

# COMMENTS

## MINE SAFETY: PENALTY STRUCTURE AND ENFORCEMENT MECHANISMS OF THE MINE ACT IN THE WAKE OF THE UPPER BIG BRANCH EXPLOSION

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## INTRODUCTION

On April 5, 2010, an explosion at the Upper Big Branch Coal Mine in West Virginia killed twenty-nine miners.<sup>1</sup> In 2011, thirty-seven miners were killed on the job.<sup>2</sup> An additional fifteen hundred current and former coal miners die each year of black lung.<sup>3</sup> Strict adherence to the safety measures mandated by the Mine Act<sup>4</sup> would have prevented all or nearly all of these deaths.<sup>5</sup> The Mine Act, as implemented by the Mine Safety and Health Administration (MSHA),<sup>6</sup> is tailored to address common and foreseeable dangers in mines. The Act's effectiveness is blunted, however,

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1. See Ken Ward Jr. & Andrew Clevenger, *Last Four Upper Big Branch Miners Found Dead: Death Toll Rises to 29; Worst U.S. Mine Disaster in 40 Years*, CHARLESTON GAZETTE, Apr. 9, 2010, <http://www.wvgazette.com/News/201004090857> (reporting four days after the disaster that rescue workers were able to return to the mine and determine there were no survivors).

2. See *2011 Comparison of Year-to-Date and Total Fatalities for M/NM & Coal*, MINE SAFETY & HEALTH ADMIN., <http://www.msha.gov/STATS/DAILY/D2011BAR.PDF> (last updated Dec. 31, 2011).

3. *Black Lung*, UNITED MINE WORKERS OF AM., <http://www.umwa.org/?q=content/black-lung> (last visited May 8, 2012). Black Lung and other related diseases are all preventable occupational diseases caused "by prolonged breathing of coal mine dust." *Id.*

4. See Mine Improvement and New Emergency Response Act of 2006 (MINER Act), Pub. L. No. 109-236, 120 Stat. 493 (codified in scattered sections of 29 U.S.C. and 30 U.S.C.); Federal Mine Safety and Health Act of 1977, Pub. L. No. 95-164, 91 Stat. 1290 (codified as amended in 30 U.S.C. §§ 801-965 (2006)). The Federal Mine Safety and Health Act of 1977 and the MINER Act of 2006, which amended the prior legislation, are collectively referred to as the "Mine Act." See News Release, Office of Pub. Affairs, U.S. Dep't of Labor, Mining Deaths Rise in 2010: MSHA Chief Pledges Continued Enforcement, Outreach on Behalf of Nation's Miners 2 (Jan. 13, 2011), <http://www.msha.gov/media/PRESS/2011/NR110113a.pdf> (quoting Joseph Main, Assistant Secretary of Labor for the Mine Safety and Health Administration (MSHA), describing the enforcement power of the agency as stemming from the Mine Act).

5. See News Release, *supra* note 4, at 1 (quoting Joseph Main, Assistant Secretary of Labor for MSHA, as stating, "Mining deaths are preventable").

6. The Mine Safety and Health Administration was created within the Department of Labor in 29 U.S.C. § 557a (2006). For an organizational chart of MSHA, see *MSHA Program Areas*, MINE SAFETY & HEALTH ADMIN., <http://www.msha.gov/programs/programs.htm> (last visited May 8, 2012).

because many mine operators, who are ultimately responsible for ensuring a safe workplace,<sup>7</sup> choose to accept citations and penalties rather than follow MSHA's safety directives.<sup>8</sup> This means that the causes of the explosion at Upper Big Branch, as well as the causes of most other mining fatalities, are already illegal. Obviously then, enforcement and compliance are appropriate points for consideration and review, but they depend in large part on cooperation from the judges who review MSHA's actions.<sup>9</sup> To affect improvement, enhanced enforcement mechanisms and higher penalties need to be accompanied by changes at the Federal Mine Safety and Health Review Commission (FMSHRC or Commission). Policy changes at MSHA to strengthen enforcement or increase the consequences of noncompliance will have little effect if FMSHRC reverses orders or reduces penalties to previous lower levels when companies contest the actions.

After a series of mine accidents in 2006, Congress passed the MINER Act,<sup>10</sup> which amended the 1977 Mine Act. Among other things, the amendments increased penalties and created a category of "flagrant" violations, which can have penalties of up to \$220,000 each.<sup>11</sup> The impact of those amendments is not yet clear; the first flagrant violation case to be

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7. See 30 U.S.C. § 801(e) (2006) ("[T]he operators of such mines with the assistance of the miners have the primary responsibility to prevent the existence of such conditions and practices in such mines . . .").

8. See News Release, Office of Pub. Affairs, U.S. Dep't of Labor, MSHA Announces Results of November Impact Inspections (Dec. 21, 2010), <http://www.msha.gov/media/PRESS/2010/NR101221.pdf> (quoting Assistant Secretary Joseph Main's statement that impact inspections "reduce the number of mines that consider egregious violation records a cost of doing business"); see also *Blankenship's First Comments on Tragedy*, METRONews, Apr. 6, 2010, <http://www.wvmetronews.com/index.cfm?func=displayfullstory&storyid=36365> (quoting the CEO of Massey Coal after the Upper Big Branch mine disaster saying, "Violations are unfortunately a normal part of the mining process"). Performance Coal, a subsidiary of Massey Coal, was the operator of the Upper Big Branch Mine.

9. Cf. 30 U.S.C. § 823(a)-(d) (establishing the Federal Mine Safety and Health Review Commission (FMSHRC or Commission) and describing its structure and procedures for review of Mine Act cases).

10. Pub. L. No. 109-236, 120 Stat. 493 (codified in scattered sections of 29 U.S.C. and 30 U.S.C.); see also Joseph Main, *MINER Act: 5 Years Later*, (WORK IN PROGRESS): THE OFFICIAL BLOG OF THE U.S. DEP'T OF LABOR (June 15, 2011), <http://social.dol.gov/blog/miner-act-5-years-later/> ("The Mine Improvement and Emergency Response (MINER) Act of 2006 was drafted in response to the tragedies at the Sago, Aracoma, and Darby mines.").

11. See 30 C.F.R. § 100.5(e) (2010) (defining flagrant violations as those involving "a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury").

litigated on its merits is currently on appeal.<sup>12</sup> It is possible that without further regulatory changes holdings favorable to MSHA in this and other cases would alter the risk analysis for mine operators, at least for the most egregious violations.

Mine safety regulations have formed and developed in response to well-publicized mine disasters in an attempt to correct the weaknesses and flaws in the law revealed by the disasters.<sup>13</sup> Congress has not thus far passed legislation responding to the Upper Big Branch disaster,<sup>14</sup> which lost a strong advocate after the death of long-time West Virginia Senator Robert C. Byrd.<sup>15</sup> MSHA released its official report on the disaster on December 6, 2011, but the report has not prompted a renewed effort to make legislative changes.<sup>16</sup> Even if Congress does not act, MSHA has already adjusted its enforcement methods and can continue rulemaking within the parameters of the current statute to respond to the dangers revealed by the disaster.<sup>17</sup> While mine safety has improved immensely since the formation

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12. See *Stillhouse Mining, LLC*, 33 FMSHRC 778, 797 (2011) (“[W]hether an alleged violation is ‘flagrant’ under section 110 of the Mine Act presents a case of first impression for this Administrative Law Judge and the Commission.”); see also *Cases Currently on Review Before the Commission*, FED. MINE SAFETY & HEALTH REV. COMM’N, <http://www.fmsrc.gov/MonthlyCaseReport.pdf> (last visited May 8, 2012) (listing *Stillhouse* as one of the cases on review as of April 12, 2012).

13. See Alison D. Morantz, *Mining Mining Data: Bringing Empirical Analysis to Bear on the Regulation of Safety and Health in U.S. Mining*, 111 W. VA. L. REV. 45, 46–47 (2008) (detailing mine regulation that began after the Monongah disaster killed hundreds of miners in 1907 and continuing through the 2006 MINER Act, enacted after twelve miners died in an explosion at the Sago Mine).

14. See Sam Hananel, *House Rejects Mine Safety Bill Prompted by West Virginia Disaster*, HUFFINGTON POST (Dec. 8, 2010, 4:54 PM), [http://www.huffingtonpost.com/2010/12/08/house-rejects-mine-safety\\_n\\_794122.html](http://www.huffingtonpost.com/2010/12/08/house-rejects-mine-safety_n_794122.html) (explaining that the legislation would have made it easier for regulators to shut down problem mines prior to an accident, such as the explosion at Upper Big Branch).

15. See Ken Ward Jr., *Sen. Robert C. Byrd on the Massey Mine Disaster: “I Am Sick, I Am Saddened and I Am Angry,” Coal Tattoo*, CHARLESTON GAZETTE (Apr. 9, 2010, 10:35 AM), <http://blogs.wvgazette.com/coalattoo/2010/04/09/sen-robert-c-byrd-on-the-massey-mine-disaster-i-am-sick-i-am-saddened-and-i-am-angry/> (providing a statement from Sen. Byrd calling for action, including “a reexamination of the health and safety laws that have been put into place and what more may need to be done to avoid future loss of life”). Senator Byrd passed away not long after the Upper Big Branch explosion.

16. See *Upper Big Branch Mine-South*, MINE SAFETY & HEALTH ADMIN., <http://www.msha.gov/PerformanceCoal/PerformanceCoal.asp> (last visited May 8, 2012) (providing links to the *Fatal Accident Investigation Report* and other materials relating to the disaster).

17. See *Examining Recent Regulatory and Enforcement Actions of the Mine Safety and Health Administration: Hearing Before the Subcomm. on Workforce Protections of the H. Comm. on Educ. & the Workforce*, 112th Cong. 18–21 (2011) (statement of Joseph Main, Assistant Secretary of Labor for MSHA) (explaining MSHA’s actions in response to Upper Big Branch, including impact

of MSHA,<sup>18</sup> disasters like Upper Big Branch, continued deaths from smaller accidents, and long-term health problems<sup>19</sup> demonstrate the need for further safety improvement.

Because existing regulations address most risks present in mines, including the causes of the Upper Big Branch disaster, any new regulations or legislation should focus on widespread noncompliance. The Commission has acted as a barrier to stronger enforcement measures in the past, and this Comment will address its role in considering potential methods of increasing compliance. Part I will provide an explanation of mine-specific terminology, common violations, and the structure of MSHA and FMSHRC. Part II will discuss the fines currently applied to violations and the accompanying appeals process that often reduces penalties, arguing that fines need to be higher to incentivize compliance. Part III will discuss other enforcement measures that could increase compliance, with a focus on inspectors' authority to shut down production in some situations. Finally, Part IV will outline potential solutions. Each Part will discuss the relationship between MSHA and the Commission, the extent to which the Commission's administrative law judges (ALJs) interfere with enforcement measures, and the potential changes that could overcome the limitations imposed by the Commission.

