dissent, Commissioner Backley proposed a standard, based on a theory of functional control, for determining whom to cite under the Act:

I am convinced that the Act's purpose of assuring the health and safety of miners can best be accomplished by placing the responsibility for their health and safety on the person most able to prevent violations or hazards and to correct them quickly should they occur. In most situations that person would be the party who controls or supervises the work activity in that portion of the mine where the violation or hazard occurred.⁹³

Moreover, Backley criticized the majority view that owners contract out work to escape liability, noting that work is contracted out because it is work that the owner does not have the expertise to perform. The thrust of the Backley position is that absolute liability of the operator is irrational; the party with the ability to assure safety should be the party cited.

In a companion case, *Secretary of Labor v. Cowin & Co.*,⁹⁴ the Secretary's issuance of an imminent danger order against an independent contractor was upheld. The Commission concluded that it was permissible to cite a contractor under the 1969 Act, and in this instance, Cowin was deemed an "operator" under the Act.⁹⁵ It should be noted that in deciding *Republic II* and *Cowin*, the Commission stated that the 1977 Act was not in issue.⁹⁶

⁹² *Id.*

⁹³ *Id.* at 2009.

⁹⁴ BARB 74-259, 1 MSHC 2010 (1979) [hereinafter *Cowin*].

⁹⁵ In another case involving the same contractor, the Fourth Circuit held that Cowin, as an independent contractor, could not be held liable as an agent of a mining company under § 109(c) of the 1969 Act and remanded the case to the Commission for a determination as to whether Cowin was an "operator" under § 109(a) of the 1969 Act. *Cowin and Co., Inc. v. Federal Mine Safety and Health Review Comm'n No. 78-1825* (4th Cir. Dec. 28, 1979), reprinted in 1 MSHC 2257 (1979) (construing 30 U.S.C.A. § 819 (West 1971) (amended 1977)).

⁹⁶ *Republic II*, *supra* note 90, at 2003 n.1.

B. Statutory Construction of the 1977 Act

The first two cases to arise under the 1977 Act on the independent contractor issue were *Monterey Coal Co. v. Secretary of Labor*,⁹⁷ and *Secretary of Labor v. Old Ben Co.*⁹⁸ In *Monterey Coal*, an Administrative Law Judge held that because the legislative history of the 1977 Act endorsed the Fourth Circuit's decision in *BCOA*,⁹⁹ Congress must have meant that "the Secretary is not forced to cite mining company owner/operators for violations caused by independent contractors but, rather, may cite the independent contractors."¹⁰⁰ The Administrative Law Judge went on to say:

In my view, this statute, comparing it with the 1969 Act, is clear on its face. It creates an express liability for independent contractors, where formerly this could only be inferred. In so doing, the legislature, in effect, seems to have removed contractors from a presumed status of that of agent. The statute would make little sense otherwise because the positions of agent and independent contractor are mutually exclusive. If Congress had intended that contractors be held liable as agents of the owner or lessee, the statute would surely have contained different language.¹⁰¹

The citations against *Monterey Coal* were vacated and strict liability of operators was rejected. While owners or lessees could be held liable for the violations of their independent contractors, such a finding would have to be "justified by the conditions and circumstances,"¹⁰² by determining who had supervision over affected workers and who controlled the pertinent work

⁹⁷ HOPE 78-469 through 78-476 (Feb. 15, 1979), *rev'd* 1 MSHC 2232 (1979), *appeal dismissed sub nom.* *Monterey Coal Co. v. Federal Mine Safety and Health Review Comm'n* 635 F.2d 291 (4th Cir. 1980) (Commission's remand to ALJ for further proceedings to determine if a violation occurred held not a final order reviewable under 30 U.S.C.A. § 816(a)(1) (West Supp. 1981) [hereinafter *Monterey Coal*].

⁹⁸ 1 FMSHRC 271 (1979), *aff'd in part, rev'd in part* 1 MSHC 2177 (1979), *aff'd sub nom.* *Old Ben Coal Co. v. Federal Mine Safety and Health Review Comm'n* 2 MSHC 1065 (D.C. Cir. 1980) [hereinafter *Old Ben*].

⁹⁹ *BCOA*, *supra* note 74.

