

STUDENT COMMENTS

MINE SAFETY LEGISLATION: A HISTORY OF NEGLECT

There has been much controversy in recent months over the necessity for new federal coal mine health and safety legislation. The catalyst for this interest was the explosion of Mountaineer No. 9 mine on November 20, 1968, at Farmington, West Virginia, after which the mine's 78 victims were sealed inside to prevent further ignitions.¹ It was the type of incident which history shows has always been necessary to elicit inquiry into the effectiveness of the nation's mining laws.

It is the purpose of this comment to investigate the adequacy of present state and federal mining laws and to advance the basic proposition that strong federal legislation is required to establish and enforce uniform, mandatory health and safety standards for coal mines. This legislation must have both a remedial and a preventive effect. In order to accomplish both of these purposes, four separate statutory provisions will be necessary in new federal legislation: (1) a national standard for respirable dust levels in all United States coal mines, (2) federal compensation benefits for coal miner's pneumoconiosis or "black lung," (3) mandatory civil penalties for the violation of statutory safety provisions, and (4) the statutory creation of a cause of action in tort in a federal court for injuries occasioned by willful violations of the federal code.

I. THE PRESENT STATE OF THE LAW

At present the primary responsibility for coal mine health and safety resides with the individual states. A chief or director of mines, usually appointed by the governor, directs a staff of inspectors whose duty it is to implement the various state codes.² The power of a state inspector usually includes the right to withdraw men from a mine when in his opinion a dangerous condition exists.³

The federal government traditionally has not actively engaged in the area of mine health and safety. A number of serious coal mine disasters after the turn of the century resulted in the establishment in 1910 of the Department of the Interior's Bureau of Mines, designed to promote health and safety in the mineral industry but not to establish and enforce standards. In 1941, Congress finally authorized federal

¹ See generally Hearings on S. 355, S. 467, S. 1094, S. 1178, S. 1300, S. 1907, S. 2118 and S. 2284 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 91st Cong., 1st Sess., pt. 3, at 880-81 (1969) [hereinafter cited as 1969 Senate Hearings].

² See, e.g., Ohio Rev. Code §§ 4151.04, 4151.06 (1968); Pa. Stat. Ann. tit. 52 §§ 701-103(14), 701-104 (1961); Va. Code Ann. §§ 45.1-3, 45.1-4 (1966); W. Va. Code §§ 22-1-3 to 22-1-4 (1958).

³ See, e.g., Ohio Rev. Code § 4151.34 (1968); Pa. Stat. Ann. tit. 52 §§ 701-121 (1961); Va. Code Ann. § 45.1-5 (1966); W. Va. Code § 22-1-11 (1958).

inspections of coal mines. The scope of these inspections was limited to obtaining information and to making recommendations relative to health and safety. Compliance with these recommendations, however, was not mandatory. After a coal mine explosion killed 111 miners in Illinois in March, 1947, Congress requested that mine operators and state agencies report to the Department of the Interior the extent of their compliance with the Bureau of Mines' recommendations, but continued to impose no penalties for failing to do so.⁴

In 1952, Congress passed the present Federal Coal Mine Safety Act.⁵ For the first time the Department of the Interior was authorized to enforce mandatory standards at underground coal mines, but the Act is encumbered by a serious structural limitation; its standards and prohibitions are designed to prevent only "major disasters,"⁶ those which result in the deaths of five or more men at one time.⁷ Industry statistics reveal that the vast majority of mine mishaps involve less than five fatalities and are classified as "accidents" and not "disasters."⁸

The federal government has been deficient in promoting the cause of industry-wide safety. The frequency of accidents has not been significantly reduced over the past decade.⁹ While the rate of major disasters, which the Federal Act is aimed at preventing, has been reduced,¹⁰ Mountaineer No. 9 is mute testimony that these disasters have not been eliminated.

The Federal Coal Mine Safety Act assigns the Bureau of Mines the function of determining the causes of accidents and occupational disease with a view towards eliminating these causes.¹¹ There is no enforcement power and the only penalty involved is a fine of up to \$500 for not admitting a federal investigator to a mine.¹² Once he has been admitted, the issues of accident and occupational disease prevention are beyond federal enforcement power since his capacity is purely advisory. Although under the section of the Act which is aimed at preventing major disasters compliance with the federal inspector's order is mandatory,¹³ the maximum penalty for non-compliance is only \$2,000 and has never been levied.¹⁴ While a federal inspector is em-

⁴ 115 Cong. Rec. 2249-50 (daily ed. Mar. 4, 1969) (introduction statement of Russell E. Train, Under Secretary of the Interior, on S. 1300).

⁵ 30 U.S.C. §§ 451 et seq. (1964).

⁶ 30 U.S.C. §§ 471-83 (1964). From the creation of the Bureau of Mines in 1910, until 1952 when the present act was passed, statistics show that 7,301 miners were killed in 333 major disasters. 115 Cong. Rec. 2250 (daily ed. Mar. 4, 1969).

⁷ See 1969 Senate Hearings at 450, 520.

⁸ For example, in 1968, 221 of the 309 fatalities were recorded as being caused by accidents not covered by the provisions of existing law. *Id.* at 520.