## I. BACKGROUND, TERMINOLOGY, AND ADMINISTRATIVE STRUCTURE

### A. *Background on Mining Terminology and Common Violations*

Because the subject matter of this Comment involves technical terminology and legal standards specific to the Mine Act, an overview of the significance of a few frequent violations may be helpful. The Upper Big Branch Mine and the conditions investigators found after the accident will

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inspections at high-risk mines and rulemaking on pattern of violations injunctions, coal dust, and examinations).

18. See Anne Marie Lofaso, *What We Owe Our Coal Miners*, 5 HARV. L. & POL'Y REV. 87, 99–100 (2011) (demonstrating a drop in fatalities after the passage of comprehensive mine safety legislation).

19. Autopsies of the Upper Big Branch victims revealed cause for concern about increases in black lung, including in younger miners and those with fewer years on the job. See J. DAVITT MCATEER ET AL., GOVERNOR'S INDEP. INVESTIGATION PANEL, UPPER BIG BRANCH: THE APRIL 5, 2010, EXPLOSION: A FAILURE OF BASIC COAL MINE SAFETY PRACTICES 32 (2011), available at <http://www.nttc.edu/programs&projects/minesafety/disasterinvestigations/upperbigbranch/UpperBigBranchReport.pdf> (reporting that seventeen of the twenty-four autopsies with sufficient lung tissue revealed coal workers' pneumoconiosis (CWP), and five of those with CWP had less than ten years of mining experience).

be used as an example throughout. The violations that contributed to the disaster are not unusual in other mines,<sup>20</sup> though most do not reach a similar extent of noncompliance.

Upper Big Branch used longwall mining, a highly productive method of underground coal mining used primarily in Appalachia.<sup>21</sup> Longwall mining uses a shearer machine to extract a full seam of coal, with the shearer bits removing the coal and then dropping it onto a conveyor belt in a relatively automated process.<sup>22</sup> The roof above the coal seam is then allowed to collapse, forming a caved-out and inaccessible area called the “gob.”<sup>23</sup> Machinery for longwall mining is very expensive, but fewer workers are needed and the coal can be extracted more efficiently.<sup>24</sup> This type of mining tends to produce large quantities of dust, and ventilation is often a challenge.<sup>25</sup>

The long-established room-and-pillar method of underground coal mining remains the most common method used today.<sup>26</sup> Room-and-pillar mining removes the coal from “rooms,” leaving behind pillars of coal to support the roof that many companies later extract during retreat mining, allowing the roof to collapse behind miners.<sup>27</sup> Conventional room-and-pillar mining involves the labor-intensive process of undercutting the coal, drilling holes in it, blasting it loose with explosives, and then loading it.<sup>28</sup> Continuous room-and-pillar mining uses a machine to remove the coal and load it in one step, though both types require frequent stops for roof

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20. In 2010, the most frequently cited standards for underground coal mines were: (1) accumulations of combustible materials; (2) ventilation plan violations; (3) electrical equipment violations; (4) failure to protect from falls of roof, face, and ribs; and (5) roof control plan violations. See *Most Frequently Cited Standards for 2010: Underground—Coal*, MINE SAFETY & HEALTH ADMIN., <http://www.msha.gov/stats/top20viols/top20home.asp> (select “2010” under “What Year?,” “Underground” under “Select a Mine Type,” and “Coal” under “Select an Industry Group,” and then select “Get Top Twenty”) (last visited May 8, 2012) (compiling data for citations given at various types of mines). Others in the top twenty include machinery and equipment violations, failure to adequately rock-dust, and inadequate maintenance of firefighting equipment. *Id.*

21. ENERGY INFO. ADMIN., U.S. DEP’T OF ENERGY, DOE/EIA-TR-0588, LONGWALL MINING, at viii (1995).

22. *Id.* at 3.

23. *Id.* at 9.

24. See *id.* at 3, 5 (explaining that longwall mining is more efficient because it is a continuous operation and allows a higher rate of production to be sustained, but that the capital costs for equipment and installation are high).

25. See *id.* at 5 (explaining that dust levels often exceed maximum limits and must be reduced by modifying the cutting sequence or increasing airflow).

26. *Id.* at 3.

27. *Id.*

28. *Id.*

bolting.<sup>29</sup>

Regardless of which type of mining is used, the environment of an underground coal mine abounds with dangers. Regulations are designed to limit those dangers, and regulations exist for almost anything that can go wrong in a mine. If the regulations were followed, few accidents would take place. If a mine roof is properly supported, it will not collapse and crush workers.<sup>30</sup> If machinery has proper visibility and operators follow safety procedures, workers will not be run over.<sup>31</sup> Others accidents, like the Upper Big Branch explosion, have more complex causes.<sup>32</sup> Still, if equipment is properly maintained, dust controlled, ventilation plans followed, and examinations performed, then explosions will not happen.<sup>33</sup> An ignition would not have been able to grow into an explosion if equipment was maintained and water sprays worked properly.<sup>34</sup> There would be no coal dust in the air to cause black lung or propagate an explosion if dust control measures were implemented.<sup>35</sup> A foreman would

29. *See id.*

30. *Cf.* 30 U.S.C. § 862(a), (f) (2006) (mandating that the mine roof in all working areas, roadways, and travelways be supported, and that operators maintain a roof control plan and perform regular safety inspections).

31. *Cf.* 30 C.F.R. § 77.1607(g) (2011) (“Equipment operators shall be certain, by signal or other means, that all persons are clear before starting or moving equipment.”).

32. *See* MCATEER ET AL., *supra* note 19, at 4 (describing the combination of problems with ventilation, dust, and equipment that led to the explosion). *See generally* MINE SAFETY & HEALTH ADMIN., REPORT OF INVESTIGATION: FATAL UNDERGROUND MINE EXPLOSION APRIL 5, 2010 (2011), <http://www.msha.gov/Fatals/2010/UBB/FTL10c0331.pdf>. MSHA found that violations of twelve safety standards contributed directly to the explosion, including failing to conduct required examinations that could have revealed hazards, coal-dust accumulations violations, failure to rock-dust, failure to comply with the ventilation plan (including operating the shearer with missing and clogged water sprays), and failing to maintain the shearer. *Id.* at 9. Nine of those twelve contributory violations were also flagrant, and an additional 357 noncontributory violations were issued. *Id.* at 9. MSHA’s findings and conclusions regarding the explosion are consistent with McAteer’s; the parallel citation is only included here and McAteer’s is used as the authority throughout.

33. *See* MCATEER ET AL., *supra* note 19, at 4 (stating that the explosion was preventable and would not have happened had the company followed existing safety laws regarding ventilation, rock-dusting, coal-dust accumulations, equipment maintenance, and pre-shift and on-shift examinations).

34. *Id.* Water sprays on the shearer were clogged at the Upper Big Branch Mine. *Id.* at 23. Water sprays serve both to control dust and to douse sparks and prevent ignitions as the metal bits of the shearer hit rock. *Id.*

35. *Cf. id.* at 4. (explaining that one factor that resulted in the explosion at Upper Big Branch was the company’s failure to maintain its ventilation system in accordance with federal regulations, which resulted in an accumulation of coal dust in the system that served fuel for the explosion). Coal dust is highly explosive, and heavy dust throughout a mine can provide fuel for the explosion to continue through the whole mine rather than being contained to one section. For a short video demonstrating a coal-dust-propagated explosion,

be aware of high levels of methane or natural gas present in the mine if meters were working properly and if pre-shift examinations were performed as mandated.<sup>36</sup> Even black lung would be greatly reduced if mine operators adhered to dust control regulations.<sup>37</sup>

Though mine operators are ultimately responsible for maintaining safe mines regardless of enforcement measures, MSHA provides oversight to ensure that safety regulations are followed. MSHA inspectors may issue citations for violations of safety standards, which FMSHRC may review.

### B. *The Split Enforcement Scheme of MSHA and FMSHRC*

As an independent agency, FMSHRC is not part of the Department of Labor, nor does it share a common leadership figure with MSHA.<sup>38</sup> Under the Mine Act, MSHA is responsible for enforcement and rulemaking, and FMSHRC is responsible for adjudication.<sup>39</sup> FMSHRC consists of presidentially appointed Commissioners and ALJs.<sup>40</sup> Cases are first heard by ALJs, and the commissioners may hear appeals if they either choose to grant a party's Petition for Discretionary Review or elect to review a case independently.<sup>41</sup> Although a relevant favorable opinion from an ALJ can

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see *Performance Coal Company: Upper Big Branch Mine-South Single Source Page*, MINE SAFETY & HEALTH ADMIN., <http://www.msha.gov/PerformanceCoal/UBBPublic/bruceton.wvx> (last visited Apr. 22, 2012).

36. Examinations are a key tool in mine safety. A foreman must go through the mine before each shift, checking for compliance with safety standards, noting areas that require attention, and ensuring that there are not dangerous gas mixtures or other immediate risks. 30 C.F.R. § 75.360 (2011). The section foreman is also required to do examinations during shifts to check for developing problems. *Id.* § 75.362; cf. MCATEER ET AL., *supra* note 19, at 17–19 (describing the working conditions leading up to the explosion at Upper Big Branch, including oxygen deficiency, inoperable pumps, and improper air flows that were left unabated even after the foremen were put on notice).

37. Dust regulations are currently being reworked to require lower levels of dust that the miners can be exposed to because of continued incidences of black lung under the current standard. See *End Black Lung: Act Now!*, MINE SAFETY & HEALTH ADMIN., <http://www.msha.gov/S&HINFO/BlackLung/homepage2009.asp> (last visited May 8, 2012) (providing references to several agency actions); see also *Coal Mine Dust Personal Sampler Units*, 30 C.F.R. pt. 74 (2009) (discussing new technology for monitoring coal dust).

38. *E.g.*, *Frequently Asked Questions, Is the Commission Different from "MSHA"?*, FED. MINE SAFETY & HEALTH REV. COMM'N, <http://www.fmshrc.gov/faq.htm> (last visited May 8, 2012) (“The Commission is completely separate from MSHA.”).

39. See *About FMSHRC*, FED. MINE SAFETY & HEALTH REV. COMM'N, <http://www.fmshrc.gov/fmshrc.html> (last visited May 8, 2012) (describing the respective roles of MSHA and FMSHRC).

40. See *id.* (outlining the makeup of the Commission, which is composed of five members appointed by the President and confirmed by the Senate).

