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THE FEDERAL MINE SAFETY AND HEALTH AMENDMENTS ACT OF 1977: CLOSURE ENCOUNTERS OF THE THIRD KIND

EDMUND J. MORIARTY* AND MARK M. PIERCE**

The passage of the Federal Coal Mine Health and Safety Act of 1969[1] created a great deal of concern over the review of enforcement activity by the United States Department of the Interior under section 104[2] of that act. Much of this concern was over the peremptory mine closure authority specifically provided by sections 104(a)[3] and 104(c)[4] of the Act.

In recent years several important decisions by the United States Court of Appeals for the District of Columbia Circuit, and the Interior Board of Mine Operations Appeals,[5] have provided new interpretations of section 104(c).[6] In addition, on November 9, 1977, President Jimmy Carter signed into law the Federal Mine Safety and Health Amendments Act of 1977.[7] This new law broadened the scope of the '69 Act, so that the '77 Act is now the single federal mine safety and health law applicable to all mining activity. Not only have the various types of mine closure authority under Section 104 of the '69 Act been retained,[8] but the '77 Act also provides a newly created "pattern of violations" closure power[9] which finds its genesis in section 104 of the '69 Act.

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[1] Act of Dec. 30, 1069 Pub. L. No. 91-173, 83 Stat. 742, (codified at 30 U.S.C. §§ 801-960 (1970)) [hereinafter referred to as the '69 Act].

[2] 30 U.S.C. § 814 (1970).

[3] 30 U.S.C. § 814(a) (1970).

[4] 30 U.S.C. § 814(c) (1970).

[5] The Interior Board of Mine Operations Appeals [hereinafter referred to as the IBMA] performed for the United States Department of the Interior final appellate and other review functions of the Secretary of Interior. 43 C.F.R. § 4.1(4) (1971).

[6] 30 U.S.C. § 814(c) (1970).

[7] 30 U.S.C. §§ 801-960 (1977) [the '69 Act, as amended by this act, will hereinafter be referred to as the '77 Act].

[8] *Compare* 30 U.S.C. § 814(a)-814(c)(i) (1970) *with* 30 U.S.C. § 817(a) and § 814(b), § 814(d), § 814(f) (1977).

[9] 30 U.S.C. § 814(d) (1977).

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At the conclusion of the popular movie "Close Encounters of the Third Kind," earthly "pioneers" board the visiting spacecraft and depart with the alien humanoids. A similar departure can be found in the present world of mine health and safety. During the past sixty-seven years, the United States Department of the Interior has exercised jurisdiction over the administration and enforcement of the federal laws governing mine health and safety. The direct responsibility for this endeavor was exercised initially by the Bureau of Mines,[10] and more recently by the Mining Enforcement and Safety Administration (MESA).[11] Now, as a result of changes made by the '77 Act, we can observe the former MESA enforcement personnel clambering aboard the United States Department of Labor.[12] Since the impact that this new venture will have upon the mining industry is unknown, we await their return with apprehension. In the meantime, it is appropriate to revisit the topic of mine closure. In making the examination, it is necessary to assess the current "state of the law"[13] regarding the "unwarrantable failure" closure authority now provided in section 104(d) of the '77 Act,[14] and to evaluate the newly created "pattern of violations" closure authority provided in section 104(e) of that same act.[15]

FIRST ENCOUNTER: THE FEDERAL COAL MINE SAFETY ACT AMENDMENTS OF 1965

The first "sighting" of the UFO—unwarrantable failure order—occurred in 1966 when the Congress enacted the Federal Coal Mine Safety Act Amendments of 1965.[16] By adding a new

[10] Act of May 16, 1910, ch. 240, § 1, 36 Stat. 369 (codified at 30 U.S.C. § 1 (1970)).

[11] The Mining Enforcement and Safety Administration [hereinafter referred to as MESA] was established in 1974 by the Secretary of the Interior to assume certain functions formerly exercised by the United States Bureau of Mines.

[12] Under the '77 Act, the former MESA personnel previously employed by the U.S. Department of the Interior are transferred to the U.S. Department of Labor, and will function as employees of the newly created Mine Safety and Health Administration (MESA). *See* Coal Mine Health and Safety Act of 1977, §§ 301, 302, 30 U.S.C.A. § 861 (West Supp. 1978), § 862 (West).

[13] The authors cannot predict whether the newly created Federal Mine Safety and Health Review Commission, as established under § 113 of the '77 Act, 30 U.S.C. § 823 (1977) will change any of the controlling law rendered to date by the IBMA; nevertheless, such law must continue in effect until modified, terminated, superseded, set-aside, revoked or repealed. *See* Coal Mine Health and Safety Act of 1977, § 301(c)(2)-(3), 30 U.S.C.A. § 861(c)(2)-(3) (West Supp. 1978).

[14] 30 U.S.C. § 814(d) (1977).

[15] 30 U.S.C. § 814(e) (1977).

[16] Act of March 26, 1966, Pub. L. No. 89-376, 80 Stat. 84 [hereinafter referred

subsection (d) to section 203 of the original Federal Mine Safety Act,[17] Congress provided authority to issue peremptory mine closure orders upon the finding of "similar" violations. As enacted, this new subsection (d) provided an enforcement mechanism almost identical to the scheme retained under section 104(c) of the '69 Act. A review of pertinent legislative history reveals that by enacting this new subsection concerning "similar" violations, Con-

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to as the '65 Act]. The unwarrantable failure closure authority was provided for in § 203(d) of the '65 Act which read as follows:

> (d)(1) If a duly authorized representative of the Bureau, upon making an inspection of a mine as authorized in section 202, finds that any provision of section 209 is being violated and if he also finds that while the conditions created by such violation do not cause danger that a mine explosion, mine fire, mine inundation, or man-trip or man-hoist accident will occur in such mine immediately or before the imminence of such danger can be eliminated, such violation is of such nature as could significantly and substantially contribute to the cause or effect of a mine explosion, mine fire, mine inundation, or man-trip, or man-hoist accident, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with the provisions of section 209, he shall include such finding in the notice given to the operator under subsection (b) of this section. Within ninety days of the time such notice was given to such operator, the Bureau shall cause such mine to be reinspected to determine if any similar such violations exist in such mine. Such reinspection shall be in addition to any special inspection required under section 203 or section 206. If, during any special inspection relating to such violation or during such reinspection, a representative of the Bureau finds such similar violation does exist, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with the provisions of section 209, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in paragraph (3) of this subsection, to be withdrawn from, and to be debarred from entering, such area. Such finding and order shall state the provision or provisions of section 209 which have been violated and shall contain a detailed description of the area from which persons must be withdrawn and debarred. The representative of the Bureau shall promptly thereafter advise the Director in writing of his findings and his action. (2) If a withdrawal order with respect to any area in a mine has been issued pursuant to paragraph (1) of this subsection, thereafter a withdrawal order shall promptly be issued by a duly authorized representative of the Bureau who finds upon any following inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) of this subsection until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) of this subsection shall again be applicable to that mine.

[17] Federal Mine Safety Act, ch. 877 § 203, 66 Stat. 694 (1952) (current version at 30 U.S.C. § 473 (1970)).

gress intended to create an enforcement mechanism to deal specifically with *recurrent* or *repeated* serious violations caused by the indifferent, heedless, irresponsible, or careless attitude or course of behavior on the part of an operator.