⁹ From 1960 through 1968, the frequency of fatality accidents per million man hours has actually increased from 1.15 to 1.28. *Id.* at 710.

¹⁰ *Id.* at 516, 613.

¹¹ 30 U.S.C. § 451 (1964).

¹² 30 U.S.C. § 454 (1964).

¹³ 30 U.S.C. §§ 473, 480 (1964).

¹⁴ 30 U.S.C. § 480 (1964). In a letter of March 23, 1968, to Stewart L. Udall,

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powered to require men to be withdrawn from an area in which he finds that an imminent danger exists,¹⁵ only one annual federal inspection is required for each mine.¹⁶ One inspection per year will probably not adequately disclose the existence of dangerous conditions which are naturally continuous or recurring.

The present Federal Act also contains a system of arbitrary mine classification based on a mine's potential for explosion.¹⁷ Under the mining codes of virtually every coal producing state, a mine in which the atmosphere at the working face is found by analysis to contain less than 0.25 of 1 per cent of methane gas qualifies as a "non-gassy" mine.¹⁸ In practical effect, this classification allows the operator of such a mine to use less expensive "non-permissible" equipment in that mine.¹⁹ However, in the course of using this more dangerous machinery, a pocket of methane gas may be released and a serious risk of explosion created.²⁰ Since 1952, 27 miners have been killed by 52 gas ignitions in "non-gassy" mines.²¹ The distinction between "gassy" and "non-gassy" mines is an artificial one which has been inspired by economic expediency,²² but it is nonetheless still recognized in the present Federal Act.²³

The most noteworthy deficiency in the Federal Coal Mine Safety Act and in the various state mining statutes is the lack of a mandatory maximum respirable dust level to be observed in coal mines. Such a standard should be imposed nationally on all mines. Such uniformity is only possible through the enactment of federal legislation.

II. A MANDATORY DUST STANDARD

Whereas coal mining creates many safety hazards,²⁴ it presents but one dominant health hazard which arises from the inhalation of coal dust. In many cases breathing this dust results in the pulmonary

Secretary of the Interior, Ralph Nader asserted that no penalty had ever been assessed in the 15 year history of the Act. 1969 Senate Hearings at 1344.

¹⁵ 30 U.S.C. § 473 (1964).

¹⁶ 30 U.S.C. § 472 (1964).

¹⁷ 30 U.S.C. § 479(b) (1964).

¹⁸ See, e.g., Pa. Stat. Ann. tit. 52 §§ 701-103(7), (8) (1961); Va. Code Ann. §§ 45.1-2(23), (24) (1966); W. Va. Code § 22-2-1(16) (Supp. 1969).

¹⁹ "Nonpermissible" equipment, basically, does not meet the U.S. Bureau of Mines' standards for spark inhibition. For a discussion of the economics of this situation see 1969 Senate Hearings at pp. 884-912.

²⁰ *Id.* at 1183.

²¹ *Id.* at 893.

²² Two facts highlight this artificiality: (1) since 1941 there has been a total of 1,126 mine fatalities due to fires and explosions. Of this number 23% have occurred in "non-gassy" mines, and (2) under a "grandfather clause" in most statutes, non-permissible equipment may be kept in use until inoperative, *even when a mine is subsequently classified as "gassy."* *Id.* at 900-01.

²³ See, e.g., 30 U.S.C. § 479(b) (1964).

²⁴ The threats to safety fall into five general categories: roof falls, methane gas and coal dust explosions, haulage accidents, electrical mishaps and machinery accidents. Together, these causes accounted for 93% of all mining deaths in 1968. 1969 Senate Hearings at 450.

disease known as coal miner's pneumoconiosis, more commonly referred to as "black lung" disease.²⁵ It is progressive in nature and often leads to total disability. According to an estimate by the United States Surgeon General, it presently affects more than 100,000 bituminous coal mine workers.²⁶

Not all of the medical facts are as yet known about pneumoconiosis, but the essentials of cause and effect are understood. The dust level in most United States mines is very high and the problem has been compounded by the introduction of continuous mining machinery into the industry in the 1950's. It has also been demonstrated that if this dust level is controlled, so also is the incidence of the disease. The cause of "black lung" is dust and the cure is dust control.²⁷

The United States is the only major coal producing nation which does not have an official government standard for coal mine dust. The United States Public Health Service suspected adverse effects from coal dust inhalation as early as 1952, but it was not until a study of the prevalence of coal worker's pneumoconiosis in the miners of Appalachia was completed in 1965, that substantive evidence of health effects was made available.²⁸ This study related the prevalence of the disease to years of employment in the mine, but it could not be related to coal dust concentration because data on contemporaneous dust levels was not available. Thus, the level of coal dust exposure resulting in the disease remains unknown. However, it is understood that exposure over a number of years produces progressively adverse effects.²⁹

The British experience in preventing "black lung" has been progressive. Isolated by the British in 1942, pneumoconiosis became a compensable illness in the following year.³⁰ In 15 years of mandatory dust control in Great Britain, the incidence rate among bituminous coal miners has been reduced from twelve to slightly over one new case per thousand.³¹ The British spend large sums of money on dust research, ten million dollars in 1967 alone. By way of contrast, the United States has spent only four and one-half million dollars in the last *five* years.³² For undetermined reasons there has been general reluctance on the part of those associated with the American coal mining industry to accept the validity of the British findings. This reluctance is reflected in the present condition of the mining laws, both state and federal.

