



Volume 77 | Issue 4

Article 4


April 2019

Enforcement of Federal Coal Mine Health and Safety Regulations

Madison McCulloch

Office of the Solicitor, Division of Mine Health and Safety, United States Department of the Interior

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>

 Part of the [Labor and Employment Law Commons](#), and the [Oil, Gas, and Mineral Law Commons](#)

Recommended Citation

Madison McCulloch, *Enforcement of Federal Coal Mine Health and Safety Regulations*, 77 W. Va. L. Rev. (2019).

Available at: <https://researchrepository.wvu.edu/wvlr/vol77/iss4/4>

This Article is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.

ENFORCEMENT OF FEDERAL COAL MINE HEALTH AND SAFETY REGULATIONS

MADISON McCULLOCH*

By now most people are aware of the fact that the federal government, through the Federal Coal Mine Health and Safety Act of 1969,¹ invited itself to become a party to the business of mining coal. A mining disaster near Farmington, West Virginia, in 1968, causing the death of seventy-eight miners, was the prime mover for the enactment of this legislation. The Act was labeled by one of its authors as "not only one of the most important pieces of legislation of this or any other Congress it is one of the most complex pieces of legislation ever enacted."²

For all this projected complexity, the law has produced a surprisingly small amount of legal issues for resolution by the federal courts. In addition, the administrative tribunal, the Office of Hearings and Appeals, Department of the Interior,³ while having an abundant caseload involving factual disputes, has been rather infrequently called upon to decide issues of law.

The purpose of this article is to acquaint the reader, very generally, with the primary health and safety enforcement tools available to the agency, the review mechanism available to aggrieved coal mine operators or miners, and highlights of the litigation that has been generated.

I. BACKGROUND OF FEDERAL REGULATION OF THE COAL MINING INDUSTRY

The present health and safety enforcement tools were very slow aborning. In 1910, Congress took its first timid and cautious step into the business of mining coal.⁴ At that time the Bureau of Mines was established to provide governmental assistance in coal

* Trial Attorney, Office of the Solicitor, Division of Mine Health and Safety, United States Department of the Interior; B.S., Virginia Polytechnic Institute; LL.B., St. Johns University.

¹ 30 U.S.C. §§ 801-960 (1970) [hereinafter referred to as the 1969 Act].

² Perkins, *Forward* to HOUSE COMM. ON EDUC. & LABOR, 91ST CONG., 2D SESS., LEGISLATIVE HISTORY: FEDERAL COAL MINE HEALTH AND SAFETY ACT at III (Comm. Print 1970) [hereinafter cited as LEGISLATIVE HISTORY].

³ 43 C.F.R. § 4.500 (1974).

⁴ Bureau of Mines Organic Act, Act of May 16, 1910, ch. 240, 36 Stat. 369. See generally LEGISLATIVE HISTORY, *supra* note 2.

mining research in order to produce improved mining conditions and to prevent accidents. That law was not only devoid of any federal enforcement authority, but it expressly denied Bureau employees any authority to inspect or supervise a mine or any phase of mine-related operations.

In 1941, Title I of the Federal Coal Mine Safety Act⁵ was enacted, authorizing the Bureau of Mines to inspect underground coal mines and to publish findings and recommendations. This law, likewise, provided no federal regulatory authority.

In 1952, following a major mine disaster in West Frankfort, Illinois, which killed 119 miners, the Federal Coal Mine Safety Act⁶ was enacted. This law established for the first time federal regulatory authority and gave federal inspectors the authority to close mines, or affected portions thereof, where disaster-type accidents were imminent. Closure orders⁷ could also be issued where hazardous conditions, specifically covered by statutory standards, were not abated within a reasonable time following notification by the inspector. This law was weak in several respects. Strip mines and mines employing less than fifteen miners were exempt. Also, it was directed toward disaster-type accidents: namely, man-trip and man-hoist accidents, mine fires and mine inundations.⁸ As a practical matter, the Bureau rarely issued a closure order for failure to abate, and if the operator was making any effort at all to abate, he was usually immune from closure orders. Furthermore, most of the regulatory authority was left to the states, and procedural safeguards diluted much of the effectiveness of what was left.⁹

In 1966 the law was amended¹⁰ to include coverage of mines

⁵ Federal Coal Mine Safety Act, Part I, Act of May 7, 1941, ch. 87, 55 Stat. 177.

⁶ Federal Coal Mine Safety Act, Part II, Act of July 16, 1952, ch. 877, 66 Stat. 692 [hereinafter referred to as the 1952 Act].

⁷ The terms "closure order" and "withdrawal order" refer to orders by the federal inspectors, in accordance with 30 U.S.C. § 814 (1970), requiring the mine operators to withdraw miners from the areas affected by the offending conditions or practices. Those persons necessary to abate the subject conditions or practices may remain in the prohibited area to abate the condition or practice. *Id.* § 814(d). Closure orders do not require the shutting down of an entire mine with attendant losses of income and production, unless the entire mine is affected by the offending condition or practice.

⁸ 115 CONG. REC. 39985 (1969).

⁹ LEGISLATIVE HISTORY, *supra* note 2, at 4-6, 12-13.

¹⁰ Federal Coal Mine Safety Act Amendments of 1965, Act of March 26, 1966, Pub. L. No. 89-376, 80 Stat. 84 [hereinafter referred to as the 1966 Amendments].

COAL MINE HEALTH AND SAFETY 665

employing less than fifteen miners.¹¹ A reinspection closing order provision was added, giving inspectors authority to issue closure orders for certain violations that repeatedly occurred as the result of negligent conduct.¹² This was the forerunner of our present “unwarrantable failure” closure provisions.¹³

In 1968, Congress began consideration of new mine health and safety legislation, prodded to some extent by the publicity given to coal miners’s pneumoconiosis (black lung), but little action was taken on this legislation until the Farmington disaster in November of the same year. At that point, caution was thrown to the wind. Congress began its determined effort to effectively protect the coal mining industry’s most precious resource—the miner.¹⁴

II. THE FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969

A. Generally

The 1969 Act was passed on December 30, 1969, and its enforcement provisions became operative March 30, 1970. The purposes of the 1969 Act are (a) to provide for the establishment of mandatory health and safety standards to protect the health and safety of coal miners; (b) to require compliance with the standards; (c) to assist the states in providing effective state health and safety programs; and (d) to improve and expand research and development and training programs aimed at preventing coal mine accidents and occupationally caused diseases.¹⁵ The Secretary of the Interior was given significant powers to regulate the coal mining industry, for not only did the 1969 Act itself establish a number of very detailed mandatory health and safety standards¹⁶ regulating the operation of coal mines, but the Secretary was given authority to promulgate implemental or improved standards as they were needed.¹⁷

The mandatory health and safety standards enacted by Congress have generally, but in some instances begrudgingly, been accepted by the industry. To date, the attacks on the health and

The 1966 Amendments were repealed by the 1969 Act.