On December 2, 1963, the House Committee on Education and Labor submitted its report to accompany H.R. 900, a bill to amend the Federal Coal Mine Safety Act. In the report's "Section-by-Section Analysis of the Bill," the following statement appeared:

> The purpose of the amendatory language of new subsection 203(d) is to provide the Bureau of Mines inspectors with increased powers to deal with *recurrent or repeated violations* of Section 209 [the mandatory safety standards], which the inspector reasonably believes to be the result of an indifferent, heedless, irresponsible, or careless attitude or course of behavior on the part of an operator. Accordingly, the new subsection would provide for reinspection procedures, and subsequent withdrawal and debarment orders, where such *repeated or recurrent violations* occur.[18]

The same statement was later repeated verbatim in the report submitted by the committee on March 17, 1965, to accompany H.R. 3584.[19]

On June 14 and 21, 1965, Senate hearings were conducted to consider H.R. 3584 and S. 1032, which were bills to amend the Federal Coal Mine Safety Act. In a prepared statement inserted into the record of these hearings,[20] John M. Kelley, Assistant Secretary, Mineral Resources, United States Department of the Interior, noted that repeated violations were found in the same mines time after time, and were not corrected until discovered by an inspector. In his view, the opportunity for reasonable time to correct any violation, as provided by the then current law, did not provide incentive to the operator to correct violations before they were cited by an inspector.

During these hearings, John F. O'Leary, Deputy Assistant Secretary, Mineral Resources, United States Department of the Interior, summarized the prepared statement of Mr. Kelley and testified as follows:

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[18] H.R. REP. No. 936, 88th Cong., 1st Sess. 5 (1963) (emphasis added).

[19] H.R. REP. No. 181, 89th Cong., 1st Sess. 7 (1965).

[20] *Proposed Amendments to the Coal Mine Safety Act: Hearings on S. 1302 & H.R. 3584 Before the Senate Subcommittee of the Committee on Labor and Public Welfare*, 89th Cong., 1st Sess. 33 (1965) (Comm. Print 1965).

> We initially proposed that there be absolutely no provision for reasonable time, that the finding of a violation of one of the mandatory provisions of the act would result immediately in a withdrawal order. . . .
> The Dent bill (H.R. 3584) does not go quite that far. It requires that we *find a violation twice in two subsequent inspections.* On the *second occurrence of a violation of a particular nature* the Federal mine safety inspector can close down the mine . . . .[21]

James Westfield, Assistant Director, Health and Safety, Bureau of Mines, likewise testified at these hearings and noted the following example:

> For example, our inspectors find *repeated violations* of the rock dusting provisions that are corrected only when found by the inspector. What the Bureau is attempting to do is to get correction between inspections and if we would find a *similar violation,* say on the second inspection, then no reasonable time would be given and the men would be withdrawn in this case, as a penalty, so the operator would keep the mine rock dusted . . . .[22]

In addition, further explanation of the concept of "similar" violations was provided at the hearings during the following colloquy between Mr. O'Leary and Chairman Morse:

> Mr. O'Leary: Mr. Chairman, if we run through one sequence it might explain this.
> Senator Morse: I think so.
> Mr. O'Leary: A coal mine inspector enters a mine and finds it is deficient so far as rock dusting is concerned. The operator has a reasonable time then to correct that, and he does, let us say, in an hour. A subsequent reinspection under present law six (6) months removed, finds the *same deficiency* and the same reasonable time provision runs and the same correction is made while the inspector is in the mine.
> Under the Dent bill, we would go through this sort of sequence. First we would find it. On a subsequent reinspection six (6) months later we would find the *same deficiency* and that would result in the issuance of a withdrawal order . . . .[23]

Questioning by Chairman Morse regarding the new closure authority ended with the following colloquy with James Westfield, Assistant Director, Health and Safety, Bureau of Mines:

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[21] *Id.*, at 35 (emphasis added).
[22] *Id.* (emphasis added).
[23] *Id.* (emphasis added).

> Senator Morse: Is that absolutely clear then? You now testify that on the second inspection, staying with the hypothetical we have been using, not enough rock dust, although it does not meet the test of an imminent danger, it meets the test of a hazardous danger, it is a hazard and he says in effect "withdraw."
> Mr. Westfield: When that section of the mine is affected, that is correct.
> Senator Morse: That completely clarifies it for the chairman . . . .[24]

Finally, when the '65 Act was enacted, the Senate report which accompanied it referred to the new closure authority and stated: "A new subsection 203(d) establishes an additional type of closing order, referred to as a "reinspection closing order," to prevent certain recurrent violations of section 209 of the act."[25]

Although a new closure power had thus been created by Congress to deal with recurrent or repeated violations, the change wrought by the '65 Act which attracted controversy was its extension of the mandatory safety requirements to "small" mines previously exempt from these requirements.[26] Thus, the first "sighting" of the UFO passed without much ado.

SECOND ENCOUNTER: THE FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969

The unwarrantable failure closure order reappeared when Congress passed the '69 Act. Redesignated as section 104(c),[27] the enforcement scheme for this sanction remained essentially the same as the scheme originally provided under the '65 Act.[28] Additionally, the following terms, undefined in the '65 Act, were retained in the '69 Act: "significantly and substantially contribute to the cause and effect of a mine safety or health hazard";[29] "unwarrantable failure";[30] "similar";[31] "inspection."[32] Unfortunately, in enacting the '69 Act, Congress again failed to define the

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[24] *Id.*

[25] S. REP. No. 1055, 89th Cong., 2nd Sess., *reprinted in* [1966] 2 U.S. CODE CONG. & AD. NEWS 2072, 2080.

[26] *Id.* at 2076.

[27] 30 U.S.C. § 814(c) (1970).

[28] *See* footnote 21, *supra.*

[29] 30 U.S.C. § 814(c)(1) (1970).

[30] *Id.*

[31] 30 U.S.C. § 814(c)(2) (1970).

[32] 30 U.S.C. § 814(c)(1) (1970).

foregoing terms which were critical for the interpretation and application of section 104(c). As a result of this Congressional default, the definition and interpretation of these terms were left to the vagaries of administrative and judicial interpretation; nevertheless, certain interpretations provided some "physical evidence" regarding the nature of the UFO. Recent judicial and IBMA interpretations of the critical terms in section 104(c) have, however, so greatly broadened the application of the unwarrantable failure closure authority that this sanction may now be employed to deal with virtually an *unlimited* class of violations.

In *Eastern Associated Coal Corp.*,[33] the IBMA considered an appeal by Eastern Associated from the decision of an administrative law judge wherein, in a review proceeding under section 105[34] of the '69 Act, the administrative law judge upheld the validity of an unwarrantable failure order of withdrawal issued under section 104(c)(2).[35] The IBMA ruled that, as a condition precedent to the issuance of either a notice of violation or any order of withdrawal under section 104(c), a finding must be made that the violation could "significantly and substantially contribute to the cause and effect of a mine safety or health hazard" in accordance with the statute.[36] The IBMA also defined this gravity criterion by stating that it would apply to violations "which pose a probable risk of serious bodily harm or death . . . ."[37]

This definition of the gravity criterion was subsequently invoked by the IBMA in *Ziegler Coal Co.*,[38] wherein the IBMA vacated an order of withdrawal issued under section 104(c)(1). On reconsideration in *Zeigler,* MESA, supported by the United Mine Workers of America (UMWA), contended that the IBMA had erred in holding that the "significant and substantial" gravity criterion was an implied prerequisite to the issuance of a withdrawal order pursuant to section 104(c)(1). The UMWA and MESA employed somewhat varying lines of argument to attack the IBMA's initial decision in *Zeigler.* The UMWA urged that section 104(c)(1)

[33] 3 IBMA 331, [1974-1975] OCCUPATIONAL SAFETY & HEALTH DEC. (CCH) ¶ 18,706 (1974), *aff'd on reconsideration* 3 IBMA 383.

[34] 30 U.S.C. § 815 (1970).

[35] 30 U.S.C. § 814(c)(2) (1970).

[36] *See* 30 U.S.C. § 814(c)(1) (1970).

[37] 3 IBMA at 349, [1974-1975] OCCUPATIONAL SAFETY & HEALTH DEC. (CCH) at 22,602 (1974).

