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The Use of Closure Orders and Notices of Violation under the Federal Coal Mine Health &(and) Safety Act of 1969--The Necessity for Stringent Enforcement

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I. BACKGROUND: DEAD MINERS ALWAYS INFLUENCE MINING LEGISLATION

Most writers place the beginning of the social revolution, that resulted in the passage of the Federal Coal Mine Health and Safety Act of 1969,[1] on November 20, 1968, the date the Consolidation Coal Company mine near Farmington, West Virginia, exploded and killed seventy-eight men. However, one experienced industry observer places the date sometime earlier—on May 10, 1968. On that date, a mine located near Hominy Falls, West Virginia, exploded and trapped ten men behind a wall of water. Nine days later, six of the men came out alive after nearly all hope for them was abandoned.[2]

According to Neil Robinson, President of Robinson and Robinson Mining Engineers,[3] the fact that these men came out alive after so long, contributed to the public reaction to the later Farmington disaster. At the Farmington No. 9 mine, newsmen, inspired by the memory of the miracle of Hominy Falls, stood in front of the smoking mine portal for nine days, as a horrified American public watched and hoped each evening, until, after almost two weeks, the mine was sealed and all was silent. A turning point in history had been reached. There was no turning back—something had to be done about safety and health in the coal mines. The "something" was the 1969 Act.

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[1] 83 Stat. 742 (codified 30 U.S.C. §§ 801-960 (1970)) [hereinafter cited and referred to as the Act.]

[2] UNITED MINE WORKERS JOURNAL, vol. 79, no. 11, June 1, 1968, at 37.

[3] Interview with Neil Robinson, President of Robinson and Robinson Mining Engineers, in Charleston, West Virginia, Aug. 20, 1970.

The chronology of federal government safety legislation has tracked the calendar of major mine disasters. In 1907, two disasters (Monongah, West Virginia, 362 deaths; Jacobs Creek, Pennsylvania, 239 deaths)[4] triggered the creation, in 1910, of the Bureau of Mines as a division of the Department of Interior.[5] The agency, however, was given no regulatory authority nor was it authorized to inspect the mines. In 1941, three separate gas explosions claimed 199 lives,[6] and Congress responded by empowering Bureau inspectors to accompany state inspectors.[7] Then, in 1952, after 119 miners died in an explosion and fire in West Frankfort, Illinois,[8] Congress gave limited authorization to the Bureau of Mines to inspect and regulate mining.[9]

In 1966, the 1952 Act was amended to include mines with less than fifteen men as well as a few additional changes,[10] but, in general, the 1952 legislation was the controlling body of law until December, 1969. In 1968, prior to the Farmington disaster, President Lyndon Johnson proposed a new act, but Congress failed to move on this proposal.[11]

II. THE ACT GENERALLY

The 1969 Act directed the Secretary of the Interior to enforce interim health and safety standards and to develop and promulgate mandatory health and safety standards.[12] The Secretary was to inspect the country's coal mines to ensure that all employers were complying with the law and standards.[13] To enforce the standards, a basically simple procedure was established. An inspector examines a mine or part thereof. If he finds a violation of a mandatory health or safety standard, he issues a "notice of violation" or "closure order," thereby requiring that the violation be abated—in

[4] U.S. BUREAU OF MINES, DEP'T OF INTERIOR, BULL. NO. 586, HISTORICAL SUMMARY OF COAL MINE EXPLOSIONS IN THE UNITED STATES 1810-1958, at 22 (1960) [hereinafter cited as HISTORICAL SUMMARY].

[5] 30 U.S.C. § 1 (1970).

[6] HISTORICAL SUMMARY 22.

[7] 55 Stat. 177 (1941) (codified at 30 U.S.C. §§ 451-54 (1970)).

[8] HISTORICAL SUMMARY 22.

[9] 66 Stat. 692 (1952) (codified at 30 U.S.C. §§ 472-73 *but repealed by* 83 Stat. 803 (1969)).

[10] Federal Coal Mine Safety Act Amendments of 1965, 80 Stat. 84 (1966) [hereinafter referred to as the 1966 Amendments].

[11] S. REP. NO. 411, 91st Cong., 1st Sess. 6 (1969).

[12] 30 U.S.C. § 801(g) (1970).

[13] 30 U.S.C. § 813 (1970).

a period of time if a notice is issued or immediately in the case of a closure order.[14] A Department of the Interior Mining Enforcement and Safety Administration Assessor then assesses the violation and determines a penalty of up to ten thousand dollars for each violation.[15] If the operator willfully violates or refuses to comply with any section 104 order, he may be liable for up to $25,000 or imprisoned for up to one year.[16]

The operator can contest the violation, order, or fine, and a public hearing is then held before a Department of the Interior administrative law judge.[17] His decisions are reviewable by the Department of the Interior Board of Mine Operations Appeals (hereinafter referred to as the Board), and their decisions are appealable to the United States Court of Appeals.[18]

The Congress also dealt with the problem of coal workers' pneumonoconiosis, or black lung, by adopting standards for determining the existence of the disease,[19] compensations for black lung victims,[20] a mechanism for removing miners with developing cases of black lung from high, dusty areas, and limits for the amount of allowable dust concentrations. The Department of Health, Education and Welfare was directed to conduct research in dust control and other health hazard areas and to develop appropriate health standards.[21]

The Act, the most far reaching in the history of industrial health and safety at that time, resulted from congressional realization that the government agency charged with enforcement of the law had a dismal record with regard to the improvement of mine safety. Over the years, it had failed to develop or enforce regulations intended to alleviate unsafe conditions in the mines.

According to Senate Committee on Labor and Public Welfare:

> Prior to the Farmington disaster of November 20, there was a notably unimpressive record by the Department of the Interior and its Bureau of Mines in respect to improving the health and safety of the miners. Many of the deficiencies of the 1952 Act

[14] 30 U.S.C. § 814 (1970).
[15] 30 U.S.C. § 819(a) (1970).
[16] 30 U.S.C. § 819(b) (1970).
[17] 30 U.S.C. § 815 (1970).
[18] 30 U.S.C. § 816 (1970).
[19] 30 U.S.C. §§ 841-46 (1970).
[20] 30 U.S.C. §§ 901-36 (1970).
[21] 30 U.S.C. §§ 951-60 (1970).

> were known years ago, yet little effort has, in the past, been made by the Bureau or the Department to correct them. . . . In the 17 years since the enactment of the Federal Coal Mine Safety Act, as amended, health and safety has been the step-child of the Bureau. The primary interest of the Bureau during this period has been mineral production, including coal. In some cases, the people involved in the direction of health and safety have been lethargic and more industry oriented than miner health and safety oriented.[22]

While the Committee noted that some improvement had occurred as a result of the Farmington disaster, it did not believe that the Bureau of Mines had altered its basic outlook toward mine health and safety. Thus, Congress constructed the Act in such a way as to strictly define and expand the responsibility of the Bureau in the safety and health area.