41. See *id.* (explaining that while most cases heard by the Commission are appealed by either an operator or the Secretary of Labor and MSHA, the Commission has the authority

be influential, ALJ decisions are not precedential, while Commission decisions are.<sup>42</sup> ALJ decisions become final if neither party appeals or if the Commission does not grant review.<sup>43</sup> Commission decisions may be appealed to the United States Courts of Appeals.<sup>44</sup>

MSHA has a relatively high level of statutory power to enforce the provisions of the Act, including at the inspector level.<sup>45</sup> MSHA inspectors do not need a warrant to enter mines, nor do they need to give notice.<sup>46</sup> Inspectors even have independent authority to shut down mines or sections of mines and withdraw miners if they find an imminent danger.<sup>47</sup>

Inspectors note the circumstances and the seriousness of a given violation, including the substantiating facts, in the citation record.<sup>48</sup> Particularly serious violations may be designated as significant and substantial (S&S), which contributes to the “gravity analysis.”<sup>49</sup> A violation is S&S if it “significantly and substantially contributes to the cause and effect of a coal or other mine safety or health hazard.”<sup>50</sup> The Commission created a four-part test to determine whether a violation is S&S:

- (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the

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to elect to review cases that were not appealed as well).

42. *Id.*

43. *Id.*

44. *Id.* Mine Act cases may be appealed to “the circuit in which the violation is alleged to have occurred or in the United States Court of Appeals for the District of Columbia Circuit.” 30 U.S.C. § 816(a)(1) (2006).

45. See R. Henry Moore, *The Doctrine of Judicial Deference and the Independence of the Federal Mine Safety and Health Review Commission*, 107 W. VA. L. REV. 187, 209–11 (2004) (comparing the lesser power given to the Occupational Health and Safety Administration with that given to MSHA, despite outwardly similar structures and missions).

46. See 30 U.S.C. § 813(a) (providing right of entry for inspectors and making it illegal for surface employees to warn underground employees of initiated inspections).

47. *Id.* § 817(a). This Comment further discusses the imminent danger standard and its interpretation, with a recommendation to strengthen inspectors’ authority. See *infra* Part III.A.

48. See *Performance Coal Company, Upper Big Branch Mine-South: Massey Energy Company*, MINE SAFETY & HEALTH ADMIN., <http://www.msha.gov/PerformanceCoal/PerformanceCoalRegularInspectionReports.asp> (last visited May 8, 2012) (linking to inspection reports, including citation forms with spaces for both the inspector’s record of the facts and boxes to check regarding the gravity, type of citation, and negligence level).

49. MINE SAFETY & HEALTH ADMIN., PROGRAM POLICY MANUAL: VOL. 1: INTERPRETATION AND GUIDELINES ON ENFORCEMENT OF THE 1977 ACT (1996) [hereinafter PROGRAM POLICY MANUAL], <http://www.msha.gov/regs/complian/ppmPMVOL1C.HTM> (explaining the rules and regulations to guide inspectors in enforcing the Mine Act).

50. *Id.* (quoting Federal Mine Safety and Health Act of 1977, Pub. L. No. 95-164, § 104(d)(1), (e)(1), 91 Stat. 1290, 1301 (1977)).

violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.<sup>51</sup>

The third factor tends to be the most difficult to demonstrate because the likelihood of injury can be somewhat speculative.<sup>52</sup> S&S designations receive a great deal of attention in many Mine Act cases, particularly in determining the appropriate penalty.<sup>53</sup> Because companies are much more likely to contest citations with high penalties, and those citations are generally S&S, ALJs regularly perform the S&S analysis. ALJs apply the standard created by the Commission to determine whether the S&S designation was appropriate. The S&S analysis demonstrates the potential for questions regarding the appropriate role of the Commission in formulating standards and rules with respect to Mine Act provisions, with MSHA bound by an interpretation of the adjudicative review body.

The split enforcement scheme leaves a blurry line between the executive and quasi-legislative functions of MSHA and the quasi-judicial function of FMSHRC. The Mine Act was enacted before *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,<sup>54</sup> and does not contain language to clarify the distinct roles of the Commission and MSHA or the standard of review. While it is fairly well-settled that MSHA is entitled to *Chevron* deference,<sup>55</sup> tension remains on some issues for which the Commission has formulated standards and rules in its precedent-setting decisions.<sup>56</sup> Agency powers

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51. See *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (1984) (footnote omitted) (creating the much-cited “*Mathies* test”).

52. Cf. *Mach Mining, LLC*, 33 FMSHRC 763, 766–67 (2011) (finding that accumulations violations were not significant and substantial (S&S) without a clearly defined ignition source at the time of the inspection, making injury possible but not “reasonably likely”).

53. See, e.g., *Triad Underground Mining, LLC*, 33 FMSHRC 231, 234–37 (2011) (referencing several Commission cases clarifying the standard and criteria to be considered in an S&S determination).

54. 467 U.S. 837, 865–66 (1984) (establishing deference for reasonable agency interpretations of an agency’s own statute that Congress has authorized the agency to administer).

55. See *Energy W. Mining Co. v. Fed. Mine Safety & Health Review Comm’n*, 40 F.3d 457, 463–64 (D.C. Cir. 1994) (holding that the Commission owes the Secretary and MSHA deference, despite language in the Mine Act granting the Commission authority to review questions of law, policy, or discretion). But see *Moore*, *supra* note 45, at 190 (“The independence of a body such as the Review Commission is in direct conflict with the doctrine of judicial deference to administrative interpretations . . .”).

56. For a discussion of the rules surrounding imminent danger withdrawal orders, for which the Commission has limited MSHA’s enforcement authority, see *infra* Part III.A. The standards for S&S designations discussed above are another example of Commission-created policy that is narrower than an MSHA standard would likely be.

reach their zenith with notice-and-comment rulemaking or formal adjudication with the force of law.<sup>57</sup> When an agency's interpretation can be found in less formal agency materials, such as letters, guidelines, or policy statements, courts are to view it as persuasive and entitled to respect, but not necessarily entitled to full *Chevron* deference.<sup>58</sup> However, the United States Court of Appeals for the D.C. Circuit has held that even MSHA's litigation positions before the Commission are entitled to *Chevron* deference.<sup>59</sup> No matter the level of deference, as in any court, certain functions are judicial by nature and must be left to FMSHRC. For those cases in which the Commission does overstep its proper role, appeals to the United States Courts of Appeals can both protect the measure in question and rein in the Commission and ALJs. While MSHA can use rulemaking and appeals to protect policy positions and interpretations of many provisions of the Mine Act, the Commission and ALJs retain the power to review MSHA's enforcement measures. ALJs and the Commission also have discretion regarding penalty assessments,<sup>60</sup> making it difficult for MSHA to impose consistently higher penalties within the discretionary range without acquiescence from the Commission.

## II. OPTIMAL PENALTIES TO INCREASE COMPLIANCE WITH SAFETY PROVISIONS

Increased penalties for violations of the Mine Act could increase compliance, but only if the penalties are set sufficiently high and consistently levied against wrongdoers to alter the current profit motives

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57. Cf. Matt Kenna, *Chevron Deference to Agencies: A Two-Way Street*, 15 SOUTHEASTERN ENVTL. L.J. 395, 400 (2007).

58. See *id.* at 399–400 (explaining that deference is granted in a continuum, to be determined on a case-by-case basis, with rulemaking receiving the highest degree and posthoc litigation positions unsupported by a prior agency position receiving a far lower degree of deference). The Court formulated the “power to persuade” standard in *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944), and revitalized it in *United States v. Mead Corp.*, 533 U.S. 218, 234–35 (2001), after *Chevron* had seemingly replaced it.

59. *Sec’y of Labor v. Excel Mining, LLC*, 334 F.3d 1, 6 (D.C. Cir. 2003) (“[I]n the statutory scheme of the Mine Act, the Secretary’s litigating position before [the Commission] is as much an exercise of delegated lawmaking powers as is the Secretary’s promulgation of a . . . health and safety standard, and is therefore deserving of deference.” (alteration in original) (internal quotation marks omitted)). Despite this holding, the resurgence of lower levels of deference to certain agency decisions discussed above could mean rulemaking will be necessary in the future or that rulemaking will be needed to preserve MSHA’s interpretations before Article III courts on appeal from Commission decisions.

60. See 29 C.F.R. § 2700.30(b) (2011) (“In determining the amount of penalty, neither the Judge nor the Commission shall be bound by a penalty proposed by the Secretary or by any offer of settlement made by a party.”).

that favor production over safety.<sup>61</sup> The maximum penalty under the Mine Act, except in recent cases with flagrant violations, is \$70,000 per violation.<sup>62</sup> Penalties can be assessed under a point system, which assigns point values to the size of the operator, the level of negligence, the number of miners affected, past violation history, and the gravity of the violation, among other factors.<sup>63</sup> Alternatively, MSHA can opt for a special penalty assessment if warranted.<sup>64</sup> MSHA must assess special penalties based on the following criteria: (1) the appropriateness of the penalty to the size of the operator, (2) violation history, (3) negligence, (4) gravity, (5) the operator's demonstrated good faith in attempting to achieve rapid compliance after notification of the violation, and (6) the effect of the penalty on the operator's ability to continue in business.<sup>65</sup>

Under the Mine Act, the goal of penalties is to deter violations.<sup>66</sup> The Senate Report from the 1977 Act explains, "Mine operators still find it cheaper to pay minimal civil penalties than to make the capital investments necessary to adequately abate unsafe or unhealthy conditions, and there is still no means by which the government can bring habitual and chronic violators of the law into compliance."<sup>67</sup> The same could be said today, despite the penalties permitted by the Mine Act, indicating that higher penalties are necessary to achieve the desired deterrent effect. At the Upper Big Branch Mine, MSHA inspectors regularly found serious problems and issued citations, with over five hundred citations and orders issued in 2009.<sup>68</sup> In 2008, inspectors issued nearly two hundred citations

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61. See A. Mitchell Polinsky & Steven Shavell, *Enforcement Costs and the Optimal Magnitude and Probability of Fines*, 35 J.L. & ECON. 133, 133 (1992) ("The optimal fine equals the harm, properly inflated for the chance of not being detected, plus the variable enforcement cost of imposing the fine."). Polinsky and Shavell's model includes variables for the cost of the harm, the benefit to the bad actor, enforcement costs, probability of detection, and the wealth of the bad actor. *Id.* at 135.

62. 30 C.F.R. § 100.3(a)(1) (2011).

63. *Id.* § 100.3(a)-(h).

64. *Id.* § 100.5(a).

65. *Id.* § 100.5(b) (referring to the six factors set out in § 100.3(a)).

66. See S. REP. NO. 95-181, at 40-41 (1977) (explaining that the goal of civil penalties is not to raise revenue but to induce compliance with the safety standards in the Act), *reprinted in* STAFF OF SUBCOMM. ON LABOR, 95TH CONG., LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, at 628-29 (Comm. Print 1978).