¹¹ *Id.* § 451.

¹² *Id.* § 472.

¹³ *See* 30 U.S.C. § 814(c) (1970).

¹⁴ *Id.* § 801(a).

¹⁵ *Id.* § 801(g).

¹⁶ *Id.* §§ 841-46 & §§ 861-78.

¹⁷ *Id.* §§ 811 & 957.

safety regulations have raised primarily procedural rather than substantive questions and have thus had little effect on the enforcement program.¹⁸

In *Reliable Coal Corp. v. Morton*,¹⁹ an indirect attack was made upon the Mining Enforcement and Safety Administration's enforcement of the mandatory safety standards that required the use of methane detectors and methane monitors in the subject mine.²⁰ Reliable Coal sought an exemption from the application of those safety standards²¹ on the grounds that its mine was a "non-gassy"²² mine. The court stated that Reliable Coal was only attempting to avoid complying with the mandatory safety standard.²³ It held that the mandatory safety standards applied to the mine and denied the relief requested.²⁴

In *Morton v. Bloom*,²⁵ an operator was successful in convincing the district court that he was not subject to the 1969 Act because he was a one-man operation that sold coal in intra-state²⁶ com-

¹⁸ *United States v. Finley*, 493 F.2d 285 (6th Cir. 1974); *McKinney v. Morton*, (Civil Action No. 1414, E.D. Ky., filed June 29, 1971). The *McKinney* case also alleges that the 1969 Act is unconstitutional.

¹⁹ 478 F.2d 257 (4th Cir. 1973).

²⁰ 30 U.S.C. §§ 863(d)(1) and (l) (1970).

²¹ An operator, or representative of the miners, may petition the Secretary to "modify the application of any mandatory safety standard to a mine if the Secretary determines that an alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard, or that the application of such standard to such mine will result in a diminution of safety to the miners in such mine." 30 U.S.C. § 861(c) (1970).

²² Methane gas can be found in coal seams, sometimes in huge quantities, and in some mines no methane has ever been detected. When combined with atmospheric gases in concentrations ranging from five to fifteen per centum, the gas becomes highly explosive, and it has been one of the primary causes of disaster-type accidents. Prior to the 1969 Act, some mines were classified as "non-gassy" and thus exempt from using certain prescribed flame-proof equipment and prescribed methane testing devices. (This information was obtained from John Nagy, Physical Scientist, Mining Enforcement and Safety Administration, Department of the Interior.) The 1969 Act abolished the distinction between gassy and non-gassy mines and made all mines subject to the same safety regulations. 30 U.S.C. § 865(a) (1970).

²³ 478 F.2d at 262.

²⁴ *Id.* at 262. See *A.K.P. Coal Co., v. Morton*, 501 F.2d 1363 (6th Cir. 1974) (motion for stay pending review denied).

²⁵ 373 F. Supp. 797 (W.D. Pa. 1973).

²⁶ "Each coal mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every

COAL MINE HEALTH AND SAFETY 667

merce only. The court held that, although the operator used equipment manufactured outside the state, his operation did not exert a substantial economic effect on interstate commerce, and was thus not subject to the coverage of the 1969 Act.²⁷ The Secretary, however, has obtained a number of favorable but unreported decisions in situations involving small operations where the coal was sold intrastate. The *Bloom* case is probably at variance with the established law.²⁸

In *United States v. Consolidation Coal Co.*,²⁹ a criminal prosecution under the 1969 Act, the defendants attacked the subject safety standards as unconstitutionally vague. The court rejected the constitutional argument stating that the statute defined the offense charged with certainty and referred to *Grayned v. City of Rockwood*³⁰ for a discussion of vague and overbroad statutes defining offenses.³¹ It thus appears that the health and safety standards will withstand any foreseeable substantive attacks.

B. Health and Safety Enforcement Provisions

The primary enforcement provisions of the Act, and consequently those that have generated the most controversy and litigation, are the "Findings, Notices and Orders" provisions.³²

miner in such mine shall be subject to the provisions of this chapter." 30 U.S.C. § 803 (1970).

²⁷ 373 F. Supp. at 799.

²⁸ See *Wickard v. Filburn*, 317 U.S. 111 (1942). "That Appellees own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of Federal regulations where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial . . ." *Id.* at 127-28.

²⁹ 504 F.2d 1330 (6th Cir. 1974).

³⁰ 408 U.S. 104 (1972).

³¹ 504 F.2d at 1332.

³² 30 U.S.C. § 814 (1970) provides:

(a) If, upon any inspection of a coal mine, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the area throughout which such danger exists, and thereupon shall issue forthwith an order requiring the operator of the mine or his agent to cause immediately all persons, except those referred to in subsection (d) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger no longer exists.

(b) Except as provided in subsection (i) of this section, if, upon any inspection of a coal mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety

standard but the violation has not created an imminent danger, he shall issue a notice to the operator or his agent fixing a reasonable time for the abatement of the violation. If, upon the expiration of the period of time as originally fixed or subsequently extended, an authorized representative of the Secretary finds that the violation has not been totally abated, and if he also finds that the period of time should not be further extended, he shall find the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to cause immediately all persons, except those referred to in subsection (d) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that the violation has been abated.

(c)(1) If, upon any inspection of a coal mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any notice given to the operator under this chapter. 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 and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, 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 subsection (d) of this section, 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 mine has been issued pursuant to paragraph (1) of this subsection, a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent 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.