> [T]he committee is still concerned that not enough attention is given by the officials of the Department in insuring that the health and safety functions of the Bureau will be buttressed. The expanded authority and responsibility found in this bill demands that these functions be substantially expanded and improved.[23]

The Committee also expressed concern as to whether the Department would properly carry out its duties under the law. "The Committee intends to do whatever it can to assure that greater efforts will be made to bring redirection to those in the Bureau who are more production oriented than health and safety oriented."[24] Sadly, though, the redirection hoped for by the Committee has not been realized. The record of enforcement of the 1969 Act can only be said to be dismal. In absolute figures, deaths have gone down but have not stablized, and non-fatal accidents have increased, decreasing only in 1974.

Ironically, the Act's positive impact on the rates of deaths and injuries has not been the result of strong enforcement. Part of this effect is obviously attributable to the basic enforcement of a much more comprehensive law. Standards and regulations under the 1969 Act cover many areas of the mining operation that were not covered under the 1952 Act as amended. Moreover, there has been

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[22] HOUSE COMM. ON EDUC. & LABOR, 91ST CONG., 2D SESS., LEGISLATIVE HISTORY: FEDERAL COAL MINE HEALTH AND SAFETY ACT (Comm. Print 1970) 42 [hereinafter cited as LEGISLATIVE HISTORY].

[23] LEGISLATIVE HISTORY 43.

[24] *Id.*

considerable oversight and pressure on the part of congressional committees and individual members of Congress, such as Congressman Ken Hechler, to prod the Mine Enforcement Safety Administration (MESA) into carrying out its basic responsibilities. Thus, even though new regulations are not enforced properly, the fact that they are promulgated at all has some positive effect on mine safety. In conclusion, while the decrease in coal miners' deaths since the Act's inception has been substantial, it has reached a level that should have been attained twenty years ago.[25] The decrease in the numbers of deaths from around 250 per year in the late sixties to 132 in 1974, does signify improvement, but there is no indication from the figures that the rate will stabilize.[26]

If there are companies that can achieve much higher standards of safety by committing themselves to obey the law and to seriously attack the health and safety problems with proper enforcement, the unwilling companies could be forced into safe operation. A MESA chart indicates that there are in fact companies able to operate relatively safe mines.[27] While the chart only indicates one year's figures, the pattern is much the same for all the years since the 1969 Act was passed. Thus, while there has been improvement, it is not sufficient and, unfortunately, is not due to stringent enforcement of the Act.

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[25] MESA Accident Reports:

National Injury Experience
All Coal Mining

	Fatal	Rate Per Million Man-Hours	Non-fatal Disabling Injury	Rate Per Million Man-Hours
1968	311	1.33	9,639	41.12
1969	203	.85	9,917	41.75
1970	260	1.00	11,552	44.40
1971	181	.71	11,916	46.89
*1972	156	.53	12,332	45.67
*1973	132	.44	11,067	40.48
*1974	132	.43	8,483	29.92

*Preliminary figures, subject to change.
Source: MESA, Accident Statics Branch

[26] *Id.*

[27] *See* Appendix.

III. The Act Specifically

There are two essential provisions that constitute the teeth of the law: the notices of violations and closure orders[28] and the penalty assessments.[29] Both provisions are intended to put economic pressure on the operator of a coal mine to see that he complies with the law and thereby operates his mine safely.[30] This article deals only with the first of these provisions—closure orders and notices of violations.

The legislative history of the 1969 Act lays out the intent of Congress with regard to the method, procedure, and functioning of the enforcement provisions.

General Inspections

> Authorized representatives of the Secretary of the Interior would be required to make inspections and investigations in coal mines for the purposes of obtaining information relating to safety conditions, developing health and safety standards, determining whether a mine is complying with the mandatory health and safety standards. . . . There must be at least four inspections of underground coal mines each calendar year, in addition to spot inspections and other investigations, and most importantly, the inspector must not provide an advance notice of these inspections to the mines. . . .

104(a) Imminent Danger

> If an inspector finds that an imminent danger exists in a mine, he would be required to issue an order requiring the mine operator to withdraw all workers from the section of the mine where the danger exists until it is determined by an inspector that the condition no longer exists.

104(b) Violation

> If, upon any inspection, an inspector finds that there has been a violation of a mandatory health or safety standard, but the violation has not created an imminent danger, he would allow the violator a reasonable time to abate the violation. If the violation is not abated by the end of that period, and if the inspector does not find that the period should be extended, he

[28] 30 U.S.C. § 814 (1970).
[29] 30 U.S.C. § 819 (1970).
[30] Legislative History 39.

would be required to order a withdrawal of all workers from the area affected by the violation.

104(c) Unwarrantable Failure

If an inspector fines a violation of a standard that does not cause an imminent danger, but is of such a nature as could significantly and substantially contribute to any mine hazard, and if he finds that the violation is due to an unwarrantable failure to comply with the standards, he includes the finding in the notice. During any inspection within ninety days after issuance of the notice, if an inspector finds another violation which is also due to an unwarrantable failure of the operator to comply, he must order the miners withdrawn from the mine.

Once a withdrawal order has been issued in the case of an unwarrantable failure, the inspector must issue such an order on subsequent inspections when he finds the existence anywhere in the mine of a similar violation until such inspections disclose no similar violations.[31]

IV. Substantive Challenges

The 1969 Act is a departure from the normal congressional procedure in drawing up legislation. It is, to a large extent, specific as to its purpose as well as its particular provisions. Congress, concerned that a mandate to the Department of the Interior would not be carried out in the manner it desired, sought to specify the responsibility of the Bureau of Mines by determining the principal provisions of the Act. Possibly because of such specificity, the litigation as to the substantive aspects of the Act have been minimal.

A. Gassy v. Non-gassy

The first major challenge to a substantive provision of the Act came early in 1971. During the congressional debate over the Act, one of the most contested provisions was the elimination of the distinction between gassy and non-gassy mines.[32] In the past, mines had been classified as either gassy or non-gassy; the former being required to meet higher standards of safety.[33] In the case of *Reliable Coal Corp. v. Morton*,[34] the operator challenged the elimi-

[31] Legislative History 37.

[32] Legislative History 222.

[33] *Id.*

[34] 478 F.2d 257 (4th Cir. 1973).

nation of the gassy/non-gassy distinction. Reliable applied for a modification of the mandatory safety standard requiring the use of a methane monitor on certain mining equipment on the grounds that its mine was non-gassy. The court, referring to the legislative history of the Act, found the argument "flawed in every aspect," especially the challenge of the gassy/non-gassy distinction.[35]

The court went on to discuss the modification provisions of the Act, which give the Bureau of Mines some limited authority to develop, promulgate, and revise improved mandatory safety standards.[36] The court, referring to the legislative history stated:

> The expeditious application of these standards to the entire coal mining industry necessarily presented a variety of problems, technical in nature, and it was necessary to give the Secretary a degree of flexibility to adjust the many detailed requirements of Title III to the particular problems of individual coal mines. This is the plain purpose of Section 301(c), but it was never intended by the Congress that modifications thereunder would be employed to dilute the statutory standards or resurrect the "gassy/non-gassy" distinction.
>
> The safety standards embodied in Title III of the Act represent an attempt by the Congress to maximize the protection of the miners based on the current knowledge and technology of the industry. These standards, however, are not to be static, but constantly upgraded to provide increased safety and, when necessary, to meet changes in technology and mining conditions.[37]

Thus, *Reliable* laid to rest the argument over the gassy/non-gassy distinction. In addition, it reiterated the congressional mandate prohibiting the Secretary from diluting the statutory standards and required thathe constantly upgrade the standards to provide increased safety.