²⁵ Coal miner's pneumoconiosis is a progressive pulmonary disease resulting from the inhalation of coal dust particles. It often leads to progressive disability and death. *Id.* at 720.

²⁶ *Id.* at 729.

²⁷ "There is no specific therapy for pneumoconiosis in either its simple or complicated form. Adequate environmental dust controls . . . appear to be, under present technology, the only helpful preventive procedures." See statement of Dr. William H. Stewart, Surgeon General, Public Health Service, 1969 Senate Hearings at 720.

²⁸ *Id.* at 574.

²⁹ *Id.* at pp. 574, 575.

³⁰ *Id.* at 671.

³¹ *Id.* at 663.

³² *Id.* at 668.

In December, 1968, the Secretary of Health, Education and Welfare recommended to the Department of the Interior a federal permissible respirable dust level for United States coal mines.³³ This standard called for a level not to exceed 3.0 milligrams per cubic meter.³⁴ It is an interim standard but, based on the present state of knowledge, this standard would significantly reduce the rate at which new cases of pneumoconiosis would develop in the future and old cases would progress.³⁵ The imposition of such a standard must be considered an essential feature of any new federal legislation. Legislation not containing such a standard would be totally unresponsive to the greatest health hazard in coal mining.

Nevertheless, the effectiveness of this suggested dust standard is somewhat unclear due to the difficulty of converting the British dust research data into quantities measureable by the standard instruments used in United States mines.³⁶ This fact raises an interesting and relevant policy question. Since standards will in all probability require revision from time to time, given the changing nature of production technology, should the Secretary of the Interior be authorized to effect such revision by simply promulgating new regulations, or, as in the case of the present Federal Act should such changes require separate statutory enactment?

The requirement for separate statutory enactment of revised standards is in large measure responsible for the present ineffectiveness of federal legislation. Because of the necessary expenditure of time and money, needed revisions in the form of new legislation have generally not been made. Thus, the Department of the Interior has been prevented from developing new responses to minimize the risks inherent in changing mining methods. The present Federal Act was passed in 1952, a year when new, highly mechanized forms of mining apparatus, such as the continuous mining machine,³⁷ were just coming into use. The introduction of this machinery greatly increased the hazards of roof falls and methane gas explosions. It also increased the

³³ Id. at 722.

³⁴ There is no statistical indicator of present dust levels in United States coal mines. But, in the opinion of Dr. I. E. Buff, Chairman, Committee of Physicians for Miners' Health and Safety, Charleston, W. Va., it is quite high: "You talk about dust standards. You know it makes me smile sometimes the way you talk about 3 milligrams and about 4 and one-half milligrams. My lord, in some of those mines it is 300 milligrams. You can't see a foot ahead of you." 1969 Senate Hearings at 642.

The testimony of Dr. Donald Rasmussen, Appalachian Regional Hospital, Beckley, W. Va., is similar: "In the vast majority the dust in the mines, particularly at the working face, is so dense, as Dr. Buff said, that one may not see his hand extended in front of him two or three feet away. . . . I do not believe the Bureau of Mines has dust measurements under these conditions nor do I believe industry has any that would be published." Id. at 660.

³⁵ Id. at 724.

³⁶ For a complete discussion of the conversion problem, see 1969 Senate Hearings at 733-50.

³⁷ The continuous miner is about 25 feet long and 7 feet wide. In one basic operation it can perform the tasks of cutting, drilling, blasting and loading. It is capable of digging and loading up to four tons of coal a minute.

health hazard caused by the excessive liberation of dust particles. But from that year, in which new risks were accumulating so rapidly, until the present time, there has been no significant change in the federal statute.³⁸

Flexibility of response is essential to the effectiveness of any new legislation,³⁹ particularly in the area of dust control where so much research is needed. The industry's criticism that such flexibility invests the Secretary of the Interior with the power to impose arbitrary standards which the industry would have to meet on short notice is without merit.⁴⁰ It would be an easy matter to provide legislatively for some form of administrative review or advisory board, representative of all interests, before which orders of the Secretary could be challenged. Also, there should be a provision in a new federal act for ultimate judicial review of agency actions.

Mine health and safety technology lags far behind the state of concurrent production technology.⁴¹ This creates an inherently dangerous situation which is aggravated by freezing existing safety standards into statutory law. An effective federal code should allow the utilization of new technology to serve the cause of health and safety, particularly in the area of dust control, by requiring the implementation of standards which have been formulated to solve contemporary problems, not problems as they existed twenty years earlier. Legislation allowing flexibility in standards will have the ultimate effect of promoting the development of new technology to eliminate existing dangers such as dust inhalation.

III. COMPENSATION FOR PNEUMOCONIOSIS

Federal legislation concerning coal mine health and safety must have a remedial as well as a preventive effect. The present Federal Coal Mine Safety Act provides no legal remedy for pneumoconiosis. A new federal act must provide such a remedy to be effective. Legislation relating to compensation for claims growing out of the occupation is generally a matter of state concern, but at the present time only four of twenty-seven coal producing states compensate the victims of coal miner's pneumoconiosis.⁴² Of these four, West Virginia only began compensation coverage as recently as July 1, 1969.⁴³

³⁸ On March 26, 1966, Pub. L. No. 89-376, 80 Stat. 84 was enacted. Its only effect was to remove the existing exemptions from regulation of coal mines which employed no more than 14 individuals underground. It amended §§ 471-73, 475-77, 480 and 482 of 30 U.S.C. (1964).