[38] 3 IBMA 448, [1974-1975] OCCUPATIONAL SAFETY & HEALTH DEC. (CCH) ¶ 19,131 (1974), *aff'd on reconsideration,* 4 IBMA 139, [1974-1975] OCCUPATIONAL SAFETY & HEALTH DEC. (CCH) ¶ 19,638 (1975).

was a model of clarity and therefore did not require statutory construction.[39] MESA also took this literalist position, and added arguments based upon certain legislative history of the section.[40]

The IBMA re-examined the literal words of section 104(c), and again found them to be ambiguous and inconclusive in a number of vital respects which it proceeded to discuss.[41] The IBMA also discussed MESA's arguments on legislative history, noting that MESA itself could not derive much benefit from such history.[42] Reaching its decision on reconsideration, the IBMA recalled the overall enforcement policy of the '69 Act:

> In *Eastern Associated Coal Corp., supra,* we analyzed at length the overall enforcement scheme and came to the general conclusion that the legislative policy was a blend of measured deterrence and protective reaction for the safety of affected miners, with each enforcement tool directed toward a particular class of conditions or practices [citation omitted]. More specifically, we concluded that section 104(c), involving as it does, ongoing liability to further withdrawal orders, contains the sharpest of the enforcement tools provided to the Secretary and accordingly should be applied in situations calling for vigorous protective reaction and maximum deterrence.[43]

With the foregoing enforcement scheme in mind, the IBMA then proceeded to demonstrate certain absurdities that would arise from the interpretation of section 104(c) as urged by the UMWA and MESA. For example, the IBMA pointed out that if the "significant and substantial" gravity criterion were not a prerequisite to the issuance of an order under section 104(c), then the lesser statutory sanction embodied in the notice of violation under section 104(c)(1) would be imposed for violations more serious than the violations subject to the more imposing statutory sanction embodied in the order of withdrawal.[44] As the IBMA concluded, "[s]uch results would be squarely at odds with the congressional

[39] 4 IBMA at 155, [1974-1975] OCCUPATIONAL SAFETY & HEALTH DEC. (CCH) at 23,441 (1975).

[40] *Id.*

[41] 4 IBMA at 156-58, [1974-1975] OCCUPATIONAL SAFETY & HEALTH DEC. (CCH) at 23,441-42 (1975).

[42] 4 IBMA at 159, [1974-1975] OCCUPATIONAL SAFETY & HEALTH DEC. (CCH) at 23,442 (1975).

[43] 4 IBMA at 160, [1974-1975] OCCUPATIONAL SAFETY & HEALTH DEC. (CCH) at 23,442 (1975).

[44] 4 IBMA at 162-63, [1974-1975] OCCUPATIONAL SAFETY & HEALTH DEC. (CCH) at 23,443 (1975).

enforcement strategy which calls for a graduated response to operator misbehavior."[45]

From this decision on reconsideration in *Zeigler,* the UMWA filed an appeal in the United States Court of Appeals for the District of Columbia Circuit. In *International Union, United Mine Workers of America, Inc. v. Kleppe,*[46] the District of Columbia Court reversed the IBMA and remanded the case for further proceedings. So ruling, the court held that "[t]here is no gravity criterion required to be met before a section 814(c)(1) withdrawal order may be properly issued."[47] While the court in its decision discussed certain excerpts from the legislative history,[48] it made no reference to the inconsistencies, as previously identified by the IBMA, arising from such an interpretation of section 104(c).[49]

The decision reached in *Kleppe* was soon expanded. In *Zeigler Coal Company,*[50] the IBMA took the strict literal interpretation of section 104(c)(1) adopted by the court in *Kleppe,* and extended it to section 104(c)(2). Thus, the IBMA ruled that the "significant and substantial" gravity criterion likewise was not a condition precedent to the issuance of a withdrawal order under section 104(c)(2). Although *Kleppe* made no reference to section 104(c)(2), the IBMA felt that the *Kleppe* rationale applied because of the absence of a "substantial and significant criterion" from the language of section 104(c)(2).[51]

Subsequently, an even more significant expansion of *Kleppe* was rendered by the IBMA in *Alabama By-Products Corporation* (On Reconsideration).[52] Despite the IBMA's recognition that the *Kleppe* decision was narrow and in no way concerned the IBMA's definition of the gravity criterion, the IBMA in *Alabama By-Products* nevertheless opined that such a "technical" reading of

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[45] 4 IBMA at 163, [1974-1975] OCCUPATIONAL SAFETY & HEALTH DEC. (CCH) at 23,443 (1975).

[46] 532 F.2d 1403 (D.C. Cir. 1976), *cert. denied sub. nom.* Bituminous Coal Operators Assn. Inc. v. Kleppe, 429 U.S. 858 (1976).

[47] *Id.* at 1407.

[48] *Id.* at 1405-07.

[49] See notes 50-51 *supra,* and accompanying text.

[50] 6 IBMA 182, [1976-1977] OCCUPATIONAL SAFETY & HEALTH DEC. (CCH) ¶ 20,818 (1976).

[51] *Id.* at 189-90, [1976-1977] OCCUPATIONAL SAFETY & HEALTH DEC. (CCH) at 24,985 (1976).

[52] 7 IBMA 85, [1976-1977] OCCUPATIONAL SAFETY & HEALTH DEC. (CCH) ¶ 21,298 (1976).

Kleppe "would at best be disingenuous,"[53] and therefore the IBMA felt compelled to change its definition.[54]

The IBMA, before proceeding to the discussion of its revised definition of the "significant and substantial" gravity criterion, reiterated its previously expressed view that the overall scheme of enforcement in the '69 Act required "application of enforcement actions of an increasingly imposing nature as a function of the *seriousness* of the misconduct in question."[55] The IBMA then concluded, however, that the court in *Kleppe* had "impliedly rejected"[56] this view, and as a result "[t]he emphasis of the D.C. Circuit on literalism which promotes wider operator liability and its rejection of our holding and the underlying reasoning in support thereof have undermined the 'probable risk' test completely."[57]

This conclusion by the IBMA in *Alabama By-Products* was erroneous and inappropriate. Contrary to the IBMA, an "honest reading"[58] of *Kleppe* reveals that the District of Columbia Court did not "impliedly"[59] reject the IBMA's view of the enforcement scheme. Rather, as noted by the concurring opinion in *Alabama By-Products,* the *Kleppe* decision was limited and therefore the majority opinion was neither compelled nor administratively prudent.[60] If the IBMA truly believed that its view of section 104(c) was "the only rational interpretation . . . in harmony with an overall construction of section 104,"[61] then it should have retained its definition of the "significant and substantial" gravity criterion. But since it determined that revision of its definition was required,[62] the IBMA announced a new definition unsupported by

[53] *Id.* at 91, [1976-1977] OCCUPATIONAL SAFETY & HEALTH DEC. (CCH) at 25,591-3 (1976).

[54] *Id.* at 90-91, [1976-1977] OCCUPATIONAL SAFETY & HEALTH DEC. (CCH) at 25,591-3 (1976).

[55] *Id.* (emphasis added).

[56] *Id.* at 92, [1976-1977] OCCUPATIONAL SAFETY & HEALTH DEC. (CCH) at 25,591-5 (1976).

[57] *Id.*

[58] *Id.*

[59] It is ironic that the IBMA's penchant for sensing "implication" was the very error specifically cited by the District of Columbia Court as the basis for its reversal of the IBMA in *UMWA v. Kleppe,* 532 F.2d 1403 (D.C. Cir. 1976).

[60] 7 IBMA at 96-97, [1976-1977] OCCUPATIONAL SAFETY & HEALTH DEC. (CCH) at 25,592 (1976).

