

**THE AMERICAN COAL MINER, THE FORGOTTEN
NATURAL RESOURCE: WHY LEGISLATIVE REFORMS ARE
A VIABLE SOLUTION TO SOLVING THE CASE BACKLOG
BEFORE THE FEDERAL MINE SAFETY AND HEALTH
REVIEW COMMISSION SPARKED BY TOUGHER
ENFORCEMENT OF NEW COAL MINING HEALTH AND
SAFETY LAWS AND REGULATIONS**

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INTRODUCTION: A SYSTEM IN CRISIS

On January 2, 2006, twelve miners tragically lost their lives at Wolf River Mining Company's Sago Mine in West Virginia.¹ As rescuers scrambled to free the trapped miners,² the nation became captivated by the miners' struggle and outraged by the perceived lack of regulatory oversight, enforcement, and rescue response coordination.³ While lightning was determined to be the most likely ignition source, an investigation revealed that the mine had received dozens of safety citations prior to the disaster.⁴ As a result, congressional hearings ensued⁵—along with several state and federal investigations.⁶ Consequently, the Sago disaster brought about sweeping legislative changes and the first major amendment to federal mine safety laws in approximately thirty years. On June 15th, 2006, the Mine Improvement and New Emergency Response Act of 2006 (New Miner Act) was signed into law.⁷ After President George W. Bush signed the new legislation into law, he profoundly stated, “[w]e make this promise to American miners and their families: we’ll do everything possible to prevent mine accidents and make sure you’re able to return safely to your loved ones.”⁸

The new legislation dramatically increased penalties for safety violations, forced mine operators to install emergency underground shelters with oxygen and supplies, required installation of updated communication devices,⁹ and mandated new guidelines for flame retardant equipment.¹⁰

1. MINE SAFETY AND HEALTH ADMINISTRATION, REPORT OF INVESTIGATION I, at 1 (2006) [hereinafter REPORT OF INVESTIGATION I].

2. *Id.*

3. Editorial, *Lessons from the Big Branch Tragedy*, N.Y. TIMES, April 14, 2010, <http://www.nytimes.com/2010/04/14/opinion/14wed2.html> (describing the public's outrage at the lack of federal oversight in the face of mine safety violations and mining disasters).

4. *Id.*

5. LINDA LEVINE, CRS REPORT FOR CONGRESS, RL 34429, COAL MINE SAFETY AND HEALTH 2 (2008).

6. J. DAVITT MCATEER, GOVERNOR'S INDEPENDENT INVESTIGATION PANEL, UPPER BIG BRANCH, THE APRIL 5, 2010 EXPLOSION: A FAILURE OF BASIC COAL MINE SAFETY PRACTICES, REPORT TO THE GOVERNOR (2011).

7. Mine Improvement and New Emergency Response (MINER) Act of 2006, Pub. L. No. 109-236, 120 Stat. 493 (2006) (codified as amended in scattered sections of 30 U.S.C. §§ 801–965).

8. Brian Naylor, *Mine Deaths Stir New Debate on Federal Oversight*, NATIONAL PUBLIC RADIO (April 27, 2010), <http://www.npr.org/templates/story/story.php?storyId=126289636>.

9. Mark Guarino, *West Virginia disaster: Will Congress take on coal mining companies?*, CHRISTIAN SCIENCE MONITOR (April 7, 2010), <http://www.csmonitor.com/layout/set/print/content/view/print/293176> (stating that, “[o]nly 14 percent of mines have complied with the New Miner Act requirements to install improved communication systems,” and only 34 of 491 coal mines have complied with the 2006 mandate requiring installation of

However, the New Miner Act did little to substantively address accident prevention and, instead, focused primarily on oversight, enforcement, post-accident safety technology, and accident response.¹¹ While bureaucrats, labor leaders, politicians, and pundits argued over the new law's effectiveness and broad reforms, one major unforeseen omission was the new law's inability to cope with the likely increase in court challenges to the new legislation.¹² Essentially, lawmakers failed to ask themselves the following question: If we dramatically increase penalties, create new violations, and toughen enforcement, will coal operators challenge it?

The spike in court challenges to the new legislation and regulations tells the story. In 2007, a total of 130,134 violations were assessed against coal mine operators and 19,581 of those violations were contested,¹³ totaling a 15% appeal rate.¹⁴ By 2009, a total of 173,710 violations were assessed, a 28% increase from 2007.¹⁵ The 2009 appeal data shows that 47,314 violations were contested, equaling an appeal rate of 27.4%.¹⁶ Converting violations into penalties (dollars) tells an even more compelling story. In 2006, civil penalties assessed by the Mine Health and Safety Administration (MSHA)¹⁷ and contested by the coal industry totaled \$30 million.¹⁸ That figure skyrocketed to \$193 million¹⁹ in 2008, before retreating to \$139 million²⁰ in 2009, and \$134 million²¹ in 2010. As of April 2011, \$45

"improved communication systems, such as two-way wireless devices that can talk with and locate trapped miners").

10. Mike Lillis, *Failed Mining Reform Bill Might Have Prevented Tragedy*, WASHINGTON INDEPENDENT, April 14, 2010, <http://washingtonindependent.com/82129/failed-mining-reform-bill-might-have-prevented-tragedy>.

11. *Id.*

12. MINER Act § 8, 120 Stat. at 500.

13. MINE SAFETY AND HEALTH ADMINISTRATION, *Number of Penalties Assessed and Percent Contested: January 2007 – April 2011 (as of 06/10/2011)*, UNITED STATES DEPARTMENT OF LABOR (May 2009), <http://www.msha.gov/stats/ContestedCitations/Civil%20Penalties%20Assessed%20and%20Contested.pdf>.

14. *Id.*

15. *Id.*

16. *Id.*

17. § 1, 120 Stat. at 493 (MSHA is the regulatory body charged with enforcing violations of the New Miner Act).

18. MINE SAFETY AND HEALTH ADMINISTRATION, *supra* note 13. *See also*, <http://www.msha.gov/MSHAINFO/FactSheets/MSHAbytheNumbers/CalenderYear/Assesm>.

19. *Id.*

20. *Id.*

21. *Id.*

million²² has been assessed in civil penalties and, at that pace, assessed penalties will likely exceed \$136 million.

Some experts estimate that mine owners, many of them located in the Appalachian coal basin, are litigating 67% of all major violations and penalties.²³ The backlog of cases is evident: in 2006, there were 2,100 cases under review and now that number exceeds 16,000.²⁴

Currently, the incentives to litigate and the cost-benefit analysis associated with those decisions have contributed to a record number of appeals and rapidly growing case backlog. Consequently, the system is in peril as inefficiency and frustration reach historic levels. However, lawmakers can take steps to reduce the backlog and ease tensions and, therefore, create a process that encourages compliance and fosters a more collaborative approach to miner safety.

This article proposes procedural and statutory reforms that are an affordable and efficient solution to reduce the case backlog. First, MSHA should be mandated to increase the current ten percent good faith abatement provision²⁵ as an incentive to encourage operator cooperation and compliance with the law. Second, coal operators should be required to prepay penalties as a condition to challenge violations by adopting a similar approach already imposed and accepted by the coal industry.²⁶ Finally, Congress should redefine the current underutilized and misappropriated “Enhanced Safety and Health Conference”²⁷ (Enhanced Conference) as a viable and legitimate means of alternative dispute resolution (ADR).

These statutory and procedural reforms will result in a more even-handed approach to enforcement and create a civil penalty system that encourages industry compliance, instead of perpetuating and fueling the current stalemate. Second, the proposed reforms will encourage more efficient settlement and resolution of cases, and they will deter lengthy and

22. *Id.*

23. Halimah Abdullah, *Mines stifle regulations, MSHA Says Spike in Appeals Causes Backlog*, LEXINGTON HERALD-LEADER (Feb. 24, 2010), <http://www.kentucky.com/2010/02/24/v-print/1153739/cause-of-mine-backlog-debated.html>.

24. *Id.*

25. 30 C.F.R. § 100.3(f) (2010).

26. Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-087, 91 Stat. 447 (codified at 30 U.S.C. §§ 1201–1328 (1988)); *see* 30 U.S.C. § 1267(c) (requiring coal operators to deposit the amount of any proposed penalty into escrow in order to contest a violation).

27. 30 C.F.R. § 100.6(a); *see* KEITH E. BELL, THE CIVIL PENALTY CASE BACKLOG FROM THE GOVERNMENT’S PERSPECTIVE 3 (2010), *available at* http://www.emlf.org/Content/images/Speakers_Mine_Safety/1.%20Civil%20Penalty%20Case%20Backlog/1.B.-Bell.Case.Backlog.pdf (explaining that during the Enhanced Conference, the operator is given the opportunity to review each citation and proposed penalty issued by MSHA).

costly litigation. Government inaction, industry tactics, and the failed procedural framework of the past have resulted in a trench warfare strategy that embraces hardball litigation tactics and fails the American miner. As a result, the parties are more concerned with litigating every issue to the bitter end, instead of working together to create the safest possible working conditions for an inherently dangerous profession. Finally, statutory and procedural reforms present the most prudent solution when confronted with a slow economic recovery, shrinking federal and state revenues, looming austerity measures, and high unemployment.

In the end, the American miner is the one who ultimately suffers in this modern day conundrum. 2005 was a benchmark year in safety, as the number of coal-related fatalities dropped to only 23 nationally.²⁸ The mining tragedies in 2006 that led to 47 deaths²⁹ sparked the new legislation that catapulted MSHA and the industry into deadlock. In 2007, mining deaths dropped to 34³⁰ before hitting a record low of 15³¹ in 2009. Initially, the new law and MSHA's increased enforcement efforts were paying clear dividends, and it was not apparent the case backlog was negatively impacting miner safety. However, in 2010, four years after the passage of the New Miner Act,³² the country was forced to endure 48 fatalities and witness the unfortunate circumstances surrounding the Upper Big Branch Mine accident.³³ This raises the issue of whether more regulations and oversight have correlated with a safer workplace. One thing is certain: the new law has thrust the parties into a clear adversarial relationship with no signs of compromise. The new legislation and regulations were clearly intended to benefit the miner and create a safer workplace. However, the new laws, without further legislative and regulatory action, undermine miner safety. The stalemate prevents the efficient implementation of effective safety measures and defeats any hope of a cooperative and collaborative environment toward safety. In order to ensure that every miner has the best possible chance to return home safely after each shift, the civil penalty system must be reformed to encourage cooperation, settlement, and collaboration.