³⁹ Flexibility of response has ample statutory precedent. Among other federal acts which vest regulatory power in the agency itself are: the National Traffic & Motor Vehicle Act of 1966, 15 U.S.C. §§ 1381 et seq. (Supp. IV, 1969); the Federal Food, Drug and Cosmetic Act of 1938, 21 U.S.C. §§ 301 et seq. (1964); the Aviation Act of 1958, 49 U.S.C. §§ 1301 et seq. (1964) and; the Natural Gas Pipeline Act of 1968, 49 U.S.C. §§ 1671 et seq. (Supp. IV, 1969).

⁴⁰ For general discussion of this issue, see 1969 Senate Hearings at 541-71.

⁴¹ *Id.* at 538.

⁴² See, e.g., Ala. Code tit. 26 § 313(1) (1958); Pa. Stat. Ann. tit. 77 § 1401 (1965); Va. Code Ann. § 65.1-47 (1968); W. Va. Code § 23-4-1 (Supp. 1969).

⁴³ W. Va. Code § 23-4-1 (Supp. 1969).

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"Black lung" is not compensable in 23 mining states because of a long-standing reluctance on the part of the mining industry, its physicians, the Bureau of Mines and state legislators to accept the validity of the British findings.⁴⁴ In the early 20th century silica dust was considered the only important pulmonary threat in mining and silicosis the primary occupational disease.⁴⁵ But British investigators continued their studies of pulmonary aberrations thought to be associated with coal dust, and in 1927 were reporting X-ray differences between silica and coal dust exposure. In 1934 limited workmen's compensation awards were available to British coal miners disabled by silicosis.⁴⁶ But the number of men receiving these awards was but a small percentage of all the miners with pulmonary disability because this disability, although acknowledged, was not traceable to silicosis.⁴⁷ Concern with the inequity of this situation prompted the British Medical Council, in 1937, to initiate intensive research which ultimately led to the isolation of coal worker's pneumoconiosis as a separate disease. In 1943 it was made compensable along with silicosis.⁴⁸

The compensation laws in 23 of our coal mining states are at the same stage as the British compensation laws were in 1934. Consequently, in these states a miner who is suffering from "black lung" and seeks compensation for it must display medical evidence of silicosis, from which he is in fact not suffering. Thus, there is no remedy for pneumoconiosis, *per se*.

Coal worker's pneumoconiosis is recognized as a compensable disease in Pennsylvania, Virginia, Alabama and West Virginia. Unfortunately, many inequities still exist in the formulation and administration of these compensation statutes. For example, the West Virginia statute does not provide benefits for victims of "black lung" who were forced to cease work before the effective date of the Act, July 1, 1969.⁴⁹ This is because workmen's compensation is judicially held to be a contractual relationship between employer and employee,⁵⁰ and a retroactive application of a new statute would unconstitutionally impair the obligation of the contract⁵¹ formed between the miner and the employer under the old act which did not cover pneumoconiosis.⁵² The basis for objection is that the retroactive claim would be paid from a fund to which the employer had contributed under the old act. Of course, if the claim were paid out of state general revenues, that basis for objection would no longer exist. If these retroactive claims

⁴⁴ For the history of providing compensation for this disease, see 1969 Senate Hearings at 669-94.

⁴⁵ *Id.* at 671.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ W. Va. Code §§ 23-4-1 et seq. (Supp. 1969).

⁵⁰ See *Gooding v. Ott*, 77 W. Va. 487, 87 S.E. 862 (1916).

⁵¹ See *Maxwell v. State Compensation Director*, 150 W. Va. 123, 144 S.E.2d 493 (1965).

⁵² See *State v. Pennybacker*, 131 W. Va. 442, 48 S.E.2d 9 (1948).

are not paid in West Virginia, the inequity will remain for as long as the last miner, disabled by "black lung" and unable to collect some form of compensation, survives.

Inequities also arise through the operation of statutes of limitations barring recovery by "black lung" victims. As previously described, the disease is progressive.⁵³ For example, simple pneumoconiosis, which often causes no disability, always precedes progressive massive fibrosis which is the terminal form of the affliction. But once the simple form of the disease has been contracted, *with or without ensuing disability*, disabling fibrosis may yet appear long after the miner has left the mining industry. The development of this fibrosis seems to be independent of additional dust exposure once a certain degree of simple pneumoconiosis has been reached.⁵⁴ Thus, the statute of limitations should only begin to run from the time that a disabling form of the disease manifests itself and is diagnosed as such. This, however, is not the case in any of the four states which recognize the existence of "black lung."