(d) The following persons shall not be required to be withdrawn from, or prohibited from entering, any area of the coal mine subject to an order issued under this section:

(1) any person whose presence in such area is necessary, in the judgment of the operator or an authorized representative of the Secretary, to eliminate the condition described in the order;

(2) any public official whose official duties require him to enter such area;

(3) any representative of the miners in such mine who is, in the

1. *Imminent Danger Closure Orders*

Section 814(a) permits the authorized representative of the Secretary, a federal coal mine inspector, to order the operator to withdraw persons from a condition or practice that the inspector has reason to believe constitutes an imminent danger.³³ After five years of the 1969 Act, some of the operators are vigorously contesting the use of this closure provision by the Mining Enforcement and Safety Administration (MESA).³⁴ These contests have, for the most part, been restricted to the administrative tribunal, and only three operators, Eastern Associated Coal Corp., Freeman Coal Mining Corp., and Old Ben Coal Corp. have sought review of orders of withdrawal in the federal courts. The United States Courts of Appeals have affirmed the agency in the issuance of the closure orders in both *Eastern Associated Coal Corp. v. Interior Board of Mine Operations Appeals*³⁵ and *Freeman Coal Mining Corp. v. Interior Board of Mine Operations Appeals*.³⁶ Those two cases were probably among the weakest cases MESA has sustained administratively, so it appears that MESA's present use of the imminent danger closure order will generally be upheld. Three cases filed on behalf of Old Ben Coal Corporation are presently before the United States Court of Appeals for the Seventh Circuit.³⁷ It is unfortunate that the cases are still pending before the court because the brief filed on behalf of Old Ben deserves comment here; that brief is remarkable in two respects, one of which is its over-enthusiasm.

judgment of the operator or an authorized representative of the Secretary, qualified to make coal mine examinations or who is accompanied by such a person and whose presence in such area is necessary for the investigation of the conditions described in the order; and

(4) any consultant to any of the foregoing.

³³ *Id.* § 814(a).

³⁴ The enforcement functions exercised through the Bureau of Mines have been delegated to the Mining Enforcement and Safety Administration [hereinafter referred to as MESA], 38 Fed. Reg. 18695-96 (1973). LEGISLATIVE HISTORY, *supra* note 4, at 635.

³⁵ 491 F.2d 277 (4th Cir. 1974).

³⁶ 504 F.2d 741 (7th Cir. 1974).

³⁷ *Old Ben Coal Corp. v. Interior Bd. of Mine Operations Appeals*, Appeal Nos. 74-1654, 74-1655, and 74-1656, 7th Cir., *petitions for review filed*, Aug. 14, 1974. Decisions of the Board of Mine Operations Appeals [hereafter referred to as the Board], acting on behalf of the Secretary, 43 C.F.R. § 4.500 (1974), are subject to judicial review by the respective United States courts of appeals. 30 U.S.C. § 816 (1970). In such a review proceeding, the findings of the Board, if supported by substantial evidence on the record considered as a whole, shall be conclusive. *Id.* § 816(b).

The obvious attack by operators on the imminent danger closure provision centers upon the meaning of the term "imminent." The 1969 Act provides: "'imminent danger' means the existence of any condition or practice in a coal mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated."³⁸ The imminent danger provision of the 1952 Act³⁹ was much more restrictive. It provided: "If a . . . representative of the Bureau . . . finds 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. . . ."⁴⁰ In redrafting the imminent danger provisions for the 1969 Act it was stated:

The definition of an 'imminent danger' is broadened from that in the 1952 act in recognition of the need to be concerned with *any* condition or practice, naturally or otherwise caused, which *may* lead to sudden death or injury before the danger can be abated. It is not limited to just disasterous type accidents, as in the past, but all accidents which could be fatal or nonfatal to one or more persons before abatement of the condition or practice can be achieved.⁴¹

The *Freeman* and *Eastern* cases explain the definition and also define the limits of an attack upon that definition. In the *Eastern* case, an accumulation of debris in an underground roadway limited the vertical clearance for vehicular traffic. In addition, two loose roof bolts that were overhanging the roadway contributed to the danger. *Eastern* argued that it had voluntarily withdrawn the miners from the affected area before the inspector arrived, and, thus, there was no imminence to the danger. The court affirmed the Board's decision that the condition "could reasonably be expected to cause death or serious physical harm to a miner *if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated.*"⁴² Actual presence of miners in the affected area at the time the closure order is issued was thus not a prerequisite for issuance of the order. There was evidence in that case that vehicles had made many trips through the endangered area without incident.

³⁸ 30 U.S.C. § 814(a) (1970).

³⁹ *Supra* note 6, Pub. L. No. 552, § 203(a)(1).

⁴⁰ *Id.*

⁴¹ 115 CONG. REC. 39985 (1969) (emphasis added).

⁴² 491 F.2d 277, 278.

In *Freeman*, float coal dust was present along approximately 7,200 feet of underground belt haulageways. The belt was in operation at the time of the inspection. Float coal dust, consisting of very small particles of coal, can be suspended in air. When so suspended it can be highly explosive upon ignition. A common cause of ignition is the ignition of methane gas, another explosive entity, and the mine in question had a history of releasing methane gas. At the time of the inspection there was no float coal dust in suspension, and there was no accumulation of methane gas.⁴³ The court held that, although the danger was not *immediate*, a reasonable man would estimate that if normal operations designed to extract coal in the disputed area should proceed, it was at least just as probable as not that the feared accident or disaster would occur before elimination of the danger.⁴⁴ The court went on to state that “[a]n imminent threat is one which does not necessarily come to fruition but the reasonable likelihood that it may, particularly when the result could well be disastrous, is sufficient to make the impending threat virtually an immediate one.”⁴⁵

The court has tried to make it clear that there was a distinction between an imminent threat and an immediate one, so the reason for this last statement of the court on the subject is unclear. Also, one wonders what the degree of severity of the threat has to do with its imminence.

MESA is fearful of the mischief that might be created if the courts begin to deal more in terms of a probability test in determining imminence. Although the operators have complained about the fifty-fifty probability test of *Freeman*, it is the coal miner who stands to lose the most under those odds. Old Ben Coal Corp. has suggested that a one in sixty-four probability fails the *Freeman* test.⁴⁶ If a given occupation presented one chance in a thousand that certain conditions would appear that could reasonably be expected to cause death or serious physical injury, the average normal person could reasonably be expected to avoid the occupation.

MESA would like to see the courts adopt the Board’s *Freeman*

⁴³ 504 F.2d at 745, 746. See also LEGISLATIVE HISTORY, *supra* note 2, at 65.

⁴⁴ 504 F.2d at 745.

⁴⁵ *Id.*

⁴⁶ Old Ben Coal Corp. v. Interior Bd. of Mine Operations Appeals, (Civil Action Nos. 74-1654, 74-1655 and 74-1656, 7th Cir., petitions for review filed Aug. 14, 1974), Appellee’s Brief 39.

test: namely, that imminent danger denotes a peril, "likely to occur at any moment, but not necessarily immediately."⁴⁷ If we must search for analogy, the imminence of the danger could be likened to a time bomb placed in a mine. The bomb has been placed, the time mechanism has been set, and no one knows the time delay. It could go off the next moment, or it could be set for months hence, but unless miners are removed immediately, there is a probability that it could go off before it is defused.