[61] *Id.* at 92, [1976-1977] OCCUPATIONAL SAFETY & HEALTH DEC. (CCH) at 25,591-5 (1976).

[62] *Id.* at 93-96 [1976-1977] OCCUPATIONAL SAFETY & HEALTH DEC. (CCH) at 25,591-3 to 91-5 (1976).

any reference to either the '69 Act or legislative history:

> Our position now is that these words, when applied with due regard to their literal meanings, appear to bar issuance of notices under section 104(c)(1) in two categories of violations, namely, violations posing no risk of injury at all, that is to say, purely technical violations, and violations posing a source of *any* injury which has only a remote or speculative chance of coming to fruition. A corollary of this proposition is that a notice of violation may be issued under section 104(c)(1) without regard for the seriousness or gravity of the injury likely to result from the hazard posed by the violation, that is, an inspector need not find a risk of serious bodily harm, let alone of death.[63]

The term "unwarrantable failure" was first defined by the IBMA in *Eastern Associated Coal Corporation*[64] as an intentional or knowing failure to comply with the health or safety standard cited, or a reckless disregard for the health or safety of miners.[65] Moreover, the IBMA specifically noted that unwarrantable failure was not synonymous with ordinary negligence.[66]

Upon remand from the decision of the District of Columbia Circuit Court of Appeals in *UMWA v. Kleppe,* discussed above, the IBMA in *Zeigler Coal Company*[67] revised its definition, first announced in *Eastern Associated,* of unwarrantable failure. After pointing out certain examples of ambiguity in the legislative history of section 104(c), which were not discussed by the D.C. Court in *Kleppe,*[68] the IBMA equated the concept of unwarrantable failure with ordinary negligence:

> [W]e hold that an inspector should find that a violation of any mandatory standard was caused by an unwarrantable failure to comply with such standard if he determines that the operator involved has failed to abate the conditions or practices consti-

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[63] *Id.* at 94, [1976-1977] OCCUPATIONAL SAFETY & HEALTH DEC. (CCH) at 25,591-5 (1976) (emphasis added).

[64] 3 IBMA 331, [1974-1975] OCCUPATIONAL SAFETY & HEALTH DEC. (CCH) ¶ 18,706 (1974), *aff'd on reconsideration* 3 IBMA 383 (1974).

[65] *Id.* at 356, [1974-1975] OCCUPATIONAL SAFETY & HEALTH DEC. (CCH) at 22,604 (1974).

[66] *Id.* at 349-50, [1974-1975] OCCUPATIONAL SAFETY & HEALTH DEC. (CCH) at 22,602 (1974).

[67] 7 IBMA 280, [1977-1978] OCCUPATIONAL SAFETY & HEALTH DEC. (CCH) ¶ 21,676 (1977).

[68] *Id.* at 285-88, [1977-1978] OCCUPATIONAL SAFETY & HEALTH DEC. (CCH) at 26,025-27 (1977).

> tuting such violation, conditions or practices the *operator knew or should have known* existed . . . .[69]

Although the IBMA cautioned that the inspector's judgment regarding unwarrantable failure "must be based upon a thorough investigation and must be reasonable,"[70] the practical impact of the IBMA's new definition upon the enforcement actions taken by federal inspectors in the mines may be overwhelming. This potential impact can best be demonstrated by the manner in which findings of negligence were applied by MESA under the civil penalty assessment regulations.[71]

Under these regulations, two categories of negligence were defined: "ordinary negligence,"[72] and "gross negligence."[73] As part of the computation of the civil penalty to be assessed against each alleged violation, points were assigned to these categories of negligence. The category of negligence, if any, to be applied was based upon the degree of negligence attributed to the operator by the inspector who issued the violation being assessed. The form used by MESA to inform the operator of the civil penalty assessed[74] contained a column which showed the category of negligence attributed to the operator. A survey of 500 alleged violations recently cited against a large coal mine operator[75] revealed that in 438 of the 500 alleged violations (87%), the issuing inspector felt the operator knew or should have known the violation existed, and was therefore guilty of ordinary negligence. In addition, the survey showed that in 58 of the 500 alleged violations, the inspector found gross negligence. Since gross negligence is greater in degree than ordinary negligence, it can be concluded that in 496 instances

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[69] *Id.* at 295-96, [1977-1978] OCCUPATIONAL SAFETY & HEALTH DEC. (CCH) at 26,027 (1977) (emphasis added).

[70] *Id.* at 296, [1977-1978] OCCUPATIONAL SAFETY & HEALTH DEC. (CCH) at 26,027 (1977).

[71] 30 C.F.R. §§ 100.1-100.8 (1977).

[72] 30 C.F.R. § 100.3(d)(2) (1977).

[73] 30 C.F.R. § 100.3(d)(3) (1977).

[74] 30 C.F.R. § 100.4(b) (1977).

[75] *See* National Coal Association and Bituminous Coal Operators' Association, Inc., *Federal Coal Mine Health and Safety Act of 1969: A Constructive Analysis with Recommendations for Improvements*, 28 (June 9, 1977). This formal written analysis was presented in conjunction with testimony on June 9, 1977, to the Subcommittee on Labor Standards, Committee on Education and Labor, United States House of Representatives, on behalf of the American Mining Congress, Bituminous Coal Operators' Association, and National Coal Association, during Congressional oversight hearings on coal mine health and safety.

(99%), the issuing inspector felt that the operator demonstrated at least ordinary negligence.

Clearly, in MESA's view, ordinary negligence was inherent in virtually every violation. Thus, it can be said that, with rare exception, MESA routinely applied to violations a finding of negligence compatible with the IBMA's most recent definition of unwarrantable failure. The implications of this conclusion are obvious and ominous. If the foregoing survey is representative of the experience of the coal mining industry as a whole, approximately 99% of all violations cited by federal inspectors now would merit the issuance of an unwarrantable failure closure withdrawal order.

Section 203(d)(1)[76] of the '65 Act provided that once a notice of a violation was issued, the Bureau of Mines was required to reinspect the mine within ninety days "to determine if any *similar* such *violation*"[77] existed; if so, an order of withdrawal was to be issued. When the '69 Act was enacted, section 203(d)(1) was renumbered and amended. The new section, 104(c)(1), stated in pertinent part as follows: "if, during the same inspection or any subsequent inspection of such mine within ninety days after the issuance of such notice, an authorized representative of the Secretary finds another *violation of any* mandatory health or safety *standard* . . . ."[78]

The new section 104(c)(1) thus deleted the word "similar," and replaced it with the words "any . . . standard." In addition, while section 203(d)(2)[79] of the '65 Act was likewise renumbered and amended by the '69 Act, the following language was retained: "violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) of this subsection . . . ."[80]

The first interpretation by the IBMA of the foregoing language of section 104(c)(2) was rendered in *Eastern Associated Coal Corp.*[81] In *Eastern Associated,* the operator contended that the foregoing phrase required that an order of withdrawal could be issued only for a violation which was *substantively* similar to the violations cited in the underlying notice of violation and order of

[76] 30 U.S.C. § 473(d)(1) (repealed 1969).

[77] *Id.* (emphasis added).

[78] 30 U.S.C. § 814(c)(1) (1970) (emphasis added).

[79] 30 U.S.C. § 473(d)(2) (repealed 1969).

[80] 30 U.S.C. § 814(c)(2) (1970).

