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## The Federal Mine Safety and Health Act of 1977: Is It Suffering from a Mid-Life Crisis

# THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977: IS IT SUFFERING FROM A MID-LIFE CRISIS?

KAREN L. JOHNSTON\*

## INTRODUCTION

Compliance and enforcement with federal law and regulations regarding safety and health in the workplace in the United States have historically followed the proverbial “stick” approach. Whether this traditional approach has been successful or whether better philosophies exist to achieve workplace safety and health, particularly in the U.S. mining industry, is the focus of this paper. Change is inevitable in light of ongoing federal budgetary concerns and against the background of improvements in technology, attitudes, and reduction in fatalities within the mining industry. Labor, industry, and government leaders should initiate the change by embracing proven concepts based on incentives and self-regulation.

The Federal Mine Safety and Health Act of 1977 (the “Mine Act”),<sup>1</sup> as enforced by the Mine Safety and Health Administration (“MSHA”), an agency within the Department of Labor, regulates every aspect of safety and health in the U.S. mining industry. The Mine Act’s sole statutory goal is the protection of the U.S. mining industry’s most precious resource—the miner.<sup>2</sup> The Mine Act evolved from the predecessor 1969 Coal Act,<sup>3</sup> which was amended in 1977 to include within its jurisdiction all mines in the U.S., and recently celebrated its thirtieth year in existence. The Mine Act had its genesis in catastrophic disasters, which killed hundreds of U.S. miners between the turn of the century and the mid-1970s.<sup>4</sup>

The Occupational Safety and Health Act of 1970 (the “OSH Act”)<sup>5</sup> was enacted by Congress to ensure the protection of employees in general industry from the increasing dangers created by industrialization.<sup>6</sup>

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\* The author gratefully acknowledges the assistance of Laura E. Beverage and L. Joseph Ferrara, members of Jackson & Kelly PLLC, in preparing this article. This article is based in part on a prior study of this topic, which was presented at Minesafe International 1996 Conference by Laura E. Beverage.

1. 30 U.S.C. §§801 *et seq.* (1994).

2. 30 U.S.C. §801(a) (1994).

3. Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-153.

4. *See, e.g.*, Senate Comm. on Human Resources, Federal Mine Safety and Health Amendments Act of 1977, S. Rep. No. 95-181, at 1-4 (1977).

5. 29 U.S.C. §§651 *et seq.* (1994).

6. 29 U.S.C. §§651 *et seq.* (1994).

The OSH Act is administered by the Occupational Safety and Health Administration ("OSHA"), also part of the Department of Labor. OSHA develops and issues standards, conducts investigations and inspections, issues citations, and proposes penalties for non-compliance by employers.<sup>7</sup> The OSH Act regulates industries affecting interstate commerce, other than mining, but does not apply to the government.<sup>8</sup> Comparison of these two Acts and these two agencies is helpful in understanding the breadth and depth of the Mine Act's jurisdiction and MSHA's authority.

The charge as we move forward into the new millennium is to determine whether the philosophical underpinnings of safety and health legislation, particularly those affecting mining, enacted thirty years ago still reflect current enforcement needs, and to evaluate alternative means of promoting safety and health in the workplace with more goal-oriented programs which recognize incentives for voluntary compliance.

## I. OVERVIEW OF THE MINE SAFETY AND HEALTH ADMINISTRATION AND THE MINE ACT

### A. *Agency Organization*

Since its inception, the Mine Act has developed into a formidable enforcement mechanism. MSHA, an enforcement arm of the U.S. Department of Labor, is headed by Assistant Secretary of Labor Dave D. Lauriski, who serves under the Secretary of Labor Elaine L. Chao.

MSHA is divided into two enforcement branches, one for Coal and one for Metal/Nonmetal (including stone, sand and gravel) mining, each headed by an Administrator. Three divisions—safety, health, and technical compliance—report to the Administrators. There are national offices of assessments, standards, regulations and variances, educational policy and development, and technical support. The MSHA enforcement units are comprised of eleven Coal District offices, six Metal/Nonmetal District offices, and numerous field offices, which are headed by District Managers and field office supervisors, respectively.

The Mine Act operates through a "split enforcement model" under which MSHA promulgates and enforces rules and regulations governing mine safety and health. Enforcement disputes arising under the Mine Act are heard by a separate governmental agency created by the Mine Act, but funded separately from the enforcement agency. This quasi-judicial agency is the Federal Mine Safety and Health Review Commission ("Review Commission"), composed of five members.<sup>9</sup> The Review Commission's administrative law judges are assigned to hear contested cases initially. The Review Commission may then review the judges'

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7. 29 U.S.C. §655 (1994).

8. 29 U.S.C. §652(5) (1994).

9. 30 U.S.C. §823 (1994).

decisions if two or more of its members vote to grant discretionary review. The Review Commission's importance extends beyond its resolution of individual cases, due to its broad authority to formulate national policy and to act as a check on the enforcement zeal of the authorized agents of the Secretary by reviewing the lawfulness of the Secretary's enforcement actions.<sup>10</sup> MSHA is represented in contested cases by the Solicitor of Labor in the national office or in one of the Regional Solicitor's offices.

### B. *Mine Safety and Health Act Summary*

The Mine Act is a strict liability statute, meaning that enforcement actions are authorized, regardless of fault, for any violations of the Mine Act or its implementing regulations, including those committed by a mine operator's employees. This is true even when the violation occurs as a direct result of an employee's failure to follow a supervisor's order, or as the result of any other purposeful or idiosyncratic employee behavior.<sup>11</sup> Because of its strict liability nature, defenses such as diminution of safety, lack of exposure or access to a hazard, and dual operator liability are ineffective. An operator's challenge to an alleged violation will not postpone the time set by an inspector to terminate or correct the allegedly violative condition or practice.