2. *Notification of Violations and Closure Orders for Failure to Abate*

Another enforcement device is provided in section 814(b).⁴⁸ In the calendar year 1974, approximately 79,000 notices of violation were issued to operators, and approximately two thousand closure orders were issued where the violations were not abated within the time allotted.⁴⁹

The litigation generated by section 814(b), except for civil penalty litigation,⁵⁰ has been generally uneventful. The disputes are usually factual ones regarding whether or not a violation occurred as alleged, and if so, the reasonableness of time set for abatement. In *Lucas v. Morton*,⁵¹ before a three-judge court, plaintiffs attacked the section 814(b) closure provision, alleging that it permits an inspector to shut down the mine before the operator has an opportunity to have a hearing, upon notice of an alleged violation. Plaintiffs asserted that this constitutes a deprivation of the use of their property without the opportunity of a prior hearing, and thus is a denial of due process. The court refused to declare the statute unconstitutional on its face. It noted that, although the

⁴⁷ Freeman Coal Mining Corp., 2 IBMA 197, 212, 1973-1974 CCH OCCUPATIONAL SAFETY & HEALTH DEC. ¶ 16,567, at 21,395 (1973), *aff'd sub nom.*, Freeman Coal Mining Corp. v. Interior Bd. of Mine Operations Appeals, 504 F.2d 741 (7th Cir. 1974).

⁴⁸ 30 U.S.C. § 814(b)(1970). See note 32 *supra*. A similar device was in the 1952 Act. See 1952 Act, *supra* note 6, at § 203(b) and (c)(1). However, under the 1952 Act there were only a few regulations in the statute and the Secretary had no power to promulgate regulations.

⁴⁹ These statistics were obtained from the Coal Mine Health and Safety Division, Mining Enforcement and Safety Administration, Department of the Interior.

⁵⁰ Section 819(a) of Title 30 provides for the assessment of civil penalties for all violations of the mandatory health and safety standards. The agency has collected eleven million dollars in civil penalties since the effective date of the 1969 Act. The civil penalty provisions are not discussed in this article.

⁵¹ 358 F. Supp. 900 (W.D. Pa. 1973).

COAL MINE HEALTH AND SAFETY 673

1969 Act does not provide for a stay of the proceeding pending a public hearing, the Board of Mine Operations Appeals is available for an expedited review proceeding,⁵² and the court presumed the agency would extend the time for abatement until after the review proceeding.⁵³ Up to the present time no situation has arisen where the Secretary has deemed it imprudent to extend the time of abatement pending a public hearing.

3. *Unwarrantable Failure Closure Orders*

The real sleeper of the enforcement provisions of the 1969 Act is the so-called “unwarrantable failure” closure section.⁵⁴ This is by far the most complicated section of the Act, and its development as an enforcement tool will be in litigation for quite some time. Generally, the issues presented are these: (a) What is meant by the phrase “significantly and substantially contribute to the cause and effect of a mine safety or health hazard”? (b) What is meant by the term “unwarrantable failure”? (c) Is an unwarrantable failure notice of violation reviewable under section 815? (d) What are the elements of a section 814(c)(1) order of withdrawal? (e) What are the elements of a section 814(c)(2) order of withdrawal? (f) Are “spot” inspections, or any type inspections short of a full and complete inspection of the mine, sufficient to remove the threat of instant closure and return the mine to the provisions of section 814(c)(1)?

Each of these questions has been answered by the Board of Mine Operations Appeals.⁵⁵ Although the United Mine Workers of America (UMWA) has petitioned for review of the Board’s decision in *Zeigler Coal Co.*,⁵⁶ the Board has, on motion of MESA, agreed to reconsider that decision.

The writer, as counsel for MESA, will present MESA’s position regarding the issues enumerated in (a) through (e) above before setting forth the Board’s holdings.

⁵² *Id.* at 904.

⁵³ *Id.*

⁵⁴ 30 U.S.C. § 814(c) (1970).

⁵⁵ *Zeigler Coal Co.*, 3 IBMA 448, 1974-1975 CCH Occupational Safety & Health Dec. ¶ 19,131 (1974); *Eastern Associated Coal Corp.*, 3 IBMA 331, 1974-1975 CCH Occupational Health & Safety Dec. ¶ 18,706 (1974).

⁵⁶ *United Mine Workers of America v. Morton*, Appeal No. 75-1107 (D.C. Cir., filed February 10, 1975). By statute, 30 U.S.C. § 816 (1970), MESA cannot obtain judicial review of a Board decision.

The forerunner of section 814(c), commonly referred to as the “unwarrantable failure” closure provision, was the “reinspection closing order” provision of the 1966 Amendments.⁵⁷ Section 203(d) of the 1966 Amendment provided:

(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 violation exists 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 conditions which such representative finds cause and constitute such violation, and a 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.

(d)(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

⁵⁷ 1966 Amendments, *supra* note 10, § 203(d).

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.⁵⁸

Although the language of section 203 of the 1966 Amendments itself would tend to support a more restrictive use of the provisions by the federal mine inspection force, the intent of Congress was to provide the Bureau of Mines with a very strong enforcement tool where mine operators continued to repeat negligent conduct.⁵⁹ Even though violations of the safety standards might be technical

⁵⁸ *Id.*

⁵⁹ In its analysis of this amendment, the Committee on Education and Labor stated the following:

Section 3. (a) Amends section 203 of the Act, by adding new subsections (d) and (e), to provide that where an inspector finds that a violation of the safety requirements of section 209 not involving immediate danger "is of such a nature as could significantly and substantially contribute to the cause of effect of a mine explosion, mine fire, mine inundation, man-trip, or man-hoist accident (commonly referred to as disaster-type accidents), and . . . such violation to be caused by an unwarrantable failure of such operator to comply with the provisions of section 209," the inspector shall include these findings in the notice which is served upon the operator which fixes a reasonable time for the abatement of such violation. Thereafter, the Bureau would be required to reinspect the mine within 90 days of the notice (in addition to any inspection required to determine whether the particular violation has been abated within the reasonable time fixed) to ascertain whether a similar violation exists. If upon the mandatory reinspection or a special investigation a similar violation is found which has been caused by the unwarrantable failure of an operator to comply with the provisions of section 209, a withdrawal order shall be issued. The discovery of similar violations upon succeeding inspections would require the issuance of a withdrawal order until an inspection occurred in which no similar violations were discovered. The "unwarrantable failure of an operator to comply with the provisions of section 209" is intended to mean a violation which occurs because of a lack of due diligence, or because of indifference or less than reasonable care on the part of the operator; as distinguished from violations which occur despite the operator's due diligence, proper concern, and reasonable care to prevent such violations. The words "unwarrantable failure" are used for the purpose of making it clear that a withdrawal and debarment order will not result if the repeated violation did not arise as a consequence of a lack of due diligence on the part of the operator. For example, a withdrawal and debarment order would not be issued where an inspector's arrival so nearly coincided with the occurrence of a repeated violation that the operator would not have had the time to correct it.