Under the Pennsylvania occupational disease statute, prior to its amendment in 1965, compensation for this disease was payable for death or total disability, defined as the inability to do *light* work, and such total disability must have occurred, "within four years after the date of his last employment in such occupation or industry."⁵⁵ Such a provision was unduly restrictive in view of the facts that total disability from progressive massive fibrosis may occur at *any* time after acquiring simple pneumoconiosis, and that this simple form of the disease is rarely disabling to the point of preventing one from doing light work.⁵⁶

⁵³ Physicians classify coal miner's pneumoconiosis as simple or complicated, depending upon the degree of evidence in the X-Ray picture. In the simple form pinpoint, micro-nodular or nodular lesions distributed throughout the lungs show up in the X-Ray picture. The physician decides the so-called radiological category of simple pneumoconiosis on the basis of the extent of the opacities.

There are no specific symptoms and pulmonary function tests seldom enable the physician to say whether or not the patient has the disease. It is generally accepted by physicians that simple pneumoconiosis seldom produces significant ventilatory impairment, but, the pinpoint type may reduce the diffusing capacity, the ability to transfer oxygen from the lungs into the blood.

Complicated pneumoconiosis is a more serious disease. The patient incurs progressive massive fibrosis as a complex reaction to dust and other factors, which may include tuberculosis and other infections. The disease in this form usually produces marked pulmonary impairment and considerable respiratory disability. Such respiratory disability severely limits the physical capabilities of the individual, can induce death by cardiac failure, and may contribute to other causes of death.

Statement of Surgeon General, 1969 Senate Hearings at 720.

⁵⁴ "Once it gets into the lungs it is progressive If a man leaves a mine 10 years later it affects him. He gets short of breath, he develops the emphysema, he develops the right heart failure and out he goes." Statement of Dr. I. E. Buff, 1969 Senate Hearings at 641.

⁵⁵ Pa. Stat. Ann. tit. 77 § 1401 (1965).

⁵⁶ See *supra* notes 9 and 10.

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The Pennsylvania legislature amended the statute in 1965, in an attempt to eliminate these obvious inequities. Individuals who could not qualify under the "basic act," i.e., that subject to the statute of limitations and its total disability provisions,⁵⁷ can now receive \$75 per month for life if they are presently totally disabled and can trace their disability to the disease.⁵⁸ However, requiring total disability, thus defined, remains a harsh provision under any circumstances. Being relatively limited by education and experience in his alternatives for employment, a miner in Pennsylvania becoming only partially disabled from "black lung" nevertheless cannot establish a claim under any circumstances even though such partial disability might prevent him from continued employment as a miner.

Virginia, Alabama and West Virginia, while not imposing the requirement of total disability, do impose definite statutory periods within which claims must be brought.⁵⁹ These statutes are also inconsistent with the present state of medical knowledge concerning the nature of the disease.

Virginia now requires death or disability to occur within one year after a diagnosis is communicated to the employee or within five years after the date of the last injurious exposure to the disease in employment, whichever occurs first.⁶⁰ Thus, this statute imposes an effective five year limitation upon claims. After this period has run, no compensation, even for subsequent total disability, is available. The statutes of limitations of the West Virginia and Alabama occupational disease acts are three years⁶¹ and one year,⁶² respectively.

Present state statutes dealing with "black lung" disease are inadequate for two reasons. The primary deficiency is the unavailability of compensation for pneumoconiosis in the majority of mining states. The secondary problem is that even in the states that do provide coverage, the applicable statute of limitations may effectively bar recovery.

It is submitted that any federal health and safety legislation must serve a remedial as well as a preventive function. It must therefore include compensation provisions subject to a statute of limitations which begins to run only when a competent medical diagnosis of any disabling form of the disease has been communicated to the disabled miner. In addition to federal payments, Congress should authorize grants through the Secretary of the Interior to provide incentives to states for developing their own workmen's compensation programs. The present fed-

⁵⁷ See, e.g., Pa. Stat. Ann. tit. 77 § 1401(c) (1965).

⁵⁸ See Pa. Stat. Ann. tit. 77 § 1401(i) (1965). The present Pennsylvania basic act requires that a claimant, in order to avail himself of the basic claim of \$12,750 paid at the rate of \$60 per week, must become totally disabled within four years of his last exposure. However, if he exceeds the statute of limitations, this section allows him to receive \$75 per month for life from whatever time he does become totally disabled.

⁵⁹ See, e.g., Ala. Code tit. 26 § 313(10) (1958); Va. Code Ann. § 65.1-52 (1968); W. Va. Code § 23-4-15 (Supp. 1969).

⁶⁰ Va. Code Ann. § 65.1-52 (1968).

⁶¹ W. Va. Code § 23-4-15 (Supp. 1969).

⁶² Ala. Code tit. 26 § 313(10) (1958).

eral law contains neither subsidy payments to states nor compensation to miners. Although the initial cost of such a federal program would be undoubtedly substantial, the financial burden would be of limited duration because the implementation of a mandatory dust standard could eliminate the high incidence of "black lung" in little over a decade.⁶³

IV. THE IMPOSITION OF MANDATORY PENALTIES

No health and safety legislation can effectively serve a preventive function unless it imposes mandatory civil penalties for its violation. The present Federal Coal Mine Safety Act authorizes no mandatory penalties. Under most state statutes the violation of a statutory provision is a misdemeanor and is punishable by fines ranging from \$10 to \$500, jail sentences of up to one year, or both.⁶⁴ Any fines authorized under the present Federal Act and the state codes are left to the discretion of the inspector or the state mining authority.