¹⁰⁰ HOPE 78-469 through 78-476, slip. op. at 8 (Feb. 15, 1979).

¹⁰¹ *Id.* at 9.

¹⁰² *Id.* at 10.

environment. Furthermore, since an absolute liability theory was rejected, the Administrative Law Judge also refused to adopt the Secretary's argument that MSHA had unfettered discretion in deciding whom to cite.

In *Old Ben*,¹⁰³ the presiding Administrative Law Judge reached an opposite result. The Judge interpreted the Commission's decisions in *Republic II*¹⁰⁴ and *Cowin*¹⁰⁵ as applicable to the 1977 Act and found "[T]he fact that a contractor is an operator by explicit statutory language rather than by construction, should logically not limit the Secretary's discretion. The legislative history does not support [Old Ben's] position that Congress intended to limit or withdraw the liability of coal mine operators for acts or omissions of independent contractors."¹⁰⁶

Both *Old Ben* and *Monterey Coal* were appealed to the Commission. A decision in *Old Ben* was issued in October 1979.¹⁰⁷ The Commission ruled that mining companies could be held absolutely liable for violations of independent contractors as a matter of law. Regarding the express inclusion of contractors in section 3(d),¹⁰⁸ the Commission ruled that:

On its face, the additional language in the 1977 Act's definition of 'operator' does not affect the question of an owner's responsibility for contractor violations. Rather, the amendment simply appears to settle an uncertainty that arose under the 1969 Act, i.e., whether *certain* contractors are 'operators' within the meaning of the Act.¹⁰⁹

The Commission stated, however, that this holding did not dilute an independent contractor's duty to comply with federal law or regulations, or affect its liability for its own violations.¹¹⁰

While at first glance, it would appear that this decision does not substantially differ from the Commission's decision in *Republic II*, the two cases should be distinguished. In *Republic*

¹⁰³ *Old Ben*, *supra* note 98.

¹⁰⁴ *Republic II*, *supra* note 90.

¹⁰⁵ *Cowin*, *supra* note 94.

¹⁰⁶ 1 FMSHRC 271, 273 (1979).

¹⁰⁷ 1 MSHC 2177 (1979).

¹⁰⁸ 30 U.S.C.A. § 802(d) (West Supp. 1981).

¹⁰⁹ 1 MSHC at 2178 (emphasis added).

¹¹⁰ *Id.* at 2179.

II,¹¹¹ the Commission implied that the Secretary of Interior's discretion as to whom to cite was outside the scope of review, while in *Old Ben* it is expressly stated that the Commission may review the Secretary of Labor's discretion under the 1977 legislative scheme, the standard of review being whether the Secretary acts in conformance with the purposes and policies of the 1977 Act.¹¹²

There is an important caveat to the Commission's opinion. The Commission reasoned that it was willing to tolerate the Secretary's blanket enforcement of the Act against mining companies as an *interim* policy pending the final promulgation of regulations for citing contractors directly.¹¹³

We note that the interim policy being pursued by the Secretary is not in line with the view expressed in his proposed 1977 Act. Also, we have doubts concerning the necessity of the Secretary's blanket 'owners only' enforcement policy even on an interim basis. In many circumstances, as in the present case, it should be evident to an inspector at the time that he issues a citation or order that an identifiable contractor created a violative condition and is in the best position to eliminate the hazard and prevent it from recurring. Thus, we fail to see the overriding need for adherence to a uniform policy in instances where it is clear that proceeding against a contractor is a more effective method of protecting the safety and health of miners. Nevertheless, we recognize that it takes some time for the development of new policies and procedures by a department newly assigned the enforcement of a major program designed to protect the health and safety of miners.

. . . .

If the Secretary unduly prolongs a policy that prohibits direct enforcement of the Act against contractors, he will be disregarding the intent of Congress. In view of the Secretary's express recognition of the wisdom and effectiveness of subjecting contractors to direct enforcement, continuation of a policy that forecloses such enforcement will provide evidence that the current policy is grounded solely on improper consideration of administrative convenience, a basis that would not be consis-

¹¹¹ Republic II, *supra* note 90.

¹¹² 1 MSHC at 2180.