28. MINE SAFETY AND HEALTH ADMIN., COAL MINING FATALITIES BY STATE BY CALENDAR YEAR (2011), available at <http://www.msha.gov/stats/charts/coalbystates.pdf> [hereinafter COAL MINING FACILITIES BY STATE].

29. *Id.*

30. *Id.*

31. *Id.*

32. MINER Act § 1, 120 Stat. at 493.

33. COAL MINING FATALITIES BY STATE, *supra* note 28.

I. AN IN-DEPTH EXAMINATION OF MINE SAFETY AND HEALTH LEGISLATION

The American mining industry has been regulated by a patchwork system of state, local, and federal laws for over a century. The first comprehensive federal legislation emerged in 1910 with the creation of the Bureau of Mines within the Department of the Interior.³⁴ However, over the next 60 years, enforcement and safety advances within the industry remained relatively modest and ineffective. The public's inattention significantly changed on November 20, 1968, when a mine explosion in Farmington, West Virginia took the lives of 78 miners.³⁵ During the next 11 months, 170 additional miners lost their lives while making a modest, hard-earned living.³⁶ Between 1967 and 1968, a total of 533 miners lost their lives in mining disasters.³⁷ Finally, public outrage prompted broad, swift congressional action.³⁸

In 1969, Congress enacted the Federal Coal Mine Health and Safety Act (1969 Coal Act), representing the first comprehensive and authoritative step by the federal government to regulate and police the industry.³⁹ The 1969 Coal Act charged the Mine Enforcement and Safety Administration (MESA), an agency within the Department of the Interior, with broadened investigatory and enforcement powers.⁴⁰ Most notably, the 1969 Coal Act permitted random and mandatory inspections, increased inspections within hazardous operations, and permitted inspectors to order miners out of areas deemed hazardous until the condition could be abated.⁴¹ Despite the 1969 Coal Act's success, more regulation and enforcement was needed.

In 1977, the Senate Committee on Human Resources determined that allowing MESA to operate under the auspices of the Department of the Interior was rife with conflicts that prevented complete and effective enforcement.⁴² Congress attempted to remedy these inherent conflicts with the passage of the Federal Mine Safety and Health Act of 1977 (Mine

34. H.R. REP. NO. 91-563, at 2 (1969).

35. *Id.* at 1-3.

36. *Id.* at 1, 3.

37. *Id.* at 3.

38. *See* Federal Coal Mine Health and Safety, Pub. L. No. 91-173, 83 Stat. 742 (1969) (amended 1977).

39. *See id.*

40. S. REP. NO. 95-181, at 56 (1977).

41. *Id.*

42. *Id.* at 5.

Act).⁴³ As part of the Mine Act, Congress created the Mine Safety and Health Administration (MSHA), an independent regulatory body charged with enforcement of the Act.⁴⁴ The Mine Act adopted a split-enforcement model whereby safety and health standards are promulgated⁴⁵ and enforced⁴⁶ by the Secretary of Labor through MSHA. Industry challenges to MSHA's enforcement are then decided⁴⁷ by an independent administrative adjudicative body, the Federal Mine Safety and Health Review Commission (Commission).⁴⁸ Congress designed the split-enforcement model to overhaul the 1969 Coal Act framework that permitted the agency to settle penalties for small, and sometimes unjustifiable, fractions of the original assessment and to prevent the inherent conflicts that emerge when regulators become too familiar with industry.⁴⁹ Consequently, the Mine Act's split-enforcement model⁵⁰ was intended to serve as an impediment to settlement and is clearly unequipped to handle the voluminous amount of cases that exist in today's high stakes litigation.

Over the next thirty years, the Mine Act underwent few substantive changes despite significant engineering, technological, and safety advancements. Coincidentally, in 2005, coal-related fatalities dropped to twenty-three nationwide.⁵¹ Many within the industry and MSHA credited the record-low mine fatalities to advancements in mine safety technology and a new corporate culture that encouraged safety over production and profits.⁵² After a century of development, a more collaborative and cooperative relationship between MSHA and industry had facilitated a safer workplace.⁵³

However, history once again repeated itself in 2006, when three mining tragedies within five months served as the precipitating events for ground-

43. *Id.* at 11.

44. *Id.*

45. 30 U.S.C. § 811(a) (1979).

46. *Id.*

47. *Id.*

48. Federal Mine Safety and Health Act of 1977 § 113(a), 91 Stat. 1290, 1313 (1977) (amended 2006).

49. S. REP. NO. 95-181 (1977), *as reprinted in* LEGISLATIVE HISTORY OF THE MINE SAFETY AND HEALTH ACT OF 1977, at 63233 (1978).

50. *See* 30 U.S.C. § 815(a), (b), (d) (2006) (outlining the enforcement procedures as carried out by the Secretary as well as the Commission).

51. COAL MINING FATALITIES BY STATE, *supra* note 28.

52. Mark E. Heath, *Increased Enforcement and Higher Penalties Under the Miner Act: Do They Improve Worker Safety?*, 30 Energy & Mineral L. Inst. 10, § 10.01 (2009).

53. *Id.*

breaking legislation.⁵⁴ The events surrounding the Sago⁵⁵ disaster captivated the nation. Then, just seventeen short days later, on January 19, 2006, West Virginia and the country mourned the loss of two miners tragically killed in another underground mine fire at the Aracoma Alma Mine Number 1.⁵⁶ MSHA determined the fire started due to a conveyor belt misalignment that ignited accumulated and combustible materials.⁵⁷ Finally, four months later, on May 19, 2006, Kentucky witnessed the death of five miners at the Darby Mine Number 1 in Harlan County.⁵⁸ Evidence showed the explosion was caused by methane ignited by an acetylene torch,⁵⁹ which resulted in the immediate death of two miners.⁶⁰ Unfortunately, three evacuating miners succumbed to carbon monoxide and soot inhalation while escaping.⁶¹

These tragedies captured the attention of the public and once again forced the government's hand to scrutinize the effectiveness of mine safety laws, regulations, and enforcement. As one former MSHA official stated, "it's unfortunate it took a disaster to bring renewed attention to the issue: '[t]hat's the history of coal mining legislation in the U.S.—it's always born out of disaster and as it's said the safety laws are written with the blood of miners[, t]hat's what it takes.'"⁶² Clearly, the events surrounding Sago,⁶³ the subsequent mine tragedies, and the current case backlog demonstrate that this symbiotic relationship to mine safety is now extinct.

On June 15, 2006, the New Miner Act became law.⁶⁴ The heart of the New Miner Act requires each mine to develop an Emergency Response Plan (ERP).⁶⁵ The ERP addresses such areas as post-accident communication and employee tracking, self-contained rescue devices, post-accident breathable air, post-accident lifelines, and increased escape training standards.⁶⁶ The New Miner Act further imposed new requirements

54. *Underground Coal Mining Disasters and Fatalities—United States, 1900–2006*, 57 MORBIDITY AND MORTALITY WEEKLY REPORT 1373, 1379 (2009).

55. REPORT OF INVESTIGATION I, *supra* note 1, at 1–3.

56. *Underground Coal Mining Disasters and Fatalities*, *supra* note 54, at 1379.

57. *Id.* at 1380.

58. *Id.* at 1381.

59. REPORT OF INVESTIGATION I, *supra* note 1, at 1.

60. *Id.*

61. *Underground Coal Mining Disasters and Fatalities*, *supra* note 54, at 1380.

62. Naylor, *supra* note 8.

63. See REPORT OF INVESTIGATION I, *supra* note 1, at 1–3 (reporting the results of an investigation into the Sago mine explosion and rescue operation).

64. MINER Act § 1, 120 Stat. at 493.

65. § 2, 120 Stat. at 493.

66. § 2, 120 Stat. at 493–95.

on each mine's designated mine rescue team.⁶⁷ The New Miner Act also required MSHA to promulgate new rules for sealing off abandoned areas.⁶⁸ While the Act did not specifically change the law with respect to refuge chambers,⁶⁹ it did require the National Institute of Occupational Safety and Health to report on the "utility, practicality, survivability, and cost of refuge chambers."⁷⁰ The Act also required the Technical Study Panel to conduct studies and provide recommendations with respect to the utilization of belt air and the composition and fire retardant properties of conveyor belt materials in coal mining.⁷¹ Most notably, the Act dramatically increased some civil and criminal penalties,⁷² which prompted MSHA to promulgate new rules that further increased penalties and created new categories of violations.⁷³

Despite significant strides to create a safer workplace, the full benefits of the New Miner Act will not be completely realized by the miner until a more efficient and collaborative approach is implemented. On April 5, 2010, 29 miners tragically died in an underground explosion at the Upper Big Branch Mine (UBB) in Montcoal, West Virginia.⁷⁴ In 2010, the mine had received 124 safety violations, including dozens of citations evidencing problems with ventilation and accumulation of combustibles.⁷⁵ Massey Energy Company (Massey),⁷⁶ operator of the UBB, had allegedly "contested 97 percent of the serious violations against it in 2007."⁷⁷ Even more telling, Massey went on the offensive after the explosion in an attempt to thwart MSHA's regulatory ability and stem the tide of public disapproval

67. § 4, 120 Stat. at 497–98.

68. § 10, 120 Stat. at 501.

69. See Kentucky Foundation, *Modern Coal Related Technology: Safety Related Equipment: Refuge Chambers*, KENTUCKY COAL EDUCATION, http://www.coaleducation.org/technology/Safety/Refuge_Chambers.htm (last visited June 6, 2012) ("The refuge chamber is extensively equipped and designed to keep miners as safe as possible for up to 96 hours, or until rescue teams can reach them. An artificial environment has been created to provide adequate air, food and water and sanitary needs of miners.").

70. MINER Act § 13, 120 Stat. at 504.

71. § 11, 120 Stat. at 501.

72. § 8, 120 Stat. at 500–01.

73. Criteria and Procedures for Proposed Assessment of Civil Penalties, 72 Fed. Reg. 13,592 (Mar. 22, 2007) (to be codified at 30 C.F.R. pt. 100).