[81] 3 IBMA 331, [1974-1975] OCCUPATIONAL SAFETY & HEALTH DEC. (CCH) ¶ 18,706 (1974), *aff'd on reconsideration,* 3 IBMA 383 (1974).

withdrawal previously issued under section 104(c)(1). The IBMA rejected this argument, acknowledging, however, that the phrase was "something less than self-defining."[82] In its decision, the IBMA particularly emphasized that in the '69 Act Congress specifically deleted the word "similar" in section 104(c)(1) and replaced it with the word "any."[83] This Congressional action made it "plain" to the IBMA that an order of withdrawal under section 104(c)(1) "could be issued for a violation . . . wholly different from the one upon which the underlying (c)(1) notice was based."[84]

Having thus decided that the violations cited under section 104(c)(1) could be substantively dissimilar, the IBMA then had to determine how these dissimilar violations under section 104(c)(1) could be "similar" for the purposes of section 104(c)(2). Since to be "similar" all violations under 104(c) "must share common characteristics,"[85] the IBMA identified four characteristics or tests which would determine the validity of any order of withdrawal under section 104(c): (1) a violation occurred; (2) no imminent danger was present; (3) the violation met the "significant and substantial" gravity criterion; (4) the violations were caused by unwarrantable failure.[86]

As discussed previously,[87] recent decision by the District of Columbia Circuit Court of Appeals and the IBMA eliminated the "significant and substantial" gravity criterion as a condition precedent to the issuance of an order of withdrawal under section 104(c). As a result, violations cited under section 104(c) were required to share only one common characteristic—the unwarrantable failure criterion—and could be different in at least two major respects: (1) the violations could be substantively dissimilar and (2) the violation cited in the notice of violation under section 104(c)(1) would meet a gravity criterion, while the violations cited in the orders of withdrawal under section 104(c) would not. Clearly, these decisions have made it untenable to maintain that violations are "similar" for purposes of section 104(c)(2) simply

[82] *Id.* at 347, [1974-1975] OCCUPATIONAL SAFETY & HEALTH DEC. (CCH) at 22,601 (1974).

[83] *Id.* at 352, [1974-1975] OCCUPATIONAL SAFETY & HEALTH DEC. (CCH) at 22,603 (1974).

[84] *Id.*

[85] *Id.*

[86] *Id.* at 353-354, [1974-1975] OCCUPATIONAL SAFETY & HEALTH DEC. (CCH) at 22,603 (1974).

[87] See footnotes 52-69 *supra.*, and accompanying text.

because they share the one characteristic of unwarrantable failure. Substantive similarity, previously rejected by the IBMA in *Eastern Associated,*[88] has become the only logical interpretation of "similar" violations under section 104(c)(2).

Two examples of the manner in which section 104(c) would operate if substantive similarity had been the accepted interpretation demonstrate that Congress intended "similar" to mean substantive similarity. Assume, first, that a rock dust violation under 30 C.F.R. § 75.403 was cited by a notice under section 104(c)(1), and within 90 days another rock dust violation under 30 C.F.R. § 75.403 was cited by an order under section 104(c)(1). In this example, if another rock dust violation under 30 C.F.R. § 75.403, caused by unwarrantable failure, were found upon any subsequent inspection, then an order under section 104(c)(1) would ensue. For the second example, assume that a rock dust violation under 30 C.F.R. § 75.403 was cited by a notice under section 104(c)(1), and within 90 days a roof control violation under 30 C.F.R. § 75.200 was cited by an order under section 104(c)(1). In this example, no (c)(2) order could ensue. Instead, if another rock dust or roof control violation (or any other violation), caused by unwarrantable failure, were found upon any subsequent inspection, a notice of violation under section 104(c)(1) would ensue (if such violation also met the "significant and substantial" gravity criterion). In other words, while the 104(c)(1) order could be issued for *any* violation caused by unwarrantable failure, the 104(c)(2) orders could only be issued for *recurring* or *repeated* violations caused by unwarrantable failure.

This interpretation is consistent with the original Congressional intent concerning the unwarrantable failure closure authority. It also explains why Congress, in enacting the '69 Act, changed "similar" violation to "any" violation in section 104(c)(1), but retained "similar" violation in section 104(c)(2). As discussed earlier,[89] the unwarrantable failure closure authority was first enacted by Congress in 1966 to provide an enforcement mechanism to deal with recurrent or repeated violations. When Congress enacted the '69 Act, it broadened the scope of the unwarrantable failure closure authority. This was accomplished by eliminating the term "similar" violation appearing in section 203(d)(1)[90] of the '65 Act,

[88] 3 IBMA 331, [1974-1975] OCCUPATIONAL SAFETY & HEALTH DEC. (CCH) ¶ 18,706 (1974), *aff'd on reconsideration,* 3 IBMA 383 (1974).

[89] See footnotes 19-29 *supra,* and accompanying text.

[90] 30 U.S.C. § 473(d)(1) (repealed 1969).

and replacing it with the term "any" violation in section 104(c)(1)[91] of the '69 Act. Congress, however, never abandoned its desire to provide enforcement sanctions against recurrent or repeated violations. Thus, it would appear that Congress purposefully retained the word "similar" in section 104(c)(2) of the '69 Act, in order to deal with substantively similar violations—*i.e.* repeated or recurrent violations.

In *Eastern Associated Coal Corporation (On Reconsideration)*,[92] the IBMA affirmed its initial ruling that the term "inspection," as used in section 104(c)(2) of the '69 Act, required a "complete inspection" of a mine in order to lift the withdrawal order liability of an operator from the provisions of section 104(c)(2).[93] But even though the IBMA interpreted the term "inspection" as it related to the procedural manner by which closure orders were to be issued under section 104(c)(2), it never rendered an interpretation in this regard concerning the issuance of closure orders under section 104(c)(1). Such interpretation was important because MESA's routine practice of issuing multiple 104(c)(1) closure orders, often beyond ninety days after issuance of an underlying 104(c)(1) notice, had been in disregard of the language of section 104(c)(1),[94] and had been employed by MESA

[91] 30 U.S.C. § 814(c)(1) (1970).

[92] 3 IBMA 383 (1974).

[93] *Id.* at 386.

[94] *See* M. Hallerud, V. Kahn and J. Meredith, *Enforcement and Administration of the Federal Coal Mine Health and Safety Act of 1969: Do the Ends Justify the Means?*, 77 W. Va. L. Rev. 623, 644 (1975). Interestingly, at the beginning of MESA enforcement, MESA instructed its personnel that section 104(c)(1) provided for the issuance of only one (c)(1) order which had to be issued within 90 days of the (c)(1) notice. By memorandum dated December 9, 1970, to all Bureau of Mines District Managers, John W. Crawford, Acting Assistant Director, Coal Mine Health & Safety, summarized section 104(c) as follows (emphasis added):

> When a 104(c)(1) Notice has been issued at a mine, *the next violation, providing it falls within* the category of unwarrantable failure and within *90 days of the issuance of the Notice,* regardless of the provision *would require the issuance of a 104(c)(1) Order. All subsequent violations,* where unwarrantable failure is established, *would require the issuance of 104(c)(2) Orders* regardless of the provision until such time as a complete inspection of the mine reveals no violations attributable to unwarrantable failure.

This summary was based upon the interpretation of section 104(c) as provided by the Associate Solicitor, Health and Safety, who functioned as chief legal counsel assigned to mine health and safety. This interpretation was formally abandoned in December 1971 when the Bureau of Mines published its first inspection manual for all underground mines. In that publication, distributed to all enforcement personnel, the Bureau changed its previous position and declared that multiple (c)(1)

to perpetuate operator liability to mine closure under section 104(c).

On its face, section 104(c) provided for the issuance of a notice of violation and orders of withdrawal in the following specific sequence or "chain": first, a notice would be issued under 104(c)(1); next, within ninety days, an order would be issued under 104(c)(1); then, after the order was issued under 104(c)(1), an unlimited number of orders would be issued under 104(c)(2) until an inspection disclosed no similar violations; finally, upon a finding of no similar violations (a "clean inspection"), the "chain" was broken and would not begin anew until the issuance of a notice under 104(c)(1).