67. S. REP. NO. 95-181, at 4, *reprinted in* STAFF OF SUBCOMM. ON LABOR, 95TH CONG., LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, at 592 (Comm. Print 1978).

68. *Summary of Citations and Orders Issued at Upper Big Branch-South Mine*, MINE SAFETY & HEALTH ADMIN., [http://www.msha.gov/performancecoal/Violation\\_Summary.pdf](http://www.msha.gov/performancecoal/Violation_Summary.pdf) (last visited May 8, 2012).

with total proposed penalties of \$292,446.<sup>69</sup> As of April 5, 2010, the operator had paid \$47,661, an additional \$73,513 remained under contest, and settlements or penalty contest cases reduced the proposed penalties by the remaining \$171,272.<sup>70</sup> It is not clear that the full \$292,446 would have been sufficient to deter violations; paying about one-sixth of the assessed penalties over a two-year period was obviously insufficient.

ALJs consider the same factors as MSHA in determining penalties but have a great deal of discretion to impose higher or lower penalties than those assessed by MSHA.<sup>71</sup> ALJs reduce penalties in many cases, even when generally accepting MSHA's evidence and contentions.<sup>72</sup> The uncertainty created by the discretion of ALJs in assigning penalties diminishes the effectiveness of the fines in deterring violations. The tendency for ALJs to significantly reduce penalties also incentivizes contesting penalties, contributing to an extensive backlog of cases for the Solicitor of Labor and ALJs to adjudicate.<sup>73</sup> The backlog consisted of nearly 70,000 citations contested between October 1, 2007, and February 28, 2010; many of those citations have since been disposed of under the Backlog Reduction Project<sup>74</sup> implemented after the Upper Big Branch

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69. *Upper Big Branch: South Mine—Civil Penalty Summary*, MINE SAFETY & HEALTH ADMIN., <http://www.msha.gov/performancecoal/Upper%20Big%20Branch-South%20Mine%20Civil%20Penalty%20Summary.pdf> (last visited May 8, 2012).

70. *Id.*

71. *See, e.g.*, *Walker Stone Co. v. Sec'y of Labor*, 156 F.3d 1076, 1086 (10th Cir. 1998) (“[A]dministrative law judges are accorded broad discretion in assessing civil penalties under the Mine Act.”).

72. *See, e.g.*, *Jim Walter Res., Inc.*, 27 FMSHRC 757, 757, 794–805 (2005) (dismissing most citations for lack of evidence after an explosion killed thirteen miners because the recovery effort required the mine to be flooded, thereby altering conditions). In *Jim Walter Resources, Inc.*, the administrative law judge (ALJ) found an incomplete pre-shift examination violation to be S&S, of high gravity, and the result of high negligence and unwarrantable failure, yet assessed a \$2,500 penalty where the Secretary proposed \$55,000. *Id.* at 805–12. On appeal, the Commission remanded the case for further explanation of the penalty assessment. *See Jim Walter Res., Inc.*, 28 FMSHRC 579, 607–08 (2006). Yet, the ALJ increased the penalty to a still-low \$5,000. *See Sec'y of Labor, Jim Walter Res., Inc.*, No. SE 2003-160, 2006 WL 3933270, at \*8 (FMSHRC Dec. 19, 2006).

73. *See generally* FED. MINE SAFETY AND HEALTH REVIEW COMM'N & U.S. DEP'T OF LABOR, FIRST QUARTERLY PROGRESS REPORT: TARGETED CASELOAD BACKLOG REDUCTION (2010), [http://www.fmshrc.gov/DOL\\_FMSHRCReport.pdf](http://www.fmshrc.gov/DOL_FMSHRCReport.pdf).

74. The Backlog Reduction Project is a joint effort of MSHA and FMSHRC to reduce the backlog of citations and penalty cases for which both agencies received additional appropriations to hire attorneys, ALJs, and other staff. *See generally* FED. MINE SAFETY AND HEALTH REVIEW COMM'N & U.S. DEP'T OF LABOR, FINAL REPORT ON THE TARGETED CASELOAD BACKLOG REDUCTION PROJECT (2011), [http://www.fmshrc.gov/4DOL\\_FMSHRC\\_report.pdf](http://www.fmshrc.gov/4DOL_FMSHRC_report.pdf).

explosion.<sup>75</sup> The backlog benefits companies by allowing them to keep violations off their records for longer and by delaying any payment, giving companies the use of the money until the final order.

Penalties available to MSHA may not be high enough to deter even if aggressively and promptly imposed. Under the point system, a relatively small coal mine operated by a relatively small controlling company with a mid-range violation history would incur a penalty of under \$10,000 for a high-negligence safety violation reasonably likely to kill three miners.<sup>76</sup> After MSHA reduces penalties to settle cases<sup>77</sup> or ALJs lower them on appeal, they are even less likely to be sufficient. The often lengthy appeals process further reduces the effectiveness of the penalties by eliminating any immediacy between the violation and the potentially much-reduced penalty, encouraging the perception that penalties are just a cost of doing business.<sup>78</sup>

#### A. *Discouraging Frivolous Appeals Through FMSHRC Reforms*

Several cases exemplify the extent to which review of cases by ALJs can diminish the effectiveness of penalties and encourage companies to contest citations. In one case, a small operator had several violations for which MSHA had assessed fairly low penalties, around \$400 per violation.<sup>79</sup> Even where the ALJ agreed with each of the inspector's findings regarding the level of negligence, the gravity of the violation, and the S&S designation, he reduced the already-low assessed penalties.<sup>80</sup> One citation for the lack of a

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75. FED. MINE SAFETY AND HEALTH REVIEW COMM'N & U.S. DEP'T OF LABOR, *supra* note 73, at 7.

76. *See* 30 C.F.R. § 100.3(a)(2) (2011) (calculating a hypothetical penalty based on penalty point charts).

77. *See, e.g.*, Black Beauty Coal Co., 31 FMSHRC 1549, 1549–50 (2009) (expressing concern that greatly reduced penalties encourage operators to contest the penalties, and rejecting a settlement proposal on the basis that the greatly reduced penalties would not have the appropriate deterrent effect against the operator, a frequent violator with many contested penalties).

78. *See Citations and Orders Assessed: \$10,000 or More, Mine Data Retrieval System*, MINE SAFETY & HEALTH ADMIN., <http://www.msha.gov/drs/ASP/OtherReports.asp> (select "Get Information" without adding any information to the search criteria) (last visited May 8, 2012) (charting the status of high-dollar penalty assessments, with most remaining in contest for years).

79. *See generally* John Richards Constr., 23 FMSHRC 1045 (2001) (reducing the penalty for twenty-one violations from the \$19,073 MSHA assessed to \$3,350).

80. *Id.* at 1066–67. For example, the Secretary assessed a \$655 penalty for lack of an emergency communication system because the operator relied on either the CB radio in a truck that was not always present or telephones at nearby homes and facilities. *Id.* Despite finding the violation S&S and the result of moderate negligence, the ALJ reduced the penalty to \$200. *Id.*

guard around moving parts on a conveyor, for which the Secretary assessed a penalty of \$399, resulted in a \$10 penalty from the ALJ, who found that it was low gravity, not S&S, and not the result of negligence.<sup>81</sup> Though it was not a serious violation, a \$10 penalty against a corporation cannot adequately serve the deterrent purpose of the Mine Act.

In another case, an ALJ reduced a penalty from \$2,200 to \$750 after finding the level of negligence to be lower than alleged.<sup>82</sup> A loader used to haul material on the mine site had weak brakes unable to stop the loader on the steep grades at the site, and the operator told the inspector that he had complained repeatedly to the foreman about the brake condition.<sup>83</sup> It took about fifteen minutes to adjust the brakes after the inspector issued an imminent danger order barring use of the loader until abatement of the violation.<sup>84</sup> The ALJ found that the operator's negligence was moderate rather than high because "the brakes did supply some stopping power."<sup>85</sup> Another ALJ agreed with each of the inspector's findings regarding gravity and negligence in a case with a truck leaking hydraulic oil, presenting danger of fire or explosion, yet reduced the penalty from \$5,503 to \$3,500.<sup>86</sup>

The outcomes in these cases explain why operators find it worthwhile to contest so many citations. In each case, the ALJ essentially agreed with MSHA inspectors' factual and legal assertions but significantly reduced the penalties. Though ALJs are accorded broad discretion,<sup>87</sup> they consider the same factors as MSHA in determining an appropriate penalty. Consistent disparity between penalties assessed at the different stages in cases in which all other findings remain unaltered suggests incorrect application of the assessment criteria.

In many other cases, ALJs reduced penalties after finding that a violation was not S&S or that the operator had not been as negligent as alleged.<sup>88</sup>

81. *Id.* at 1054–55.

82. *See* Washington Cnty. Aggregates, 25 FMSHRC 306, 307–10, 317 (2003).

83. *See id.* at 307–08 (describing the inspector's observations and interactions).

84. *Id.* at 308.

85. *Id.* at 310.

86. *See* Sequoia Energy, LLC, 32 FMSHRC 1361, 1370–71 (2010) (finding that the violation was S&S, of serious gravity, the result of at least moderate negligence, and reasonably likely to result in a fire or explosion causing serious injury or death).

87. *See* Walker Stone Co. v. Sec'y of Labor, 156 F.3d 1076, 1086 (10th Cir. 1998) (reciting the "broad discretion" standard).

88. *See, e.g.,* Sidney Coal Co., 31 FMSHRC 1197 (2009) (removing S&S designations and reducing the penalty from \$38,000 to \$20,000); Cumberland Coal Res., LP, 31 FMSHRC 137, 143, 151, 158, 166 (2009) (removing S&S designations). *Cf.* H.R. 5663, *Miner Safety and Health Act of 2010, Hearing before the H. Comm. on Educ. and Labor*, 111 Cong. 19 (2010) (Statement by M. Patricia Smith, Solicitor of Labor, U.S. Department of Labor).

For example, in one case, the ALJ found that a citation for extensive accumulations of combustible coal dust along a conveyor belt was not S&S because the ALJ considered ignition unlikely.<sup>89</sup> The inspector testified that lubricant around the metal parts of the belt dries out within hours, causing rubbing, heat, and sparks, although the bearings were not hot at the time he conducted the inspection.<sup>90</sup> The ALJ ordered a penalty of merely \$500.<sup>91</sup> Because inspectors cannot constantly be present in all mines to monitor developing conditions, they must cite conditions based on their observations during periodic inspections and their experience of how those conditions may develop. ALJs often want more definitive evidence of an ignition source than is available, though ignition sources abound in any mine from friction, electrical equipment, sparks from heavy machinery, or even miners illegally smoking while underground.