The Mine Act prescribes minimum health and safety standards with great specificity and directs the Secretary of Labor to make those standards more stringent as technology and identified hazards warrant and to improve safety and health.<sup>12</sup> Under §506 of the Mine Act, federal preemption of state mine safety and health laws is not recognized except where federal law is more stringent than state law.<sup>13</sup> Thus, every state may have its own dual enforcement program which may be redundant or contradictory to federal law.

MSHA has broad authority to conduct warrantless inspections at mines. The agency carries out essentially three types of inspections: routine,<sup>14</sup> spot,<sup>15</sup> and those conducted pursuant to a miner's complaint.<sup>16</sup> MSHA is *required* to conduct at least *two* routine inspections annually for surface mines and *four* inspections for underground mines.<sup>17</sup> These

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10. See, *Secretary of Labor v. Thunder Basin Coal Co.*, 510 U.S. 200 (1994).

11. 30 U.S.C. §820(a) (1994); See, *Asarco, Inc. - Northwestern Mining Dep't v. Federal Mine Safety and Health Review Comm'n*, 868 F.2d 1195, 1198 (10th Cir. 1989).

12. 30 U.S.C. §811 (1994).

13. 30 U.S.C. §955 (1994).

14. 30 U.S.C. §813(a) (1994).

15. 30 U.S.C. §813(i) (1994).

16. 30 U.S.C. §813(g) (1994).

17. 30 U.S.C. §813(a).

“twos and fours” are conducted regardless of the mine’s compliance efforts as reflected by its violation history and accident and incidence rates compiled annually by the agency. The Mine Act also directs the Secretary to investigate the causes of “accident[s]” and “other occurrence[s] relating to health and safety.”<sup>18</sup>

The Mine Act and its regulations require an operator to report, investigate, and maintain records pertaining to all accidents, injuries and illnesses.<sup>19</sup> Annual statistics regarding accident and incidence rates are compiled by the agency using this data.

The Mine Act’s enforcement scheme is cumulative in nature, with penalties and the potential for withdrawal orders (cessation of work in an affected area) increasing with higher gravity and negligence findings. These “special findings” are made in connection with every enforcement action taken. A violation is “significant and substantial” if the hazard presented by the violation has serious or grave potential consequences based upon the particular facts surrounding that violation. There must exist a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.<sup>20</sup> A violation is considered to be the result of “unwarrantable failure” (a high degree of operator fault) when the violation occurs as a result of the operator’s “aggravated conduct, constituting more than ordinary negligence.”<sup>21</sup> These important definitions are not found in the Mine Act. Rather, the definitions have evolved through litigation in contested cases.

An additional component of the Mine Act’s cumulative enforcement scheme is known as “excessive history.” Each time a violation is assessed by the MSHA Office of Assessments, MSHA calculates the overall history of violations for the mine for a preceding 24 month period. A mine is placed on excessive history when the number of violations per inspection day, as calculated by MSHA, is 2.1 or more.<sup>22</sup> A designation of excessive history of violations affects the amount of penalty assessed for routine, non-significant and substantial violations and can result in a significant financial impact on a mine operator. An operator who is not on excessive history can expect a single penalty assessment amount of \$55 for this type of routine minor violation; an operator on excessive history can be assessed a penalty ranging from \$66 to \$55,000 per routine minor violation.<sup>23</sup> This aspect of the Mine Act’s enforcement scheme can result in a mine operator paying increasingly onerous penalties for relatively minor violations, despite the fact that the operator may have an

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18. 30 U.S.C. §813(b) (1994).

19. 30 U.S.C. §813(d) (1994); 30 C.F.R. Part 50 (2001).

20. Secretary of Labor v. Cement Div., Nat’l Gypsum Company, 3 FMSHRC 822, 825 (Rev. Comm. 1981).

21. Emery Mining Corp. v. Secretary of Labor, 9 FMSHRC 1997, 2004 (Rev. Comm. 1987).

22. 30 C.F.R. §100.4(b) (2001).

23. 30 C.F.R. §100.4(a)(2) (2001).

excellent incident and injury rate (demonstrating the effectiveness of the operator's safety program). An excessive history is not necessarily indicative of an unsafe mine operation, but MSHA relies on history to justify increased penalties, without taking into consideration other mitigating factors.

### 1. Summary of MSHA's major enforcement tools

<u>Provision of the Mine Act</u>	<u>Enforcement Action Taken</u>
§814(a)	If the Secretary believes a violation exists, a citation must be issued, setting a reasonable abatement time. <sup>24</sup>
§814(b)	A withdrawal, or closure, order may be issued for the area affected by the violation for a failure to abate, or correct, the violation within the time prescribed. <sup>25</sup>
§814(d)	A citation for a significant and substantial ("S&S") violation, caused by the operator's un-warrantable failure to comply with a standard, commences a "withdrawal order chain" each time thereafter a violation resulting from an un-warrantable failure to comply is observed. <sup>26</sup> An intervening "clean" inspection ( <i>i.e.</i> , no un-warrantable failures) breaks the withdrawal order chain.
§814(e)	If an operator is identified as a "pattern violator," all violations characterized as "S&S" result in withdrawal orders until an intervening inspection reveals no "S&S" violations. <sup>27</sup>
§814(f)	A withdrawal order will be issued for failure to comply with respirable coal dust concentration limits. <sup>28</sup>
§814(g)	A withdrawal order will be issued for failure to provide mandatory training required under the Mine Act. <sup>29</sup>

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24. 30 U.S.C. §814(a) (1994).

25. 30 U.S.C. §814(b) (1994).

26. 30 U.S.C. §814(d) (1994).

27. 30 U.S.C. §814(e) (1994); 30 C.F.R. Part 104 (2001).

28. 30 U.S.C. §814(f) (1994).