74. *Coal Mine Fatality*, MINE SAFETY AND HEALTH ADMINISTRATION, <http://www.msha.gov/FATALS/2010/FAB10c0331.asp> (last visited June 6, 2012).

75. *Id.*

76. Tim Huber, *Alpha's Purchase of Troubled Massey Coal Company Gets OK*, USA TODAY, June 1, 2011, http://www.usatoday.com/money/industries/energy/2011-06-01-massey-alpha-coal-deal_n.htm.

77. Naylor, *supra* note 8.

and political scrutiny.⁷⁸ Massey sent letters to the governors of Kentucky, West Virginia, Virginia, and Illinois alleging that MSHA requirements may have contributed to the explosion.⁷⁹ However, the letter stopped short of blaming the ventilation plan developed by MSHA as the cause of the explosion.⁸⁰ Massey's CEO, Don Blankenship,⁸¹ stated: "Our investigation into the UBB accident is continuing. While we do not yet know the cause of the explosion, we have developed grave and serious concerns about the MSHA imposed ventilation system employed at UBB."⁸²

On May 19, 2011, MSHA released a press release in response to the Governor's Independent Investigation Panel's report (GIIP)⁸³ detailing the cause of the UBB accident.⁸⁴ The GIIP report noted the UBB accident was preventable because basic safety practices were ignored by Massey Energy.⁸⁵ The report attributed the explosion to a methane gas buildup that was ignited due to faulty water sprayers, thus contributing to a major coal dust explosion.⁸⁶ The GIIP report detailed that Massey knew it had compliance problems, but it failed to effectively address the issues.⁸⁷ The report added that Massey promoted a culture that prized "production over safety" and where "wrongdoing became acceptable."⁸⁸ Though the GIIP report was not binding on MSHA, MSHA stated: "[w]hile our own investigation is ongoing, it is fair to say that MSHA is in agreement with

78. Dori Hjalmarson, *Massey Goes on Offensive, Criticizes MSHA in Letter to Governors*, LEXINGTON HERALD-LEADER, June 9, 2010, <http://www.kentucky.com/2010/06/09/v-print/1298150/massey-goes-on-the-offensive-criticizes-MSHA-in-letter-to-governershtml>.

79. Letter from Don L. Blankenship, Chairman & CEO, Massey Energy, to Stephen L. Beshear, Governor of Ky.; Joseph Manchin, Governor of W. Va.; Robert F. McDonnell, Governor of Va.; Patrick J. Quinn, III, Governor of Ill., (June 7, 2010), available at http://media.kentucky.com/smedia/2010/06/08/16/masseylettertoky.source.prod_affiliate.79.pdf.

80. *Id.*

81. The embattled, and often controversial CEO, stepped down on December 3, 2010, due to board and public pressure. Clifford Krauss, *Under Fire Since Explosion, Mining C.E.O Quits*, N.Y. TIMES, Dec. 3, 2010, <http://www.nytimes.com/2010/12/04/business/energy-environment/04massey.html>.

82. Letter from Don L. Blankenship, *supra* note 79.

83. MCATEER, *supra* note 6, at 5 ("The Governor of West Virginia has the authority to appoint one person to lead an independent panel to investigate the cause of various mining disasters and tragedies.").

84. *Id.* at 5.

85. *Id.* at 99, 108.

86. *Id.* at 67, 73, 99.

87. *Id.* at 51, 53, 72.

88. *Id.* at 99, 101.

many of the GIIP findings. The panel's report echoes many of the findings that MSHA has been sharing with victims' families and the public."⁸⁹

As lawmakers and regulators conduct their investigations into the UBB disaster, political momentum and traction are building on both sides of the aisle for increased oversight and additional legislation. In the House, the "Robert C. Byrd Miner Safety and Health Act of 2010" is being circulated.⁹⁰ In the Senate, a competing bill, the "Robert C. Byrd Mine and Workplace Safety Act of 2010" is currently being considered.⁹¹ It remains uncertain if a compromise bill can be reached or if any action will be taken before the 2012 elections.⁹² However, with the balance of power shifting in the House from Democrat to Republican and the Senate remaining in Democratic hands, one can safely assume legislative deadlock and political inaction.

An in depth examination of the proposed legislation shows that it takes bold steps to increase MSHA's investigatory power by calling for an independent investigation team for accidents involving three or more deaths.⁹³ It expands MSHA's enforcement authority by expanding Section 104(d)(1) of the Mine Act to include "any provision of the Act,"⁹⁴ compared to the current law which limits liability to "violation[s] of any mandatory health and safety standard[s]."⁹⁵ Additionally, the legislation aggressively targets mines found to be in "pattern of recurring noncompliance or accidents."⁹⁶ It also, once again, heightens civil penalties,⁹⁷ as well as expands personal⁹⁸ and criminal liability.⁹⁹ Interestingly enough, the Mine Act makes one feeble attempt to stem the growing surge of litigation by requiring operators to pay pre-judgment interest on any amount of contested

89. *Statement by MSHA Assistant Secretary Joseph A. Main on Release of Upper Big Branch Independent Investigation Report*, U.S. DEPARTMENT OF LABOR (May 19, 2011), <http://www.msha.gov/media/PRESS/2011/NS110519.asp>.

90. Robert C. Byrd Miner Safety and Health Act of 2010, H.R. 5663, 111th Cong. (2010).

91. Robert C. Byrd Mine and Workplace Safety and Health Act of 2010, S. 3671, 111th Cong. (2010).

92. *See* S. 3671; H.R. 5663 (noting that the last action taken on both Bills occurred on July 29, 2010, as S. 3671 was referred to the Committee on Health, Education, Labor, and Pensions; and HR 5663 was placed on the Union Calendar as Calendar No. 334. Neither bill became law).

93. H.R. 5663 § 101(b)(2)(A).

94. *Id.* § 201.

95. 30 U.S.C. § 814(d)(1) (2006).

96. H.R. 5663 § 202.

97. *Id.* §§ 301, 305.

98. *Id.* § 302.

99. *Id.* § 302.

penalty not reduced by the Commission.¹⁰⁰ In the end, the legislation does nothing substantive to address the current case backlog.

As the emerging legislation proves, the arguments for more oversight, expanded liability, and higher penalties are the politically popular solution.¹⁰¹ However, one question that should be posed to regulators and legislators is: “[I]f more regulations and enforcement were the answer, why did the tragedy at Upper Big Branch Mine happen?”¹⁰² While part of the solution may rest in the current regulatory and oversight approach, safety “[r]egulations alone are not sufficient to see continued improvement,” and, instead, there needs to be a more cooperative and collaborative approach between regulators and the industry when dealing with human life.¹⁰³

Regardless of which philosophy one embraces, one potential problem recognized by both the mining industry and regulators is a clear lack of alternatives to the backlogged appeals process for contesting safety violations.¹⁰⁴ As recently evidenced by Hilda Solis, the Secretary to the Department of Labor, the Department and MSHA have no plans to fold under industry pressure.¹⁰⁵ However, the industry argues the case backlog is attributable to a wave of new hires at MSHA who, they say, subjectively apply the law, issue numerous violations, and slow the process.¹⁰⁶ Clearly, the parties have drawn a line in the proverbial sand with no sign of surrender. Thus, it is safe to assume the coal industry will continue to experience increased regulation, oversight, and pressure. In response, the operators will continue to file voluminous amounts of appeals in order to stifle, frustrate, and delay an already broken system. In the end, the American miner and workplace safety are the victims.

100. *Id.* § 305(a).

101. Ian Urbina, *Authorities Vow to Close Mines Found to Be Unsafe*, N.Y. TIMES April 27, 2010, http://www.nytimes.com/2010/04/28/mine.html?_r=2&pagewanted=print.

102. Heath, *supra* note 52, at § 10.01.

103. *Id.*

104. *Id.*

105. Hilda L. Solis, *Make Mines Safe: Fatalities Hit an All-Time Low Last Year But Coal Miners Need More Protection*, PITTSBURGH POST-GAZETTE, Jan. 26, 2010, <http://www.post-gazette.com/pg/10026/1030997-109.stm>. (“I and MSHA Assistant Secretary Joseph Main are redoubling the department of labor’s commitment to ensure that every miner can return home at the end of each shift – safe and healthy. For only the second time ever, MSHA last year completed 100 percent of its mandated inspections of all surface and underground mines. Robust hiring of mine inspectors will enable us to continue this.”).

106. *Id.*

II. A CLOSER ANALYSIS OF THE CIVIL PENALTY SYSTEM AND ENFORCEMENT, INSPECTION, AND LITIGATION PROCESSES

A. *The Civil Penalty System and Enforcement*

The Mine Act created a civil penalty system for violations.¹⁰⁷ The assessed penalty is determined by a set of factors: (1) operator size, (2) violation history, (3) negligence of the operator, (4) gravity of the violation, (5) good faith ability to rapidly abate the violation, and (6) the effect on operator's ability to continue in business.¹⁰⁸ After the violations are calculated, the total points are then converted into dollars, and a proposed assessment or penalty is lodged against the operator.¹⁰⁹ However, the Mine Act provides no guidance on how to weigh the factors when assessing penalties and bolsters the industry's argument that the law is being applied subjectively and inconsistently.

The events of 2006 and subsequent legislative action led MSHA to completely overhaul the violation-to-penalty conversion table.¹¹⁰ Under the previous system, a violation assigned eighty points under the Mine Act's civil penalty system resulted in an \$11,535 penalty.¹¹¹ Under the New Miner Act regulations, a violation assigned eighty points yields only a \$555 penalty.¹¹² At first glance, this new conversion table seems to dramatically favor the operator and greatly reduce possible exposure. However, the points assigned to each factor were significantly adjusted,¹¹³ making it impossible to compare the previous violation-penalty totals to the new violation-penalty totals for the same violation.¹¹⁴ For instance, under the new regulations, one operator's violations totaled 138 points and yielded a proposed penalty assessment of \$48,472.¹¹⁵ Under the old regulations the same violations would have received seventy-one points and a proposed

107. Federal Mine Safety and Health Act of 1977 § 110(a)(1), 91 Stat. 1290, 1311.

108. § 110(i), 91 Stat. 1311–12.