or of minor consequence, if the operator did not exercise due care in attempting to comply with the safety standards, he was subject to summary closing of that section of the mine affected by the violation.⁶⁰ However, the Bureau of Mines construed the terms “similar,” “such similar,” and “similar such,” used in identifying the type violation giving rise to the section 203(d)(1) and (2) closure orders, as meaning similar in all respects to the violation initiating the series: namely, that (a) there was no imminent danger, (b) the violation could significantly and substantially contribute to the cause and effect of a disaster type occurrence, (c) the same safety standard was being violated, and (d) the violation resulted from the operator’s unwarrantable failure to comply with the safety standards.

Recognizing that this enforcement provision of the 1966 Amendments was not accomplishing its objective because of the restrictions placed on it by its authors and the interpretations of the Bureau of Mines, significant and substantial changes were made as it was redrafted for the 1969 Act.

(1) Looking at the violation that initiated the unwarrantable failure sequence, or, if you will, the violation that set the spring for instant, summary closure should negligent operation of the mine be repeated, we see that the requirement of a significant and substantial contribution to the cause and effect of a disaster-type accident has been eliminated. The violation now need only significantly and substantially contribute to the cause and effect of any health or safety hazard.⁶¹ The requirement that the violation create less than an imminent hazard was carried over to the 1969 Act.

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, which the inspector reasonably believes to be a 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. At the same time, in recognition of the fact that minor and technical violations of section 209 do occur, and will occur, despite conscientious efforts of operators to prevent them, it is deemed unnecessarily punitive to provide for the mandatory shutting down of mines, or the mandatory withdrawal of men from the mines, where violations of section 209 occur without any lack of diligence or due care on the part of the operator.

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

⁶⁰ *Id.*

⁶¹ 30 U.S.C. § 814(c)(1) (1970).

There is no guidance in the legislative history regarding the meaning of the phrase “significantly and substantially contribute to the cause and effect of a mine safety or health hazard.” First of all, the grammar of the sentence advises us that “significantly” and “substantially” are adverbs modifying the verb “contribute.” They are not adjectives modifying the noun “hazard.” This observation is fortified by the provisions of the 1966 Amendments. There the hazards were a mine fire, mine inundation, and so forth, which were certainly significant and substantial hazards. If “significant” and “substantial” were meant to be adjectives, by putting them next to the nouns they modify, we would then end up, under the 1966 Amendments, with violations that contribute to *significant* and *substantial* significant and substantial hazards. This awkward paraphrasing should point up the fallacy in presuming that the words “significant” and “substantial” are adjectives modifying the noun “hazard.” The Board in interpreting the 1969 Act, however, has held that the phrase “significantly and substantially contribute to the cause and effect of a mine safety or health hazard” refers to violations “posing a probable risk of serious bodily harm or death.”⁶²

(b) “Unwarrantable failure” has been defined in the legislative history of both the 1966 Amendments and the 1969 Act as ordinary negligence.⁶³ The Board, on the other hand, and while acknowledging the existence of the legislative history of the 1969 Act, states that that history suggests that “unwarrantable failure” has occurred when an operator “intentionally” or “knowingly” failed to comply or demonstrated a “reckless disregard” for the health or safety of the miners.⁶⁴

(c) A question has also arisen regarding whether an operator has the privilege of administrative review of an 814(c) notice of violation. MESA has urged the Board in the *Zeigler* case to rule that there is no such entity as an 814(c) Notice of Violation. MESA’s position is that section 814(c)(1) does not authorize the issuance of a notice of violation; it only authorizes the insertion of additional findings into 814(b) and (i) notices of violation.⁶⁵

⁶² *Zeigler Coal Co.*, 3 IBMA 448, 461, 1974-1975 CCH Occupational Safety & Health Dec. ¶ 19,131, at 22,855 (1974).

⁶³ H.R. REP. No. 181, 89th Cong., 1st Sess. 7 (1965); LEGISLATIVE HISTORY, *supra* note 2, at 1030.

⁶⁴ *Eastern Associated Coal Corp.*, 3 IBMA 331, 354-55, 1974-1975 CCH Occupational Safety & Health Dec. ¶ 18,706, at 22,604 (1974).

⁶⁵ 30 U.S.C. § 814(c)(1) (1970). Notices are also authorized under 30 U.S.C. §

Section 815, the administrative review provision, states in part: (a)(1) . . . An operator issued a notice pursuant to section 814(b) or (i) of this title . . . if he believes the period of time fixed in such notice for abatement of the violation is unreasonable, apply to the Secretary for review . . .⁶⁶

If the 814(c) notice is in fact in 814(b) or (i) notice with additional findings, then presumably the only issue reviewable is the reasonableness of time for abatement. However, it can readily be seen that where the unwarrantable failure findings are added to the 814(b) and (i) notices, and the operator is suddenly placed in jeopardy of summary and instant closure of all or a portion of his mine, then the reasonableness of time to abate becomes a rather insignificant issue.

In view of the fact that all issues relevant to the issuance of orders of withdrawal are reviewable, MESA argues that it does not seem reasonable to believe Congress meant to limit review of notices of violation only to the reasonableness of time to abate the alleged violations. However, perhaps Congress intended the review proceeding to provide interim relief and did not intend to provide for review of notices and orders that have been terminated. The most pragmatic approach, at least as far as the 814(c) notices of violation are concerned, would be to presume that Congress simply overlooked the section 814(c) elements that might be added to 814(b) and (i) notices and provide for that review.⁶⁷

The Board resolves the issue by finding that there is an entity known as an 814(c) notice of violation, that it cannot be reviewed as an entity under section 815, but that it can be reviewed as an element of an 814(c)(1) closure order.⁶⁸ MESA has petitioned the

814(h) (1970). However, they involve conditions which cannot be abated by the use of existing technology, so unwarrantable failure cannot be an issue under this section.

⁶⁶ 30 U.S.C. § 815 (1970).