B. Scope and Coverage—Interstate Commerce

The scope of the Act was, at the time of its passage, the broadest legislation ever enacted to deal with industrial health and safety problems. The mines subject to the Act as stated by Congress in section 4 included "[e]ach coal mine, the products of which enter commerce, or the operations or products of which af-

[35] *Id.* at 257.
[36] 30 U.S.C. § 811 (1970).
[37] 478 F.2d at 262.

fect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act."[38]

A challenge to this provision was made in *Morton v. Bloom*.[39] A one-man mine operator denied federal inspectors the right to enter and inspect his mine on the grounds that he did not fall within the coverage of the 1969 Act because his coal was sold totally intrastate and "[n]either the operations of nor the coal produced by his mine affect[ed] commerce." The court believed ". . . that it was not a part of the legislative intent of Congress to subjugate a one-man owner/operated coal mine to the requirements of theAct."[40] Essentially then, the Court exempted this mine on the grounds that it did not affect interstate commerce.[41] This decision has had little effect on the enforcement of the Act, primarily because of its limited application and also because of case law development in the area of interstate commerce.[42]

A more crucial question of scope coverage that has never been litigated is whether the Department was given responsibility for inspecting and controlling gob piles and coal waste dams or embankments. After the collapse of the gob coal waste dam on February 26, 1972, along Buffalo Creek in Logan County, West Virginia, the Department of the Interior denied that the regulation of such piles and dams was its responsibility, even though for a short period prior to the disaster, it had published regulations concerning their control and inspection.[43] However, at the present time, MESA does assume responsibility for inspecting, monitoring, and controlling such structures and has promulgated new regulations.

C. Unconstitutionally Vague

A more serious challenge to the Act arose in *United States v. Consolidation Coal Co.*[44] This case was the first criminal prosecution brought under section 109(b) of the Act.[45] The defendants

[38] 30 U.S.C. § 803 (1970).

[39] 373 F. Supp. 797 (W.D. Pa. 1973).

[40] *Id.* at 798.

[41] *Id.* at 799.

[42] *See* Wickard v. Filburn, 317 U.S. 111 (1942).

[43] *Hearings on Buffalo Creek Disaster Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 2d Sess., pt. 1, at 857.

[44] 504 F.2d 1330 (6th Cir. 1974).

[45] 30 U.S.C. § 819(b) (1970).

attacked the section of the Act relating to roof support as being unconstitutionally vague. The facts of this case bear consideration.[46] The court declared "that Section 862(a) supra, is not unconstitutionally vague, that it defines the offenses charged in the information with certainty.. . . ."[47]

An additional issue was presented which bears directly on the question of the limitations of the Act. The defendants challenged the interpretation of section 109(b) relating to a criminal offense:

> Any operator who willfully violates a mandatory health or safety standard, or knowingly violates or fails or refuses to comply with any order issued under section 104 of this title, or any order incorporated in a final decision issued under this title except an order incorporated in a decision under subsection (a) of this section or section 110(b)(2) of this title, shall, upon conviction, be punished by a fine of not more than $25,000, or by imprisonment for not more than one year, or by both, . . .[48]

The question raised by the defendants was as to the interpretation of the word "willful." The court concluded that "[t]he statute uses the term 'willfully violates.' We are of the opinion that this would contemplate an affirmative act either of commission or omission, not merely the careless omission of a duty."[49]

This case stands for the principle that this particular safety standard is not unconstitutionally vague, and one can reasonably conclude that other safety standards established by Congress

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[46] Thomas Michael Ball was killed on June 14, 1972, in a roof fall accident in a Consolidation Coal Company mine. The MESA report of the accident clearly lays out the facts of the accident, in listing what the investigator believed to be some of the causes:

> (2) Thomas Michael Ball (victim) having never received formal course of inspection designed to train him in the performance of his duties as a shotfirer and timberman.
>
> (3) The victim with only 12 days underground mining experience being permitted to work alone while installing temporary roof support in face areas.
>
> (4) Management's failure to enforce the company's approved roof control plan and other policies designed to eliminate substandard conditions and practices which result in roof fall accidents.

Report of Fatal Coal Mine Roof Fall Accident—Franklin #25 Mine, Hanna Coal Co., Division of Consolidation Coal Co., New Athens, Ohio, June 14, 1972, by Federal Mine Inspector Gerald Young.

[47] 504 F.2d at 1332.

[48] 30 U.S.C. § 819(b) (1970).

[49] 504 F.2d at 1335.

would withstand such a challenge. Also, the decision sets the standard for a "willful violation," requiring a knowing and purposeful act. However, the Sixth Circuit, the decision against Consolidation Coal Co. was reversed and remanded to the District Court for retrial, and the conviction against appellant Kidd, the section foreman, was vacated for failure to show that he knowingly authorized or ordered the violations.[50] In April, 1975, the retrial as to Consolidation Coal Company was dismissed on Company motion after the presentation of the government's evidence.[51]

V. ENFORCEMENT

While the enforcement procedures have been listed, it may be helpful to restate them in terms they are commonly referred to:

104(a): Imminent Danger
104(b): Notice of Violation of Mandatory Health and Safety Standard (Non-imminent danger)
104(c)(1) and 104(c)(2): Unwarrantable Failure: "Notice" and Withdrawal Order

These procedures, being the principle enforcement mechanisms of the Act, are the most frequently litigated. Although the vast majority of the litigation is within the Department of the Interior, a few cases have reached the federal courts.

A. Imminent Danger Closure Orders

Section 104(a) contains the single most powerful remedy provided for by the Act.[52] If an inspector finds an imminent danger, he can immediately close the mine or section affected. This direct application of economic pressure is considered the most potent provision of the Act. On 6,623 occasions since March 30, 1970, federal inspectors have issued imminent danger withdrawal orders.[53] On an average, every thirty-ninth time an inspector enters a mine, an imminent danger closure order for all or part of the mine is issued.[54] In 1974 alone, 1,369 section 104(a) imminent dan-

[50] *Id.*

[51] Interview with Clerk of Court, Fed. District Court, for Northern Dist. of Ohio, May 11, 1975.

[52] 30 U.S.C. § 814(a) (1970).

[53] Statistics of 104(a) closures from March 30, 1970 to December 31, 1974, received from Vern Stevens, Congressional Liaison Officer of MESA in Washington, D.C., April 21, 1975 [hereinafter referred to as Statistics].

[54] *Id.*

ger orders were issued. Because no statistical breakdown regarding the number of applications for review of section 104(a) orders or their disposition thereof are available, it is difficult to analyze these figures. One is simply forced to conclude that imminent danger does continue to exist in America's mines, and the individual miner is imperiled each working day, notwithstanding the existence of the Act.