109. See 30 C.F.R. § 100, tbl. XIV (2010) (showing that the table converts violations into the proposed penalty).

110. *Id.*

111. John M. Williams, *The MINER Act: Keeping Out of Trouble*, 29 Energy & Min. L. Inst. 299, 300 (2008).

112. *Id.*

113. 30 U.S.C. § 820(b) (2006).

114. Williams, *supra* note 112, at 308–09.

115. *Id.*

penalty assessment of \$6,374.¹¹⁶ This scenario is not an isolated event; it plays out every day.¹¹⁷

In addition to the conversion table reforms, the New Miner Act substantially increased operator penalties in several different ways. First, under the prior law a “willful violation” resulted in a maximum \$25,000 penalty;¹¹⁸ however, the New Miner Act increased the “willful violation” penalty to \$250,000,¹¹⁹ a ten-fold increase. Second, the New Miner Act created a “flagrant violation” category with a maximum penalty of \$220,000.¹²⁰ Lastly, the new law mandated that MSHA promulgate new regulations with respect to penalties and violations.¹²¹ This is simply a sampling of the dramatic and sizeable increases thrust onto the industry.

On March 22, 2007, MSHA released the new regulations and the revised penalties that substantially increased some existing penalties.¹²² The maximum penalty for Section 104¹²³ violations of the Mine Act increased from \$50,000 to \$60,000.¹²⁴ Further, on March 10, 2008, MSHA increased the Section 104 penalty to \$70,000, and the maximum per-day penalty for failure to abate a Section 104(a) violation increased to \$7,500.¹²⁵ MSHA also promulgated a new notification penalty with a maximum of \$70,000 for failure to timely notify MSHA of a death, injury, or entrapment with reasonable potential to cause death.¹²⁶

In addition to overhauling the civil penalty process, MSHA has started to enforce the underutilized Pattern of Violations (POV)¹²⁷ that was initially included in the 1977 Mine Act.¹²⁸ However, MSHA did not begin POV

116. *Id.*

117. *Id.*

118. Federal Mine Safety and Health Act of 1977 § 110(d), 91 Stat. 1290, 1311 (1977).

119. MINER Act § 8, 120 Stat. at 500.

120. § 8, 120 Stat. at 500–01.

121. § 8(b), 120 Stat. at 500.

122. 72 Fed. Reg. 13592, 13597, 13598, 13599–603, 13605–07, 13611, 13612, 13614, 13615, 13617–20, 13623 (2010).

123. A Section 104(a) violation is any a violation of a mandatory health and safety standard. Mandatory standards are those health and safety regulations promulgated by the Secretary under Section 101 of the Mine Act. 30 U.S.C. § 820(a) (2006).

124. 30 C.F.R. § 100.3(c)(2) (2010).

125. Criteria and Procedures for Proposed Assessment of Civil Penalties, 73 Fed. Reg. 7206–08 (Feb. 7, 2008) (to be codified at 30 CFR pt. 100).

126. *Id.* at 7209.

127. See 30 C.F.R. § 104.1 (2010) (stating that the purpose is to implement “section 104(e) of the Federal Mine Safety and Health Act of 1977 (Act) by addressing mines with an inspection history of recurrent S&S violations of mandatory safety or health standards that demonstrate a mine operator’s disregard for the health and safety of miners. The purpose of the procedures in this part is the restoration of effective safe and healthful conditions at such mines.”).

128. Federal Mine Safety and Health Act of 1977 § 104(e), 91 Stat. 1290, 1301.

enforcement until after the passage of the New Miner Act in 2006.¹²⁹ The pattern process requires annual industry-wide reviews to determine which mines should be considered for a “pattern of violations” under Section 104(e) of the Mine Act.¹³⁰ The purpose of the procedure is to identify those mines that exhibit poor safety records and either compel compliance or force closure. Today, the threat of being placed on POV status and MSHA’s enforcement of the law have become two of MSHA’s most powerful compliance tools.

Pursuant to a regulatory criteria and mathematical formula, MSHA determines whether a mine should be placed on POV status for monitoring and improvement.¹³¹ MSHA examines the mine’s history with regard to “(1) significant and substantial (“S&S”) violations;¹³² (2) section 104(b) closure orders resulting from S&S violations; (3) section 107(a) imminent danger orders; (4) other enforcement measures (other than 104(e)) that have been applied by MSHA to the mine; (5) evidence of lack of good faith by operator in correcting problems that result in recurrent S&S violations; (6) any accident, injury, or illness record that shows a serious safety or health management problem at the mine; and (7) mitigating factors.”¹³³ The more violations and penalties that are assessed, the greater likelihood the mine will find itself on POV status,¹³⁴ which will consequently force mine closures, cause production delays and disruptions, and result in job loss.

Once a POV is found to exist, MSHA then requires the mine to enter into an S&S reduction plan and undergo close monitoring for a 90-day period.¹³⁵ During the 90-day period, if an inspector finds any S&S violations of a mandatory health and safety standard, the inspector is required to issue a “withdrawal order”¹³⁶ requiring closure of that specific area of the mine. The order stays in effect until MSHA determines the

129. *Putting Safety First: Strengthening Enforcement and Creating a Culture of Compliance at Mines and Other Dangerous Workplaces, Testimony Before the Senate Committee on Health, Education, Labor and Pensions*, 111th Cong. 2 (2010) (statement of Cecil E. Roberts, President, United Mine Workers of America), available at <http://help.senate.gov/imo/media/doc/Roberts1.pdf>.

130. 30 C.F.R. §§ 104.1–104.2 (2010).

131. *Id.*

132. For a violation to be considered significant and substantial: (1) there must be a violation of mandatory safety standard; (2) the violation must contribute to a safety hazard; (3) there must be a reasonable likelihood of an injury; (4) the prospective injury must be of a reasonably serious nature. Mathies Coal Company, 6 FMSHRC1 3-4 (1984).

133. 30 C.F.R. § 104.2 (2010).

134. *Id.* §§ 104.2–104.3.

135. *Id.* § 104.4(a)(4).

136. 30 U.S.C. § 814(d)–(e) (2006).

violation has been corrected.¹³⁷ Therefore, if a mine is not removed from pattern status, it will be forced to close.¹³⁸

MSHA's use of the POV process has dramatically increased in the past year, and the additional enforcement can be directly attributed to the UBB tragedy.¹³⁹ Following the explosion, Secretary Solis called for scrapping and replacing this “badly broken” process for identifying the nation's most dangerous mines.”¹⁴⁰ Her initiative was sparked because of a computer error that allowed the UBB to avoid closer scrutiny that may have saved lives.¹⁴¹

On November 5, 2010, revised POV criteria for monitoring the mining industry for habitual offenders went into effect.¹⁴² Assistant Secretary Joe Main stated:

MSHA's changes to the screening process are designed to meet [the] statutory and regulatory objectives [of the Mine Act]. The new screening criteria will draw more attention to the so-called “bad actors” than did the old criteria. [The new criteria] will focus on mines that exhibit chronic failures to maintain safe working conditions, have repeated significant and substantial violations, and have not responded to other enforcement tools.¹⁴³

Under the new screening criteria, the operator has a stronger incentive to contest every violation that could be factored into the revised POV criteria.

Logically, as the scope of the POV process expanded, the mining industry soon began to feel the effects. On November 19, 2010, MSHA put 13 mines on notice of possible POV status.¹⁴⁴ On April 12, 2011, two mines were placed on POV status—an “unprecedented enforcement”¹⁴⁵ move in

137. *Id.*

138. 30 C.F.R. § 104.

139. Lawrence Messina, *Labor Secretary Faults Mine Scrutiny Process*, DESERT NEWS (Salt Lake City), June 23, 2010, <http://www.deseretnews.com/article/700042770/Labor-secretary-faults-mine-screening-process.html>.

140. *Id.*

141. *Id.*

142. PATTERN OF VIOLATIONS SCREENING CRITERIA, MINE SAFETY AND HEALTH ADMINISTRATION (2010).

143. *News Release, MSHA Takes Steps to Overhaul ‘Broken Pattern of Violations Program* U.S. DEPARTMENT OF LABOR (Sept. 27, 2010), <http://www.dol.gov/opa/media/press/MSHA/MSHA20101372.htm>.

144. *News Release, MSHA Puts 13 Mines on Notice for Potential Pattern of Violations*, U.S. DEPARTMENT OF LABOR (Nov. 19, 2010), <http://www.msha.gov/media/PRESS/2010/NR101119a.asp>.

145. Despite MSHA's claim, this was not the first time a mine had been placed on a pattern of violation status. A small mine belonging to National Coal in Tennessee was placed on pattern and shortly thereafter removed following a satisfactory inspection. Letter from Irvin T. Hooker, District

coal mining.¹⁴⁶ The POV process is quickly becoming one of MSHA's most potent and effective enforcement tools. On February 2, 2011, MSHA released a proposed rule that would further revise the existing POV regulations.¹⁴⁷ The comment period for the proposed rule closed on April 18, 2011.¹⁴⁸ MSHA argues the revisions would "simplify the existing POV criteria, improve consistency in applying the POV criteria, and more adequately achieve the statutory intent."¹⁴⁹ While everyone can agree that habitual offenders and unsafe mining conditions should face stiffer penalties and potential closure, the reality is that as the POV process is ratcheted up, the case backlog and burden on the system will likely parallel these increased enforcement efforts.

B. The Inspection Process

The Mine Act states that representatives of the Department of Labor "shall make frequent inspections and investigations."¹⁵⁰ The Act requires underground mines to undergo at least four inspections per year and surface mines twice per year.¹⁵¹ MSHA interprets this requirement to mean that each underground mine should be inspected quarterly and each surface mine at least once every six months.¹⁵² In addition to the mandatory inspections, if dangerous or life threatening conditions are detected at the mine, then MSHA generally conducts more frequent inspections.¹⁵³ MSHA is not required to notify a mine before inspection.¹⁵⁴ Some large underground mines have inspectors on hand every day conducting inspections and insuring a safe workplace.¹⁵⁵ Additionally, the Mine Act gives the miner the authority to report possible violations and to require

Manager, Mine Safety and Health Administration, to Johnny Smiddy, Superintendent, National Coal Corporation, (Nov. 18, 2010), *available at* <http://www.msha.gov/pov/2010Letters/PPOV%20Letter%20to%20National%20Coal%2040-03272.pdf>.