⁶⁷ See 73 AM. JUR. 2d *Statutes* § 203 (1974). If the Secretary does not provide for review of the notice before the closure order is issued, we will be faced with the argument that the closure order, which can be issued where there is no imminent peril to life or limb, deprives the operator of his property without, at least, a prior hearing. On the other hand, in cases where there is imminent peril to life and limb, summary closure of the mine without a prior hearing would meet Constitutional muster. See *Mitchell v. W. T. Grant*, 416 U.S. 600 (1974); *Fuentes v. Shevin*, 407 U.S. 67, *reh. denied*, 409 U.S. 902 (1972).

⁶⁸ *Zeigler Coal Co.*, 3 IBMA 448, 461, 1974-1975 CCH Occupational Safety & Health Dec. ¶ 19,131, at 22,853 (1974).

Board to reconsider this holding in order to avoid any constitutional arguments. If an operator believes he has a valid defense to the unwarrantable finding inserted into a notice of violation and wants to litigate the issue before being subjected to summary closure under section 814(c)(1), it is of little consolation, and of no practical consequence whatsoever, to know that he can have an administrative review of the unwarrantable failure finding, but only after he has been closed down with an 814(c)(1) order of withdrawal.

(d) The next problem area arises in determining what constitutes the elements of an 814(c)(1) order of withdrawal.⁶⁹ MESA has taken the position that section 814(c) provides an enforcement tool to deal with negligent operators. Obviously, in an enterprise that is so dangerous and destructive to life and limb, employers are obligated to maintain at all times a high degree of caution.⁷⁰

Common law remedies, for the most part, were ineffective in dealing with careless and indifferent operators, and civil penalties are likewise an after-the-fact remedial device⁷¹ that one hopes will have some impact on the future conduct of that operator. However, a device was needed to immediately and summarily deal with the negligent operator who *repeated* his negligent conduct.

The prerequisite to the issuance of this summary closure order for repeated negligent conduct is the issuance of the section 814(c) notice of violation. As previously noted, violations giving rise to the issuance of that notice must be of such a nature as to significantly and substantially contribute to the cause and effect of a mine safety or health hazard. Violations of a technical or records-keeping nature could not cock the gun, so to speak. But once the notice is issued that contains the section 814(c)(1) findings, the gun is cocked, the stage is set, and the operator is put on notice that he is subject to summary closing upon the finding of a violation of *any* mandatory health or safety standard, provided that it is caused by the operator's negligence, regardless of whether it

⁶⁹ It should be reiterated at this point that the closure orders issued under any provision of 30 U.S.C. § 814 (1970) apply only to the areas where the dangers exist and not to the mine as a whole, unless, of course, the whole mine is affected by the offending condition or practice.

⁷⁰ LEGISLATIVE HISTORY, *supra* note 2.

⁷¹ *See, e.g.* One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965); United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 554 (1942) (Frankfurter, J., concurring).

creates an imminent hazard or little or no hazard.⁷² Another precondition to this 814(c)(1) closure order is that the negligent conduct be found within ninety days of the issuance of the first unwarrantable failure violation.

The 1966 Amendments required, once the underlying notice was issued, the issuance of a closure order where a “similar such” violation is found. This violation also must have been caused by the unwarrantable failure of the operator to comply with the mandatory safety standards.⁷³ The House Conference Committee, in removing the ambiguities in the 1969 Amendments, made the comment:

Section [814]

1. The Senate bill provided that if an inspection of a coal mine shows that a mandatory health or safety standard is being violated but that no imminent danger is created thereby, though the violation could significantly and substantially contribute to the cause or effect of a mine hazard, and if it is found that the failure of the operator to comply is unwarrantable, that finding shall be included in the notice given the operator under section [814(b) or (i)]. If, during that inspection or any subsequent inspection carried out within 90 days after the issuance of the notice, another violation of *any such* mandatory standard is discovered by the inspector and he finds that the violation is

⁷² 30 U.S.C. § 814(c)(1) (1970). However, the Board has held that even though an 814(c) notice has been issued, if another unwarrantable failure violation occurs within ninety days of that notice which also constitutes an imminent hazard, an 814(a) imminent hazard withdrawal order must be issued and not an 814(c)(1) unwarrantable failure order of withdrawal. The problem with that interpretation is that under certain circumstances an operator may avoid the unwarrantable failure closure order sequence. For instance, suppose the 814(c) notice has been issued and during the last inspection of the 90-day period (following the issuance of the notice), an unwarrantable failure violation is found. According to the Board, if the violation creates a condition that is an imminent hazard, an imminent danger closure order is issued and not an unwarrantable failure closure order. The operator thus avoids the threat of future unwarrantable failure closure orders until the 814(c) sequence is begun anew. On the other hand, if that unwarrantable failure violation, found on the last day of the ninety-day period, was less than an imminent hazard, the 814(c)(1) order of withdrawal would be issued and the operator would be locked into the unwarrantable failure closure sequence until a complete inspection reveals no unwarrantable failure violations. Aside from the fact that the unwarrantable failure closure provisions do not exclude hazards that are imminent, there is no reason to exclude the negligent operator from the penalties of the 814(c) closure orders and the section 820 payments to miners just because the violation happens to constitute imminent peril to life and limb.

⁷³ 1966 Amendments, *supra* note 10, § 203(d)(1).

also caused by an unwarrantable failure of the operator to comply, the inspector is required to issue a withdrawal order and to continue, under section [814(c)(2)] of both the Senate bill and the House amendment, to issue such orders when he finds *other unwarrantable* violations until such time as a subsequent inspection discloses the occurrence of no such similar violations. The comparable provision of the House amendment required the inspector, in such a case, to cause the mine to be reinspected to determine if any similar violation exists. If *such a similar* violation did exist, and was caused by the unwarrantable failure of the operator to comply, the inspector would then issue a withdrawal order. The *substitute* agreed upon in conference adopts the provision of the Senate version of section [814(c)(1)] with technical changes *to make it clear that*, if another violation of *any* mandatory health or safety standard occurs which is also caused by an unwarrantable failure of such operator to comply, then a withdrawal order must be issued. The managers note that an “unwarrantable failure of the operator to comply” means the failure of an operator to abate a violation he knew or should have known existed, or the failure to abate a violation because of a lack of due diligence, or because of indifference or a lack of reasonable care, on the operator’s part.⁷⁴

MESA argues that it should be clear from the language of the 1969 Act itself, to say nothing of the explanation in the House Conference Committee Report, that the only elements of an 814(c)(1) order of withdrawal are: (a) a violation of any mandatory health or safety standard, (b) that is caused by an unwarrantable failure of the operator to comply with such standard, and (c) occurring within ninety days of the issuance of the underlying notice.