Some statutory violations by mine operators create hazards so severe that the mere fact of the violation should demand the assessment of a penalty. An operator who allows unsafe equipment to be used in his mine should not merely be permitted to remove this equipment pursuant to a mine inspector's order; he should be fined for allowing the condition to exist, and the fine should not be at the discretion of the inspector. Any discretion should be vested in the Secretary of Interior and should not be exercised until *after* the penalty has been assessed. He could be given the power to compromise the penalty after considering the amount of the penalty, the appropriateness of the penalty to the size of the business of the operator charged, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance. Bills have been submitted to Congress requiring heavy, mandatory civil penalties, some as high as \$20,000,⁶⁵ for health and safety violations by a mine operator.

The effectiveness of these provisions will be limited, however, since enforcement requires the presence of a federal inspector in the mine when a violation exists. Considering that present federal law requires that a mine be inspected only once a year⁶⁶ and that the most demanding of the proposals submitted to Congress sets a minimum of only three inspections per year,⁶⁷ the limited prevention possibilities which even severe penalties afford is clear.

An effective federal inspection would necessitate policing about

⁶³ See 1969 Senate Hearings at 1025-26, and Hearings on H.R. 4047, H.R. 4295 and H.R. 7976 Before the General Subcomm. on Labor of the House Comm. on Education and Labor, 91st Cong., 1st Sess., at 315 (1969).

⁶⁴ See, e.g., Pa. Stat. Ann. tit. 52 §§ 701-03 (1966); Va. Code Ann. § 45.1-33 (1967); W. Va. Code § 22-2-78 (1966).

⁶⁵ See S. 1094, 1969 Senate Hearings at 84.

⁶⁶ 30 U.S.C. § 472(a) (1964).

⁶⁷ See S. 1300, 1969 Senate Hearings at 198.

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6,000 coal mines presently active in the United States.⁶⁸ While the most effective inspection system would require a permanent inspector in *every* mine, the cost would be prohibitive. Even adequate inspections on a periodic basis would be extremely costly. Therefore, it is submitted that these funds might be put to better use by the Bureau of Mines in advancing the state of research with regard to dust control, roof support and gas detection. Thus, federal enforcement through inspection would seem to be of limited effectiveness and other enforcement methods must also be utilized.

V. A FEDERAL CAUSE OF ACTION IN TORT

Since most of the money spent in coal mining research has been used to develop new production techniques,⁶⁹ and since proportionately less money has been spent on the lower priority of health and safety, the present laws are based on an outmoded technology. Nevertheless, there is widespread belief throughout the mining industry that, if the present state and federal mine safety statutes were strictly enforced, death and accident rates in coal mines would be significantly reduced.⁷⁰

The most effective approach to the enforcement of health and safety legislation is to make the wrongdoer, in this case the mine operator, pay his victim for the injuries inflicted. But under the provisions of all state workmen's compensation statutes as judicially construed, the employer cannot be held liable in a tort action instituted by his victim.⁷¹ Removing this disability would greatly aid the enforceability of coal mine health and safety legislation.

The purpose of workmen's compensation statutes is to effect a compromise between employer and employee in apportioning damages for personal injuries suffered by the employee. The employee surrenders his right to bring an action at law against his employer and agrees to accept as compensation for his injuries a sum limited by statute. The employer surrenders any right to a defense based on contributory negligence, assumption of risk and the fellow servant rule, but he is relieved of liability to the employee for damages which in an ordinary negligence case he might otherwise be liable for to a greater extent. The only issue to be determined in a compensation proceeding is whether or not the claimant suffered the injury *by accident* in the course of his employment. Thus, the purpose of compensation laws is to provide payment for accidental injuries incurred in the course of employment without regard to the negligence of the parties.

⁶⁸ See 1969 Senate Hearings at 489.

⁶⁹ See 1969 Senate Hearings at 640. Dr. I. E. Buff maintains that the federal government expended \$63,000,000 in coal research for new markets in 1969 and less than \$1,000,000 for coal dust control.

⁷⁰ For instance, in 1965, 88% of the fatalities that occurred in Virginia mines resulted from noncompliance; in 1966, 80%; in 1967, 87½%, and in 1968, 91.7%. See 1969 Senate Hearings at 1191.

⁷¹ See, e.g., W. Va. Code § 23-2-6 (1966); Ala. Code tit. 26 § 272 (1958); Va. Code Ann. § 65.1-40 (1968); Ky. Rev. Stat. § 342.015 (1956).

Workmen's compensation statutes may reduce an employer's observance of health and safety statutes because they have the effect of giving the employer immunity from actions in tort even if his actions seem more intentional than negligent. One expert observed:

My experience in the West Virginia and Pennsylvania coal-fields leads me to the inescapable conclusion that the main factor which has led to the deplorable conditions in and around the mines is the fact that employers are effectively immune from suit under most State compensation acts and *they are not liable for even the most callous disregard for the health and safety practices.*⁷² (Emphasis added.)