§817(a) A withdrawal order will be issued for a condition or practice that can be expected to cause death or serious physical harm before it can be corrected, regardless whether the condition or practice violates a standard or rule.<sup>30</sup>

## 2. Summary of the Mine Act's civil and criminal penalties

<u>Provision of the Mine Act</u>	<u>Potential Penalty</u>
§820(a)	An operator of a mine in which any violation occurs is assessed a civil penalty of no more than \$55,000 per violation. The civil penalty formulas consider criteria such as gravity, negligence, size of operator's business and good faith in achieving compliance. <sup>31</sup>
§820(c)	An operator or corporate officer, director or agent (one who supervises all or part of a mine or miners <sup>32</sup> ) who "knowingly" authorizes, orders or carries out a violation or refuses to comply with an order may be fined civilly up to \$55,000 and/or charged criminally (\$25,000 fine and up to one year imprisonment for first offense). <sup>33</sup>
§820(d)	An operator or corporate officer, director or agent who "willfully" authorizes, orders or carries out a violation or refuses to comply with an order may be fined up to \$25,000 and or up to one year imprisonment (first offense), or up to \$50,000 fine and up to 5 year imprisonment (second offense). <sup>34</sup>
§820(e)	Any person who gives advance notice of inspections is subject to criminal fine up to \$1000 and/or six months imprisonment. <sup>35</sup>

29. 30 U.S.C. §814(g) (1994).

30. 30 U.S.C. §817(a) (1994).

31. 30 U.S.C. §820(a-b),(i) (1994); 30 C.F.R. §100.3(b-g) (2001).

32. 30 U.S.C. §802(e) (1994).

33. 30 U.S.C. §820(c) (1994). In the event that the violation results in a death, the criminal fine may be increased to \$250,000. 18 U.S.C. §3571(b)(4) (1994). If no death results, it may be increased to \$100,000. 18 U.S.C. §3571(b)(5) (1994).

34. 30 U.S.C. §820(d) (1994). In cases where the "operator" is determined to be an "organization," the criminal fine may be increased to \$500,000 for misdemeanors that result in a death. 18 U.S.C. §3571(c)(4) (1994). If no death results, it may be increased to \$200,000. 18 U.S.C. §3571(c)(5) (1994).

35. 30 U.S.C. §820(e) (1994).



§820(f) Any person who knowingly makes false statements, representations or certifications in any application, report, plan, record or other document required to be maintained or filed under the Act is punishable by fine of up to \$10,000 and/or imprisonment of up to 5 years.<sup>36</sup>

## II. COMPARISON OF MSHA WITH ITS SISTER AGENCY, THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, AND THE OSH ACT

### A. *Major Provisions and Aspects of the OSH Act and Agency Organization*

It is instructive to compare MSHA, and its administration of the Mine Act, with its sister agency, OSHA, and its administration of the OSH Act.

There are some similarities between MSHA and OSHA. For example, the OSH Act operates under a split enforcement model similar to the Mine Act, with a three-member independent quasi-judicial Commission.<sup>37</sup> An employer cited for an OSHA violation may request a review of a violation or penalty assessment by an administrative law judge assigned by the Occupational Safety and Health Review Commission.

The OSHA enforcement units are comprised of ten regions and eighty-five area offices throughout the United States, which are headed by Area Directors and field office supervisors in charge of compliance officers. Compliance officers are authorized to take enforcement actions based on evaluations of gravity and negligence similar to those taken under the Mine Act. OSHA compliance officers have authority to conduct investigations and inspections, issue citations, and propose penalties for non-compliance by employers.<sup>38</sup> An inspector may characterize citations as "other-than-serious," "serious," "willful," and "repeat," based on the specific facts surrounding the violation. The minimum penalty for a repeat or willful violation is \$5,000, and the maximum is \$70,000. The maximum penalty for each other-than-serious or serious violations is \$7,000. A failure to abate violation can result in assessment of a penalty

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36. 30 U.S.C. §820(f) (1994). In this case, the criminal fine may be increased to \$250,000 pursuant to 18 U.S.C. §3571(b)(3) because violations of §110(f) are classified as felonies. 18 U.S.C. §3559(a)(5) (1994).

37. 29 U.S.C. §651 (1994).

38. 29 U.S.C. §655 (1994).

of up to \$7,000 a day.<sup>39</sup> OSHA's "egregious" penalty policy initiated in 1991 has resulted in record-high fines by counting each separate employee exposure to a hazard as a separate violation meriting a fine.

OSHA prioritizes its compliance goals in order to conserve its resources and conducts three basic types of inspections: programmed, unprogrammed, and monitoring. OSHA prioritizes the various types of inspections as follows:<sup>40</sup>

- First priority: imminent danger
- Second priority: fatality/catastrophe investigations
- Third priority: complaints/referrals investigation
- Fourth priority: programmed inspections

With the present number of inspectors employed by OSHA and the number of sites covered, OSHA visits many worksites only once during a ten-year period.<sup>41</sup> This is contrasted by MSHA's statutory mandate to inspect surface mines two times per year and underground mines four times per year.<sup>42</sup>

#### B. *Comparisons Between the Mine Act and the OSH Act*

Key differences between the Mine Act and the OSH Act include:

- The OSH Act is *not* a strict liability statute. Therefore, defenses such as employee misconduct or lack of exposure to hazard may be successful.
- The OSH Act contains no minimum mandatory inspection requirements.
- OSHA has no general mandatory minimum training requirements but does have specific requirements in some standards.
- OSHA has no warrantless inspection power; warrants must be obtained if the business will not waive the warrant requirement.
- The OSH Act provides no withdrawal order authority without first obtaining an order from a federal court, and then only in the case of an imminent danger.

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39. 29 U.S.C. §666 (1994); New OSHA Civil Penalties Policy, OSHA Fact Sheet No. OSHA 92-36 (1/1/92).

40. Field Inspection Reference Manual, I.B.3, OSHA Instruction CPL 2.103 (Sept. 26, 1994).

41. HERITAGE FOUNDATION, A BUDGET FOR AMERICA, 245 (Angela M. Antonelli et al. eds., 2001).

42. 30 U.S.C. §813(a) (1994).