It is important to keep in mind that these penalties are being assessed against companies, not individuals. Given the profit motive of corporations, penalties need to be high enough to make it more profitable to obey the law than to violate it.<sup>92</sup> Even when companies do not rely on ALJ discretion to reduce penalties, those available to MSHA under the Mine Act may not be high enough to effectively deter some violations. Simply increasing the penalties that MSHA can impose, however, would accomplish little without corresponding policy changes at FMSHRC to ensure that higher penalties are actually imposed.

Appealing citations has other benefits for operators in addition to the eventual lower fine, which may be negated in some cases by the legal expenses of the appeal. Some of MSHA's stricter enforcement measures depend upon a history of violations, and citations still contested cannot be

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(explaining that the Commission's narrower interpretation of S&S "has hampered enforcement for many years" and listing some examples).

89. See *Freedom Energy Mining Co.*, 31 FMSHRC 1475, 1480-82 (2009) (finding that coal dust extending 320 feet along a belt line was not an S&S violation because the lack of an ignition source made it unlikely that injuries would occur).

90. See *id.* at 1481-82.

91. See *id.* at 1483.

92. Accord S. REP. NO. 95-181, at 41 (1977) ("To be successful in the objective of including effective and meaningful compliance, a penalty should be of an amount which is sufficient to make it more economical for an operator to comply with the Act's requirements than it is to pay the penalties assessed and continue to operate while not in compliance."), reprinted in STAFF OF SUBCOMM. ON LABOR, 95TH CONG., LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, at 629 (Comm. Print 1978). The Report also suggests that even low and administratively cumbersome penalties were far more effective than none in a comparison between the outcomes of regulations on coal mines with penalty provisions and metal and nonmetal mines without penalty provisions. S. REP. NO. 95-181, at 41, reprinted in STAFF OF SUBCOMM. ON LABOR, LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, at 629 (Comm. Print 1978).

used to support those measures.<sup>93</sup> A company's violation history plays a role in assessing penalties, providing another reason to contest citations.<sup>94</sup> By keeping more citations under contest, a company can partially hide the extent of its noncompliance with safety regulations. Companies can also claim far better safety records than they actually have, winning safety awards and garnering public relations benefits.<sup>95</sup> These benefits, derived from the delay in finalizing violations, are enhanced by the backlog of contests and appeals before ALJs. The more citations companies appeal, the harder it is for the government to expedite the cases and the longer the companies can keep violations off their records.

The Backlog Reduction Project can help reduce some of the benefits of contesting citations, but it is unlikely to significantly reduce the number of frivolous appeals because companies have little to lose. One of the United Mine Workers of America's (UMWA's) recommendations after Upper Big Branch is for all assessed penalties to be paid into a non-interest bearing escrow account until a final order is reached.<sup>96</sup> This measure, like the Backlog Reduction Project, would reduce automatic, inherent benefits of contesting citations. However, companies would still have nothing to lose by contesting citations, no matter their legal and factual position, and would still have the potential to recognize significant gains. Measures that add an element of risk to the appeals would be more effective. ALJs have the authority to increase penalties as well as decrease them; if the Commission created a policy encouraging them to do so as appropriate, companies might hesitate to appeal when they lack supportive facts. A standard could be developed defining frivolous appeals for which assessed penalties would be increased.<sup>97</sup> Though such a standard would not apply

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93. UNITED MINE WORKERS OF AM., INDUSTRIAL HOMICIDE: REPORT ON THE UPPER BIG BRANCH MINE DISASTER 18 (2011), available at <http://www.umwa.org/files/documents/134334-Upper-Big-Branch.pdf> (explaining that a pattern of violations, which can halt production and increase MSHA's enforcement power, cannot be issued while the relevant violations are contested).

94. See 30 C.F.R. §§ 100.3(a)(1)(ii), 100.3(a)(2), 100.5(b) (2011) (including history of violations as a factor for penalty assessments under either the point system or special assessment).

95. See, e.g., Laura Strickler, *Massey Energy Honored with Safety Award*, CBS NEWS (May 28, 2010, 12:45 PM), [http://www.cbsnews.com/8301-31727\\_162-20006284-10391695.html](http://www.cbsnews.com/8301-31727_162-20006284-10391695.html) (reporting on a safety award Massey won not long after the Upper Big Branch explosion); see also *Massey Energy Becomes First Mining Company to Win Three Sentinels of Safety Awards in a Single Year*, PR NEWSWIRE (Oct. 28, 2009), <http://www.prnewswire.com/news-releases/massey-energy-becomes-first-mining-company-to-win-three-sentinels-of-safety-awards-in-a-single-year-66936477.html> (highlighting Massey's awards for exemplary safety in three mines).

96. UNITED MINE WORKERS OF AM., *supra* note 93, at 86.

97. See *id.* at 86–87 (suggesting application of increased penalties and fees to citations found to be frivolous).

to most appeals, if it were imposed often enough, companies would decide whether to appeal based on the strength of their legal claims rather than the magnitude of penalty to reduce or delay.

*B. The Impacts of Corporate Culture on Noncompliance with Regulations*

The conditions at Upper Big Branch prior to the disaster, combined with evidence gathered about Massey's corporate culture, demonstrate that the prospect of citations and penalties was insufficient to prompt compliance.<sup>98</sup> Don Blankenship, the former CEO of Massey Energy, sent a memo in 2005 reminding mine superintendents of the primacy of production over other concerns in mines:

If any of you have been asked by your group presidents, your supervisors, engineers or anyone else to do anything other than run coal (i.e. build overcasts, do construction jobs, or whatever) you need to ignore them and run coal. This memo is necessary only because we seem not to understand that coal pays the bills.<sup>99</sup>

This memo was cited in a lawsuit by the widows of miners killed after a belt fire in 2006 alleging that production demands at the expense of safety measures contributed to the fire.<sup>100</sup> The conditions found at Upper Big Branch further demonstrate a continuing disregard for safety measures that would require shifting workers from production to safety or temporarily halting production to make repairs, despite past accidents.<sup>101</sup>

Some long-standing problems that contributed to the Upper Big Branch Mine explosion include inadequate rock-dusting, ventilation problems, and poorly maintained equipment.<sup>102</sup> The rock-dusting machine rarely worked, and too few workers were assigned to rock-dusting to be effective.<sup>103</sup> The

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98. See generally MCATEER ET AL., *supra* note 19; UNITED MINE WORKERS OF AM., *supra* note 93 (placing the majority of the blame for the accident on the disregard for safety exhibited by Massey, based on company culture, employee intimidation, and violation history).

99. Memorandum from Don Blankenship, CEO of Massey Coal, to All Deep Mine Superintendents (Oct. 19, 2005), *reprinted in* UNITED MINE WORKERS OF AM., *supra* note 93, app. AA—Corporate Communications, at 1.

100. Complaint at 6, *Bragg v. Aracoma Coal Co.*, No. 06-C-372-D (W. Va. Cir. Ct. 2006).

101. UNITED MINE WORKERS OF AM., *supra* note 93, at 73–80 (highlighting several Massey mines and incidents that illustrate Massey's prioritization of production over safety).

102. MCATEER ET AL., *supra* note 19, at 15–16 (outlining the primary causes of the explosion).

103. See *id.* at 50–55 (“The dusting, difficult to begin with because the small crew had to cover an extremely large area and contend with mine traffic, was further complicated by the fact that the big orange duster at UBB didn't work properly much of the time.” (footnote omitted)).

operator was well-aware of the problem and decided that a new machine or extensive repairs on the old one were too expensive.<sup>104</sup> The operator presumably chose not to assign sufficient numbers of employees to the rock-dusting crew to keep the entire mine rock-dusted.<sup>105</sup> Those choices resulted in a mine with inadequate rock-dusting, leaving combustible coal dust to propagate the explosion throughout the mine.<sup>106</sup> If the fine for coal-dust accumulations violations were sufficiently high and consistent, a profit-motivated operator would have chosen to hire the extra person and fix the machine rather than incur penalties and correct the conditions only when forced by inspectors.<sup>107</sup>

Ventilation problems abounded at the Upper Big Branch Mine as well and also contributed to the explosion.<sup>108</sup> The report on the explosion explains: “Because results for making changes to ventilation cannot be predicted, it is considered a cardinal sin to make ventilation changes with miners underground.”<sup>109</sup> At Upper Big Branch, the ventilation system apparently relied on such changes on a daily basis.<sup>110</sup> When one section

104. *See id.* (documenting testimony from workers that they had complained to management about the condition of the rock-duster and the need for a larger rock-dusting crew). Records from pre-shift examinations showed 561 rock-dusting requests were heeded only 65 times. *Id.* at 53.

105. *Id.* at 51.

106. *See id.* at 56 (explaining how coal dust, without sufficient levels of rock dust to combat its combustibility, can propagate an explosion).

107. Performance Coal Company, the Massey subsidiary that operated the Upper Big Branch Mine, was cited nearly one hundred times between early 2008 and the time of the explosion in April 2010 for accumulations of combustible material and impermissible combustible content at Upper Big Branch. *See Upper Big Branch Mine-South: Citations, Orders, and Safeguards Issued Between January 2008 and April 5, 2010*, MINE SAFETY & HEALTH ADMIN., <http://www.msha.gov/performancecoal/performancecoal.asp> (scroll down to “Resources” and then select link for “Citations, Orders and Safeguards Issued Between January 2008 and April 5, 2010”) (last visited May 8, 2012). Many of the proposed penalties for accumulations violations were as low as \$100, with a few—still being contested—for over \$1,000. *Id.* The highest accumulations-related penalty of \$66,142 was for extensive accumulations throughout a section that was also cited for excessive methane. *Id.* That Massey chose to either pay or contest penalties while continuing to violate the combustible accumulations standard indicates that the operator found it more economical to absorb the current level of fines than to invest in the resources necessary for compliance. *Cf.* S. REP. NO. 95-181, at 41 (1977) (suggesting that the penalties needed to be high enough to incentivize compliance), *reprinted in* STAFF OF SUBCOMM. ON LABOR, 95TH CONG., LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, at 629 (Comm. Print 1978).

108. *See* MCATEER ET AL., *supra* note 19, at 15–16 (stating contributing factors to the explosion).

109. *Id.* at 60. Advanced ventilation systems are needed to maintain safe air quality in deep mines that have little airflow and experience occasional releases of methane and other gases.