From the standpoint of miner health and safety, this "chain" was of no particular consequence, since mine closure (and the protection afforded thereby) was identical whether an order was issued under 104(c)(1) or 104(c)(2). From a due process standpoint, however, the "chain" was quite important for two reasons. Once a 104(c) "chain" was begun by the issuance of the 104(c)(1) notice, it could not be broken until the following events occurred: (1) an order under 104(c)(1) was issued, thereby rendering the operator liable only for orders under 104(c)(2); (2) a "clean" inspection occurred while the operator was in 104(c)(2) "status," thereby rendering the operator liable only for a notice under 104(c)(1). By increasing the number of orders issued under 104(c)(1), MESA thus prevented the operator from obtaining an opportunity to be released from the "chain" under 104(c)(2).

In addition, the use of multiple 104(c)(1) orders enable MESA to circumvent the operators' opportunity for administrative relief under section 105[95] of the '69 Act. While an order under section 104(c)(1) could generate the subsequent issuance of additional orders under 104(c)(2), a 104(c)(2) order could not. If a 104(c)(1) order were successfully challenged by an operator and vacated in a proceeding under section 105(b),[96] no subsequent orders under

orders could be issued if the first (c)(1) order was issued within 90 days; thereafter, additional (c)(1) orders could be issued during the same inspection and the 90 day limitation would have no further effect. *See* United States Department of the Interior, *Bureau of Mines: Coal Mine Safety Inspection Manual for Underground Mines*, 100-104 (December, 1971).

[95] 30 U.S.C. § 815 (1970).

[96] 30 U.S.C. § 815 (1970).

104(c)(2) could validly be based on that 104(c)(1) order.[97] The "chain" would thus be broken.

In order to avoid this possibility, MESA forged the following strategem employing use of multiple (c)(1) orders in conjunction with section 104(g)[98] of the '69 Act. MESA would first create a chain by issuing multiple (c)(1) orders against an operator; then, in the event that one of these (c)(1) orders was deemed invalid, any (c)(2) orders based thereon would be "modified" (i.e., rewritten) under section 104(g), so that the (c)(2) orders would refer to an existing valid (c)(1) order. This so-called modification would most often occur long after the 104(c)(2) order undergoing modification had been *terminated.*[99]

Two cases that particularly addressed many of the foregoing abuses by MESA unfortunately languished before the IBMA for over two and one-half years. As a result, the IBMA failed to render any decision on these matters before the functions of the IBMA were transferred to the Department of Labor.[100] *Old Ben*

[97] Although the IBMA never directly ruled on this issue, it did provide dictum which clearly suggested that invalidation of a 104(c)(1) order would invalidate any 104(c)(2) order premised thereon. *See Zeigler Coal Corp. [sic]* 1 IBMA 71, 80, [1971-1972] OCCUPATIONAL SAFETY & HEALTH DEC. (CCH) ¶ 15,371 (1971); *Kentland Elkhorn Coal Corp.*, 4 IBMA 166, 171, [1973-1974] OCCUPATIONAL SAFETY & HEALTH DEC. (CCH) ¶ 17,727 (1974). In *Old Ben Coal Corp. v. MESA*, Docket Nos. VINC 74-188 *et al*, (ALJ Merlin, March 6, 1975), the ALJ ruled that: (1) the invalidation of a 104(c)(1) notice would invalidate all subsequent 104(c)(1) and (c)(2) orders based upon it; (2) the invalidation of a 104(c)(1) order would invalidate all subsequent 104(c)(2) orders based upon it. This ruling was appealed by MESA to the IBMA in *Old Ben Coal Co.*, Appeal No. IBMA 75-42, [1975-1976] OCCUPATIONAL SAFETY & HEALTH DEC. (CCH) ¶ 19,870, and was rendered moot.

[98] 30 U.S.C. § 814(g) (1970).

[99] Such so-called "modification" was clearly unlawful. Section 104(g), 30 U.S.C. § 814(g) permitted MESA to modify *or* terminate. Once a notice or order was terminated, it no longer remained in effect and nothing remained to be modified. See *Old Ben Coal Co.*, Docket No. VINC 76-56 (ALJ Littlefield, Dec. 8, 1977). The IBMA had rendered two decisions concerning "modification"; neither case, however, concerned the issue of whether "modification" could be effectuated *after* "termination." *See Ashland Mining & Dev. Co.* 5 IBMA 259, [1975-1976] OCCUPATIONAL SAFETY & HEALTH DEC. (CCH) ¶ 20,161 (1975).

[100] Under the '77 Act, final administrative review functions, previously performed by the IBMA, will be exercised by the newly created Federal Mine Safety and Health Review Commission. See §§ 113, 301(a) of the '77 Act, 30 U.S.C.A. §§ 823, 861(a) (West Supp. 1978). Under the provisions of §§ 301(c)(3) & (4) of the '77 Act, 30 U.S.C.A. §§ 861(c)(3) & (4) (West Supp. 1978), cases pending before the IBMA at the time of transfer shall be continued before the Federal Mine Safety and Health Review Commission. Hopefully, this new Commission will soon address the issues posed by these two cases which had been pending before the IBMA for

Coal Co.[101] concerned an appeal by an operator from the decision of an administrative law judge[102] in a proceeding to review the validity of several closure orders issued under section 104(c)(1). In his decision, the administrative law judge condoned MESA's practice of issuing more than one 104(c)(1) closure order. He also ruled that such orders could be issued beyond ninety days after issuance of the underlying 104(c)(1) notice, as long as the first 104(c)(1) order was issued within ninety days. A second case involving Old Ben Coal Company[103] also concerned an appeal by MESA from the decision on remand by an administrative law judge[104] in a proceeding to review the validity of a notice of violation and several closure orders issued under section 104(c)(1). The decision affirmed the initial ruling that multiple orders could not be issued under section 104(c)(1).

Both Old Ben Coal Co. cases concerned the interpretation of the following phrase in section 104(c)(1): "If, during the same inspection or *any subsequent* inspection of such mine *within ninety days* after the issuance of such notice . . . ."[105] This phrase imposed a ninety day limitation upon the issuance of closure orders under section 104(c)(1).[106] MESA attempted to circumscribe

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over two and one-half years. It should be noted, however, that the Department of Labor recently promulgated a procedural rule, prepared by the acting Chief Administrative Law Judge under the Commission (*see* 20 C.F.R. § 2700.57 (1978)), which clearly contradicts the savings provisions in the '77 Act. *See* §§ 301(c)(3) & (4), 30 U.S.C.A. §§ 861(c)(3) & (4) (West Supp. 1978). The impact of such rule upon cases pending before the IBMA at the time of transfer is presently unknown by the authors. Despite the fact that such rule is clearly unlawful, the Federal Mine Safety and Health Review Commission might proceed under such rule and decline to exercise its discretionary review power. *See* § 113(d)(2)(A)(i) of the '77 Act, 30 U.S.C.A. § 823(d)(2)(A)(i) (West Supp. 1978). If the new Review Commission were to so decline, pending cases could not be pursued any further at the administrative level, since the IBMA no longer exists.

[101] Appeal No. IBMA 76-21.

[102] Old Ben Coal Company v. MESA, Docket Nos. VINC 75-267 *et al* (ALJ Broderick, July 16, 1975).

[103] Old Ben Coal Company, Appeal No. 77-42.

[104] Old Ben Coal Company v. MESA, Docket Nos. VINC 75-246, *et al* (ALJ Koutras, June 23, 1977). This decision was rendered upon remand ordered by the IBMA in *Old Ben Coal Company*, 7 IBMA 299 (1977). The original decision by the administrative law judge in this case was issued on June 30, 1975, in *Old Ben Coal Company v. MESA*. Docket Nos. VINC 75-246 *et al.*

[105] 30 U.S.C. § 814(c)(1) (1970) (emphasis added).