As might be expected, there has been a multitude of litigation under this section, particularly with regard to the meaning of "imminent danger." The cases have, for the most part, been resolved in the Department of the Interior's administrative tribunal. However, two major cases which seek review of imminent danger withdrawal orders are pending in federal court.

The Act defines "imminent danger" as "[t]he 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."[55]

The first federal court challenge to an imminent danger order came from *Eastern Associated Coal Corp. v. Interior Board of Mine Operations Appeals*.[56] In this case an imminent danger closure order had been issued at Eastern's Rachel mine as a result of an accumulation of debris in a mine passage and two loose roof bolts. Eastern, in an apparent attempt to avoid the 104(a) withdrawal order, voluntarily withdrew the miners from the affected mine until the conditions were corrected, prior to the issuance of the order.[57] The Court affirmed the Secretary's holding as follows:

> [A]n imminent danger exists when the condition or practice observed 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.*[58]

Thus, there is no requirement that miners actually be present for an imminent danger to exist and a section 104(a) order to be issued.

In the second major case concerning imminent danger, the court established a standard for determining imminentness. In

[55] 30 U.S.C. § 802(j) (1970).
[56] 491 F.2d 277 (4th Cir. 1974).
[57] *Id.* at 277.
[58] *Id.* at 278.

Freeman Coal Mining Co. v. Interior Board of Mine Operations Appeals,[59] float coal dust accumulated along an operating underground belt haulageway in a mine with a history of releasing methane gas. A section 104(a) order was issued. The court first dealt with the issue of mootness, which was raised by the fact that the withdrawal order was effective for only twenty-six hours, and it had been issued and had expired sometime prior to the application for review.

Holding that the case was not moot, the court reasoned that the withdrawal order could quite conceivably have an effect on other proceedings under the Act, *i.e.*, the civil penalty assessment, especially in determining the amount of penalty.[60] The Seventh Circuit, citing *Eastern*, stated that "[t]he issuance of a withdrawal order is a factor bearing upon the gravity of a violation, and its validity or the correctness of the factual basis on which it rests may not be relitigated in a [civil penalty] proceeding."[61]

Secondly, the court established the test for determing an imminent danger. In following the Board's construction of "imminent danger" the court stated that it is

> a situation in which a reasonable man would estimate that, if normal operations designed to extract coal in the disputed area should proceed, *it is at least just as probable as not that the feared accident or disaster* would occur before elimination of the danger.
>
> [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.[62]

Thus, a probability test of fifty-fifty, just as probable as not, has been established for the question of imminent danger.

In the most recent development regarding imminent danger, Old Ben Coal Corporation has filed an appeal in the Seventh Circuit on three cases concerning imminent danger closure orders[63] and has proposed that the probability test be one in sixty-four.

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[59] 504 F.2d 741 (7th Cir. 1974).

[60] *Id.* at 743.

[61] *Id.*

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

[63] Old Ben Coal Corp. v. Interior Bd. of Mine Operations Appeals, Appeal Nos. 74-1654, 74-1655, 74-1656, 7th Cir.

While it is impossible to predict the outcome, it would appear that in the face of the *Freeman* decision, the chances of establishing such a test are unlikely, given the fact that the miner is the one exposed to the consequence of such a test.

Old Ben raises two issues directly in these cases: first, a procedural issue concerning the burden of proof in the review proceedings and, second, whether there were conditions sufficient to warrant the issuance of an imminent danger closure order in the three cases under consideration.[64] However, Old Ben appears to raise one issue indirectly, that may well be the real question it wishes to address. That issue is the abuse of discretion by inspectors in issuing closure orders. According to Old Ben, "this appeal involves not just three episodes of questionable governmental conduct, but rather, a *panorama of abuse* in the implementation of Federal Law."[65]

The procedural issue of burden of proof raised by Old Ben does not appear on its face to present a serious question for consideration. The second issue of whether there was a basis in law or fact to warrant the issuance of imminent danger closure orders contains several sub-arguments, including the proper interpretation of the imminent danger provision of the Act, the use of imminent danger closure orders as an enforcement tool, and the denial of due process by use of the imminent danger section.[66]

In essence, each of these arguments has as its basis the question of abuse of power by inspectors. Old Ben, in support of this allegation, cites the drastic number of section 104(a) imminent danger orders issued in 1972 (1,300). In addition, Old Ben asserts that in nearly 1,500 other instances, closure orders were issued under related provisions of the Act.[67] However, during that same year, 156 men were killed in the mines, and 12,332 men disabled by injury. Combining the number of deaths and injuries, the total is 12,488. On 12,488 occasions then, there existed provable imminent danger which resulted in death or physical harm. Thus, on these occasions, the definition of imminent danger, as set out in the Act,[68] was met. The number 1,300, cited by Old Ben as being drastic closures, is drastically low, given the number of accidents

[64] *Id.*, Brief for Petitioner at 3.
[65] *Id.*, Brief for Petitioner at 1.
[66] *Id.*, Brief for Petitioner at 14.
[67] *Id.*, Brief for Petitioner at 1.
[68] 30 U.S.C. § 802(j) (1970).

and the number of deaths and injuries. Using this argument, Old Ben's allegations are easily dismissed.

An additional development in the use of section 104(a) orders that has not reached Federal Court, but which is of major significance, is the question of the use of imminent danger orders following a fatal or serious non-fatal accident. During the first several years following the passage of the Act, federal inspectors issued section 104(a) withdrawal orders as a matter of course upon arriving at the scene of a fatal or serious non-fatal accident. The order would stay in effect until the investigation of the accident was completed and in many instances until an inspection of the entire mine was completed. The principle behind this action was that a serious accident was sufficient evidence of an imminent danger, requiring investigation of that cause as well as any other similar conditions or similar types of machines, and so forth.

On several occasions, operators, most notably Eastern Associated Coal Corporation, have contested the issuance of a section 104(a) orders. In a case involving a fatality, the Interior Board of Mine Operations Appeals held that the issuance of such a withdrawal order was incorrect and that an order should have been issued under section 103,[69] the accident investigation provision. MESA inspectors now issue section 103 orders after a fatality.

MESA's failure to make an appeal points out their lack of aggressiveness in carrying out the Act. The consequence of this failure, and of the changed procedure, are many. First, as was indicated in *Freeman*,[70] the issuance of a 104(a) withdrawal order has a direct bearing on the amount of penalty assessed for the violation, since it is considered by the Secretary in determining the gravity of the violation.

Second, the use of section 103 rather than section 104(a) has a direct bearing on the payment of time lost to the miners. Under the current procedure, if a section 103 order is issued, a miner is not entitled to payment for time lost even if the accident and subsequent layoff are purely the fault of the mine operator.

Most important is the attitude that a company position opposing the 104(a) order reflects—after a serious non-fatal accident occurs or the miner lies dead after a fatal accident—that the immi-

[69] 30 U.S.C. §§ 813(e) & (f) (1970).

[70] 504 F.2d at 743.

nent danger clearly exists, that it may have passed, or that it just as likely could remain. The 104(a) order is used to remove every man from the situation and freeze the scene so that no further harm could befall anyone, and, yet, Eastern Associated Coal Corporation, among others, takes and holds the position that it is best to cut the losses and move on, producing coal.

