

CHAPTER 13

Resolution of MSHA Disputes -- The Need for Change and Suggestions for A More Productive Approach

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§ 13.01. **Introduction.**

With the passage of the Federal Coal Mine Health and Safety Act of 1969⁽¹⁾ (Coal Act or 1969 Act), Congress created one of the most pervasive regulatory regimes ever imposed on a segment of American business. Passage of the Federal Mine Safety and Health Act of 1977 (Mine Act, 1977 Act, or Act)⁽²⁾ expanded this regime to include all coal and noncoal mines, whether operated by the private or public sector. The 1977 Act also adopted the split-enforcement model whereby mandatory safety and health standards are promulgated⁽³⁾ and enforced⁽⁴⁾ by the Secretary of Labor through the Mine Safety and Health Administration (MSHA). The Secretary's enforcement actions are challenged and adjudicated⁽⁵⁾ before the independent Federal Mine Safety and Health Review Commission (Review Commission or Commission).⁽⁶⁾

One of the stated purposes of the 1969 and 1977 Acts was to "provide more effective means and measures for improving the working conditions and practices in the Nation's coal or other mines in order to prevent death and serious physical harm, and in order to prevent occupational diseases originating in such mines."⁽⁷⁾

Remedial statutes such as the Mine Act allow the federal government considerable latitude in securing widespread compliance with the safety and health mandates of Congress. A significant component of the Mine Act's remedial approach to occupational safety and health has been the mandatory civil penalty. Few would dispute that the civil penalty sanction, when properly used, can encourage voluntary compliance with the Act and the mandatory standards. When, however, the finite resources of government, industry, and labor are expended unnecessarily on the civil penalty *process* at the expense of devising "means and

measures for improving . . . working conditions,"⁽⁸⁾ a critical review of the current system is warranted.

Accordingly, this Chapter first describes the current explosion of litigation under the Mine Act, as well as the procedural and institutional causes of the crisis. Thereafter, it outlines a proposal for the informal resolution of disputes associated with the assessment of civil penalties. Finally, it demonstrates the safety and health benefits to be gained from the alternative means of dispute resolution proposed by the authors.

§ 13.02. Statutory and Regulatory Scheme.

[1]--Assessment Authority Under the Mine Act.

A key weapon in the arsenal available to the Secretary of Labor is the mandatory civil penalty system. Under Section 110(a) of the Mine Act,⁽⁹⁾ the operator of a mine in which a violation occurs is strictly liable for the violation and is subject to the assessment of a civil penalty. Civil penalties have been imposed on operators even when the violation resulted from the idiosyncratic and defiant behavior of a rank-and-file employee⁽¹⁰⁾ or when the violation was committed by an independent contractor.⁽¹¹⁾ Under Section 110(b) of the Act,⁽¹²⁾ a mine operator may be held liable for a penalty assessed for failure to correct a violation within the time specified in the underlying citation.⁽¹³⁾

Agents of corporate operators who knowingly authorize, order, or carry out an operator's violation are individually liable for civil penalties under Section 110(c) of the Act.⁽¹⁴⁾ A constitutional challenge to Section 110(c) on due process and equal protection grounds has been rejected.⁽¹⁵⁾

Mandatory civil penalties for operators' violations were first introduced in the 1969 Coal Act, with the maximum penalty set at \$10,000.⁽¹⁶⁾ The penalties for failure to abate a violation were set at a maximum of \$1,000 per day for each day the violation went uncorrected.⁽¹⁷⁾ These maximum levels were retained in the 1977 Act and made applicable to metal/nonmetal mines as well.⁽¹⁸⁾

As part of the Omnibus Budget Reconciliation Act of 1990⁽¹⁹⁾ (OBRA), known more prominently for then President Bush's accession to a tax increase, Congress raised the maximum civil penalty for operators' violations from \$10,000 to \$50,000. Concurrently, the maximum penalty for failure to abate a violation was raised from \$1,000 per day to \$5,000 per day. The maximum civil penalty for a corporate agent found to have knowingly authorized, ordered or carried out the operator's violation was also increased from \$10,000 to \$50,000.

[2]--Secretary's Procedures for Assessing Civil Penalties.

Assessment of civil penalties under the Mine Act is governed by the Secretary's regulations.⁽²⁰⁾ Penalty amounts are set by three different procedures: regular assessments,⁽²¹⁾ single penalty assessments,⁽²²⁾ and special assessments.⁽²³⁾

[a]--Regular Assessments.

Regular assessments, which account for the vast majority of penalties generated under the Act, are derived from a formula based on six statutory criteria used to evaluate a violation: (1) the size of the operator's business, (2) the operator's history of previous violations, (3) the degree of negligence surrounding the violation, (4) the gravity of the violation, (5) the good faith demonstrated by the operator in rapidly abating the violation, and (6) the effect of the penalty on the operator's ability to continue in business.⁽²⁴⁾