- OSHA recognizes state primacy of approved enforcement programs, eliminating dual enforcement roles of state and federal agencies.
- Contest of a violation issued by OSHA effectively stays the requirement for abatement until after a full adjudication of the merits of the enforcement action.
- The OSH Act applies criminal liability to an employer in cases where a death occurs as a result of a willful violation. It has no civil penalty authority against individuals, *i.e.*, agents, officers or directors.

C. MSHA/OSHA Budget Comparisons<sup>43</sup>

<u>FY2000</u>	<u>MSHA</u>	<u>OSHA</u>
<i>FY 2000 Budgets</i>	\$228 million	\$382 million
<i>Private Sector- Employees Covered Total</i>	357,000	111,000,000
<i>PrivateSectorEmployees Covered per Inspector</i>	388	89,516
<i>Dollars Spent per Employee Covered</i>	\$638.00	\$56.00
<i>Sites Covered</i>	13,902	4.0+ million
<i>Dollars Spent per Site Covered</i>	\$16,400.00	\$74.00
<i>Number of Federal Inspectors</i>	920	1,240

In terms of pure dollar amounts, MSHA's overall budget authority for FY 2001 increased to \$242.2 million, an increase of \$14.2 million over FY 2000. OSHA's overall budget authority for FY 2001 also increased, by \$44 million, to a total budget authority amount of \$426 million.<sup>44</sup>

## D. Overview of OSHA Policy Initiatives

In the mid-90s, OSHA announced that an effective and credible enforcement program provides the cornerstone for safe workplaces. As evidence of that resolution, the agency began assessing increasingly higher penalties against violators.<sup>45</sup> At the same time, OSHA's leaders pledged to improve targeted inspections and focused inspections and to involve workers and employers in the process of workplace safety by providing mechanisms for involvement and incentives. In furtherance of these efforts, OSHA underwent an evaluation which produced a report entitled *The New OSHA—Reinventing Worker Safety and Health*.<sup>46</sup> The

43. HERITAGE FOUNDATION, *supra* note 42, at 245.

44. Budget authority data available from MSHA at [http://www.dol.gov/dol/\\_sec/public/budget/msha20001.htm](http://www.dol.gov/dol/_sec/public/budget/msha20001.htm) and from OSHA at [http://www.dol.gov/dol/\\_sec/public/budget/osha20001.htm](http://www.dol.gov/dol/_sec/public/budget/osha20001.htm).

45. 74 Daily Lab. Rep. (BNA) A-8 (Apr. 19, 1994); 106 Daily Lab. Rep. (BNA) A-1 (Jun. 6, 1994).

46. NATIONAL PERFORMANCE REVIEW, *THE NEW OSHA - REINVENTING WORKER SAFETY AND HEALTH* (May 1995).

report focuses on alternative philosophies to traditional coercive compliance through industry “partnerships” with the agency. (MSHA has yet to undertake such an introspective evaluation.)

*The New OSHA—Reinventing Worker Safety and Health* incorporates a number of suggested proposals for revamping OSHA, recognizing that, historically, OSHA has been driven by statistics and rules and a “one size fits all” approach in terms of enforcement and inspection efforts. The report lauds efforts by OSHA and industry to shift responsibility for ensuring the safety and health of workers to employers, managers and workers, and to provide special incentives to employers who initiate effective worksite safety and health programs which identify hazards and ensure safety awareness. Incentives provided by OSHA to employers who adopt the partnership approach include:

- assignment of lower priority for enforcement inspections (*i.e.*, reduced inspections);
- assignment of higher priority for technical assistance;
- penalty reductions that could be as great as 100%.

OSHA has discovered through these few initiatives, initially undertaken experimentally, that shifting more responsibility to employers allows them to decide how they want to be regulated. If employers choose to implement safety and health programs that (in a sense) self-regulate their workplaces, the ultimate result has been greater protection for their workers, and less “red tape,” paperwork, and enforcement action by OSHA. As a result of the demonstrated benefits of these initiatives to industry, workers, and the government, the OSHA Strategic Partnership Program for Worker Safety and Health (OSP) was adopted by the agency on November 13, 1998.<sup>47</sup>

While not predominant throughout general industry, the partnership initiative has slowly increased in popularity in the latter half of the 1990s, with OSHA entering into partnership agreements on a national and regional basis. Recently, OSHA and the Associated General Contractors of America entered into a formal partnership agreement which will allow contractors with the best safety records to avoid targeted inspection lists. The agreement sets forth specific, objective criteria which the contractor must satisfy in order to attain “blue” status (*e.g.*, injury/illness rate which is 10% below the construction industry average; institute a comprehensive site specific written safety and health program; provide necessary orientation and training; no willful or repeat serious violations in the last three years; no fatalities or catastrophic accidents in

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47. OSHA Directive No. TED 8-0.2 (Nov. 13, 1998).

the past three years which resulted in serious citations). Once the criteria are met, among other benefits, OSHA agrees to conduct unplanned inspections only under specific circumstances and not to target the site for a planned inspection within the next twelve months.<sup>48</sup>

OSHA's innovative use of partnership agreements has enabled those participating employers in general industry to implement effective safety and health programs within the workplace, increasing worker protection, with diminished concern of governmental enforcement activity. Conversely, the programs have enabled OSHA to better focus its enforcement activities and resources on those employers whose safety records demonstrate an increased need for government oversight.

### III. WHAT'S WRONG WITH U.S. SAFETY AND HEALTH REGULATION, PARTICULARLY THE MINE ACT

The two principal safety and health Acts in the U.S. stem from a troubled history of labor-management conflict, serious industrial safety and health problems, and relative industry and government neglect. It is not surprising, therefore, that these remedial statutes (and their predecessors) were cast in a punitive mold during the period 1966 - 1977. Whether that mold retains its utility for the 21<sup>st</sup> Century has been the subject of recent and on-going debate. We suggest that a new regulatory direction is needed.