The employer receives this blanket immunity for a relatively small investment.⁷³ Awards are paid from a fund, invested and administered by the state, into which each employer simply pays premiums depending upon the size of his work force and his accident experience.⁷⁴ While it might be argued that preservation of a low accident record might be sufficient reason for an employer to run a safe mine, the argument fails for two reasons: first, the amount assessed on the basis of a poor record will not approach what might be demanded as tort damages, and, secondly, even with a careless and unsafe operation a mine owner might continue to operate for many years without an unusually high incidence of accidents while the fact would remain that he was courting a major disaster because it was more economical to do so. Moreover, merely by contributing his premium the employer enjoys absolute immunity from a direct civil action at law by his employee, even for the most extreme negligence.⁷⁵

Providing such immunity from liability for injuries occasioned by conscious disregard of safety rules or gross negligence with regard to known and published safety standards encourages the continuation of unsafe practices and conditions. It has been maintained that the conscious violation of a safety standard which is the proximate cause of sickness or injury is not an "accident" within the meaning of a workmen's compensation statute. Justice Musmanno of the Supreme Court of Pennsylvania, dissenting in *Hyzy v. Pittsburg Coal Co.*,⁷⁶ stated:

It is not likely that the Legislature, in passing the Workmen's Compensation Act, intended to bar from compensation em-

⁷² 1969 Senate Hearings at 661-62.

⁷³ See, e.g., Ala. Code tit. 26 § 272 (1958); Ky. Rev. Stat. § 342.015 (1956); Va. Code Ann. § 65.1-40 (1968); W. Va. Code § 23-2-6 (1966).

⁷⁴ Procedures vary between states. Some provide for a state administered fund only; some provide for a choice between a private insurer and a state plan, and some permit the employer to be a self-insurer. See, e.g., Va. Code Ann. § 65.1-104 (1968). (Under this section all three options are allowed.) In West Virginia, all premiums are paid into a State compensation fund. W. Va. Code §§ 23-2-1-5 (1966).

⁷⁵ See *King v. Empire Colliers Co.*, 148 Va. 585, 139 S.E. 478 (1927); *Brewer v. Appalachian Constructors*, 135 W. Va. 739, 65 S.E.2d 87 (1951); *Maynard v. Island Creek Coal Co.*, 115 W. Va. 249, 175 S.E. 70 (1934).

⁷⁶ 384 Pa. 316, 121 A.2d 85 (1956).

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ployees who violate safety laws and yet immunize employers from liability in trespass actions when they ignore the same safety laws. If violation of a safety law takes the claimant out of the course of employment, a disregarding of statutory requirements by the employer must remove him from the protection of the Workmen's Compensation law.⁷⁷

Many state mining codes establish a cause of action in tort for death or injury occasioned by an operator's willful violation of, or failure to comply with, a statutory provision.⁷⁸ Even the workmen's compensation laws in several states provide that if death or injury is occasioned by a willful or deliberate intent on the part of the employer to injure the employee, such an injury is outside the scope of the workmen's compensation law and gives rise to an action in tort on an elective basis.⁷⁹ However, courts have consistently construed "deliberate intent" and "willfulness" as meaning more than negligence, however gross or wanton.⁸⁰

Such judicial construction is capable of producing undesirable results in the area of enforcement and should be remedied legislatively. The impediment to effective enforcement created by this judicial construction would be removed by the legislative enactment of a uniform jury instruction defining "willfulness" in health or safety violation cases as follows:

a conscious indifference to a known and correctable inherently dangerous health or safety hazard ignored and not remedied by an employer, i.e. where such injury, disease or death is due to the deliberate intent of the employer . . .⁸¹

⁷⁷ Id. at 320, 121 A.2d at 89.

⁷⁸ See, e.g., Ark. Stat. Ann. § 52.618 (1947); Ill. Ann. Stat. ch. 93 § 28(c) (1947); Ohio Rev. Code § 4155.13 (1968); Wyo. Stat. § 30-141 (1945).

⁷⁹ See, e.g., Wash. Rev. Code Ann. § 51.24-020 (1962) (provides for an action against the employer for any excess of damages over the provisions of the workmen's compensation act); Md. Ann. Code art. 101 § 44 (1957); N. Mex. Stat. § 59-10-7 (failure of an employer to comply with a safety statute which causes an injury—benefits increased by 10%); Mo. Stat. Ann. § 287.120(4) (Supp. 1968) (benefits increased by 15%); Ky. Rev. Stat. § 342.015(a) (1963); W. Va. Code § 23-4-2 (Supp. 1969).

⁸⁰ See *Brewer v. Appalachian Constructors*, 135 W. Va. 739, 65 S.E.2d 87 (1951); *Fryman v. Electric Steam Radiator Corp.*, 277 S.W.2d 25 (Ky. 1955), where it was said that "deliberate intention" implies that the employer must have determined to injure the employee and that where the allegation is that the dangerous condition under which the employees worked was known to the employer, such an allegation is not sufficient to support an action at common law.

See also *Duncan v. Perry Packing Co.*, 162 Kan. 79, 174 P.2d 78 (1946), where the court indicated that the workmen's compensation act includes a *wanton* injury inflicted on the employee by the employer if it arises out of and in the course of the employment.

⁸¹ See 1969 Senate Hearings at A4. (Sample jury instruction is reprinted below.)