[106] In two recent cases, an operator contended that MESA must conduct a full inspection of a mine within 90 days after the issuance of a 104(c) withdrawal order. The operator further argued that, as a consequence of failure to conduct such

this limitation by resurrecting the various interpretations of "inspection" adopted by the IBMA in *Eastern Associated Coal Corporation,*[107] and urged the IBMA to apply them to the phrase "any subsequent inspection" appearing in section 104(c)(1). Reference to the IBMA's decision in *Eastern Associated* reveals that the IBMA's reasoning was particularly influenced by the absence of the word "any" in section 104(c)(2): "If the legislators had intended to lift liability upon a clean *spot* inspection subsequent to the issuance of a (c)(2) closure order, we think that they would have used the words '*any* inspection' rather than 'an inspection' . . . ."[108]

In order to be consistent in the *Old Ben* cases, the IBMA presumably would likewise have been influenced by the presence of the word "any" in section 104(c)(1),[109] and therefore would have ruled that the ninety day time limitation applied, regardless of the type of inspection in progress. By such a ruling, the IBMA would have reintroduced an element of due process long since abandoned by MESA in its application of section 104(c).[110]

THIRD ENCOUNTER: THE FEDERAL MINE SAFETY AND HEALTH AMENDMENTS ACT OF 1977

After being "sighted" for the first time in the '65 Act, and then reappearing in the '69 Act, the UFO—unwarrantable failure order—again returned when Congress enacted the '77 Act.[111] Redesignated as section 104(d),[112] this mine closure authority remains

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inspection, the continuing chain of operator liability under section 104(c) would thus be broken. The IBMA declined to rule on this contention for procedural reasons, noting however: "We mean our decision on this point to convey no message regarding the Board's view of the issue raised by Pocahontas. The Board recognizes the interests of both parties in obtaining a decision on the issue, but they and we must await for another case where the question is directly and properly presented." *Pocahontas Fuel Company,* [1977-1978] OCCUPATIONAL SAFETY & HEALTH DEC. (CCH) ¶ 22,218 (1977).

[107] 3 IBMA 331, [1974-1975] OCCUPATIONAL SAFETY & HEALTH DEC. (CCH) ¶ 18,706 (1974), *aff'd on reconsideration* 3 IBMA 383 (1974).

[108] *Id.*, at 358, [1974-1975] OCCUPATIONAL SAFETY & HEALTH DEC. (CCH) at 22,604 (1974) (emphasis added).

[109] Congressional use of the word "any" was also recently found to be significant by the U.S. Court of Appeals for the D.C. Circuit. See *UMWA v. Kleppe,* 532 F.2d 1403, 1406-07 (D.C. Cir. 1976) (slip opinion at 7-8).

[110] For a discussion of the erroneous application of section 104(c) by MESA, *See* 77 W. Va. L. Rev. 623, 643 (1974).

[111] Federal Mine Safety and Health Act of 1977, § 104(d), 30 U.S.C. § 814(d) (1977).

[112] 30 U.S.C. § 814(d) (1977).

virtually identical to its predecessors under sections 104(c) of the '69 Act and 203(d) of the '65 Act. Further analysis of this authority is therefore unnecessary. A new mine closure authority provided under section 104(e)[113] of the '77 Act did emerge from the UFO, however, and an initial appraisal of this authority is necessary.

Reference to the new "pattern of violations" closure authority, set forth in section 104(e),[114] reveals that its sequential nature, as well as most of its language, was lifted directly from the unwarrantable failure closure provisions now contained in section 104(d).[115] Although the '77 Act does not define "pattern of viola-

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[113] 30 U.S.C. § 814(e) (1977).

[114] Section 104(e), 30 U.S.C. § 814(e) (1977), reads as follows (emphasis added):

(e)(1) If an operator has a *pattern of violations* of mandatory health or safety standards in the coal or other mine which are of such nature as *could* have *significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards,* he shall be given written notice that such pattern exists. If, upon any inspection within 90 days after the issuance of such notice, an authorized representative of the Secretary finds any violation of a mandatory health or safety standard *which could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard,* the authorized representative shall issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

(2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of any violation of a mandatory health or safety standard *which could significantly and substantially contribute to the cause and effect of a coal or other mine health or safety hazard.* The withdrawal order shall remain in effect until an authorized representative of the Secretary determines that such violation has been abated.

(3) If, upon an inspection of the entire coal or other mine, an authorized representative of the Secretary finds no violations of mandatory health or safety standards *that could significantly and substantially contribute to the cause and effect of a coal or other mine health or safety hazard,* the *pattern of violations* that resulted in the issuance of a notice under paragraph (1) shall be deemed to be terminated and the provisions of paragraph (1) and (2) shall no longer apply. However, if as a result of subsequent violations, the operator reestablishes a *pattern of violations,* paragraphs (1) and (2) shall again be applicable to such operator.

(4) The Secretary shall make such rules as he deems necessary to establish criteria for determining when a pattern of violations of mandatory health or safety standards exist.

[115] 30 U.S.C. § 814(d) (1977).

tions," section 104(e)(4) mandates that the Secretary of Labor "shall make such rules as he deems necessary to establish criteria for determining when a pattern of violations . . . exist."[116] Such rules are absolutely essential. The lack of interpretative regulations severely hampered efforts to interpret and administer the unwarrantable failure closure authority. Interpretation and administration of the new "pattern of violations" closure authority hopefully will not be impeded by a similar deficiency. In the absence of such rules, it will be useful to ascertain the intent of Congress in creating this new closure authority.

The conference managers of the Senate and House submitted a joint statement to explain the '77 Act, and stated:

> *While a notice may be based on one standard or a number of different standards, it is the intention of the conferees that the pattern can be based only on violations of standards that "significantly or substantially contribute to the cause and effect of a mine safety and health hazard."* After the notice of the existence of a pattern, although an order could be issued under this provision for a violation which is not one which makes up this pattern, *the violation which results in the issuance of the order must be one which could "significantly or substantially contribute to the cause and effect of a mine safety and health hazard." Thus, just as the pattern may not be based merely on violations of technical standards, the order under this section cannot be based on violations of technical standards.*[117]

When this conference report was called-up by Congressman Carl D. Perkins for a vote on the House floor, Congressman Perkins made some introductory remarks, particularly emphasizing the 1976 disaster at Scotia Coal Mine in eastern Kentucky:

> In order to eliminate any future doubt, however, the Conference Report contains clear authority for Federal inspectors to deal with a Scotia-type operation . . . *This provision is directed to the Scotia-type operator. It is intended* to give unquestioned authority to the inspector *to deal with the reckless operator who operates his mine without regard for the safety or health of his miners.*[118]

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[116] 30 U.S.C. § 814(e) (1977). *See also* 43 Fed. Reg. 13,648 (1978) (delegation of responsibility for mine safety and health programs from the Secretary of Labor to the Assistant Secretary for Mine Safety and Health and the Solicitor of Labor).

[117] H. CONF. REP. No. 95-655: JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE, 48-49 (Comm. Print 1977), 95th Cong., 1st Sess., *reprinted in* [1977] U.S. CODE CONG. & ADM. NEWS 5288-89 (emphasis added).

[118] 123 CONG. REC. H11,662 (daily ed. Oct. 17, 1977) (emphasis added).