#### A. *The Regulatory System Lacks Flexibility*

By and large, the voluminous standards issued by the enforcement agencies are too *rigid* and *prescriptive*. Regulated enterprises are afforded little flexibility to devise methods of compliance that may work best for them under the circumstances of their operations. Worse still, the Mine Act itself is an extremely rigid statute whose structure precludes many of the creative enforcement directions currently being initiated under the somewhat looser regime of the OSH Act.

The tremendous quantity and detail of these bodies of regulation are fairly mind-boggling. Indeed, one of OSHA's "reinvention" priorities is eliminating some 1,000 pages of redundant and unnecessary regulations.<sup>49</sup> All of this reflects *paternalistic* government at its most intrusive. In the 1970s, it was assumed by some (and, of course, still is) that government *does* know best and that inflexible prescription is the *only* means of achieving betterment. It is true that progress has been attained in reducing accidents, injuries, disease, and fatalities. The former

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48. OSHA and Associated General Contractors Form Partnership to Improve Safety in Construction, OSHA Trade News Release (Dep't of Labor Jan. 9, 2001).

49. Fleming, S.H., *Charting a New Course Toward Workplace Safety and Health*, Vol. 7 Job Safety and Health Quarterly 9, 10 (1996).

Assistant Secretary of Labor for Mine Safety and Health, J. Davitt McAteer, testified before the U.S. House of Representatives Committee on Education and the Workforce, Subcommittee on Workforce Protections, to the recent accomplishments of the mining industry over the past decades, noting that the past five years have been the safest on record for the U.S. mining industry and that the U.S. mining industry is at the forefront of mine safety among major producing countries in the world.<sup>50</sup> The relative fatality rates per million tons of coal produced in several coal producing countries fills in some of the details. For example, in 1996, China's fatality rate was 7.29, Russia's was 0.66, India's rate was 0.47, followed by South Africa and Poland at 0.23. The U.S.'s rate was far lower than any of these countries at 0.04.<sup>51</sup> The OSH Act and Mine Act have played an important role in that progress. However, the progress has also been due to such factors as the social maturation of industry, a growing appreciation by labor and management of the importance of safety and health in stable employment and production, and increased automation of industrial processes with concomitant reduction of associated risks.

Moreover, the public resources available for the implementation of the current enforcement models are not likely to expand. On the contrary, they will probably contract. Accordingly, in an environment wherein progress continues to be achieved, it is time to question seriously the paternalistic underpinnings of the present law.

#### *B. The Regulatory System is not Sufficiently Performance-Based*

Related to the above problems is the fact that too few safety and health standards are performance-based. If the fundamental goal is, as it should be, the result of improved safety and industrial hygiene, the obsessive concern with how the results are achieved makes little economic sense. Good performance speaks for itself, and good government should recognize results.

In testimony that was as timely several years ago as it is today, Michael E. Baroody of the National Association of Manufacturers summa-

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50. *A Review of Mine Safety & Health: The State of the Industry Today: Hearing Before the House Subcomm. on Workforce Protections, Comm. on Educ. and the Workforce*, 107th Cong. (Sept. 14, 2000) (statement of J. Davitt McAteer, Asst. Secretary for Mine Safety and Health, U.S. Dept. of Labor).

51. *A Review of Mine Safety & Health: The State of the Industry Today: Hearing Before the House Subcomm. on Workforce Protections, Comm. on Educ. and the Workforce*, 107th Cong. (Sept. 14, 2000) (statement of Bruce Watzman, Vice President, Safety and Health, National Mining Association); Eckholm, Erik, *Dangerous Coal Mines Take Human Toll in China*, N.Y. Times, June 19, 2000.

rized this problem well in 1995, while testifying on regulatory reform legislation:

The shortcomings of our present regulatory system are not limited to the absence of a rational method for setting regulatory priorities. Major problems also are evident in the way in which health, safety, and environmental regulations are developed, structured, and implemented.... [Among other things,] . . . [a]gency rules tend to be relatively inflexible, reflecting a penchant for command-and-control specification, rather than a performance-based orientation. This results in regulations that are far less cost-effective than they could be, and it frequently precludes the adoption of . . . management practices that would actually be more protective and less costly than the actions required under the rule.<sup>52</sup>

### C. *The Mine Act is Premised on an Outmoded Concept of Strict Liability*

As previously noted, this concern applies only to the Mine Act. Strict liability is a punitive concept that is wrong for two reasons: (1) strict liability deters exemplary performance—no matter how hard it strives, the operator will be held responsible for *all* violations, even those in which it was not at fault; and (2) strict liability exempts *miners* from meaningful responsibility for safety and health in mines. Safe mines must be a priority, not only to operators, but to miners alike. Placing the responsibility for an unsafe act where it actually belongs in each case, including with miners, is a more powerful means of ensuring responsible attitudes by all.

### D. *The Regulatory System Excessively Relies Upon Governmental Enforcement for Compliance*

This problem, present under both Acts, is especially acute with respect to the Mine Act, with its scheme of mandatory inspections (“twos and fours”). Under the Mine Act, compliance is not encouraged through meaningful self-audit or self-regulation. Rather, compliance is forced through an adversarial system of governmental inspection often followed by an even more adversarial system of litigation. Recently, however, OSHA has made a positive move in the direction of compliance through meaningful self-audit via implementation of its *Final Policy Concerning the Occupational Safety and Health Administration’s Treatment of Voluntary Employer Safety and Health Self-Audits* (“Final Policy on Self-Audits”).<sup>53</sup>

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52. *Regulatory Reform Legislation: Why Is It Needed? What Should It Provide?: Hearing Before the Senate Committee on Environment and Public Works*, 102nd Cong. (March 21, 1995) (statement of Michael E. Baroody, Nat’l Assn. of Manufacturers).