110. *See id.* at 61–62 (“The competition for air at Upper Big Branch led to the dangerous

foreman shut down his section for lack of air as required by law, the president of Performance Coal Company threatened to fire him.<sup>111</sup> In the long term, the company chose profit over safety by neglecting to pay engineers to create a functioning ventilation system.<sup>112</sup> In the short term, each time ventilation problems were noticed, the company violated the law and chose production over safety by refusing to withdraw miners while correcting airflow.<sup>113</sup>

To be an effective deterrent for profit-maximizing corporations, a penalty must cost more than the gain achieved by the violation after accounting for the probability of an inspection taking place.<sup>114</sup> Some violations are the result of simple carelessness,<sup>115</sup> which mine operators can discourage but not eliminate, and from which companies gain little. Others, however, result from a focus on production at the expense of safety or deliberate allocation of resources away from health-and-safety related tasks. Without regulation, some safety measures would be taken because accidents impose costs on operators in the form of lost work time and potential liability.<sup>116</sup> However, “there would be an efficient number of fatalities” that can be paid for with the additional profit earned through

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practice of ad hoc modifications of the ventilation system by foremen concerned with providing adequate air for their crews on a day-to-day or shift-by-shift basis.”)

111. *Id.* at 59. The Mine Act contains antidiscrimination rules that bar taking disciplinary action against employees who exercise their rights under the Act, including the right to refuse to work in unsafe conditions, but not all miners are aware of their rights or willing to risk the chance of losing their jobs. See 30 U.S.C. § 815(c)(1) (2006).

112. See MCATEER ET AL., *supra* note 19, at 63–64 (reporting that the ventilation plan went through frequent revisions, and that Massey’s engineers were often not well-educated or well-trained).

113. See *id.* at 60 (quoting testimony from miners regarding frequent ad hoc ventilation changes).

114. See Polinsky & Shavell, *supra* note 61, 133–35 (arguing that fines must be high enough to pay for the harm plus the enforcement, and must take into account the wealth of the wrongdoer and the benefit gained); see also Shari Ben Moussa, Note, *Mining for Morality at Sago Mine: Big Business and Big Money Equal Modest Enforcement of Health and Safety Standards*, 18 U. FLA. J.L. & PUB. POL’Y 209, 229–30 (2007) (explaining that fines under the Mine Act constitute the operator’s cost of noncompliance, so the higher the fine, the more likely the operator is to comply). Optimal penalty theory generally focuses on ensuring the fine is high enough to cover the cost to society. In the context of mine safety, the goal is to protect workers’ lives, and the competing interest for the company is profit. Therefore, eliminating any noncompliance benefit is necessary to accomplish the goals of the Mine Act.

115. For example, safety violations involving equipment, like failure to turn a machine off before doing a repair, can be blamed in part on lack of training but can also result from an individual miner’s decision.

116. See Lofaso, *supra* note 18, at 102 (charting profit versus fatalities with and without regulations).

higher production.<sup>117</sup> Regulations are designed to ensure that those deaths do not take place, and penalties must be high enough to counteract the additional profit gained through noncompliance.<sup>118</sup>

*C. The Potential for the Flagrant Violations Provision of the 2006 Amendments to Increase Compliance*

Amendments to the Mine Act made in 2006 created a subset of violations that can receive much higher penalties of up to \$220,000 for each citation.<sup>119</sup> In *Stillhouse*,<sup>120</sup> the first case litigated on the merits of the flagrant violations provision, an ALJ approved penalties of as much as \$212,700 per violation.<sup>121</sup> The facts of *Stillhouse* demonstrate the calculus noncompliant mine operators use to determine whether to follow safety regulations when they conflict with production. The ALJ summarized events as follows:

At virtually the stroke of midnight on December 3, 2006, Stillhouse secretly cut to the surface of the 002 section, turned off its mine fan, and proceeded to mine coal—all during the third-shift when it normally does not produce coal. Stillhouse disabled the alarm sounding the shutoff. . . . Stillhouse mined coal for six hours with its fan shut down, failing to withdraw miners in violation of 30 C.F.R. § 75.313.<sup>122</sup>

Before the inspectors arrived to withdraw miners, Stillhouse extracted 700 tons of coal from a section it would not otherwise have been able to legally and economically mine.<sup>123</sup> The ALJ interpreted Stillhouse's actions as a gamble that it would not get caught, noting that inspections normally took place during a later shift.<sup>124</sup>

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117. *See id.* This analysis assumes perfect allocation of costs so that operators pay the full burden of the costs of noncompliance, including the “price” of injuries and fatalities. In reality, many such costs are externalized, and society or individuals bear part of the burden.

118. *See id.* at 102–03 (explaining the economic incentives but suggesting that companies be “enabled to recapture their lost profits through subsidies and tax breaks” to lessen the incentive to break the law).

119. *See* 30 U.S.C. § 820(b)(2) (2006) (defining the term *flagrant* as “a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury”).

120. *Stillhouse Mining, LLC*, 33 FMSHRC 778 (2011).

121. *See id.* at 779 (upholding the fines as imposed by the Secretary for a total of \$761,000 for four violations).

122. *Id.* at 814–15.

123. *Id.* at 815.

124. *See id.* (“Stillhouse’s conduct only became known to MSHA when at the end of second-shift a concerned miner called an MSHA supervisor at his home to report dangerous roof conditions where Stillhouse was cutting to the surface. Stillhouse grossly deviated from

The size of the penalties in this case, had the company expected them, would likely have been sufficient for deterrence. However, flagrant violations can apply only to the most egregious abuses. Increased consistency in application from MSHA would likely be necessary for these penalties to have a true impact.<sup>125</sup> Even if the flagrant violations provision stops operators from engaging in behavior similar to Stillhouse's, it will not reduce the instances of more common negligence, such as the dust control and coal accumulations and inadequate pre-shift examination violations. These violations occur in sloppy and understaffed mines without anyone in a leadership position making such a blatant and deliberate decision to flout the law. Penalties for the more routine violations need to be increased to encourage operators to make safety a priority, even at the expense of production. While some of the conditions at Upper Big Branch would probably be considered flagrant violations, it was largely the combination of many common violations that led to the disaster.

In addition, the flagrant violations provision does nothing to prevent ALJs from reducing penalties with or without altering MSHA's findings on the penalty determination factors. If the flagrant violations provision included mandatory minimums, it might more effectively discourage the most blatant decisions to ignore safety standards. Mandatory minimum penalties, particularly for cases with high negligence or deliberate actions by the operator, would change the cost-benefit analysis for operators who count on the contest process to diminish any consequences. However, operators know that the risk of violations being cited is relatively low because inspectors are not always present. Any violative conditions might be cited as more or less serious depending on the inspector. Operators also know that any penalty imposed by MSHA might be greatly reduced by an ALJ or settled by an overextended MSHA. With all the ways in which even eligible flagrant violations might not result in the increased penalties, the provision is unlikely to be effective unless MSHA and FMSHRC make more consistent use of it as a policy matter. The Commission's holding in the *Stillhouse* case will largely determine whether the provision can solve even the limited portion of the compliance and enforcement problem for which it was designed.

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its regulatory obligations gambling that it would not get caught until MSHA's inspection arrived on site at the end of third-shift.").

125. See Ken Ward Jr., *Flagrant Violations: Is MSHA Using All of Its Tools?*, *Coal Tattoo*, CHARLESTON GAZETTE (Mar. 31, 2011, 8:35 AM), <http://blogs.wvgazette.com/coalattoo/2011/03/31/flagrant-violations-is-msha-using-all-of-its-tools/> (questioning whether MSHA issues flagrant violations as often as justified and appropriate, noting that through March 31, 2011, only three flagrant violations had been issued in 2011).

### III. PRODUCTION SHUTDOWNS AS AN ENFORCEMENT MECHANISM TO PROTECT MINERS AND INCREASE THE COST OF NONCOMPLIANCE

#### A. Imminent Danger Shutdowns

Under the Mine Act, inspectors have the authority to halt production and order the withdrawal of miners until a condition presenting an imminent danger is corrected.<sup>126</sup> The Commission has limited the use of imminent danger withdrawal orders,<sup>127</sup> but MSHA could promulgate a rule interpreting the standard more broadly. With *Chevron* deference,<sup>128</sup> MSHA would likely prevail, particularly because the statutory definition and early circuit court cases support a more expansive reading of the provision.<sup>129</sup> Allowing imminent danger shutdowns if there were a reasonable risk that the conditions could seriously injure miners before being abated would permit inspectors to take into account the length of time likely to pass before abatement. In a mine in which inspectors found several extensive violations, particularly if the mine also has a history of violations,<sup>130</sup> shutting down production would both protect miners during the corrective period and force the operator to refocus attention to safety.

The Commission has interpreted imminent danger to include the dictionary definition of “imminence,” rather than simply applying the statutory definition of the term.<sup>131</sup> According to accepted canons of

126. 30 U.S.C. § 817(a) (2006).

127. See *Utah Power & Light Co.*, 13 FMSHRC 1617, 1621 (1991) (creating the current standard ALJs apply in reviewing imminent danger orders).

128. See generally W. Christian Schumann, *The Allocation of Authority Under the Mine Act: Is the Authority to Decide Questions of Policy Vested in the Secretary of Labor or in the Review Commission?*, 98 W. VA. L. REV. 1063 (1996) (describing cases holding that the Commission must apply *Chevron* deference to MSHA’s policy decisions and providing legislative history and policy justifications for *Chevron* deference).

129. See 30 U.S.C. § 802(j) (defining *imminent danger* as “the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated”). Circuit courts interpreting the provision in the mid-1970s accepted the Secretary’s interpretation that the provision was applicable “when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if *normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated*.” *Old Ben Coal Corp. v. Interior Bd. of Mine Operations Appeals*, 523 F.2d 25, 33 (7th Cir. 1975) (citing *E. Associated Coal Corp. v. Interior Bd. of Mine Operations Appeals*, 491 F.2d 277, 278 (4th Cir. 1974)); accord *Freeman Coal Mining Co. v. Interior Bd. of Mine Operations Appeals*, 504 F.2d 741, 745 (7th Cir. 1974). These cases interpreted the imminent danger provision in the 1969 predecessor to the 1977 Coal Act. The provision remains unchanged.

130. A history of violations could be construed as relevant to determining how long abatement could take and whether harm could be caused before abatement.

131. See *Utah Power & Light Co.*, 13 FMSHRC at 1621–22 (holding that “the hazard to

statutory construction, the definition of a term contained in a statute should be applied unless it is incomplete or inapplicable to the situation.<sup>132</sup> Dictionary definitions are to be relied upon only for “[w]ords that are not terms of art and that are not statutorily defined.”<sup>133</sup> MSHA has not yet challenged the Commission’s interpretation of the imminent danger standard in a federal appeals court.