146. *Press Release, US Labor Department's MSHA Places 2 Mining Operations on Pattern of Violations Status*, U.S. DEPARTMENT OF LABOR (April 12, 2011), <http://www.msha.gov/MEDIA/PRESS/2011/NR110412.asp>.

147. Mine Safety and Health Administration: Pattern of Violations, 76 Fed. Reg. 5719 (Feb. 2, 2011) (codified at 30 C.F.R. pt 104) [hereinafter Pattern of Violation].

148. Extension of Comment Period, Pattern of Violations, 76 Fed. Reg. 18467 (proposed Apr. 4, 2011).

149. Pattern of Violations, 76 Fed. Reg. 5719.

150. 30 U.S.C. § 801(a) (2006).

151. *Id.*

152. *Id.*

153. Federal Mine Safety and Health Act of 1977 § 103(a), 91 Stat. 1290, 1297.

154. *Id.*

155. *Id.*

“immediate” inspections if the miner reasonably believes that an “imminent danger exists.”¹⁵⁶

During the inspection process, the MSHA inspector uses a check-the-box form to issue citations and violations.¹⁵⁷ The inspector has the sole discretion to rate the violations based on the level of operator negligence from “no negligence,”¹⁵⁸ a lower level of culpability, to the highest level of negligence, “reckless disregard.”¹⁵⁹ If the inspector determines the violation is a “reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory safety or health standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury,”¹⁶⁰ then he can designate the infraction as “flagrant,” which carries with it a maximum penalty of \$220,000.¹⁶¹ More violations coupled with more severe designations leads to more violation points, which are then converted into a much greater proposed penalty.¹⁶² Thus, operators often appeal and attack the inspector’s discretion and inspection reports in hopes of mitigating their proposed penalties.¹⁶³ After each inspection, the inspector is required to complete a report and issue a citation and order for each violation.¹⁶⁴ Once the operator is presented with citations and violations, the litigation process generally ensues.

C. The Litigation and Appellate Process

Once the inspector provides the operator with notice of the proposed violations and citations, the operator has 30 days to file a notice of contest¹⁶⁵ to the proposed citations or ten days to request an Enhanced Conference.¹⁶⁶ MSHA is then notified of the citations and violations and a

156. *Id.* § 103(g)(1), 91 Stat. 1290, 1298–99.

157. 30 C.F.R. pt. 100 (2010).

158. *Id.*

159. *Id.*

160. MINER Act § 8(a)(2), 120 Stat. at 500–01.

161. *Id.*

162. Federal Mine Safety and Health Act of 1977 § 110(i), 91 Stat. 1290, 1311–12.

163. *See* C.C. Coal Co., 23 FMSHRC 11822 (2001) (upholding the commission’s finding of a violation despite the fact that other MSHA inspectors had not cited those same conditions in 18 years); *see also* U.S. Steel Mining Co. Inc., 15 FMSHRC 1541, 1546–47 (1993) (holding that an inconsistent enforcement pattern by its inspectors does not estop MSHA from proceeding under an interpretation of the standard that it concludes is correct); *see also* TwentyMile Coal Co., 27 FMSHRC 260 (2005) (holding that inspector’s actions did not rise to the level of “arbitrary” to support an abuse of discretion claim).

164. § 104(a), 91 Stat. 1300.

165. 30 U.S.C § 815(d).

166. *Id.*

notice of proposed penalty is provided to the operator.¹⁶⁷ Once again, the operator has 30 days to respond to the proposed penalty¹⁶⁸ and has two procedural choices.¹⁶⁹

First, the operator can accept the proposed penalty assessment and issue payment, effectively ending the case.¹⁷⁰ Alternatively, the operator may file a written intention to contest the proposed penalty assessment.¹⁷¹ Once the operator files its written notice to contest the proposed penalty, MSHA notifies the Commission and its jurisdiction is officially invoked over the case.¹⁷² Instantly, MSHA is transformed from regulator to adversary, undermining any hope for an efficient and collaborative outcome. As a result, the controversy is removed from parties who are in the best position to reach a fair and efficient solution, MSHA and the operator. Thus, the parties become entrenched in their positions and the administrative process grinds to a halt.

Once the Commission invokes jurisdiction, the case receives a docket number and is assigned to an attorney at the solicitor's office or a Conference and Litigation Representative ("CLR").¹⁷³ The government then drafts a petition of civil penalty and notifies the operator.¹⁷⁴ The operator has 30 days to file an answer to the petition.¹⁷⁵

In most cases, operators neither pay the proposed penalty nor contest the occurrence of the violation. Instead, most operators attack the gravity of the violation itself with hopes of mitigating and reducing the proposed penalty. Once the matter is removed from MSHA's jurisdiction, the Commission has exclusive jurisdiction, and the law requires that "[n]o proposed penalty which has been contested before the Commission shall be compromised, mitigated, or settled except with the approval of the Commission."¹⁷⁶ Consequently, the controversy is removed from the best possible setting for compromise and settlement, and it becomes bogged down at the Commission level.¹⁷⁷

167. 30 C.F.R. § 100.7(a) (2010)

168. 30 C.F.R. § 100.7(b)-(c).

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. 30 C.F.R. § 100.6 (2010).

174. 30 C.F.R. § 100.7(a).

175. 30 C.F.R. § 100.7(b).

176. *Id.*

177. Daniel Malloy, *MSHA Mines Mountain of Violation Tiffs*, PITTSBURGH POST GAZETTE, Aug. 21, 2010, <http://www.post-gazette.com/pg/10233/1081650-84.stm>.

As the case backlog stifles the system, what has become apparent is that an enforcement model crafted in the 1970's and intended to prevent settlement while handling a very small case load is ill-equipped to function in the current regulatory and adversarial landscape. Thus, as additional regulation and more stringent enforcement become the norm, the volume of cases litigated will steadily, if not dramatically, increase. As a result, the system may collapse under the weight of its own arcane and inadequate processes and policies.

Currently, the focus appears to be on changes within the Commission and its handling of cases. This strategy signifies that any hope of improvement and collaboration between MSHA and the operator has been simply ignored or deemed hopeless. There has been little attention focused on changes that could be made before Commission involvement. There are possible statutory and procedural reforms that could aid in stemming the stalemate and provide solutions for reducing the case backlog. Continuing to act as if the emperor has no clothes is no longer a viable option.

III. PRODUCTION AND STATUTORY REFORMS THAT AVOID LITIGATION, FACILITATE A MORE EFFICIENT HANDLING OF CASES AND SETTLEMENTS, AND OFFER A COST EFFECTIVE OPTION IN RECESSIONARY TIMES

A. Increasing the Discount for Good Faith Abatement of Violations

Today, the regulations provide for a “10% reduction in the penalty amount of a regular assessment when the operator abates the violation within the time set by the inspector.”¹⁷⁸ Under the former regulations, operators were entitled to a 30% good faith abatement reduction if the violation was corrected within the time set by the inspector.¹⁷⁹ The Mine Act requires MSHA to weigh the operator's good faith abatement of a violation when assessing a proposed penalty.¹⁸⁰ However, there is no statutory requirement that the operator is entitled to a meaningful or significant discount for timely abatement. Thus, in the face of rapidly increasing violations and penalties, the discount has been reduced to a point where it is no longer a valued incentive for compliance or compromise.

178. 30 C.F.R. § 100.3(f) (2010).

179. *Id.*

180. Federal Mine Safety and Health Act of 1977 § 105(b)(1), 91 Stat. 1290, 1303–04 (1977).

Based on MSHA's reduction, one can understand why this development has fueled the operators' vigilance in contesting violations. Violations and penalties were dramatically overhauled and increased; however, the incentive to quickly abate the violation and voluntarily comply was, by some estimates, unforeseeably decreased. A legitimate argument can be made that an individual or corporation should not receive a discount or bonus for compliance with the law. The citizenry receives no bonuses or discounts when complying with state or federal law but complies because of enforcement and the threat of possible punishment. Contrarily, the public is acutely aware of the benefits received by criminal and civil defendants who quickly comply with the law and settle their disputes in order to avoid trial and litigation. To simply remove or ban this unspoken public incentive would be to arbitrarily omit reason and weigh the criminal and civil system down with voluminous challenges and appeals.

A meaningful good faith abatement discount should be the embodiment of timely compliance and settlement. However, this tool plays a much more important role than a routine discount of operator liability. The discount serves as a bargaining chip for both the regulator and the regulated. Used properly, the good faith abatement discount should serve as a catalyst for prompt corrective action and incentivize timely settlement. Unfortunately, MSHA's unilateral reduction from 30% to 10% rendered the incentive *de minimus* at best and inflammatory at worst, especially when viewed through the prism of dramatically increased violations and penalties.

An example best illustrates how the new regulation fails to incentivize compliance and, instead, incentivizes delay, avoidance, and litigation. Hypothetically, under the previous law, the operator who was assessed a \$25,000 penalty for a willful violation would receive a 30% reduction of \$7,500 if the violation was corrected in a timely manner. Clearly, a \$7,500 discount creates a meaningful incentive to swiftly abate the violation and pay the remaining \$17,500 penalty without contesting the underlying violation while avoiding the risk of incurring costly litigation fees and expenses.

Now, examine the same scenario under the new regulations and penalties. The operator is cited for a "willful violation" and is assessed a proposed penalty assessment of \$250,000. The current 10% reduction provides only a \$25,000 discount to swiftly abate the violation and still requires the operator to pay the remaining \$225,000 penalty. Consequently, the operator faces a very significant penalty and receives only a minimal reduction. Even though the operator receives a much larger discount under the new regulations, the discount does not reduce the penalty to a level that discourages litigation when compared to the old regulations. Thus, the

operator has a clear incentive to simply avoid payment or settlement and contest the violation and proposed penalty. Thus, MSHA's 2007 adjustment has clearly rendered the good faith abatement discount meaningless. A civil penalty system should encourage compliance instead of incentivizing litigation. However, instead of encouraging compliance, MSHA has decided to shrink the size of the carrot and dramatically increase the size of the stick.