53. *Final Policy Concerning the Occupational Safety and Health Administration’s Treatment of Voluntary Employer Safety and Health Self-Audits*, 65 Fed. Reg. 46,498 (July 28, 2000).



OSHA believes that “[v]oluntary self-audits, properly conducted, may discover conditions that violate the [OSH] Act so that those conditions can be corrected promptly and similar violations prevented from occurring in the future.”<sup>54</sup> OSHA acknowledges the benefits to worker health and safety that may be derived from voluntary self-audits. Consequently, OSHA adopts the position in the Final Policy on Self-Audits that compliance officers will not routinely request voluntary self-audits at the initiation of an inspection, nor will OSHA utilize a self-audit, obtained through legal means or by employer submission, to either focus or expand an inspection. The Final Policy on Self-Audits provides that violative conditions identified in qualifying self-audits will not be used as the basis for issuing citations to the employer where the violative condition was corrected prior to the inspection and the employer has taken steps to avoid the recurrence of the condition.

In addition, the Final Policy on Self-Audits provides for a “safe harbor” for employers, wherein a qualifying self-audit may be used as evidence of good faith in those situations where the corrective steps have been undertaken but not completed at the time of the inspection, instead of used as evidence to support a willful violation (on the basis that the employer had knowledge of the violative condition, as demonstrated by the self-audit, and allowed it to exist). Moreover, where a qualifying self-audit is deemed evidence of good faith, the employer may expect to receive a corresponding reduction in penalty assessments. It is this type of innovative means of enforcement that will increase worker safety and health by encouraging employers to periodically re-evaluate the work environment without fear of repercussion or unduly stringent enforcement action being taken against them.

#### *E. The Regulatory System is Unduly Punitive*

Both statutes enforce their mandates almost entirely through punishment rather than incentive. Violations receive citations and violators are subjected to penalties. On a national basis, the penalty amounts proposed by these agencies are large. For example, according to MSHA statistics, in FY 1999 MSHA proposed \$24.4 million in penalties. Based on OSHA data for FY 1998, the most current data available from the agency, federal OSHA and the state OSHA programs proposed almost \$108 million in penalties. Too little attention has been given under either statute to methods of encouraging, assisting, and rewarding successful performance.

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54. See *id.* at 46,502.

### F. Lack of Proper Assessment in Developing Regulations

Like most other federal agencies, MSHA and OSHA do not sufficiently conduct reliable risk assessment and cost-benefit analysis in promulgating rules or allocating regulatory priorities. A classic example of this problem was afforded by OSHA's unhappy experience in the past year when it attempted to regulate, in one fell swoop, musculoskeletal disorders, or repetitive motion injuries. OSHA published the Ergonomics Rule in the Federal Register on November 14, 2000,<sup>55</sup> and it was immediately widely denounced by industry. The regulation was repealed by President Bush on March 21, 2001, when the President signed into law S.J. Res. 6, marking the first time the Congressional Review Act<sup>56</sup> has been put to use.<sup>57</sup> The Ergonomics Rule was repealed because OSHA had failed to establish a sound basis for its sweeping regulatory action and failed to demonstrate that the uncertain benefits of the rule came anywhere close to justifying the tremendous costs to employers, including financial costs of implementation and compliance.

The science underlying OSHA and MSHA regulations is not always submitted to the crucible of *independent* peer review. Thus, agency actions are not always based on the best (or even good) science. In many cases, these agencies inadequately state the actual health and environmental risks involved in their proposed regulations. They sometimes target risks looming larger in their minds than in reality. Public participation in the regulatory process is often not very meaningful.

## IV. QUANTITATIVE REVIEW

Available data on fatalities and injuries, MSHA budget expenditures, and the declining number of mines and miners, all underscore the need for MSHA reform. In a 2001 report, The Heritage Foundation, a conservative think-tank, articulated the case for a dramatic restructuring of the Federal mine safety and health program by such means as elimination of MSHA and absorption of its functions by an enlarged OSHA:

Both the number of American workers involved in mining and the injuries associated with it have declined significantly in recent years, calling into question whether there is any rationale for a separate

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55. OSHA Final Rule on Ergonomics, 65 Fed. Reg. 68,261 (Nov. 14, 2000).

56. Congressional Review Act, 5 U.S.C. §§ 801, *et seq.* (2001). The CRA is Subtitle E of Title II (The Small Business Regulatory Enforcement Fairness Act) of the Contract With America Advancement Act of 1996, Public Law 104-121. Under the CRA, Congress has placed upon itself the responsibility to ensure that regulations promulgated by federal agencies are necessary and accomplish what they are intended to in the most cost-effective and least burdensome manner. Until Congressional review of the Ergonomics Rule, the CRA had not been used to overturn a single regulation in the five years since the law went into effect.

57. Statement by the President, The White House, Office of the Press Secretary (March 20, 2001).

agency dedicated to the safety and health of miners. . . . MSHA is funded at \$228 million in FY 2000 and has over 2,300 employees, about 920 of whom are inspectors. According to government sources, these numbers translate into a ratio of about one inspector for every four coal mines and every 41 metal/nonmetal mines. In contrast, OSHA received \$382 million in FY 2000 and has around 1,240 inspectors enforcing health and safety standards in over 4.0 million non-mining worksites. Whereas MSHA is required by law to inspect underground mines four times a year and surface mines two times a year, OSHA visits many worksites only once during a ten-year period. Therefore, MSHA spends about \$16,400 per year for every mine under its jurisdiction and over \$638 per year for every miner employed in the industry, while OSHA spends around \$74 per covered worksite and less than \$56 per employee.<sup>58</sup>

The Heritage Foundation asserts that MSHA should be restructured into an office within OSHA, modeled after OSHA's Construction Safety Office. The Heritage Foundation further advocates phasing out the Federal Mine Safety and Health Review Commission and having Mine Act cases adjudicated by the Occupational Safety and Health Review Commission.<sup>59</sup>

#### A. Fatality Data

Since the 1970s, fatalities, injuries and illnesses in the U.S. have dramatically declined. Based on the Department of Labor's Bureau of Labor Statistics ("B.L.S.") *Census of Fatal Occupational Injuries* ("C.F.O.I."), from 1970 to 1999, American workplace fatalities have been reduced from an estimated 13,800 to 6,023. Mining fatalities during the same period have been lowered from approximately 600 to 121. From 1970 to 1999, the overall American workplace fatality rate dropped from 18 per 100,000 workers to approximately 5.5 per 100,000 workers.