B. Notification of Violation and Closure Orders for Failure to Abate

Section 104(b)[71] is the most commonly used of the enforcement provisions, and it results in the least serious consequences. It is, in the notice aspect, the inspector's warning ticket, and in the order aspect, the minimum parking fine. It operates simply: A notice of violation is issued; it is then either extended or abated, or an order of withdrawal for failure to abate is issued. The assessments and civil penalties which result from these violations are generally the least expensive and are most frequently evaded or dismissed. Logically, then, section 104(b) can be divided into two parts—notices and orders.

Notices constitute the major business of the inspectors. From March 30, 1970, to December 31, 1974, there have been 330,559 notices of violations of mandatory health and safety standards.[72] During that same time, there have been 264,144 inspections,[73] meaning that on every inspection the inspector finds, on the average, at least 1.25 violations per mine. In 1974, with 78,996 inspections, inspectors wrote 81,154 notices of violations.[74] The ratio of notices of violations to inspections has only slightly improved over the four-year period that the Act has been in effect. In the jargon of criminal law, the mine operators' rate of recidivism is abyssal.

However, even more disturbing than the rate of inspections to notices is the rate of notices to orders. In 1974, when 81,154[75] notices were issued under section 104(b),[76] on 1,947 occasions,[77] the inspector was forced to issue an order to force abatement. No statistics were available as to the number of extensions granted, but

[71] 30 U.S.C. § 814(b) (1970).
[72] Statistics, *supra* note 53.
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] 30 U.S.C. § 814(b) (1970).
[77] Statistics, *supra* note 53.

it is common practice to grant an initial minimum thirty day extension and a second extension ranging from fifteen to twenty days[78] before taking the serious step of issuing an order, especially under section 104(b) because of the less serious nature of the condition. But on nearly two thousand occasions (usually after a minimum of seventy-five days—the normal procedure being thirty days on notice, forty-five days on two extensions),[79] the inspector was forced to issue a withdrawal order under section 104(b) generally for a less serious matter because of the operator's recalcitrance. An attitude of compliance does not appear too prevalent among the operators when, after an inspector issues a notice under 104(b), he must issue an order every forty times to withdraw the miners to force an operator to abate a violation of what are generally less serious problems requiring little effort to abate.

From the standpoint of litigation, notices of violation are a very minor consideration. The single appeal by the operator or representative of the miner is an application of review as to the reasonableness of the time for abatement. In *Lucas v. Morton*,[80] the court, agreeing with the Board, concluded that while section 105(a)[81] provides only for appeal on the reasonableness of time set out in the notice of violation as a proper subject of review, this appeal must, by necessity, include the fact of violation itself.[82] The Board recognized the problem of denial of due process but resolved it by reference to the expedited proceedings available to the operator. Furthermore, the Board referred to section 105(d),[83] which prohibits the granting of temporary relief from notices issued under sections 104(b) or (i) of the Act. While this provision appears to deny due process, the court in *Lucas* referred to section 104(g), which provides for modification or termination by an authorized representative of the Secretary of a notice or order issued pursuant to section 104.[84]

Modification, as the court concluded, may consist of extending the time of abatement until after a hearing on the notice.[85]

[78] Interview with MESA Mine Inspector Lindsay Kirk, in Washington, D.C., May 4, 1975.

[79] *Id.*

[80] 358 F. Supp. 900 (W.D. Pa. 1973).

[81] 30 U.S.C. § 815(a) (1970).

[82] 358 F. Supp. at 903.

[83] 30 U.S.C. § 815(d) (1970).

[84] 358 F. Supp. at 904.

[85] *Id.*

Because of the nearly automatic nature of the granting of extensions, no significant litigation either in the federal courts or the administrative tribunal exists regarding notices.

As to orders under section 104(b), there is a substantial amount of litigation in the administrative tribunal within the Department of the Interior, primarily relating to disputes over facts and technical questions. The only federal case resulting from section 104(b) closure orders, is *Lucas v. Morton.*[86] In this case, the operator challenged the constitutionality of the Act provision on the grounds of lack of reviewability, as an inspector is allowed to shut down the mine on a withdrawal order after a notice of violation but before the operator has an opportunity to contest the notice of violation at a hearing. The operator contended that such a procedure constituted a denial of elemental due process, by denying the opportunity to be heard before a penalty is inflicted—the closing of the mine and the halting of coal production. The court rejected the plaintiff's argument by noting that the Act requires appeals from section 104(b) notices to be timely (section 105(a)),[87] and that the Act prohibits temporary relief from notices under section 105(d).[88] Moreover, the Act also provides for an expedited review process.[89] Finally, the court surmised that the time for abatement would be extended until after the review proceedings were completed.[90]

C. Unwarrantable Failure Closure Orders

The unwarrantable failure orders under sections 104(c)(1) and 104(c)(2),[91] were intended to counteract the dangerous attitude of operators with regard to mining health and safety. These two provisions deal with the problems of repeated and unwarranted violations of mandatory safety and health standards—violations which could significantly and substantially contribute to the cause and effect of a mine health and safety hazard but which do not constitute an imminent danger. In 1974, there were 1,438 section 104(c) closure orders and, since theAct's passage, there have been 3,432 such closures.[92]

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[86] *Supra* note 82.
[87] 30 U.S.C. § 815(a) (1970).
[88] 30 U.S.C. § 815(d) (1970).
[89] 358 F. Supp. at 904.
[90] *Id.*
[91] 30 U.S.C. §§ 814(c)(1) & (2) (1970).
[92] Statistics, *supra* note 53.

While these figures are not conclusive, they do indicate that inspectors in the first few years of the Act did not use 104(c)[93] closure orders. Quite possibly because of the complex nature of this provision, inspectors have stayed away from it.

The 1969 Act provides in section 104(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 Act. 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.[94]

The Board of Mine Operation Appeals has dealt with several major challenges regarding this provision, and while some issues have been resolved, this section remains one of the most difficult to interpret.

1. *How It Works*

When an inspector finds a violation of any mandatory health or safety standard, even though it may not create an imminent danger, the violation could significantly and substantially contribute to the cause and effect of a safety or health hazard and could be caused by an unwarrantable failure of the operator to comply with the standard. The inspector shall include such findings in any

[93] Between March 30, 1970, and December 31, 1973, only 1,994 section 104(c) closure orders were issued. Statistics, *supra* note 53.

[94] 30 U.S.C. § 814(c)(1) (1970).

notice he gives the operator. If during the same inspection or any subsequent inspection occurring within ninety days the inspector finds another violation of any standard also caused by an unwarrantable failure, he shall issue a withdrawal order until the violation is abated.[95] The Board in *Eastern Associated Coal Corp.*[96] and *Zeigler Coal Co.*[97] dealt with several major issues raised under this subsection.

2. *Notice Reviewability*

In *Zeigler* the Board took up, among other items, the issue of whether a "notice" issued under a section 104(c)(1) unwarrantable failure is reviewable under section 105(a).[98] While there is no provision in section 104(c) for the issuance of a "notice," the section does authorize the inspector to insert his findings as to 104(c) violations into any notice issued under the Act.