Congressman Perkins further elaborated on the meaning of this "Scotia-type operator":

> As our committee noted in our report of October 15, 1976, entitled "Scotia Coal Mine Disaster," Scotia was ". . . known as one of the most dangerous mines in the United States and the most gassy mine in eastern Kentucky. In addition, the Scotia mine had a long and chronic history of federal coal mine health and safety violations. From the record, it is clear that the Scotia mine was a bad mine, a dangerous mine, a mine with a long and chronic history of health and safety violations. It was a mine which in our opinion placed production and profit before the safety and health of its miners. It was a mine which essentially ignored the law."[119]

It therefore seems clear that Congress intended the new section 104(e) to be a strong enforcement tool to be implemented against an operator who exhibits a reckless disregard for the health and safety of miners or an operator who ignores the law and in doing so creates a very serious health and safety situation. Congress prescribed, however, that the "pattern of violations" be comprised of violations "which are of such nature as could *have* significantly and substantially *contributed* to the cause and effect of coal or other mine health or safety hazards . . . ."[120] Except for the change to past tense, as underscored in the foregoing, this language is identical to the first sentence of section 104(d)(1).[121] While Congress may thus have given an indication that the IBMA has not properly defined the "significant and substantial" gravity criterion, as suggested in this article,[122] it may have also created an inducement for the U.S. Department of Labor to determine a "pattern of violations" in the same manner as the U.S. Department of Interior computed "history of previous violations" under the '69 Act.[123] Based upon six cases[124] in which the IBMA presented

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[119] *Id.*

[120] 30 U.S.C. § 814(e)(1) (1977) (emphasis added).

[121] 30 U.S.C. § 814(d)(1) (1977).

[122] See footnotes 39-69 *surpa*, and accompanying text.

[123] 30 U.S.C. § 819(a)(1) (repealed 1977). This "history of previous violations" likewise appears in the '77 Act. See 30 U.S.C. §§ 815(b)(1)(B), 820(i) (1977).

[124] *The Valley Camp Coal Co.*, 1 IBMA 196, [1971-1973] OCCUPATIONAL SAFETY & HEALTH DEC. (CCH) ¶ 15,385 (1972); *Myers Coal Co.*, 2 IBMA 167, [1973-1974] OCCUPATIONAL SAFETY & HEALTH DEC. (CCH) ¶ 16,499 (1973); *Corporation of the Presiding Bishop, Church of Jesus Christ of Latter-Day Saints*, 1 IBMA 285, [1973-1974] OCCUPATIONAL SAFETY & HEALTH DEC. (CCH) ¶ 16,913 (1973); *Old Ben Coal Co.*, 4 IBMA 198, [1974-1975] OCCUPATIONAL SAFETY & HEALTH DEC. (CCH) ¶ 19,723 (1975); *Peggs Run Coal Co. Inc.*, 5 IBMA 144, [1975-1976] OCCUPATIONAL

meaningful discussion of "history of previous violations," the following broad principles emerged: (1) "history" meant previous alleged violations of the same standard, which penalty assessments had been paid, in full or otherwise, and (2) "history" did not include alleged violations not processed through the MESA assessment office, or alleged violations pending in some stage of litigation within the U.S. Department of Interior, Office of Hearings and Appeals.[125]

In order to establish this "history," MESA resorted to the use of computer printouts which provided nothing more than perfunctory tabulation of the alleged violations which civil penalty assessments had been paid by an operator. More recently, this procedure was formalized by regulations which simply required tabulation of the number of alleged violations assessed during the preceding twenty-four months.[126] These regulations specifically provided that alleged violations vacated or dismissed *after* the time of assessment would nevertheless constitute part of the "history."[127]

The authors of this article presently understand that the assessment office, formerly associated with MESA, will be transferred to the United States Department of Labor as an adjunct to the newly created Mine Safety and Health Administration, presumably to continue to assess civil penalties in some fashion.[128] Undoubtedly, the assessment office will continue to employ its computerized system of tabulating alleged violations. With some system in place, the Department of Labor will be tempted to utilize this apparatus to establish the "pattern of violations" under section 104(e). Since the pattern is to be based on "significant and substantial" violations, and since such violations can be cited as significant and substantial only under the unwarrantable failure provisions in section 104(d)(1), it is quite conceivable that "pattern of violations" could become nothing more than a mere computer tabulation of the notices of violation issued under section 104(d)(1) against a particular operator. Hopefully, the Secre-

SAFETY & HEALTH DEC. (CCH) ¶ 20,201 (1975); *Peggs Run Coal Co. Inc.*, 6 IBMA 212, [1976-1977] OCCUPATIONAL SAFETY & HEALTH DEC. (CCH) ¶ 20,839 (1976).

[125] 43 C.F.R. §§ 4.1-4.5 (1977).

[126] 30 C.F.R. § 100.3(c) (1977).

[127] *Id.* at § 100.3(c)(2).

[128] *See* footnote 15 *supra*. It is questionable whether such a transfer of the assessment office is proper under these sections of the '77 Act, and it is further questionable whether any civil penalty assessment can be done by such personnel. Compare 30 U.S.C. § 820(a) (1977), which refers to "the Secretary," with 30 U.S.C. § 820(i) (1977), which refers to "the Commission."

tary of Labor will choose to administer the '77 Act in a more equitable and enlightened fashion, and will promulgate appropriate regulations under section 104(e)(4).[129]

CONCLUSION

This article has shown how the procedural safeguards provided in section 104(c) of the '69 Act, and theoretically now contained in sections 104(d) and 104(e) of the '77 Act, have been systematically eroded by administrative and judicial interpretation rendered to date. This erosion has been so severe that sections 104(d) and 104(e) now provide the type of closure authority long desired by the United States Department of Interior—immediate closure upon a finding of any violation, regardless of the gravity of the violation or negligence of the operator.[130]

To achieve this authority, it would have been a simple matter for Congress to delete the reasonable time requirement now provided in sections 104(a),[131] 104(b),[132] and 104(f)[133] of the '77 Act. Such an approach, however, would have raised questions concerning the constitutional validity of such closure authority. Instead, as discussed herein, such authority has been developed in a more circuitous series of events. Initially, the unwarrantable failure closure authority was enacted with apparent safeguards such as the "significant and substantial" gravity limitation, the "unwarrantable failure" negligence limitation, the ninety day time limitation, the "same" and "any subsequent inspection" limitations, and the "similar" violation limitation. Subsequently, each

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[129] An example of the type of regulation which the Secretary of Labor should not publish is provided by the regulation promulgated by the Secretary of Interior to determine "pattern of violations" under the Surface Mining Control and Reclamation Act of 1977 (Pub. L. 95-87, 91 Stat. 445, 30 U.S.C. § 1201 *et seq.*). Specifically, as published at 42 F.R. 62702 (Dec. 13, 1977), Section 722.16(c)(3) states as follows:

> Violations of the same or related requirements of the Act, regulations, or permit conditions required by the Act during three or more Federal inspections within any 12-month period which were either caused by the unwarranted failure of the permittee to comply . . . , or were willful violations, shall constitute a pattern of violations.

In other words, three or more unwarranted failures or willful violations within any 12-month period equals a "pattern."

[130] *See* footnotes 25 *supra.*

[131] 30 U.S.C. § 814(a) (1977).

[132] 30 U.S.C. § 814(b) (1977).

[133] 30 U.S.C. § 814(f) (1977).

of these apparent safeguards was systematically rendered meaningless by emasculative interpretations. Finally, with the exception of the unwarrantable failure limitation, each of these meaningless "safeguards" was engrafted upon the newly created "pattern of violations" closure authority.

The mining industry now awaits the return of the former MESA enforcement personnel clothed in Department of Labor garb,[134] and armed with new and expanded authority under sections 104(d) and 104(e) of the '77 Act, to summarily order the cessation of mining activity. Possessed with such authority, the federal mine inspectors could potentially cripple production if their enforcement actions are not closely monitored. The Department of Labor now bears the responsibility to ensure that health and safety in the nation's mines will be enhanced without resort to arbitrary and capricious application of the expanded mine closure authority under the '77 Act. Hopefully, the Department of Labor will recognize that the '77 Act was intended to be remedial rather than punitive, and will seek to improve health and safety while according proper recognition to the principles of due process.

[134] The transfer to the Department of Labor became effective on March 9, 1978.