Occupational fatalities by industry in 1999, based on the B.L.S.'s 1999 C.F.O.I., placed mining at approximately 2% of fatalities, behind construction (20%), transportation (17%), service (12%), agriculture (13%), manufacturing (12%), retail trade (8%), government (9%), and wholesale trade (4%). Thus, in terms of the actual numbers of fatalities experienced, these other industrial sectors are all more dangerous than mining. Average mining employment in 1999 (about 535,400 employees, including oil and gas extraction workers) accounted for only .5% of all industry employment. Because of the relatively low number of miners employed, the 1999 mining fatality rate of about 22 per 100,000 employ-

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58. HERITAGE FOUNDATION, *supra* note 42, at 245 (2001).

59. *See id.*

ees was high. Nevertheless, the numbers of mining fatalities are still low compared to the rest of industry.

The improving conditions in the U.S. mining industry were testified to by Joseph A. Main of the United Mine Workers of America. Main's testimony paints a picture of dramatically improved working conditions by noting that in the 30-year period prior to the enactment of the Federal Coal Mine Health and Safety Act of 1969, 19,144 miners were killed in the nation's coal mines. In the 30-year period following enactment of the 1969 Coal Act, there were 86% fewer coal mining deaths. In the metal/nonmetal mining industry, 3,889 deaths were recorded in the 23-year period prior to the Federal Metal and Non-Metallic Mine Safety Act of 1966; in the same period following passage of the Metal and Non-Metallic Mine Act, there were 40% fewer deaths.<sup>60</sup>

### B. Injury/Illness Data

Since the early 1970s, the U.S. non-fatal occupational injury and illness rates have also declined. According to the B.L.S.'s *Survey of Occupational Injuries and Illnesses* for the years 1995-1999, the total injury/illness rate for private industry per 100 full-time workers declined during the period 1995 to 1999 from 8.1 to 6.3. The mining incidence rate during that same period fell from 6.2 to 4.4.

Mining also compared well to other important industrial sectors in the period 1995-1999. In sum, these data show that fatalities, injuries, and illnesses in mining have greatly decreased. Since the early 1970s, the fatality rate in mining has fallen nearly 75% and the injury/illness rate has dropped by one-third in the past five years.

### C. Employment Data

The numbers of mining operations and miners employed have drastically declined since 1970, yet MSHA's budget and personnel have continued to remain at both steady and high levels. In a February 1996, speech at a Washington mining safety and health workshop, Representative Cass Ballenger (R-NC), who has introduced important OSHA and MSHA reform bills, emphasized the economics of regulation. He noted that in 1977, when MSHA was started, there were 20,000 mines subject to the Mine Act, employing nearly 500,000 miners. In 1995, those numbers had dropped to 14,000 mines and 370,000 miners (including a 40% reduction in underground mines). Most recent figures available (for 1998) show that these numbers have continued to decrease: 13,876 aver-

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60. *A Review of Mine Safety & Health: The State of the Industry Today: Hearing Before the House Subcomm. on Workforce Protections, Comm. on Educ. and the Workforce*, 107th Cong. (Sept. 14, 2000) (statement of Joseph A. Main, Administrator, Dept. of Occupational Health and Safety, United Mine Workers of America).

age total active mining operations and 357,315 average number of miners working at active mining establishments.<sup>61</sup> Yet MSHA's budget and personnel have grown and continue to grow. When these factors are considered together with the striking success in reducing fatalities and injuries in mines, discussed above, seeking continuing improvement through new directions in the character, cost-effectiveness, and methods of regulation is both a rational and timely enterprise.

#### D. *Lack of Direct Correlation Between Cited Standards and Causes of Accidents*

The top-cited standards under the Mine Act do not necessarily correlate well with the leading causes of injuries and fatalities. In recent years, the most frequently cited MSHA standards address combustible accumulations (coal mining) and guarding (metal/nonmetal mining). Neither of these areas are the leading sources of most fatalities, injuries, and illnesses. In coal, the leading cause of fatalities is fall of roof or back and powered haulage; in metal/nonmetal, the leading cause of fatalities is powered haulage. The leading cause of non-fatal injuries in coal and metal/nonmetal is handling of materials.<sup>62</sup> Moreover, the lack of significant analysis as to whether compliance with the frequently cited standards could have prevented particular accidents or illnesses makes judging actual effectiveness difficult.

### V. LEGISLATIVE AND REGULATORY REFORM: PROSPECTIVE AND POLITICS

Regulatory reform continues to be a major focus of attention on Capitol Hill. To date, however, legislative success has largely eluded proponents of reform. President Clinton had threatened to veto any measures that would, in his Administration's view, compromise workers' safety and health protection. However, with the Bush Administration demonstrating a new openness toward regulatory reform, the chances for enactment of a major reform bill seem to be looking brighter. Given the number of serious proposals on various Congressional tables in the past and a fair amount of bipartisan support for *some* form of regulatory improvement, it is likely that reform initiatives will be advanced and some reform measure will be seriously considered.

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61. Statistics obtained from National Mining Association website, *Summary of Selected U.S. and World Mining Statistics*, <<http://www.nma.org/SMB%20intlsummary.pdf>>.