The Board has ruled, however, that all elements of the underlying notice must also be present; namely, there must be a violation of a mandatory standard, no imminent danger, a significant and substantial contribution to the cause and effect of a mine safety or health hazard, and an unwarrantable failure of the operator to comply with the standard.⁷⁵

(e) Once a withdrawal order is issued under section 814(c)(1), withdrawal orders are to be issued during any subsequent inspection where violations are found similar to those that resulted in the

⁷⁴ LEGISLATIVE HISTORY, *supra* note 2, at 1029, 1030.

⁷⁵ Eastern Associated Coal Corp., 3 IBMA 331, 354-55, 1974-1975 CCH Occupational Safety & Health Dec. ¶ 18,706, at 22,604 (1974).

issuance of an 814(c)(1) order.⁷⁶ A resolution of the *Zeigler* issues will also resolve the remaining section 814(c)(2) issues regarding the elements of an 814(c)(2) withdrawal order. For the present time, the Board's ruling in *Eastern* is controlling: namely, that the word "similar" relates back, through the 814(c)(1) order, to all the elements of the underlying notice of violation, except that the mandatory health or safety standard violated need not be the same for the 814(c)(2) order.⁷⁷

(f) Once the operator is "locked into" the unwarrantable failure closure provisions, he is subject to these summary closures "until such time as an inspection of such mine discloses no similar violations."⁷⁸ This requirement would not appear to generate any dispute. However, MESA conducts several types of inspections—spot inspections⁷⁹ and complete inspections among others. The Board has held that in order for an operator to remove the liability of continued unwarrantable failure closure orders, he must undergo, a *complete* inspection that reveals no unwarrantable failure violations.⁸⁰ If the operator undergoes a "clean" complete inspection, that is, an inspection that reveals no unwarrantable failure violations, the summary closures cease, the mine reverts to the triggering mechanisms of section 814(c)(1), and the unwarrantable notice of violation provisions are again applicable.⁸¹

C. Summary of the Enforcement Provisions

The Act has provided the Secretary with an excellent and effective tool to assist the industry and the miners in developing a safer environment for the mining of coal. Unfortunately, it is a frustrating necessity to live through the seemingly endless agonies of developing the meanings and the limits of various enforcement provisions. While one might cull from the reams of initial decisions presented to the agency from the public hearing process many

⁷⁶ 30 U.S.C. § 814(c)(2) (1970).

⁷⁷ *Eastern Associated Coal Corp.*, *supra* note 75.

⁷⁸ 30 U.S.C. § 814(c)(2) (1970).

⁷⁹ Spot inspections occur when an inspector inspects only a portion of a mine or a whole mine with respect to one kind of potential violation, for example, roof control. In some instances MESA combines a series of spot inspections which, collectively, are considered a complete inspection. *Eastern Associated Coal Corp.*, 3 IBMA 331, 354-55, 1974-1975 CCH Occupational Safety & Health Dec. ¶ 18,706, at 22,604 (1974).

⁸⁰ *Id.*

⁸¹ 30 U.S.C. § 814(c)(2) (1970).

holdings and narrowly defined rules of law suited to one's immediate need or purpose, it should be remembered that the factual foundations of those holdings can often reduce their effectiveness as basic and transferrable principles of law to mere illusion.

D. Remedies Available to Operators and Miners

Sections 815(a)(1) and 816(a) and (b) provide the primary administrative and judicial remedies for operators or miners aggrieved of MESA action under section 814.⁸² Section 815(a)(1) provides:

(a)(1) An operator issued an order pursuant to the provisions of section 814 of this title, or any representative of miners in any mine affected by such order or by any modification or termination of such order, may apply to the Secretary for review of the order within thirty days of receipt thereof or within thirty days of its modification or termination. An operator issued a notice pursuant to section 814(b) or (i) of this title, or any representative of miners in any mine affected by such notice, may, if he believes that the period of time fixed in such notice for the abatement of the violation is unreasonable, apply to the Secretary for review of the notice within thirty days of the receipt thereof. The applicant shall send a copy of such application to the representative of miners in the affected mine, or the operator, as appropriate. Upon receipt of such application, the Secretary shall cause such investigation to be made as he deems appropriate. Such investigation shall provide an opportunity for a public hearing, at the request of the operator or the representative of miners in such mine, to enable the operator and the representative of miners in such mine to present information relating to the issuance and continuance of such order or the modification or termination thereof or to the time fixed in such notice. The filing of an application for review under this subsection shall not operate as a stay of any order or notice.⁸³

Section 816(a) and (b) provide:

(a) Any order or decision issued by the Secretary or the Panel under this chapter, except an order or decision under section 819(a) of this title, shall be subject to judicial review by the United States court of appeals for the circuit in which the af-

⁸² 30 U.S.C. § 861(c) (1970), provides a separate type remedy in that it permits the *modification* of certain standards in their application to the particular mine in question. See note 21 *supra*.

⁸³ 30 U.S.C. § 815(a)(1) (1970).

fectured mine is located, or the United States Court of Appeals for the District of Columbia Circuit, upon the filing in such court within thirty days from the date of such order or decision of a petition by any person aggrieved by the order or decision praying that the order or decision be modified or set aside in whole or in part, except that the court shall not consider such petition unless such person has exhausted the administrative remedies available under this chapter. A copy of the petition shall forthwith be sent by registered or certified mail to the other party and to the Secretary or the Panel, and thereupon the Secretary or the Panel shall certify and file in such court the record upon which the order or decision complained of was issued, as provided in section 2112 of Title 28.

(b) The court shall hear such petition on the record made before the Secretary or the Panel. The findings of the Secretary or the Panel, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The court may affirm, vacate, or modify any order or decision or may remand the proceedings to the Secretary or the Panel for such further action as it may direct.⁸⁴

Most of the litigation and governing principles discussed in this article have been developed through sections 815 and 816.⁸⁵ The public hearing referred to in section 815(a)(1) is governed by the provisions of the Administrative Procedures Act (APA), specifically sections 554 and 556.⁸⁶

In 1974, the operators applied for review of seventy-eight notices of violations and 178 orders of withdrawal.⁸⁷ All issues relevant to the validity of orders of withdrawal are reviewable,⁸⁸ and abatement of the offending practice with the attendant termination of the order of withdrawal does not moot the issues presented.⁸⁹ The reason for permitting review of an order of withdrawal after the offending condition is abated and the order terminated is to provide an opportunity for judicial guidance of the activities of MESA, the enforcement branch.⁹⁰

⁸⁴ 30 U.S.C. § 816(a) & (b) (1970).