The Commission also limited the discretion of inspectors in issuing imminent danger orders, holding, “An inspector, albeit acting in good faith, abuses his discretion in the sense of making a decision that is not in accordance with law when he orders the immediate withdrawal of miners under section 107(a) in circumstances where there is not an imminent threat to miners.”<sup>134</sup> This has limited the use of the provision in situations in which an inspector sees very dangerous conditions that could easily escalate, such as where dust and inadequate fire suppression equipment mean an ignition would lead to an explosion, but the inspector does not see the ignition. In one case, the ALJ found that the inspector abused his discretion by ordering an imminent danger withdrawal where there was a fire in a mineshaft that connected through a sealed borehole to working sections with miners present.<sup>135</sup> The company wanted to pour water down the shaft to put out the fire without removing the miners, and the inspector insisted that the miners come above ground to protect them in case of an explosion.<sup>136</sup> The ALJ found insufficient evidence to support the inspector’s

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be protected against by the withdrawal order must be impending so as to require the immediate withdrawal of the miners. . . . To support a finding of imminent danger, the inspector must find that the hazardous condition has a reasonable potential to cause death or serious injury within a short period of time”).

132. See YULE KIM, CONG. RESEARCH SERV., ORDER CODE 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 5-6 (2008) (explaining when the statutory definition will be used).

133. *Id.* at 6.

134. Utah Power & Light Co., 13 FMSHRC at 1622-23. This standard allows the ALJ or the Commission to decide whether there was an imminent threat, which is precisely what the inspector should have discretion to determine. A more typical abuse of discretion standard would ask only whether the inspector could reasonably have found an imminent threat. *But see* Moore, *supra* note 45, at 209-11 (arguing that the Commission should have more discretion to review MSHA’s decisions because of the extraordinary power conferred on inspectors under the Mine Act).

135. See BethEnergy Mines, Inc., 16 FMSHRC 935, 969-74 (1993) (finding that MSHA did not present sufficient evidence that conditions in the working sections were dangerous, despite the concern that the shaft fire could cause an explosion that would spread to those sections).

136. See *id.* at 955-57 (asserting additionally that though methane measurements were low at the time, it was a gassy mine, further increasing the risks associated with an active fire).

conclusion that there was an imminent danger of an explosion in the shaft or that such an explosion could spread to the working sections.<sup>137</sup>

Reworking the imminent danger withdrawal standard would protect miners in dangerous mines when inspectors are present, and it would increase the costs to operators associated with having unsafe conditions when inspectors visit. MSHA could use the rulemaking process to develop a more favorable standard. An appeal to a U.S. court of appeals arguing that the statutory language is unambiguous and the Commission's interpretation inappropriate could also be successful.<sup>138</sup> Even with a more expansive interpretation of MSHA's authority, though, "imminent danger" can cover only conditions that reach a fairly high threshold of likelihood of harm. In addition, imminent danger shutdowns are only possible when inspectors are present, and there simply are not enough inspectors to visit all mines regularly enough to prevent dangerous conditions from developing. More actions need to be available to MSHA before conditions reach the level of an imminent danger, regardless of whether the standard is construed narrowly or broadly.

#### B. Section 104 Shutdowns

Production shutdowns are also allowable under § 104 for failure to timely abate a violative condition or for repeated unwarrantable failure violations.<sup>139</sup> More active use of this provision could encourage greater compliance, particularly after citations are issued. If waiting to correct a violation or continuing to violate the same standard after having received a citation led to a more consistent withdrawal of miners, then operators would be more likely to follow the directives of inspectors in a prompt manner.

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137. *Id.* at 974.

138. *See* *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (explaining that the first step of analysis is to determine whether Congress "has directly spoken to the precise question at issue," in which case both courts and agencies "must give effect to the unambiguously expressed intent of Congress").

139. *See* Federal Mine Safety and Health Act of 1977, Pub. L. No. 95-164, § 104(a), (b), (d)(1), 91 Stat. 1290, 1300–1301 (codified at 30 U.S.C. § 814 (2006)). Section 104(b) provides that, when a condition has not been corrected during the agreed-upon abatement period, those miners not needed to correct the condition may be withdrawn. Section 104(d) provides for withdrawal of miners not needed to correct the condition if the inspector finds an unwarrantable failure violation for the same problem multiple times during an inspection, or repeated within ninety days. Both of these are partial withdrawal orders for only the affected areas of the mine. For guidelines designed to help inspectors apply § 104, see PROGRAM POLICY MANUAL, *supra* note 49.

*C. Potential Benefits of Expanded Shutdown Authority*

Whether imminent danger and unabated violative condition shutdown provisions are interpreted more broadly or new legislation is passed, permitting shutdowns of mines where operators display disregard for safety provisions could convince those operators to change the way they do business.<sup>140</sup> Production shutdowns are very costly for operators, who must pay workers even when no coal is being produced. Withdrawing miners and then restarting production can be a lengthy process even if the condition can be abated quickly.<sup>141</sup>

Production shutdowns can be more directly connected with the safety violations than fines in many cases. Because companies contest so many violations, even fines that are upheld in full may not be paid for years.<sup>142</sup> By the time the accountant or secretary writes the check, no one even remembers that the fine resulted from the decision to have a miner work on the longwall rather than do rock-dusting. However, when an inspector arrives, sees a violation, and stops production until it is fixed, the foreman or mine superintendent can readily associate the consequences with the decision to ignore safety. Production shutdowns send the message that compliance with safety standards is a precondition that must be met before mining may take place.

MSHA could more frequently use existing authority to shut down production when operators repeatedly and unwarrantably violate mandatory health and safety standards. Using the notice-and-comment rulemaking process to solidify policy positions for the imminent danger standard would protect the more reasonable and more expansive interpretation from the Commission's narrower viewpoint. Between § 104 shutdowns, imminent danger shutdowns, and the newly revived pattern of violations standard,<sup>143</sup> MSHA has a statutory basis to use production

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140. The outraged responses of mining companies to proposed permitting changes for environmental regulations demonstrate resistance to any measures that reduce production. In addition, Massey's documented production demands display the importance placed on continued production. See MCATEER ET AL., *supra* note 19, at 22 (explaining the production costs of shutting down a longwall machine).

141. In a mine that extends for miles, it can take a long time simply to transport workers between the surface and the more remote sections of the mine. In addition, new pre-shift examinations would need to be performed, and some continuously operating mine machinery could require time and effort to stop and restart.

142. See Lofaso, *supra* note 18, at 103 (explaining that some operators try to circumvent regulation by making frivolous citation appeals).

143. See 30 U.S.C. § 814(e)(1)–(2) (2006) (outlining the pattern of violations standard, which allows the withdrawal of miners from sections of mines with violations of safety standards if MSHA has established a pattern of repeated S&S violations).

shutdowns to force operators into compliance when penalties are not working.

Reports from Upper Big Branch suggest a widespread, top-down culture that favored production at all costs and had little respect for safety regulations.<sup>144</sup> The failure of required examinations to improve conditions in the mine demonstrates the impacts and extent of this culture. Examinations are the key self-enforcement mechanisms for operators to ensure compliance with safety standards, giving foremen the chance to observe problems and direct that they be corrected before they become serious.<sup>145</sup> At Upper Big Branch, not only were recorded problems uncorrected, but foremen did not even take some required readings.<sup>146</sup> MSHA needs to develop better methods of counteracting the culture of noncompliance in companies like Massey. Allowing inspectors to halt production in mines with widespread violations of multiple safety standards would make it more difficult for operators to profitably disregard safety regulations. Even if inspections do not take place frequently enough to fully alter the cost-benefit analysis of compliance, shutting down production while the company addresses safety problems would at least ensure a clean slate after inspections so that conditions would not have the chance to continuously deteriorate. For these changes to succeed, MSHA will likely need cooperation from FMSHRC, or will have to more aggressively appeal adverse Commission decisions to the federal courts, which have traditionally been much more deferential to MSHA's policy decisions.

#### IV. OTHER SOLUTIONS AND CONCLUSIONS

##### A. *Nonadministrative Solutions*

While the focus of this Comment is on administrative solutions, those potential changes should be viewed in the context of possible non-administrative developments. Non-administrative methods of increasing compliance include increased criminal liability for certain types of violations,<sup>147</sup> more tort suits with large damage awards,<sup>148</sup> and stronger

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144. See MCATEER ET AL., *supra* note 19, at 97–102 (detailing several areas which demonstrate a “normalization of deviance”).

145. See, e.g., UNITED MINE WORKERS OF AM., *supra* note 93, at 46 (“The purpose of these examinations is to identify hazardous conditions and to ensure they are corrected.”).

146. See MCATEER ET AL., *supra* note 19, at 98 (stating that fraudulent practices of filling in the examiner's book as though readings had been taken “suggests a profoundly dangerous attitude that firebossing a mine is just another burden”).

147. See *Examining Recent Regulatory and Enforcement Actions of the Mine Safety and Health Administration: Hearing Before the Subcomm. on Workforce Protections of the H. Comm. on Educ. & the Workforce*, 112th Cong. 23 (2011) (statement of Joseph Main, Assistant Secretary of Labor for

union presence.<sup>149</sup> Any of these measures would likely increase compliance by increasing the costs of ignoring regulations. Unions have the potential to change the culture of the company, something that the Governor's Independent Investigation Panel suggested was of utmost importance after Upper Big Branch.<sup>150</sup> Criminal liability in some situations is already available and could be imposed more vigorously. Even without any legislative changes, members of upper management could be criminally liable for the events at Upper Big Branch. In fact, the Department of Justice has prosecuted some individuals and indicated that more criminal prosecutions may take place,<sup>151</sup> and the settlement reached on civil penalties did not rule out further individual criminal charges.<sup>152</sup> The UMWA has suggested that a grand jury be convened and subpoenas issued to determine levels of knowledge and responsibility, with indictments as appropriate.<sup>153</sup> Criminal charges against members of management would likely be an effective deterrent for other mine operators with similar disregard for safety, though the deterrent effect could wear off in the time

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MSHA) (advocating for a lower bar for criminal prosecution of operators who risk miners' lives and for extending criminal penalties to providing advance notice of inspections).

148. See, e.g., Jim Fink, *Massey Energy: A Dirty Coal Company*, INVESTING DAILY (Apr. 7, 2010), <http://www.investingdaily.com/id/17176/massey-energy-a-dirty-coal-company.html> ("Blankenship's actions over the years may have maximized Massey's earnings in the short term, but they have exposed Massey shareholders to massive litigation risk in the long term. Society will exact its revenge against Massey one of these days through a jury verdict so large that it will dwarf whatever unjust enrichment Blankenship has managed to accumulate for Massey.").

149. See Lofaso, *supra* note 18, at 106–13 (arguing that the union model should be applied to non-union mines because of strong evidence that union mines are safer).

150. See MCATEER ET AL., *supra* note 19, at 97–102 (discussing the "normalization of deviance" that developed at the Upper Big Branch Mine regarding safety).

151. See Ken Ward Jr., *Breaking News: Upper Big Branch Superintendent Charged with 'Conspiracy' in Mine Disaster Probe, Coal Tattoo*, CHARLESTON GAZETTE (Feb. 22, 2012, 10:21 AM), <http://blogs.wvgazette.com/coaltattoo/2012/02/22/breaking-news-upper-big-branch-superintendent-charged-with-conspiracy-in-mine-disaster-probe/#more-22007> (suggesting that the superintendent charged may be cooperating with prosecutors, which would suggest that there may be more people charged further up the chain of command).