(b) This section shall supercede any state legislation granting immunity from common law damages in instances in which injury, disease, or death is due to conscious indifference to a known and correctable inherently dangerous health or safety hazard ignored and not remedied by an employer, i.e. where such injury, disease or death is due to the deliberate intent of the employer.

The issue of whether the employer was guilty of deliberate intention shall be

Such an instruction respects the basic objectives of the workmen's compensation system and preserves employer incentive to observe safety standards since the best precaution against suits for large damages is to run a safe mine.

A federal cause of action in tort, although previously unused in the area of coal mine safety, might prove to be an effective aid in enforcing a new federal health and safety code. Its effectiveness would depend in large measure upon the availability to miners of information concerning their rights under such a statute, and upon the availability of competent legal counsel. Its effectiveness would also depend upon the extent to which an employer is permitted his common law defenses under such a statute. If the injured employee possesses the right to elect between recovery in either tort or workmen's compensation, it would seem reasonable to allow the employer his common law defenses, particularly since the defense of assumption of risk has been losing vitality in the area of employer-employee relations.⁸² However, it may be equally reasonable to place an affirmative duty on the employer to provide his employees a safe place to work, in which case the only issue to be determined would be whether the employee's continuing to work, with or without protest, and with knowledge of his employer's failure to correct an unsafe condition, constituted contributory negligence.

A viable common law right of recovery requires the elimination of the fellow servant rule which bars recovery from the employer if the injury was caused, even partially, by the negligence of a fellow

determined by a jury, in the following manner. The following questions shall be submitted to the jury by the trial judge:

1. Whether the employer permitted to exist a condition which was inherently dangerous to his employees, that is, a condition which an ordinary prudent employer, acting under the same or similar circumstances should know would ultimately result in the death, serious injury, or disease, including respiratory ailments, of one or more of his employees.

2. Whether such inherently dangerous condition existed for a sufficient length of time so that an ordinary prudent employer acting under the same or similar circumstances would have or should have known of its existence, and had time and opportunity to correct such condition, and the condition could have been corrected.

If the jury should answer the above two questions in the affirmative, then the jury may conclude that the employer chose to run the risk of death, serious injury, or disease, including respiratory ailments, to his employees rather than to expend the money or take other appropriate measures to correct the inherently dangerous condition and the jury may accordingly find that the employer was guilty of deliberate intention and award such damages as they deem just for any injury, death, or disease, including respiratory ailments, proximately caused by such deliberate intention.

The willful or continued violation of any safety rule or regulation of any federal, state, or other governmental regulatory authority, or any contractual agreement between employer and employee, or their representative, which shall be found by the jury to have proximately caused injury, disease, including respiratory ailments, or death to an employee shall constitute a rebuttable prima facie case of deliberate intention against the employer.

⁸² See *Siragusa v. Swedish Hosp.*, 60 Wash. 2d 310, 373 P.2d 767 (1962).

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worker. This is essential because many industrial accidents are related to minor statutory infractions on the part of fellow miners. Moreover, the elimination of this defense would not be unduly harsh on the employer since a claimant would have the burden of establishing that, standing alone, the negligence of his fellow worker could not have caused the accident without the employer's conscious disregard for safety in allowing a dangerous condition to exist.

CONCLUSION

The history of coal mine health and safety legislation in the United States has been marked by unresponsiveness, apathy and neglect. Despite strong evidence of the deadly effects of coal worker's pneumoconiosis, the disease is compensable by legislation in only a few states. Moreover, far too few resources have been devoted to the development of new safety technology, more healthy working conditions, and better enforcement of existing laws.

The 1969 hearings on new health and safety legislation before the Senate and House of Representatives subcommittees produced evidence indicating that the present deficiency in health and safety legislation is due to a lack of technological development in the area of accident and disease prevention; that the imposition of national health and safety standards would prompt the development of the technology necessary to implement the standards; and that the difficulty of enforcing present state and federal legislation has contributed to the generally poor safety record in the coal mining industry.

There is an urgent need for a strong, federal law which imposes uniform health and safety standards. A mandatory dust standard will prevent new cases of "black lung" from developing. Compensation payments for victims of the disease are necessary to remove the social burden of disabled miners and to provide them with a measure of security and self respect. Mandatory penalties and a right to sue in tort will prompt mine owners to more closely observe health and safety standards. Also, the Secretary of the Interior should be authorized to promulgate binding regulations which would be from time to time updated to keep pace with technological developments in the area of coal mine safety. These measures should be the minimum acceptable to Congress in any new mine health and safety legislation.⁸³

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⁸³ Following the completion of this Comment, mine safety legislation was passed by both houses of Congress. On October 2, 1969, the Senate passed S. 2917, Federal Coal Mine Health and Safety Act of 1969. In relevant part, this bill authorizes: (1) the establishment of an interim dust standard for all United States mines, (2) the Surgeon General and the Secretary of the Interior to promulgate health and safety standards, (3) civil penalties up to a maximum of \$25,000 per violation, (4) limited, short term compensation benefits for totally disabled miners, and (5) the appropriation of funds for health and safety research in the amounts of \$20,000,000 in fiscal 1970, \$25,000,000 in fiscal 1971 and \$30,000,000 in fiscal 1972. See 115 Cong. Rec. 11772-88 (daily ed. Oct. 2, 1969).