Instead of using the discount mechanism to incentivize compliance, MSHA relies on the threat and force of the "withdrawal order."¹⁸¹ The "withdrawal order" remains the strongest incentive for timely abatement of violations. The law requires the inspector to set a "reasonable time" for the abatement of all violations regardless of severity.¹⁸² In setting a time frame, the inspector examines the nature of the hazard and what corrective actions are needed to solve the issue.¹⁸³ If the operator fails to abate the violation within the required time frame, then the inspector issues a "withdrawal order" closing that area of the mine or the entire mine until the violation is corrected.¹⁸⁴ Additionally, operators can, and often do, face daily penalties for failure to abate violations in a timely manner.¹⁸⁵ In most cases violations are abated on the same day the inspector issues the citation.

To help reduce the case backlog and improve the current system, the good faith abatement reduction should be substantially increased or, at a minimum, returned to its pre-2007 level of 30%. However, the operator should choose which avenue to pursue: discount and settlement or forfeiture of the discount and litigation. Civil litigants, the government, and criminal defendants weigh the following options every day: settle and receive a reduced sentence or liability or litigate the issue and face uncertain or possible increased liability.

A revised examination of our previous example will help shed light on the issue. For argument's sake, assume a 50% good faith abatement incentive to avoid litigation and compliance. Under the new regulation the operator is assessed a "willful violation" totaling \$250,000. The operator can abate the violation in a timely manner and receive the 50% discount totaling \$125,000. The operator would still be required to pay the \$125,000 penalty, which is clearly a substantial sum. However, if the operator decided to challenge the violation and penalty, then the operator would forfeit the

181. § 104(e), 91 Stat. 1301-02.

182. § 104(a), 91 Stat. 1300.

183. §§ 103-107, 91 Stat. 1300-04.

184. § 104(e)(1), 91 Stat. 1301-02.

185. § 10(b), 91 Stat. 1311.

discount and face \$250,000 in exposure. Regardless of the operator's election, the operator would still be forced to abate the violation in a timely manner or risk further penalties and a possible "withdrawal order." Thus, even after the case is settled or a final decision is reached by the Commission, the operator may only realize a small penalty reduction instead of the initial \$125,000 discount. Conversely, the operator could challenge the violation and receive a greater penalty reduction depending on the strength of the operator's case. Regardless of the end result, the increased discount and incentive to settle will force the operator to conduct a more thorough cost-benefit analysis, start a dialogue between the parties, and require a more extensive review of each case's strengths and weaknesses.

MSHA would receive several benefits as well. An increased discount to avoid litigation would save personnel time and resources in light of an inevitably shrinking federal budget. MSHA could allocate more resources to safety compliance and enforcement rather than litigation. In the end, an environment that fosters compliance is encouraged to ensure a safer workplace.

Also, the increased good faith abatement discount would reduce the case backlog as it forces the operator to conduct a more extensive cost-benefit analysis when contesting violations and penalties. As the system stands today, the operator's incentive is to simply appeal every violation, no matter how trivial, and let the process play out over a period of months or even years. A legitimate and meaningful good faith discount is needed to help resolve the current case backlog and restore confidence in the system. The increased discount would serve as an incentive for the operator to work with MSHA to swiftly abate violations and voluntarily comply with the law. Also, this important incentive would bring the operator to the negotiating table and facilitate a more collaborative and efficient approach to mine safety. Finally, the risk-reward option would force the operator to conduct a more meaningful, well-reasoned cost-benefit analysis in deciding whether to contest today's heightened violations and penalties or to face the uncertainties of litigation.

B. Prepayment of Penalties as a Condition to Challenge Violations

Currently, mine operators can, and often do, appeal almost every major and substantial violation and citation.¹⁸⁶ Currently, there is no requirement

186. Abdullah, *supra* note 23.

that the mine operator prepay the amount of proposed penalties it intends to contest. Instead, the current system enables the operator to simply conduct a wholesale appellate approach to all violations in an attempt to delay and frustrate the system. There is a push among some lawmakers to make the operator invest more in the litigation process, as evidenced in the Robert C. Byrd Miner Safety and Health Act of 2010.¹⁸⁷ The proposed law requires operators to pay pre-judgment interest on any contested penalty amount not reduced by the Commission in its final order.¹⁸⁸ However, with the current political stalemate, there is little hope the pending legislation will become law.¹⁸⁹ Additionally, the proposed legislation arguably fails to go far enough as it only requires pre-judgment interest to be paid after a final order has been entered by the Commission.¹⁹⁰ Thus, the operator faces an additional penalty,¹⁹¹ but this does little to prevent litigation and reduce the case. Ultimately, this proposed solution still enables the operator the unfettered ability to challenge and appeal almost every violation. These failed and inadequate solutions have systematically contributed to the crisis. What the parties need now is a swift and effective departure from the failed policies of the past.

Alternatively, to help stem the tide of dilatory tactics and blanket appeals, the operator should be required to prepay the entire proposed penalty for each violation and citation it intends to challenge. Operators should be forced to invest more than their litigation expenses in delaying the efficient and timely implementation of safety laws, regulations, and corrective action. Lawmakers have a viable solution at their fingertips; they should simply adopt the current approach found under the Surface Mining Control and Reclamation Act (SMCRA).¹⁹² Under SMCRA, the operator is compelled to prepay the entire proposed penalty before appealing a violation.¹⁹³

187. Robert C. Byrd Miner Safety and Health Act of 2010, H.R. 5663, 111th Cong. § 305(a) (2010).

188. *Id.*

189. Bill Status and Summary of Robert C. Byrd Mine Safety Protection Act of 2010, H.R. 6495, LIBRARY OF CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:H.R.6495:#> (last visited June 6, 2012).

190. Robert C. Byrd Miner Safety and Health Act of 2010, H.R. 5663, 111th Cong. § 305(a) (2010).

191. *Id.*

192. Surface Mining Control and Reclamation Act of 1977 (SMCRA) § 518, 30 U.S.C. § 1268(c) (1977).

193. *Id.*

SMCRA was implemented by Congress in 1977 to “protect society and the environment from the adverse effects of surface mining operations.”¹⁹⁴ The purpose of SMCRA is to establish an effective and efficient comprehensive “program involving both federal and state regulatory authorities aimed at controlling the adverse effects of surface mining.”¹⁹⁵ One interesting facet of SMCRA, known as “state primacy,” allows “states [to] assume primary responsibility for regulating surface coal mining activities within their borders by applying to the Secretary of the Interior for permanent program approval.”¹⁹⁶ Therefore, if a state’s program is not approved or the state does not apply¹⁹⁷ to the Department of the Interior, surface mining is solely governed by the federal system through the Office of Surface Mining (OSM).¹⁹⁸ Regardless of whether a state falls under the auspices of exclusive federal control or has a comparable state regulatory system, OSM has the authority to compel compliance through inspections, “issuance of federal notices of violation, cessation orders,¹⁹⁹ and the imposition of federal civil penalties.”²⁰⁰ OSM’s enforcement system is similar to the factor-point system utilized by MSHA.²⁰¹ In assessing points, OSM considers: (1) history of previous violations, (2) seriousness of the violation, (3) negligence of the operator, and (4) operator’s good faith abatement of the violation.²⁰² The amount of violations and severity are then assigned points, which are converted into civil penalties.²⁰³ The maximum penalty for a violation of SMCRA is \$7,500 per day, per violation.²⁰⁴ Consequently, SMCRA penalties are very modest when compared to their

194. SMCRA § 202(a), 30 USC § 1202(a).

195. Joseph J. Zaluski & Lesly A.R. Davis, *Liabilities of Non-Permit Holders Under the Surface Mining Control and Reclamation Act*, in 16 E. MIN. L. ISNT, 241, 242-43 (1997).

196. *Id.* at 245.

197. SMCRA § 504(a),(b),(e); 30 U.S.C. § 1253(a),(b); 30 U.S.C. § 1254(a),(b),(e) (Tennessee and Washington are currently the only coal producing states without primacy and that there are 24 primacy states: Alabama, Alaska, Arkansas, Colorado, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, New Mexico, North Dakota, Ohio, Oklahoma, Pennsylvania, Texas, Utah, Virginia, West Virginia, Wyoming.)

198. *See* Substituted Federal Enforcement of Portions of the Tennessee Permanent Regulatory Program and Director’s Findings on Status, 49 Fed. Reg. 15,496 (1984) (finding that Tennessee’s program failed to receive necessary approval).

199. *See* Zaluski & Davis, *supra* note 195, at 246 (arguing that, similar to NOV, a cessation order is one of the most important OSM enforcement tools since it allows OSM to shut down an operation and order the worksite closed until the operator comes into compliance with the law).

200. *Id.*

201. 30 C.F.R. § 845.13 (2010).

202. *Id.*

203. 30 C.F.R. § 845.14.

204. *Id.*

counterpart within MSHA's statutory and regulatory framework. However, the possibility exists for operators to incur significant penalties under the current SMCRA and regulatory framework.²⁰⁵

Once a proposed civil penalty is issued to the surface mine operator, the operator has a choice to either pay the proposed penalty or contest it.²⁰⁶ However, if the operator chooses to contest the penalty, it must forward the entire amount of the proposed penalty to the Treasury Department for placement in escrow.²⁰⁷ If the operator prevails, then the operator receives the prepayment back in full, plus six percent interest or the prevailing Treasury rate, whichever is greater, within 30 days.²⁰⁸

Under this proposed amendment, the operator will have a greater incentive to conduct a more thorough and well-reasoned cost-benefit analysis before challenging almost every violation. As previously discussed, an illustration best shows how the prepayment condition will force the operator to conduct a meaningful cost-benefit analysis when contesting proposed penalties after earning a meaningful discount for timely abatement. For instance, assume the operator is assessed a proposed penalty of \$250,000. Instead of paying the \$125,000 penalty after realizing a discount of \$125,000 for good faith abatement, the operator decides to challenge the violation.

First, the operator would be required to prepay the entire \$250,000 proposed penalty in order to appeal the violation. The operator's willingness to contest large penalties would significantly reduce liquidity and deplete corporate balance sheets. Therefore, the operator's ability to purchase equipment, acquire leaseholds and mineral rights, pay dividends or judgments, or simply reinvest would be negatively affected.