62. Based on accident classification statistics from MSHA for FY 1999 and FY 2000, MSHA, *Mine Injury and Worktime Quarterly Statistics*, <<http://www.msha.gov/ACCINJ/ALLMINES.HTM>>.

### A. *Testimony in Congressional Oversight Hearings*

Even in the waning months of the Clinton Administration, Congress demonstrated its increased interest in reforming the Mine Act and MSHA by holding oversight hearings. On September 14, 2000, the U.S. House of Representatives Committee on Education and the Workforce, Subcommittee on Workforce Protection, held a hearing at which representatives of industry, labor and the agency testified. Representatives of industry articulated a common goal of moving toward regulatory reform and a less onerous enforcement environment.<sup>63</sup> One of the suggested reforms included discarding the current system of mandated “twos and fours” inspections and, instead, focusing the inspection resources on those mines whose safety records demonstrate a need for on-going enforcement oversight (i.e., a targeted enforcement model more similar to that utilized by OSHA). A novel approach to enforcement was suggested by L. Joseph Ferrara, Esq., former General Counsel of the Review Commission, in the concept of development of a class of minor violations and eligibility criteria that would designate “abatement-only” status to violations, avoiding the need for the oftentimes onerous paper enforcement action and penalty, especially the excessive history criteria, and the accompanying litigation. Other reasonable, workable reforms suggested included the provision for petitions for modifications of health standards and an increased openness to and acceptance of the use of personal protective equipment, in conjunction with engineering and administrative controls.

## VI. WHAT IS TO BE DONE—NECESSARY REFORMS OF THE SAFETY AND HEALTH LAWS

From all that we have surveyed, the indicated paths of needed change emerge clearly. The U.S. must turn away from the prescriptive, paternalistic, bureaucratic, and punitive models of regulation that the Mine Act and OSH Act encapsulate. What may have worked in the 1970s will continue to be increasingly counterproductive in the 21<sup>st</sup> Century.

In the field of occupational safety and health, impressive strides have been made since the 1970s in reducing accidents, injuries, and illnesses in the American workplace, particularly in mining. Indeed, mining is now one of the safer industrial sectors, judged by those criteria. Certainly, the OSHA and MSHA programs have played a role in this im-

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63. *A Review of Mine Safety & Health: The State of the Industry Today: Hearing Before the House Subcomm. on Workforce Protections, Comm. on Educ. and the Workforce*, 107th Cong. (Sept. 14, 2000) (statement of Bruce Watzman, Vice President, Safety and Health, National Mining Association); *A Review of Mine Safety & Health: The State of the Industry Today: Hearing Before the House Subcomm. on Workforce Protections, Comm. on Educ. and the Workforce*, 107th Cong. (Sept. 14, 2000) (statement of L. Joseph Ferrara, Esq., Jackson & Kelly PLLC).

provement. But it is appropriate to ask whether it is still necessary in the 2000s to employ the hammer of the 1970s. Can *more* be achieved if new methods of regulation are tried?

We suggest the following direction as mining moves into the Third Millennium:

- **Greater industry self-regulation:** In the 21<sup>st</sup> Century, government cannot do it all. Government cannot afford to do it all. If these premises are accepted, then it follows that the private sector should be encouraged to do more through greater self-regulation. This can be accomplished by such tools as development of individualized “plant codes”; safety and health audits by certified private parties as an alternative to government inspection; confidential self-auditing by affected operators that can be carried out without threat of “self-incrimination” or penalization.
- **Greater use of scientific risk assessment, prioritizing of risk-reduction goals, and employment of cost-benefit analysis:** OSHA and MSHA must balance better the societal and economic cost of regulation with anticipated benefits.
- **Greater flexibility in regulation:** The prevailing rigidly prescriptive model should be shifted to a *performance-based* system. The government should pursue improvement through focus on actual outputs and results—not detailed, prescribed schemes of achieving those results.
- **Independent peer review:** Risk assessments and the claimed scientific bases for regulations should be subjected to independent *peer review* so that proposed regulation is based on the *best available science*.
- **Incentives rather than punishment:** There must be far greater emphasis placed on providing *incentives* for improved performance and a de-emphasis on the punitive philosophy that animates the present Acts. This can take forms such as government consultation, assistance and training to achieve better results—rather than punishment through penalties. At the governmental inspection level, a history of good performance should lead to lessened government intrusion. (On the flipside, such an approach would mean that government could better focus its attention on the most problematic enterprises and scofflaws.) Violations, if not serious or repeat, should trigger prompt correction, not penalties.

- **Jettisoning strict liability in the Mine Act:** The Mine Act should proceed on a fault-based system, where the highest levels of operator achievement are rewarded. The mine operator should be responsible for putting forth its best efforts to achieve results, but should not be held accountable for every unavoidable, unpredictable incident.

To accomplish much of this reform in the mining arena, the Mine Act must be legislatively overhauled in dramatic fashion. Its present rigidity is blocking creative avenues for further improvement.

#### CONCLUSION

There is growing pressure in the U.S. to alter the predominant regulatory model. This seems particularly appropriate in the occupational safety and health field. The mining industry is contracting and consolidating. American industry as a whole faces increasingly vigorous world competition. Resources available for the public sector are constrained as never before. The enlightened American business has learned that poor safety and health practices, and the attendant losses, can spoil the bottom line.

The stern parental government must relax its grip on responsible industry participants and reserve its “stick” for woodshedding those who demonstrate unwillingness to achieve expected and realistic results. It is also likely that the regulatory agency of the future will have to make its case more convincingly that its regulations stem from reliable and prioritized risk assessment, have been subjected to the crucible of cost-benefit analysis, and are founded on “good” science.

As we await the next batch of regulatory reform bills to be proposed in Congress, it is good to consider what lies on the horizon. The answer to this paper’s topic is, we suggest, that the Mine Act is in need of substantial reform in order to enable regulation of the mining industry to age gracefully while at the same time bringing the U.S. enforcement model into the 21<sup>st</sup> Century.