¹¹³ 1 MSHC at 2181.

tent with the Act's purpose and policies. The ability to proceed against owners for contractor violations was intended to provide an effective tool for protecting the safety and health of miners. To use this tool as a mere administrative expedient would be an abuse.¹¹⁴

Commissioner Backley dissented on the ground that deference to the agency was innappropriate since the Secretary's enforcement policy was "ill-founded".¹¹⁵ He chastised the Commission for deferring to Secretarial discretion where administrative convenience was the sole rationale for a particular policy and where the policy was at the expense of safety. Backley again proposed a functional control/supervision test for making a factual determination as to where to assign liability.¹¹⁶

Following the *Old Ben* decision, *Monterey Coal*¹¹⁷ was summarily decided with reference to *Old Ben*. Reversing the decision of the Administrative Law Judge below, the company was held liable for the violation of its independent contractor.

Three cases have been decided since *Old Ben*. In *Secretary of Labor v. Pittsburgh & Midway Coal Mining Co.*,¹¹⁸ Administrative Law Judge Koutras found that he was constrained by *Old Ben* to hold a mine operator liable "irrespective of the fact that I may disagree with the Commission's rationale, or am in accord with Commission Backley's well-reasoned dissents."¹¹⁹ At least to a certain extent, however, Koutras did circumvent the *Old Ben* ruling in his assessment of penalties against the mining company. He mitigated the penalties, stated that the owner "should not bear the burden of any increased assessments based on [the contractor's] negligence."¹²⁰

In two other cases, Administrative Law Judges were faced with approving settlement agreements. In *Secretary of Labor v. Central Premix Concrete Co.*,¹²¹ the Administrative Law Judge

¹¹⁴ *Id.*

¹¹⁵ *Id.* Commissioner Backley implied that the Secretary was taking an unduly long time to promulgate regulations.

¹¹⁶ See note 93 *supra* and accompanying text.

¹¹⁷ See note 97 *supra*.

¹¹⁸ 2 FMSHRC 311 (1980).

¹¹⁹ *Id.* at 324-25.

¹²⁰ *Id.* at 330-31.

¹²¹ Nos. DENV 79-62-PM and 79-126-PM, 1 MSHC 2110 (1979).

noted that although a mining company cannot defend against an independent contractor violation on that basis alone, it could be a mitigation factor in a penalty assessment. In *Secretary of Labor v. Consolidation Coal Co.*,¹²² the Administrative Law Judge denied enforcement of a settlement agreement maintaining that MSHA's enforcement policies were senseless.

Once again the parties insult our sensibilities and intelligence with a proposal to settle with a wrist slap three extremely serious violations that created a hazard of three or more fatalities or permanently disabling injuries. The excuse offered is so outrageous as to be mind boggling.

MSHA flouts the law by refusing to prosecute independent contractors. As a result, those contractors flout the law with immunity. OSHA, remember, cannot touch them because they are under the 'protection' of MSHA.

MSHA then 'prosecutes' the operator who pleads the unfairness of holding him responsible while the real culprit goes free. This plea is appealing to the ears of the assessment office, the solicitor and so far the Commission.

As a result, the operator gets off with a token assessment, the policy of non-enforcement proliferates and the death and injury rate among miners employed by independent contractors soars. This charade has got to stop.¹²³

In recent dicta, the Third Circuit discussed when independent contractors should be "operators" for the purpose of assigning liability for violations.¹²⁴ The *National Industrial Sand Corp. v. Marshall* [NISA] court favored a "control/supervision"¹²⁵ test to determine when a contractor is the responsible operator. The court reasoned that only a contractor with a substantial degree of participation, involvement and contact with the mine should be cited.¹²⁶ The court did not address the degree of liability to be imposed on contractors, nor whether a contractor who is deemed an operator for enforcement purposes *must* be cited for its violations.

¹²² No. WEVA 80-145 (FMSHRC April 2, 1981).

¹²³ *Id.*

¹²⁴ *National Industrial Sand Corp. v. Marshall*, 601 F.2d 689 (3d Cir. 1979) [hereinafter NISA].

¹²⁵ *Id.* at 701.