For simplicity, a hypothetical examination of a simple investment will yield the benefits of avoiding pre-payment and litigation and receiving the 50% good faith abatement reduction. Instead of contesting the \$250,000 "willful violation" penalty and being compelled to pre-pay the entire amount, the operator receives the 50% discount for compliance and avoids litigation. Thus, the operator saves \$125,000 and could then invest the savings. This \$125,000 conservatively invested over a three-year period, with a seven percent return compounded annually, grosses \$153,130.38 and a subsequent profit of \$28,130.38. A modest profit of approximately \$28,000 will most likely not halt the operator in its litigation tracks.

205. *Id.*

206. 30 C.F.R. § 845.19(a) (2010).

207. Surface Mining Control and Reclamation Act of 1977 § 518(c), 30 USC § 1268(c) (1977).

208. *Id.*

However, when the model is applied to millions of dollars in contested penalties, a significant amount of capital is placed at risk.

Excluding the proposed amendment to increase the good faith abatement discount, if the operator decides to contest the \$250,000 violation, the operator will be compelled to pre-pay the entire penalty as a condition to file a notice of contest. This \$250,000 invested over three years at seven percent interest compounded annually yields a gross amount of \$306,206.75 and a profit of \$56,260.75. Conversely, the operator could still receive a return on the penalty prepayment if the operator prevailed before the Commission. Thus, the operator has recourse that provides a gain that is dependent upon the strength of its case and likelihood of success. However, the profit received from the prevailing Treasury rate would most likely be less than that yielded through private sector investment. Regardless of the costs or potential gains, the effects of a pre-payment requirement would significantly impact the decision-making process of large operators²⁰⁹ like Massey who were, by some estimates, contesting 97% of all major violations.²¹⁰

Additionally, adoption of the SMCRA prepayment requirement would greatly reduce potential court challenges and facilitate a more timely and effective implementation on the coal industry. Despite SMCRA's modest penalties, the law has been challenged and has survived operator challenges.²¹¹ SMCRA's prepayment condition to appeal alleged violations has withstood several Constitutional and court challenges. In *United States v. Finley*,²¹² the court found that prepayment was not a violation of the operator's due process rights. In *Hodel v. Indiana*,²¹³ the Court held the conditional prepayment did not constitute a "taking" under the Fifth Amendment. Finally, in *United States v. Hill*²¹⁴ and *Graham v. Office of*

209. Legislation or regulation could allow exceptions for indigent and small operators who are unable to prepay large proposed penalties in order to alleviate due process concerns and permit access to the courts. The small operator could be forced to prepay a percentage of the penalty determined by annual revenues and profits. This information could be easily obtained and provided based on Internal Revenue Service (IRS) filings.

210. Gardiner Harris & Erik Eckholm, *Mines Fight Strict Laws by Filing More Appeals*, N.Y. TIMES, April 6, 2010, <http://www.nytimes.com/2010/04/07/us/07/company.html>.

211. See e.g., *Graham v. Office of Surface Mining Reclamation and Enforcement*, 722 F.2d 1106 (3rd Cir. 1983) (upholding the constitutionality of the escrow deposit provision as applied to operators).

212. *United States v. Finley*, 835 F.2d 134, 137–38 (4th Cir. 1987) (finding that the prepayment requirement does not violate procedural due process as the operator still has the right to contest the violation; prepayment is merely conditional).

213. *Hodel v. Ind.*, 452 U.S. 314, 334–35 (1981).

214. *United States v. Hill*, 533 F. Supp. 810, 816 (E.D. Tenn. 1982).

Surface Mining Reclamation & Enforcement,²¹⁵ the courts found the legislation did not violate the equal protection of the law.

A prepayment requirement would also aid in improving the judgment of some MSHA inspectors who sometimes issue unreasonable or unsubstantiated violations.²¹⁶ If the operator is required to invest substantially in the litigation process, it is only fair that the federal government and regulators be required to invest precious resources in the process as well. Once the federal government is forced to issue costly repayments with interest, regulators may feel the pressure to apply a more analytic and well-reasoned approach to writing citations and violations. This simple and relatively inexpensive procedural reform would help refocus MSHA's approach to working with the operator, especially once violations are overturned or reduced and an already underfunded system sees greater budgetary reductions. Ultimately, the prepayment requirement would serve as a motivational tool for both parties to work together to reach a compromise and avoid litigation.

C. Redefining the Role of the Safety and Health Conference as a Viable Means of Alternative Dispute Resolution

Once the operator challenges the proposed penalty assessment, Commission jurisdiction is invoked and no informal resolution can be reached without Commission approval.²¹⁷ The Commission is required to approve any compromise, mitigation, or settlement reached between MSHA and the operator.²¹⁸ Under the current procedure, the parties have difficulty informally settling claims because there are few, if any, avenues for settlement other than formal litigation before the Commission. As originally conceived, the "Informal Safety and Health Conference"²¹⁹ ("Informal Conference"), now known as the "Enhanced Conference,"²²⁰ was intended

215. *Graham v. Office of Surface Mining Reclamation & Enforcement*, 722 F.2d 1106, 1114 (3d Cir. 1983).

216. *See Sewell Coal Co.*, 1 FMSHRC 864, 865, 872, 873 (1979) (determining whether the Secretary was authorized, without obtaining a warrant, to examine a mine operator's personnel records, which contained information both related and unrelated to reporting requirements under Part 50. Recognizing that the Mine Act "does not authorize wholesale warrantless, non-consensual searches of files and records in a mine office," then-Chief Administrative Law Judge Broderick held that 30 C.F.R. § 50.41 does not authorize the Secretary to inspect without a warrant).

217. 30 U.S.C. § 820(k) (2006).

218. *Id.*

219. Procedure Instruction Letter, No. I08-III-01, Mine Safety and Health Administration (2008).

220. *Id.*

to serve as a litigation “escape valve,” allowing MSHA and the operator to mitigate, vacate, or settle an alleged citation without Commission involvement and formal litigation.²²¹ In reality, the Informal Conference has historically played an extremely limited role,²²² but it now serves as a beacon for underutilization and mismanagement.

Currently, there are 16,000 cases, consisting of more than 80,000 violations,²²³ pending before the Commission.²²⁴ The initial conferencing system was eliminated in 2008.²²⁵ Prior to February 2008, MSHA held the Informal Conference before the assessment of the civil penalty and Commission jurisdiction.²²⁶ After the Informal Conference, MSHA would assign a proposed penalty based on modifications and reductions to the amount and the severity of the alleged violations.²²⁷ Thus, the Informal Conference was held much earlier in the process: after the inspector’s citation, but before MSHA issued a proposed penalty.²²⁸ This pre-penalty process allowed MSHA and the operator to conceivably settle and mitigate disputes in an efficient manner.²²⁹

In March 2009, MSHA reformed this process and instituted the new Enhanced Conference.²³⁰ Consequently, operators are required to file a notice of contest before MSHA will grant the operator’s request for an Enhanced Conference.²³¹ Once the notice is filed, the Commission has jurisdiction over the matter and the Commission’s approval is required for all settlement agreements.²³² Thus, MSHA’s procedural and policy shift, coupled with Commission jurisdiction, has compounded the case backlog.²³³ After a close examination of both conferencing options, the most

221. Mark N. Savit & Michael F. Duffy, *Resolution of MSHA Disputes—The Need for Change and Suggestions for a More Productive Approach*, E. MIN. L. INST. ch. 13 (1993).

222. *Id.*

223. BELL, *supra* note 27, at 1.

224. Victoria VanBuren, *US MSHA Unveils Pilot Mediation Program*, MEDIATE.COM (Aug. 2010), <http://www.mediate.com/articles/BayerKbl20100830b.cfm>.

225. *Mining Deaths Rise in 2010*, U.S. DEPT. OF LABOR, <http://www.dol.gov/opa/media/press/msha/MSHA20110029.htm> (Jan. 13, 2011).

226. *Id.* at 224.

227. *Id.*

228. JUDITH E. RIVLIN, THE CIVIL PENALTY CASE BACKLOG AT THE FEDERAL MINE SAFETY HEALTH REVIEW COMMISSION: WHAT’S TO BE DONE?, 3 (2010), *available at* http://www.emlf.org/Content/images/Speakers_Mine_Safety/1.%20Civil%20Penalty%20Case%20Backlog/1.C.-Rivlin.FMSHRC.Backlog.pdf.

229. *Id.* at 1.

230. *Id.*

231. *Id.*

232. § 106(a)(1), 91 Stat. at 1306.

233. *Id.* at 224.

effective alternative would be to hold the conference before MSHA issues any proposed penalty and the operator is compelled to file its notice of contest.²³⁴

Under the Enhanced Conference system, the parties are given the opportunity to review each citation issued during an inspection with MSHA.²³⁵ However, MSHA has the discretion to grant the request and determine the scope of the conference.²³⁶ As a result, even if the operator wants to settle the claim and avoid formal litigation, the decision to grant the Enhanced Conference rests solely with MSHA, one of the litigants. Thus, a clear conflict emerges and undermines the integrity of the process. Ideally, a fair and legitimate alternative dispute resolution (ADR) procedure cannot rest solely within one party's discretion, especially when that litigant has complete control over the process.

Despite the ineffective timing of the Enhanced Conference, other issues also serve as impediments. First, the mine inspector rarely attends the conference;²³⁷ the individual in the most advantageous position to educate the parties as to the legitimacy and nature of the violations is absent.²³⁸ As a consequence of the inspector's absence, the operator often receives a penalty reduction or abatement of the violation.²³⁹ Clearly, under this protocol the outcome is tarnished. Even though the operator may receive a reduction and leave with some sense of satisfaction, this sentiment is not attributable to any form of collaboration or understanding. Instead, the sentiment is due to miscommunication and a lack of information. Therefore, the parties enter the conference with a wait-and-see strategy as to whether the inspector will attend rather than a genuine motivation to mediate. Obviously, a system that encourages this type of ADR strategy will rarely produce meaningful outcomes for the parties and is most likely doomed for failure.

In a recent MSHA "Procedure Instruction Letter," the agency stated: "District Managers and Conference and Litigation Representatives (CLRs) have discretion regarding the timing of safety and health conferences and are encouraged to defer conferences until after the civil penalties have been proposed and timely contested."²⁴⁰ Informal conferences have been replaced

234. *Id.*

235. 30 C.F.R. § 100.6(a) (2010).