⁸⁵ The civil and criminal penalty provisions, 30 U.S.C. § 819 (1970), have also been a prolific source of the Agency's decisional law.

⁸⁶ 30 U.S.C. § 815(a)(1) (1970).

⁸⁷ The statistics quoted have been supplied by MESA.

⁸⁸ 30 U.S.C. § 815(a)(1) (1970).

⁸⁹ *Zeigler Coal Corp.*, 1971-1973 CCH OCCUPATIONAL SAFETY & HEALTH DEC. ¶ 15,371, at 20,523 (1971).

⁹⁰ *Id.*

On the other hand, the Board has held that the only issue reviewable in an application for review of a section 814 notice of violation is the reasonableness of time set for abatement, and abatement of the alleged violation moots the review.⁹¹ If, however, an operator receives a notice of violation that establishes a certain time period for abatement, and if the operator applies for review of the notice on the sole basis that no violation exists, the Board will permit the review on the ground that the reasonableness of time is the real issue, since any time set for abatement is unreasonable where no violation exists.⁹²

As noted earlier, the application for review remedy is seldom used by the industry. This is probably due to two factors. First, the conditions giving rise to the issuance of the notices of violation and orders of withdrawal are abated within a very short period of time after their issuance, and the notices and orders are terminated. Thus, there is no immediate need for a resolution of the issues an operator may wish to litigate. Secondly, the operators usually wait until the penalty assessment proceeding⁹³ to present their objections or issues they may wish to litigate.

Old Ben Coal Corporation, however, has raised an issue regarding what it alleges to be a denial of statutory and Constitutional rights to a review of orders of withdrawal. In providing for review under section 815(a), the Secretary has adopted certain procedures for the public hearing.⁹⁴ One section of those procedures, provides, in part: "In proceedings brought under the Act, the applicant, petitioner or other party initiating the proceedings shall have the burden of proving his case by a preponderance of the evidence . . ."⁹⁵ The public hearing provided for in section 815(a)(1) is also governed by provisions of the Administrative Procedures Act, specifically sections 554 and 556. Section 556(d) of the APA provides that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof."⁹⁶ The review provision of the 1969 Act has "otherwise provided" for the applicant to bear the burden of proof: "Such investigation shall provide an opportunity for a public hearing . . . to enable the

⁹¹ Reliable Coal Corp., 1971-1973 CCH OCCUPATIONAL SAFETY & HEALTH DEC. ¶ 15,368, at 20,518 (1971).

⁹² *Id.* at 20,517. See *Lucas v. Morton*, 358 F. Supp. 900, 904 (W.D. Pa. 1973).

⁹³ 30 U.S.C. § 819(a) (1970).

⁹⁴ 43 C.F.R. §§ 4.500 *et seq.* (1973).

⁹⁵ 43 C.F.R. § 4.587 (1974).

⁹⁶ 5 U.S.C. 556(d) (1970) (emphasis added).

operator and the representative of miners in such mine to present information relating to the issuance and continuance of such order. . . .”⁹⁷ Old Ben, nevertheless, argues that the departmental regulation is contrary to the APA provision.⁹⁸ The elaborate argument it presents overlooks the basic holdings of the Board in the three cases. Old Ben did not lose its cases because of a failure to meet its burden of proof.⁹⁹ In the first of the three *Old Ben* cases,¹⁰⁰ the Board affirmed the finding of the administrative law judge that “the Mining Enforcement and Safety Administration had established by a preponderance of the evidence that the conditions and practices cited in the Order existed at the time of its issuance. . . .”¹⁰¹ In the second case,¹⁰² the Board affirmed the holdings of the administrative law judge “that the conditions cited [in the order] constituted an imminent danger.”¹⁰³ In the third case,¹⁰⁴ the Board found that the “belt line conditions were sufficient in and of themselves to support a conclusion of imminent danger.”¹⁰⁵ So we see that the attacks on the administrative procedure, in the final analysis, were only attacks on *statements* made in the Board’s decisions regarding Old Ben’s failure of proof. Old Ben did not prevail in its review proceedings because the records in the cases contained evidence that the administrative law judges at the hearing stage and the Board in its review considered sufficient to sustain MESA’s orders of withdrawal, regardless of who may have had the burden of proof.

In the final analysis most objections to the administrative and legal procedures established by and pursuant to the 1969 Act have

⁹⁷ 30 U.S.C. § 815(a)(1) (1970) (emphasis added).

⁹⁸ *Old Ben Coal Corp., 1973-1974 CCH OCCUPATIONAL SAFETY & HEALTH DEC.* ¶ 18,227, ¶ 18,297, ¶ 18,299 (1974); *Old Ben Coal Corp. v. Interior Bd. of Mine Operations Appeals*, Appeal Nos. 74-1654, 74-1655 & 74-1656 (6th Cir. petition for review filed August 14, 1974).

⁹⁹ There was a suggestion in each of the Board’s decisions to the effect that Old Ben had failed in its burden of proof, but that was only *dictum*. Old Ben’s applications for review were dismissed on other grounds.

¹⁰⁰ *Old Ben Coal Corp., 1973-1974 CCH OCCUPATIONAL SAFETY & HEALTH DEC.* ¶ 18,227 (1974).

¹⁰¹ *Id.* at 22,369.

¹⁰² *Old Ben Coal Corp., 1973-1974 CCH OCCUPATIONAL SAFETY & HEALTH DEC.* ¶ 18,297 (1974).

¹⁰³ *Id.* at 22,408.

¹⁰⁴ *Old Ben Coal Corp., 1973-1974 CCH OCCUPATIONAL SAFETY & HEALTH DEC.* ¶ 18,299 (1974).

¹⁰⁵ *Id.* at 22,411.

COAL MINE HEALTH AND SAFETY 687

been objections to form or procedure. As stated by an administrative law judge in an initial decision, however, "instead of a procedure that is in any way vague, uncertain, or arbitrary, we have, if anything, an administrative-judicial remedy that threatens to drown in a sea of due process."¹⁰⁶

¹⁰⁶ Old Ben Coal Corp., Office of Hearings and Appeals, Dep't of the Interior, Docket Nos. VINC 73-96, VINC 73-214-P; IBMA Appeal No. 75-17, (Old Ben Coal Corp. noted an appeal with the Interior Board of Mine Operations Appeals, December 5, 1975).