¹²⁶ *Id.*

The NISA decision also alluded to the Secretary's pending draft regulations for identifying contractors as operators,¹²⁷ and stated that a control/supervision standard would be appreciated. The court noted, for instance, that it was troubled by the prospect of small companies having to train employees of specialized contractors who were hired for the very reason of being specialists.¹²⁸

V. THE PROPOSED REGULATIONS

A review of the foregoing development of case law underscores the difficulties inherent in enforcing the 1977 Act in the most efficacious fashion regarding independent contractors. Although the courts and the agency acknowledge that contractors may indeed be cited for their violations, no guidelines are set as to whether or not they shall be cited in any particular case.

The importance of the Secretary's role in making the initial enforcement decision cannot be overlooked. In *Old Ben*, the Commission allowed the Secretary to follow a blanket policy of citing mining companies, pending adoption of final rules for citing contractors directly.

The Secretary initially issued draft proposed regulations on October 23, 1978.¹²⁹ Following a comment period, proposed regulations were published in the Federal Register on August 14, 1979.¹³⁰

In the draft regulations, MSHA proposed a system for identifying contractors who would be considered "operators". However, MSHA reserved the right to hold a contractor and a mining company jointly and severally liable. Under the draft scheme, a contractor would be identified as an operator based on four criteria: (1) whether the work to be performed was "major" work,¹³¹ (2) whether the contractor had a right of control over its employees or those of its subcontractors, (3) whether the con-

¹²⁷ See notes 129-36 *infra* and accompanying text.

¹²⁸ NISA, *supra* note 124, at 703-07.

¹²⁹ 43 Fed. Reg. 50,716 (1978) (advanced notice of proposed rulemaking) [hereinafter cited as Draft Regs.].

¹³⁰ 44 Fed. Reg. 47,746 (1979) [hereinafter cited as Proposed Regs.].

¹³¹ Draft Regs., *supra* note 129, at § 45.4.

tractor was scheduled to have a "continuing presence",¹³² and (4) whether the contractor was truly independent and not subject to the company's control.¹³³

A procedure to identify contractors was set forth as follows. The contractor and operator would jointly or separately submit information required by the regulations to MSHA.¹³⁴ MSHA would then have sixty days to notify the parties as to whether the contractor was an "operator".¹³⁵ If identified as an "operator", the contractor would be assigned an identification number for that job *only*, and the contractor would have to file a legal identity report with MSHA.

The draft rules were sharply criticized. Criticism focused primarily on the six month "continuing presence" requirements. Also, there were charges that the term "major work" was too vague to be useful. Moreover, many commenting parties objected to a determination of "operator" status on a job-by-job basis, arguing that it would involve excessive paperwork and would yield inconsistent results.¹³⁶

Although various changes were incorporated in the proposed regulations, certain fundamental concepts of the draft rules were retained. In determining "operator" status, emphasis was shifted away from the "major work" and "continuing presence" criteria. Under the proposed rules the critical consideration was control over the area of the mine where the work is being performed.¹³⁷ When inquiring into control, however, the Secretary was still permitted to consider whether the contractor was engaged in "major work" and whether it had a "continuing presence".¹³⁸ The proposed regulations defined "major work" as work which is "substantial in nature",¹³⁹ while the criteria for

¹³² *Id.*

¹³³ *Id.*

¹³⁴ Draft Regs., *supra* note 129, at § 45.3.

¹³⁵ Draft Regs., *supra* note 129, at § 45.5.

¹³⁶ Under the draft regulations, a contractor could be an "operator" at one mine site but not at another. *See* Draft Regs., *supra* note 129, at § 45.4. *See also* 44 Fed. Reg. at 47,746-51.

¹³⁷ Proposed Regs., *supra* note 130, at § 45.4, *reprinted in* 44 Fed. Reg. at 47,752.

¹³⁸ *Id.*

¹³⁹ *Id.* at § 45.2(d).