In the *Zeigler* case, the Board considered whether a 104(c) notice was reviewable. Referring to section 105(a) of the Act, which prohibits review of notices to sections 104(b) or 104(i),[99] the Board concluded that ". . . [t]he validity of a Section 104(c)(1) notice *by itself* is not subject to challenge at the initiation of the operator by Application for Review."[100] The Board went on to say, however, that the operator was not totally foreclosed from contesting the validity of a section 104(c)(1) notice as an incident of the review of the withdrawal order. Reasoning that when a 104(c) order is challenged, the validity of the underlying 104(c) notice, as well as its existence, may be challenged.[101]

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[95] 30 U.S.C. § 814(c) (1970).

[96] 3 IBMA 331, 1974-1975 CCH Occupational Safety & Health Dec. ¶ 18,706 (1974).

[97] 3 IBMA 448, 1974-1975 CCH Occupational Safety & Health Dec. ¶ 19,131 (1974).

[98] 30 U.S.C. § 815(a) (1970).

[99] 30 U.S.C. § 815(a)(1) in pertinent part reads:

> An operator issued an order pursuant to the provisions of section 104 of this title . . . may apply to the Secretary for review of the order within thirty days of receipt thereof. . . . An operator issued a notice pursuant to section 104(b) or (i) of this title, . . . 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.

[100] Ziegler Coal Co., 3 IBMA at 455, 1974-1975 CCH Occupational Safety & Health Dec. at 22,853.

[101] *Id.*

C. *Significantly and Substantially*

A second substantive issue raised in *Zeigler*[102] and dealt with earlier in *Eastern*[103] concerns the kind of violation which "significantly and substantially contributes to the cause and effect of a mine safety or health hazard." More specifically, the issue is what is the degree of gravity required to make a violation a significant or substantial contributor to the cause and effect of a mine safety or health hazard?

> In *Eastern* the Board set out the test that a violation must ". . . significantly and substantially contribute to the cause and effect of a mine safety or health hazard in section 104(c) referred to violations *posing a probable risk of serious bodily harm or death* and that an inspector's conclusion to that effect was to be evaluated by the traditional, objective standard of the reasonable man.[104]

This same test was reaffirmed by the Board in *Zeigler*[105] and is almost exactly the standard set for a 104(a) imminent danger. In *Freeman*, an imminent danger is

> ". . . a situation in which a reasonable man would estimate that, if normal operations designed to extract coal in the disputed area should proceed, it is at least *just as probable as not that the feared accident or disaster would occur* before elimination of the danger."[106]

A probability test thus exists for both—for determining what is an imminently dangerous condition and for determining what kinds of violations can be considered to significantly and substantially contribute to the cause and effect of a safety or health hazard.

However, the Board's decision clearly is in conflict with the very language of the Act itself. Section 104(c)(1) language specifically lessens the requirements for a 104(c) notice by eliminating the imminent danger conditions standard, which mandates a 104(a) order if a violation causes an imminent *danger*,[107] and by

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[102] *Id.*

[103] Eastern Associated Coal Corp. *supra* note 98.

[104] *Id.* at 355, 1974-1975 CCH Occupational Safety & Health Dec. at 22,603 (emphasis added).

[105] Ziegler Coal Co., 3 IBMA at 461, 1974-1975 CCH Occupational Safety & Health Dec. at 22,855.

[106] Freeman Coal Mining Co. v. Interior Bd. of Mine Operation Appeals, 504 F.2d 741, 745 (7th Cir. 1974) (emphasis added).

[107] 30 U.S.C. § 814(c)(1) (1970) (emphasis added).

setting a second standard, requiring a violation to be "of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health *hazard*."[108] Even the choice of the condition to be avoided—a hazard rather than a danger—infers a lesser problem. While the legislative history of the 1969 Act does not enlighten the intent of Congress on this particular matter, the evolution of this provision from the 1966 Amendments[109] to the 1969 Act lends weight to the argument that a lesser standard than imminent danger was contemplated. Under the 1966 provisions, sections 203(d)(1) and (2), a similar structure existed; however, the violation was to have been of such a nature "[a]s could significantly and substantially contribute to the cause of effect of a mine explosion, mine fire, mine inundation or man-trip or man-hoist accident."[110] The change from the disaster type language in 1966 to a "safety or health hazard" in the 1969 Act would seem to indicate the intentions of the authors to broaden the area protected and to expand the coverage from simply a disaster-type danger to a hazard. More on point, however, the legislative history of the 1966 Act indicates that even under those provisions, the concept behind the unwarrantable failure provision was broad and not directed toward the danger or gravity of the violation, but was directed toward the attitude of the operator.

> 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.[111]

A House Report continues to clearly specify the intent:

> The purpose of the amendatory language of new subsection 203(d) is to provide the Bureau of Mine's 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 the operator.[112]

Finally, the 1966 legislative history deals with the question of minor and technical violations.

> At the same time in recognition of the fact that minor technical

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[108] *Id.*

[109] 1966 Amendments, *supra* note 10, at § 203(d).

[110] *Id.*

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

[112] *Id.*

> 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*.[113]

As is apparent from the legislative history, Congress in 1965 was dealing with the attitude of the operator and not the gravity of the violation, even though violations were limited to five disaster-type categories. When the 1969 Act broadened this area to cover *health and safety standards*, via section 104(c) it was intended to deal with the question of attitude, not one of gravity. Thus, even a minor violation, that could significantly and substantially contribute to the cause and effect of a mine safety or health hazard and is caused by an unwarrantable failure of the operator, could cause the 104(c) provision to be put into effect, primarily attacking the operator's attitude.

Yet in *Eastern* the Board determined that a section 104(c) violation occurred ". . . if the evidence shows that the conditions or practice cited as a violation posed a probable risk of serious bodily harm or death."[114] To reach its conclusion, the Board developed a rational test that is worth reviewing. Comparing the first three subsections of section 104, the Board concluded by restricting 104(c) as follows:

> By comparison, conditions or practices subject to subsection 104(c) treatment, that is, notice and then closure and continuing liability to closure, *are restricted as befits the serious consequences of employing such strong enforcement tools.* Considering its sequential nature, its explicit restriction to infractions of the mandatory standard, and its reference in paragraph (1) requiring the inspector to find *no* imminent danger, we are of the opinion that section 104(c) has within its ambit conditions or practices constituting violations, which pose a probable risk of serious bodily harm or death short of imminent danger and where there is a degree of fault, greater than ordinary negligence, which may be aggravated by repetition.[115]

Thus, with no apparent legislative or regulatory foundation

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

[114] Eastern Associated Coal Corp., *supra* note 98, at 355, 1974-1975 CCH Occupational Safety & Health Dec. at 22,604.