236. *Id.*

237. Rivlin, *supra* note 228, at 3.

238. *Id.*

239. *Id.*

240. *How Useful Are MSHA Conferences?*, SAFEPROINC.COM, http://www.safeproinc.com/how_useful_are_mshas_conferences.htm (last visited June 6, 2012).

by time consuming and costly litigation. Under the current system, MSHA assesses all citations immediately.²⁴¹ The operator then has ten days to request a conference and contest all proposed penalties in writing.²⁴² MSHA assigns a CLR to the file, who then files a request with the Commission for a 90-day period within which to conduct the conference.²⁴³ If a settlement is reached, the CLR files the proposed settlement with the Commission for approval.²⁴⁴ However, if a settlement is not reached, the parties proceed to “formal” litigation, a place all too familiar for the parties, and a track they have been on for several months before the procedural event.

Knowing the current conferencing system is badly broken, MSHA unveiled a “Pilot Mediation” procedure on August 20, 2010.²⁴⁵ The pilot procedure commenced on August 31, 2010, and was set to run for a 90-day test period.²⁴⁶ MSHA stated the goal of the pilot program was to “alter [the] ‘safety and health conferences’ so that mine operators can informally dispute citations before filing a formal appeal with the [Commission].”²⁴⁷ Due to the case backlog and the need for a legitimate mediation procedure, MSHA is “considering reinstating a conferencing system that was eliminated in 2007 partly in response to criticism that too many citations were being thrown out in a manner too friendly to the industry.”²⁴⁸ Currently, the program is being conducted in three district offices: Coal District Two in Mount Pleasant, Pennsylvania; Coal District Six in Pikeville, Kentucky; and the Metal/Nonmetal Southeast District in Birmingham, Alabama.²⁴⁹ However, the rise or fall of the Pilot program is statistically unclear at this time.

At first glance, this appears to be a welcome move to all the stakeholders. In reality, this Pilot program, like its predecessors, is premised upon the failed policies and procedures of the past. However, in a rare agreement between the Obama Administration and the coal industry, MSHA head Joe Main conceded, “[i]t is clear . . . the current conferencing structure is not working,” and “[b]y resolving factual disputes before a violation is contested, these citations will not be added to the enormous backlog of

241. *Id.*

242. 30 C.F.R. § 845.18 (2010).

243. *Id.*

244. *Id.*

245. VanBuren, *supra* note 224.

246. *Id.*

247. *Id.*

248. *Id.*

249. U.S. DEPT. OF LABOR, *supra* note 225.

cases that have bogged down the judicial system.”²⁵⁰ Despite the fact that the mining industry, the Obama Administration, and MSHA appear to agree about the need for a legitimate mediation process, the United Mine Workers of America (“UMWA”) has expressed concerns over the proposed mediation system. A UMWA spokesperson recently noted that, if the proposed pilot mediation program is a return to the 2007 program, the pilot would mark a “step backwards” for miner safety.²⁵¹

While there is clearly a need for the parties to have the right to elect mediation as an alternative to the current stalemate, simply turning back the clock in some vain attempt to restore the lost symbiotic relationship between MSHA and the operator will not work in today’s civil penalty arena. The benefits of litigation clearly outweigh the incentives to find a compromise.

The Informal Conference system, while procedurally positioned at a more advantageous time to reach settlement, was still largely ineffective.²⁵² Similar to the Enhanced Conference, the operator was required to request the Informal Conference within ten days of receipt of the citation.²⁵³ However, MSHA was under no statutory requirement to conduct the conference within a prescribed time frame.²⁵⁴ Thus, the operator would request the conference and then wait to see if MSHA would unilaterally grant the request. This was especially problematic as the 30-day statute of limitations to contest a citation or violation to the Commission continued to run.²⁵⁵ Consequently, the operator would file a “‘protective’ notice of contest” pending the outcome of the Informal Conference.²⁵⁶ This raised three very problematic issues.²⁵⁷ First, once the protective notice of contest was filed, the threat of formal litigation greatly diminished MSHA’s willingness to conduct the Informal Conference, jeopardizing an opportunity for settlement.²⁵⁸ Consequently, MSHA would then elect to have all discussions with the operator through legal counsel,²⁵⁹ thereby reducing communication and transforming the Informal Conference into a more adversarial process. Second, there was always uncertainty as to

250. *Id.*

251. *Id.*

252. *Id.*

253. Savit & Duffy, *supra* note 221.

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. Savit & Duffy, *supra* note 221.

whether or not Commission approval was required for outcomes reached during the Informal Conference once the protective notice of contest was filed.²⁶⁰ This jurisdictional quandary only propelled the parties further toward formal litigation and reduced any willingness to reach settlement during the Informal Conference. Third, in previous cases, conferencing officers were used to help expedite the process.²⁶¹ While the use of conferencing officers helped avoid the timing issues, the conference officer was not always “fully trained, prepared, or authorized to deal with the wide array of legal, factual, and technical arguments he or she may face.”²⁶² In the end, the Informal Conferencing structure, “when available, stymie[d] the efforts of . . . the parties to resolve conflicts without” formal litigation.²⁶³ As a result, cases ripe for settlement were contested and appealed in an attempt to find a legitimate forum to conduct settlement negotiations.²⁶⁴

A legitimate and successful ADR process will require more transparency and procedural safeguards to ensure that all the parties arrive at the conference with a willingness to come to a fair, reasonable, and justifiable outcome. A new approach is desperately needed. Simply reinstating the prior conferencing structure and labeling it “Pilot,” with no substantive reforms to the process, will be unsuccessful. Therefore, the conference structure and procedure surrounding it must be completely overhauled so that the parties are willing to participate and invest in mediation.

First, the timing of the conference needs to be reformed so the operator and MSHA can mediate controversies without Commission involvement. The Enhanced Conference should ideally take place before any proposed penalty is assessed against the operator.²⁶⁵ Additionally, all filing deadlines should be tolled until the conference is conducted,²⁶⁶ thus forestalling formal litigation and allowing the parties to attempt mediation.

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.*

265. See MICHAEL T. HEENAN, WHAT ABOUT THE CASE BACKLOG? (2010), available at http://www.emlf.org/Content/images/Speakers_Mine_Safety/1.%20Civil%20Penalty%20Case%20Backlog/1.A.-Heenan.Backlog.pdf (arguing that holding the Enhanced Conference before assessing a proposed penalty would help operators feel more fairly treated and would less likely end in litigation).

266. See Savit & Duffy, note 221 (offering solutions to incentivize mediation of disputes).

Currently, there is no requirement for MSHA to conduct the Enhanced Conference. Instead, the decision to grant the operator's request rests safely within the confines of MSHA's regulatory powers. MSHA's unilateral decision-making power only serves to undermine the process and fuel the operator's frustration. Therefore, a deadline and requirement should be imposed on MSHA. As long as the operator requests the conference within ten days following the inspection, MSHA should be compelled to grant the conference and conduct it within 60 days of the operator's request. MSHA's failure to hold a timely conference would result in the dismissal of violations and citations against the operator. This procedural reform would bring both parties to the negotiation table and facilitate a meaningful dialogue. While discernment cannot be mandated, procedural mechanisms can be instituted that facilitate compromise and settlement. This policy shift would relieve the operator's frustration at not being heard while implementing a formal procedure that thwarts arbitrary and inconsistent decision making. Thus, a more bright-line, consistent process would be laid out for the parties.

Further, the role and expectations of each party must be clearly defined. As the current conferencing system stands, the expectations and requirements are unclear and undefined. First, the mine inspector should be required to attend the conference. The inspector has the ability to provide the CLR, hearing officer, and operator with an explanation²⁶⁷ as to why the citation was issued. This crucial piece of evidence would help both parties gain a better understanding of the strengths and weaknesses of each other's case. Additionally, the inspector's attendance would have the added bonus of allowing him or her to gain a new perspective regarding enforcement and inspection issues from both sides. This will also create more consistency during the inspection process while fostering a more collaborative and cooperative relationship between the operator and inspector.

Also, a neutral third party should be incorporated to work with the operator and CLR. The CLR or the solicitor's office should continue its representation of MSHA. However, the role of the hearing officer should be reformed to that of a mediator or neutral third party. One option that has been proposed is to retain retired and former ALJs, solicitors, or attorneys²⁶⁸ to serve as mediators during the Enhanced Conference. Those individuals familiar with mine safety and the regulatory issues facing today's inspectors

267. Rivlin, *supra* note 228, at 4.

268. See Heenan, *supra* note 265 (suggesting that former solicitors, former judges, or other attorneys may be willing to mediate cases and the parties would be willing to share the cost).

would require less training and avoid unnecessary delay or expense. However, mediation and negotiation training will be an essential step even though these professionals may have extensive substantive knowledge.

Additionally, the mine operator and CLR must come to the negotiating table in good faith with a willingness to work toward a resolution. Congress cannot compel good faith and discernment. However, a more transparent and open discovery process during the Enhanced Conference would serve to expose each party's strengths and weaknesses and facilitate a more fruitful, focused, and candid negotiation. The exchange of information would take place before discovery rules attach; however, the parties would have to exercise good faith.²⁶⁹ Additionally, this open pre-litigation exchange of evidence and information would inform and educate the mediator about the issues and disagreement. A more transparent process and an earlier exchange of evidence will be essential to the success of the reformed Enhanced Conference. With these reforms, the Enhanced Conference will finally serve its intended role as an escape valve to formal litigation. More importantly, the informal conference will become a viable means of ADR that can legitimately and efficiently serve the parties, settle disputes, and reduce the case backlog.

CONCLUSION

A civil penalty system should encourage compliance rather than litigation, delay, frustration, and avoidance. MSHA and the industry have become entrenched in their positions where economics and principles, rather than a safer workplace, are the driving forces of compliance. Procedural reforms must be implemented in order to save a system ill-equipped to efficiently navigate today's regulatory and litigation landscape. These procedural reforms will provide incentives to avoid litigation and encourage the parties to come to the negotiating table. Also, the reforms will facilitate a dialogue that will focus on solving today's safety issues and ensure a safer workplace. Choosing to ignore the case backlog and relying on outdated legislation, policies, and strategies will only enable the system to fail. America will once again be forced to endure a tragedy that could have been prevented by these procedural reforms aimed at transforming the present adversarial system into one that encourages and fosters collaboration toward workplace safety.

269. *Id.*