"continuing presence" was reduced from six months to three months.¹⁴⁰

In its discussion of the proposed rules, MSHA argued that control over the work area provided was the best determinant of operator status.¹⁴¹ Industry has attacked this view. The primary criticism of MSHA's approach was that many contractors are quite mobile and their employees are dispersed on mine property. Consequently, there is no particular area over which the contractor has control.¹⁴² Another potential flaw in the proposed regulations was the three month continuing presence requirement. In many instances, contractors are hired on a long term contract, but are actually present only for short, intermittent periods.¹⁴³ Additionally, contractors may be hired on an "as needed" basis.¹⁴⁴ Neither of these contracts would satisfy the continuing presence requirement. Nevertheless, the independent contractor's employees may be free from mining company supervision due to the nature of their work. In this context, a test which determines control over the *work itself*, rather than control over the *area*, would be preferable.

On the other hand, it could be argued that it is administratively futile to attempt to cite contractors who have such a fleeting presence. In this respect, it would be preferable to hold the mining company liable and have the company exert pressure on the contractors. It should be noted, however, that in some circumstances this would be virtually impossible. In the case of a large mine, for example, the seemingly impossible task of overseeing the activities of hundreds of contractors would be thrust upon the mining company.

Another criticism leveled against the "continuing presence" requirement was that many contractors could totally escape

¹⁴⁰ *Id.* at § 45.2(e).

¹⁴¹ *See* 44 Fed. Reg. at 47,747.

¹⁴² For example, a contractor hired to do repair work may have several employees at the mine site at a given point, each of whom moves from machine to machine. While it is arguable that "control" can be interpreted as controlling the area around each machine operated by the contractor's employees, such a construction would strain plain meaning.

¹⁴³ An example of an "intermittent" contractor is the electrical contractor who comes in every several months to check equipment.

¹⁴⁴ An example of an "as needed" contractor is the haulage contractor whose contract calls for haulage services only when they are needed.

liability by contracting for short term jobs. Since operator status was to be determined on a job-by-job basis, contractors could seek jobs just short of three months.

The "continuing presence" requirement could have resulted in even more serious problems. It could have adversely affected specialized contractors which do only short term work. Mining companies facing strict liability might have decided to perform their own short term work, rather than employ a specialized contractor. This could have actually impeded the safety and health goals of the 1977 Act. Small specialized contractors whose expertise in a specific area is greater than a mining company's might have been forced out of business. Consequently, the lesser qualified mining company would have ended up doing short term, specialized work for which it would otherwise employ a contractor.

It has been argued that administrative convenience of the Secretary should outweigh the need to directly penalize smaller, short term contractors. In lieu of direct penalization, the mining company can make contractual arrangements with the contractors for reimbursement of penalties. Therefore, even though the mining company would be officially cited, it would have a civil remedy to recover the amount of the penalty.

However, there are two problems with this view: (1) it does not promote mine safety, and (2) it results in excessive litigation. If the 1977 Act is to be remedial, the focus of enforcement should be to *prevent* violations. Involving extraneous parties to enforce mandatory health and safety standards, particularly where the mining company lacks effective control over the parties, contravenes the ultimate utility of enforcement protection of health and safety.

Another challenge lodged against the proposed rules was that they would have created a burdensome identification scheme. The proposed rules would have established a system akin to that of the draft rules. Under the proposed rules, the contractor and the company would apply to MSHA for contractor operator status.¹⁴⁵ MSHA then would have only thirty days

¹⁴⁵ Proposed Regs., *supra* note 130, at § 45.3, reprinted in 44 Fed. Reg. at 47,752.

to reply.¹⁴⁶ This would have been an undue administrative delay on beginning jobs. Moreover, a contractor might have had numerous applications pending on different jobs and would have been unable to begin work knowing its status at each particular job.¹⁴⁷

Whether the proposed regulations would have enhanced safety and health in the mines is disputed. While those contractors having operator status have incentive to comply with health and safety standards at particular jobs, they may not feel compelled to do so where they are not identified as operators. For those contractors who perform only "non-operator" type work, there is no incentive at all to become familiar with the regulations and to train their employees accordingly. Despite that it might be extremely difficult for the mining company to assure the expeditious abatement of citations and orders,¹⁴⁸ MSHA seemed satisfied because it clearly had a party from whom it could collect penalties.¹⁴⁹ MSHA was satisfied to use the statute punitively, rather than to foster safety and health.