[115] *Id.* at 349, 1974-1975 CCH Occupational Safety & Health Dec. at 22,602 (emphasis added).

the Board restricted section 104(c)'s application to a probable risk of death or serious bodily harm. For justification, the Board cited the section 104(c)(1), stating that "the Congress provided much the same description of the sweep of section 104(c) in its express enumeration of the findings an inspector must make in a 104(c)(1) notice of violation."[116] But it is difficult to find the similarity of description of the sweep to which the Board referred, since the language of the Act and the Board's language on its face appear to be directly opposite. The Act states that "[a] violation of any mandatory health or safety standard"[117] is restricted only to those not causing an imminent danger. Yet, the Board restricted a violation to a probable risk of serious bodily harm or death. No two views are as dissimilar as these.

Several paragraphs later in *Eastern*, the Board reversed itself as to the clarity of the congressional description of the sweep of section 104(c):

> In absence of clear Congressional direction to the contrary, we decline to adopt an interpretation of section 104(c) *which might encourage indiscriminate use* of the closure order sanction without any concomitant health or safety benefit.[118]

Indeed, the Board in *Ziegler* continued to attempt to explain its unique approach.

> In *Eastern, supra*, we sought to interpret the ambiguous language of section 104(c) so that its enforcement would harmonize with the administration of other enforcement tools provided to the Secretary in the Act and would effectuate the Congressional purposes we understood them. *We particularly made an effort to avoid any interpretation which carried the potential for absurd results.*[119]

It appears that the Board, in attempting to avoid absurdity and in avoiding an as yet unsupported indiscriminate use danger, doth protest too much. It went to great lengths to rationalize its position, and, in an effort to avoid absurd results, completely disregarded the language of section 104(c).

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[116] *Id.* at 350, 1974-1975 CCH Occupational Safety & Health Dec. at 22,602.

[117] 30 U.S.C. § 814(c) (1970).

[118] Eastern Associated Coal Corp., *supra* note 98, at 353, 1974-1975 CCH Occupational Safety & Health Dec. at 22,603 (emphasis added).

[119] Ziegler Coal Co., *supra* note 99, at 460, 1974-1975 CCH Occupational Safety & Health Dec. at 22,855 (emphasis added).

The Board erred in restricting section 104(c)(1) to only those violations of a mandatory standard which pose a probable risk of serious bodily harm or death. This interpretation is in direct conflict with the clear language of the Act, and there is no 1969 legislative history to support such a position. In fact, the 1966 legislative history and the expansion of the coverage in the 1969 redraft of this provision are contrary to the finding of the Board.

4. *Unwarrantable Failure*

The Board continued in *Eastern* to deal with section 104(c) by developing the definition of "unwarrantable failure" as follows:

> An inspector is justified in finding an unwarrantable failure to comply with a mandatory health or safety standard, pursuant to section 104(c) of the Act, where the evidence shows that the operator intentionally or knowingly failed to abate a violation or demonstrated a reckless disregard for the health and safety of miners.[120]

Appearing to read the congressional collective mind, the Board stated:

> Since the Congress *deliberately omitted* any definition of the phrase "unwarrantable failure to comply," it is apparent that the legislators left the task of investing that concept with meaning to the Secretary and his lawful delegates, to be performed on a case-by-case basis.[121]

Such a finding is interesting in light of the Legislative History that reads:

> 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 due diligence, or because of indifference or lack of reasonable care, on the operator's part.[122]

The Board, taking this paragraph into account in a footnote, interpreted the legislative history:

> [T]he legislative history unmistakably suggests that a given 104(c) violation possesses the requisite degree of fault where, on the basis of the evidentiary record, a reasonable man would

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[120] Eastern Associated Coal Corp., *supra* note 98, at 335, 1974-1975 CCH Occupational Safety & Health Dec. at 22,604.

[121] *Id.* at 356, 1974-1975 CCH Occupational Safety & Health Dec. at 22,604.

[122] LEGISLATIVE HISTORY, *supra* note 22, at 1030 (emphasis added).

> conclude that the operator *intentionally or knowingly* failed to comply *or* demonstrated a *reckless disregard* for the health or safety of the miners.[123]

The Board appears to have borrowed this language, with no reason given, from the section 109(b) criminal provision of the Act.[124] The demonstration of a reckless disregard requirement appears to be the Board's own creation since no justification or source is given and since the legislative history of the Act describes due diligence, indifference, or lack of reasonable care as the standards. The definition arrived at by the Board is in error, is not justified, and is in direct conflict with the legislative history's establishment of the ordinary negligence standard.

5. *The Elements*

Further important questions on section 104(c) involve the elements of sections 104(c)(1) and 104(c)(2). First, once an inspector has found the conditions that are sufficient to constitute a 104(c) violation, and a 104(c) notice is issued, does a second violation found within ninety days of the notice have to meet all the requirements of the notice violation in order to justify issuing a 104(c)(1) order? Second, if a section 104(c)(1) withdrawal order has been issued, and an additional violation has occurred, is it necessary that a 104(c)(2) withdrawal order contain all the findings required for a 104(c)(1) notice and withdrawal order? The Act clearly indicates that only once is it necessary that the standard established for the notice 104(c)(1) violation be met.

> If during the same inspection or any subsequent inspections 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 . . . all persons . . . to be withdrawn . . .[125]

As to the first question the elements for the 104(c)(1) order are given in the direct language: there must be (1) within ninety days of "notice" (2) another violation of *any* mandatory health or safety standard, and (3) the violation must be caused by an unwarranta-

[123] Eastern Associated Coal Corp., *supra* note 98, at 356, 1974-1975 CCH Occupational Safety & Health Dec. at 22,604.

[124] *Id.* at footnote 8.

[125] 30 U.S.C. § 814(c)(1) (1970).

ble failure by the operator. However, the Board in *Eastern* determined that the 104(c)(1) order must have not only the three elements listed in the Act but also must contain two additional elements of the section 104(c)(1) notice.[126] Thus, the Board's finding in these two cases regarding the question of elements conflicts with the clear language of the Act and with the intent of the section, as well as the purpose of this section; the Board is plainly in error.

6. *Lifting the 104(c)(2) Order*

The last question presented is whether a spot inspection[127] which discloses no "similar" violation is sufficient to life a section 104(c)(2) order. The Board held:

> Upon issuance of a valid section 104(c)(2) closure order, an operator becomes subject to further such orders until a *complete*[128] inspection of the mine discloses no "similar" violations. A spot inspection which discloses no "similar" violation is insufficient, by itself, to lift continuing liability to closure.[129]

This aspect of the Board's decision appears consistent with the language of the Act and its purpose.

On February 10, 1975, the United Mine Workers filed a petition for review of the decision in *Zeigler* in the D.C. Circuit Court;[130] however, MESA sought and was granted reconsideration by the Board of the decision.[131] Therefore, the question raised in the *Zeigler* case remains unresolved.

7. *Summary*

The unwarrantable failure approach to mine safety has always held out much promise for attacking directly the problem of an unsafe attitude on the part of the mine operator. It was supposed to put direct economic pressure on companies for their failure and unwillingness to try and create safe and healthful mines. It was not

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[126] Eastern Associated Coal Corp., *supra* note 98, at 352, 1974-1975 CCH Occupational Safety & Health Dec. at 22,602.

[127] A spot inspection is a MESA inspection which is concerned with only one portion of the mine or one particular problem or condition.

[128] Under MESA, there are circumstances in which a series of spot inspectons can add up to a complete inspection.