The proposed rules were also attacked for retaining the discretionary joint and several liability rule.¹⁵⁰ Mining companies still would not have been able to rely on their contractors to bear the burden of their noncompliance with regulations. The proposed rules provided that the company could still be held liable despite a lack of control. The argument favoring this provision is that operators should not be able to "wash their hands" of their contractors' operations, giving them an incentive to make their contractors comply with the federal regulations. It also assures MSHA of a party from whom to collect penalties.

¹⁴⁶ *Id.* at § 45.5(a).

¹⁴⁷ At this point, MSHA still consistently refused to identify individual contractors as operators across the board for work performed at different job sites.

¹⁴⁸ This is especially true since the contractor has its own work practices with the mining company busy with its own operations.

¹⁴⁹ It is arguable that the Secretary has the discretion to enforce the law in this manner and leave it to the parties to establish a method to encourage safety. However, there are three responses to this view: (1) for large companies it may be more cost effective just to pay penalties as opposed to investing, with each contractor, in complicated arrangements to oversee work; (2) as a practical matter, it will be very difficult for a company to supervise the operation of contractors. If forced to do so, it would not be worth the cost to hire contractors, which could have deleterious economic implications in an already depressed industry; and (3) MSHA should not pass its responsibility to enforce the law to private parties.

¹⁵⁰ See notes 97-100 *supra* and accompanying text.

Despite the express inclusion of independent contractors as operators in the 1977 Act, a cohesive, efficacious policy dealing with contractor violations has not been established. The proposed regulations created new problems and lacked a unitary criteria to provide adequate notice to companies and contractors of their respective responsibilities. Furthermore, the proposed regulations failed to guide federal inspectors in performing their duties at the mine site. Consequently, an alternative approach to the issue was warranted.

VI. FINAL REGULATIONS

On July 1, 1980, MSHA promulgated final regulations on citing independent contractors directly for their violations.¹⁵¹ The final regulations abandoned the "continuing presence"¹⁵² and "major work"¹⁵³ concepts, making it more likely that independent contractors will be held accountable for their violations of the Act, standards and regulations.¹⁵⁴ Interpreting the final regulations, MSHA has instructed its "inspectors [to] cite independent contractors for violations, committed by them or their employees, of provisions of the Act, standards or regulations which are applicable to independent contractors."¹⁵⁵

Under the new regulations, however:

MSHA's general enforcement policy regarding independent contractors does not change the basic compliance responsibilities of production-operators. Production-operators are subject to all provisions of the Act, standards and regulations which are applicable to their mining operation. This overall compliance responsibility of production-operators includes assuring compliance with the standards and regulations which apply to the work being performed by independent contractors at the mine. As a result, independent contractors and produc-

¹⁵¹ 30 C.F.R. § 45 (1980).

¹⁵² See note 132 *supra* and accompanying text.

¹⁵³ See note 131 *supra* and accompanying text.

¹⁵⁴ 45 Fed. Reg. 44,497 (1980) (MSHA's enforcement policy and guidelines for independent contractors state, "Effective immediately, the general policy of the Mine Safety and Health Administration . . . is to issue citations and, where appropriate, orders to independent contractors for their violations of provisions of the Act, standards or regulations that are applicable to independent contractors.").

¹⁵⁵ *Id.*

tion-operators both are responsible for compliance with the provisions of the Act, standards and regulations applicable to the work being performed by independent contractors.

This 'overlapping' compliance responsibility of independent contractors and production operators means that there may be circumstances in which it is appropriate to issue citations or orders to both the independent contractor and the production-operator for a violation.¹⁵⁶

MSHA's enforcement guidelines identify at least five situations where the mining company will be cited for violations committed by its independent contractors:

(1) where the mining company contributes to the occurrence of a violation by act or omission,

(2) where the mining company contributes to the continued existence of a violation by act or omission,

(3) where a mining company's employees are exposed to the hazard,

(4) where the mining company has control over the condition in need of abatement, and

(5) where the independent contractor is not fully able to assume compliance responsibilities.¹⁵⁷

These five situations, however, are by no means exhaustive of when a mining company may be cited for the violations of its independent contractors.¹⁵⁸ Hence, the assignment of liability between companies is still an open question. Consequently, the adequacy of MSHA's new enforcement policy is questionable.

VII. A PROPOSED RESOLUTION OF THE INDEPENDENT CONTRACTOR PROBLEM

Since the goal of the 1977 Act is to place the health and safety of miners above other considerations,¹⁵⁹ MSHA's policy on citing independent contractors should reflect the most functional and expedient method of promoting compliance with man-

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ See note 156 *supra* and accompany text.

¹⁵⁹ 30 U.S.C.A. § 801(a) (West Supp. 1981).

datory standards. A control/supervision test¹⁶⁰ for assigning liability is the most viable method by which the overriding goal of the miners' safety and health can best be reached. This test would necessarily entail making the party responsible for the creation of the health or safety hazard, and with the ability to timely abate those hazards, liable for them.

Such a program could be implemented in the following manner. First, the party controlling the work and supervising the employees performing that work should have *primary* responsibility for violations of the Act, standards and regulations. To determine who is in control, the inspector at the mine site would be required to make a realistic assessment, based on the nature of the work being performed. This can be easily accomplished since the inspector is accompanied by company officials and a representative of the miners. Hence, a simple question will resolve whose employees are performing the work. Moreover, contractor employees are often generally identifiable by their uniforms, the names on the equipment they use or even by the type of work being done.

Second, *all* independent contractors interested in doing mine related work would be required to apply for an identification number.¹⁶¹ Contractors would thereby establish a direct relationship with MSHA. Consequently, notice of applicable regulations could be better effectuated.¹⁶²

This system would have several productive results. First, each contractor would have notice of applicable regulations. Second, the job-by-job determination of "operator" status, with

¹⁶⁰ Liability should be predicated upon the theory that the party in control of the actual work and with direct supervisory control of the employees performing the work is in the best position to prevent violations. This party should be obligated to imbue employees with the health and safety consciousness essential to making the mines a safer place to work.

¹⁶¹ The final regulations adopted by MSHA establishes a registration system whereby independent contractors *may* obtain a permanent MSHA identification number. Since the regulation is drafted only in the permissive, contractors are not required to have a permanent number. Contractors electing not to obtain a permanent number can be determined to have "operator" status only on a job-by-job basis. This method is inconsistent with a control/supervision test for liability since it increases the likelihood that an independent contractor can escape liability for its violations. See 30 C.F.R. § 45.3 (1980).

¹⁶² A mining company choosing to work with a non-registered contractor would assume the risk of being held liable for the non-registered contractor's violations.

its concomitant excessive bureaucratic red tape, would be totally eliminated. Third, from an economic standpoint, MSHA-registered contractors would have a market advantage since mining companies could hire them knowing that the contractors are aware of their regulatory obligations. Required registration would eliminate the mining companies' fear that the contractors will flout the law. Fourth, MSHA would have an additional sanction available to it. Contractors not complying with the mandatory standards could have their registration revoked.

Finally, joint and several liability would be uncalled for under this system. Contractors would not be free to claim a lack of notice of pertinent regulations and mining companies could not contest penalties assigned to them based on a lack of control. Moreover, the threat of absolute liability of the mining company would no longer be necessary to force mining companies to oversee contractor operations. Since the contractor would be directly liable, the contractor himself would have the incentive to comply with the regulations. Additionally, the problems of using progressive sanctions and higher penalties against mining companies for a contractor's violations would be eliminated.¹⁶³ Hence, the emphasis of enforcement would be shifted from disputing who is liable to promoting health and safety at the mine site.¹⁶⁴

VIII. CONCLUSION

To date, attempted resolution of where to assign liability for independent contractor violations has been a dismal failure. Statutory, judicial, administrative and regulatory attempts at dealing with the problem have done little more than result in determinations that contractors may be held liable for their violations, with an absence of guidelines as to which contractors can be cited and when and under what circumstances they must be cited. It is not at all clear that MSHA's final regulations solve these problems. However, since this question involves a host of issues regarding the health and welfare of miners, the development of a cohesive and rational enforcement policy must be a priority.

¹⁶³ See notes 38-53 *supra* and accompanying text.

¹⁶⁴ However, joint and several liability should be preserved where a mining company acts in concert with a contractor in violating the Act or materially abets the commission of a violation.