[129] Ziegler Coal Co., *supra* note 99 at 335, CCH Occupational Safety & Health Dec. at ____.

[130] UMWA v. Morton, Appeal No. 75-1003, D.C. Cir., filed Feb. 10, 1975.

[131] Office of Hearings and Appeals Informational Bulletin, April 3, 1975.

expected that all dangers and hazards would be eliminated immediately, but it was thought that the unsafe and unwilling attitude of some operators would be struck down. This is not the case in the two decisions discussed above. The Board has committed such grevious errors in its interpretations as to virtually eliminate the 104(c) provision as a serious tool for mine safety. One must conclude that as a result of the *Eastern* decision and the *Zeigler* ruling, the continued use of section 104(c) as a viable tool of enforcement for mine safety is in serious doubt.

VI. Criminal Sanctions

The criminal sanctions of the Act are covered under section 109(b). They provide for a $25,000 fine or up to a year in jail for willful violation of a standard or knowing violation of an order.[132] March 30, 1970, was the operative date of titles I and III of the Act. Since that time, two cases have been prosecuted by the Justice Department under this section.

The first case, *United States v. Consolidation Coal Co.*,[133] was heard on July 9, 1973. All parties were ultimately dismissed. The second prosecution grew from a disaster that occurred exactly one year from the signing of the 1969 Act. A mine in eastern Kentucky exploded on December 30, 1970, killing thirty-eight men. Two cases grew out of that explosion. The company contended that two of the regulations it was charged with violating[134] were *not* valid because of the failure of MESA (then the Bureau of Mines) to consult, under section 101(c), with industry, government, and labor prior to the promulgation of these regulations.[135] The District Court granted defendants' motion to quash; an appeal was taken to the Sixth Circuit where the lower court's decision was affirmed. An appeal en banc was denied and a writ of certiorari was denied in the Supreme Court. In the second round, *United States v. Finley Coal Co.*,[136] twenty-four additional courts against the defendant operator have yet to be heard. These two cases represent the sum total of the Department of the Interior's (then the Bureau of Mines) criminal prosecution activity. Both of these cases were

[132] 30 U.S.C. § 819(b) (1970).

[133] 504 F.2d 1330 (6th Cir. 1974).

[134] 30 C.F.R. § 75.400-1 is a definitional section, and 30 C.F.R. § 75.400-2 requires a program for the clean-up of coal and coal dust.

[135] 30 U.S.C. § 815(c) (1970).

[136] 493 F.2d 285 (6th Cir. 1974).

brought under special circumstances involving public pressure on the Department.

On April 12, 1974, MESA finally established a Special Investigation Division as part of the Coal Mine Safety Division.[137] This division specifically deals with investigating potential criminal violations under section 109 and making referrals to the Department of Justice when appropriate. In its first year of operation, the Division referred a total of five cases to the Justice Department for prosecution. In two instances, the cases are being taken before grand juries, and in the remaining three cases, the Justice Department is preparing for prosecution. Currently, seventy-nine cases are being actively investigated, with fifty-six cases disposed of during 1974.[138]

An additional provision of the penalties section is section 109(c), involving individual civil penalties.[139] On May 1, 1974, MESA filed its first case under this provision with the Office of Hearings and Appeals.[140] Three other such cases are currently under investigation. MESA describes these cases as those which meet all the criteria of criminal penalties and are intentional violations, yet are not aggravated so as to meet the Justice Department's criteria for criminal prosecution.

Despite the aforementioned statistics, the Department of the Interior has failed to utilize the criminal penalty provisions of the Act. Since March 30, 1970, the effective date of the Act, only seven cases have been referred to the Justice Department for prosecution, and five of the seven have been referred in the last year. Only two cases have been prosecuted, and no case has been successfully argued by the government.

One concludes either that there is no criminal conduct that might fall under section109 or that there is criminal conduct, but MESA and the Bureau of Mines have not considered section 109 to be within the Act and within their power. To resolve this question, one simply needs to read the reports of fatal accidents, occurring within the last four years or consider the numbers of closure orders issued under section 104, particularly 104(c). Of the 16,683

[137] Interview with Mark Savit, Director of the Special Investigation Division, MESA, in Washington, D.C., May 11, 1975.

[138] *Id.*

[139] 30 U.S.C. § 819(c) (1970).

[140] MESA v. Henshler, Office of Hearing and Appeals, Docket No. 75-3749.

closure orders issued since March 20, 1970, it is quite logical to assume that a considerable number of the violations would be willful, and of the 3,432 section 104 closure orders, it would be absurd to deny willfulness in many cases.[141]

Even to the uninitiated, it is apparent that MESA has more than ample opportunity to investigate and prosecute successfully under section 109, both criminally and civilly, but from the results one must conclude it does not have the desire.

VII. CONCLUSIONS

Many months have passed since the most recent mine disaster left its victims scattered in the dust and across the headlines in December, 1972. Those memories, like most unpleasant memories, fade quickly, and when they are gone, we return to debating the intricacies of enforcement procedures, alleged inspectors' abuses of discretion, whether the appeal was properly filed and properly considered, and whether the due process rights of all the parties have been protected.

Discussions now rage over the meaning of "unwarrantable failure" and "imminent danger," over what constitutes a violation, what the amount of the penalty shall be, and whether the scope of the Act includes a two-man mine. Briefs are written arguing whether or not MESA is carrying out its mandate from Congress, and numerous examples are used to show how the government has failed in its duty or has overstepped its bounds. Perhaps these are all necessary debates, because we live, after all, in a society of law, and indeed, without this kind of discussion, how would we progress? Moreover, how would the rules by which mines are operated be determined?

The problem with that approach, however, is that we are living, in this instance, not simply under law but also on borrowed time. We can debate the issue of how much accumulated coal dust on a belt roller consitutes an imminent danger; we can debate the application and restriction of the unwarrantable failure, and we can question the use of an imminent danger closure order after a fatality. As these debates continue, however, we are challenging a law much more fundmental than the Federal Coal Mine Health and Safety Act of 1969. We are challenging the law of averages. It

[141] Statistics, *supra* note 53.

has caught up with the coal industry before, and it will catch up with the coal industry again. If in fact we cut corners, if we chill the inspector's enthusiasm, and if we fail to pursue enforcement aggressively, are we not then increasing the odds for catastrophe? Are those odds not rough enough already?

APPENDIX

SAFETY RECORDS
15 LARGEST COMPANIES—1974
DISABLING INJURIES PER MILLION
MAN-HOURS WORKED

Eastern Associated Coal Corp.	
Westmoreland Coal Co.	88.83
Pittsburg & Midway Coal Mining Co.	62.74
North American Coal Co.	58.79
National Average	29.22
Pittston Coal Co.	27.13
General Dynamics	24.80
Peabody Coal Co.	23.33
Old Ben Coal Co.	21.25
Island Creek Coal Co.	12.14
American Electric Power	11.34
Consolidation Coal Co.	9.62
Bethlehem Steel	9.28
Utah International	7.06
Amax	6.71
U.S. Steel	4.04

Source: MESA, Statistical Analysis Branch