152. See Ken Ward Jr., *Alpha to Pay \$200 Million in UBB Safety Deal*, CHARLESTON GAZETTE, Dec. 5, 2011, <http://wvgazette.com/News/201112050159> ("But unlike a previous government deal with Massey, the deal does not resolve any potential criminal violations by any officers or agents of Performance Coal or Massey . . .").

153. See UNITED MINE WORKERS OF AM., *supra* note 93, at 71–72, 85. This report suggests that the corporate officials who invoked the Fifth Amendment to avoid testifying about events leading up to the explosion should be subject to subpoenas and likely should be prosecuted. This includes officials who spent time underground directly after the explosion without communicating with the mine rescue teams, and who now refuse to answer questions regarding their findings and actions. *Id.*

between disasters or if prosecutors fail to bring charges consistently. To have a major effect on behavior, criminal charges against upper management would probably be necessary after serious violations that do not result in fatalities, rather than only after a major disaster like Upper Big Branch.

### B. MSHA Administrative Solutions and Current Changes

Multiple administrative tools are available to MSHA that would improve the efficacy of the agency without fundamentally altering the current regulatory framework or requiring legislative action. First, inspectors can use their authority more aggressively to issue more citations and order more withdrawals. Next, MSHA could implement a policy of imposing the highest penalty available under the point system, and using special assessments for higher penalties when companies are frequent offenders or are negligent operators.<sup>154</sup> Rulemaking could further extend MSHA authority in key areas, including shutdowns and withdrawals. An eminently sensible recommendation from the UMWA would place MSHA, rather than the operators, in charge of training miners on their rights under the Mine Act,<sup>155</sup> which could reduce the ability of management to intimidate workers.

MSHA has already begun several initiatives that at least partially address some of the problems discovered in the aftermath of the Upper Big Branch disaster. Impact inspections target mines with a history of compliance problems by sending several inspectors at once, stopping phone lines to prevent advance notice, and scheduling checks often take place at unusual times when operators do not expect an inspection.<sup>156</sup> MSHA also

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154. One of the challenges with this recommendation is that FMSHRC would need a similar policy. While it is beyond the scope of this Comment to debate the split-enforcement model or to consider changes that would require major legislative action, many of the difficulties of strong enforcement arise because of the lack of common leadership and common policy goals between FMSHRC and MSHA. Eliminating FMSHRC or placing it under the control of the Department of Labor would resolve that problem. Any concerns of ALJs would be considered in the formulation of policy, and ALJs would be informed of and bound by the same policies as the inspectors and other personnel responsible for enforcing the Mine Act.

155. See UNITED MINE WORKERS OF AM., *supra* note 93, at 87 (explaining that many miners were either unaware or uncomfortable with exercising their right to report unsafe conditions and to refuse to work in such conditions).

156. See *Examining Recent Regulatory and Enforcement Actions of the Mine Safety and Health Administration: Hearing Before the Subcomm. on Workforce Protections of the H. Comm. on Educ. & the Workforce*, 112th Cong. 18–19 (2011) (statement of Joseph Main, Assistant Secretary of Labor for MSHA) (detailing the successful results and many violations discovered during impact inspections).

instigated rulemaking to require correction of any violations discovered during pre-shift and on-shift examinations.<sup>157</sup> Structural changes to address workload problems at MSHA have also taken place, such as the division of the largest district, which served Upper Big Branch, into two districts with separate offices.<sup>158</sup>

### C. FMSHRC Reforms

Underlying these solutions, though, is the need for reform at FMSHRC. The D.C. Circuit held in 1994 that MSHA regulations and interpretations are entitled to *Chevron* deference from the Commission and ALJs.<sup>159</sup> It has been argued that the Commission should have the authority to review policy decisions because of the special position of the Commission as an independent agency in a split-enforcement scheme.<sup>160</sup> However, the legislative history of the Mine Act does not support that view.<sup>161</sup> In addition, MSHA inspectors, while given a great deal of authority, are required to have practical mining experience, making them uniquely qualified to exercise discretion and judgment in the course of inspecting mines.<sup>162</sup>

Legislative change is probably not necessary to challenge the Commission's forays into mine policy. Appeals to federal circuit courts would likely succeed, particularly if MSHA promulgates rules reflecting stronger enforcement.<sup>163</sup> Official rulemaking for some changes can protect

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157. *See id.* at 20 (stating that the proposed rule would reinstate requirements that were previously in place).

158. News Release, Mine Safety & Health Admin., *MSHA's Newly Formed Coal District 12 Begins Operations* (June 14, 2011), <http://www.msha.gov/media/PRESS/2011/NR110614.asp>.

159. *See* Energy W. Mining Co. v. Fed. Mine Safety & Health Review Comm'n, 40 F.3d 457, 463–64 (D.C. Cir. 1994) (holding that the Commission owes the Secretary and MSHA *Chevron* deference); *see also* Schumann, *supra* note 128, at 1095 (outlining the arguments of both sides and describing the court's holding in favor of the Secretary, rejecting the operator's argument that the Commission should have authority to decide questions of policy).

160. *See generally* Moore, *supra* note 45 (arguing that Congress intended MSHA and FMSHRC to share authority over policy matters).

161. *See* S. REP. NO. 95-181, at 49 (1977) (“[T]he Secretary's interpretations of the law and regulations shall be given weight by both the Commission and the courts.”), *reprinted in* STAFF OF SUBCOMM. ON LABOR, 95TH CONG., LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, at 637 (Comm. Print 1978). *Chevron* was decided after the passage of the Mine Act, so neither the statute nor legislative history incorporates more obvious indications of the intended level of deference.

162. *See* Schumann, *supra* note 128, at 1066 (explaining that the statute requires MSHA employees, especially inspectors, to have practical mining experience).

163. *See* Kenna, *supra* note 57, at 399–400 (explaining that levels of deference can be

MSHA actions against judicial review as long as the rules are reasonable interpretations of the statute under *Chevron*.<sup>164</sup> MSHA could seek to revisit some past decisions of the Commission, like the imminent danger holdings, and those could be challenged in federal appeals court when MSHA has a good test case. This would return MSHA's enforcement capabilities to their position between the passage of the Mine Act and the early- to mid-1990s, when Commission cases contracted MSHA's authority.

Penalties imposed by ALJs are more difficult for MSHA to control. It is possible that appealing penalty determinations more often would discourage ALJs from reducing them without good reason, but the resources involved in bringing more cases before the already overloaded Commission could be prohibitive. In addition, the penalties imposed by MSHA are often too low to be effective, creating a dual need to increase penalties at the agency level and to preserve higher contested penalties. Imposing higher penalties without some change in FMSHRC could easily result in more penalties being determined by ALJs rather than by MSHA. Higher penalties are more likely to be contested already; if MSHA begins imposing higher penalties and ALJs continue to reduce them, the increased penalties would simply add to the backlog of appeals.<sup>165</sup>

Legislative action might be necessary to reduce ALJs' discretion in penalty awards, a traditional area of judicial discretion. Mandatory minimum penalties would be a fairly simple and straightforward method of reducing ALJ discretion and ensuring a floor sufficient to deter at least some noncompliance.<sup>166</sup> Minimums could be applied to several factors already considered: there could be a minimum for any S&S violation, or

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higher or lower for agency positions depending on whether the position has been formalized through some official process).

164. Deference given to agencies is greater for interpretations that have undergone notice-and-comment rulemaking or formal adjudication as opposed to less formal agency materials that may not reflect an official position. *See id.* at 400; *see also* Moore, *supra* note 45, at 193 (discussing the Supreme Court's reasoning in *Christensen v. Harris County*, 529 U.S. 576 (2000)).

165. In one case, an ALJ discussed the problem of companies increasingly contesting penalties. *See* Black Beauty Coal Co., 31 FMSHRC 1549, 1549 (2009). In addition to ALJs reducing penalties, MSHA often settles because the agency is unable to handle the volume of cases. The ALJ rejected a settlement that would have reduced the initial penalties by over eighty percent, holding that "such a reduction encourages mine operators to contest the penalties in the hope of receiving such a reduction. The fact that a mine operator can obtain such a drastic reduction does not encourage the mine to comply with the requirements of the Act." *Id.*

166. Though mandatory minimum penalties have been criticized in the criminal law context, many of the concerns would not be relevant to administrative fines imposed against companies for a strict liability statute. There is little risk of discrimination, and a well-designed rule would not risk being excessively punitive.

minimums graded with levels of negligence, gravity, or both, or some percentage of the penalty point system result could serve as a minimum.

### CONCLUSION

A variety of administrative changes at MSHA and FMSHRC could increase compliance with existing mine safety regulations. Penalties could be increased through mandatory minimums, particularly for certain classes of serious or repeated violations and through more consistent use of flagrant violations provisions. The recommendations of the UMWA regarding frivolous appeals would be a good start to reducing the collateral benefits companies receive by contesting penalties.<sup>167</sup> In addition to penalty increases, stronger enforcement mechanisms at the inspector level increase the costs of noncompliance while immediately eliminating safety hazards. The imminent danger withdrawal standard should be interpreted more broadly to allow inspectors to order withdrawal of miners when conditions are such that miners' lives could be endangered before the condition is corrected. Inspectors should also make better use of existing provisions allowing withdrawal of miners when operators repeatedly violate safety standards and do not promptly correct cited conditions. MSHA, rather than operators, should train miners on their rights under the Mine Act, which could reduce operators' ability to intimidate miners and increase miners' role in ensuring a safe workplace. A combination of increased penalties for all violations and increased enforcement measures like production shutdowns is necessary to effectively combat the disregard shown by some companies toward safety regulations. MSHA can use rulemaking and appeals to solidify inspectors' enforcement authority and to challenge constraints imposed by FMSHRC. Using such authority consistently would increase the costs of noncompliance, leading profit-motivated mine operators to comply with safety standards rather than risk high penalties and production shutdowns.

Even without official action, agency behavior will likely be altered toward increased enforcement in the aftermath of the Upper Big Branch disaster, at least temporarily. Inspectors are less likely to give warnings or overlook violative conditions. Attorneys are less likely to settle for minimal penalties. Perhaps ALJs will also prove less likely to reduce penalties to a nominal level. For a lasting impact, though, structural change is necessary to maintain the stricter enforcement measures and achieve safer mines.

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167. See UNITED MINE WORKERS OF AM., *supra* note 93, at 86–87 (recommending that assessed penalties be placed into an escrow account during the appeals process and that additional fines be imposed if the appeal is found to have been frivolous).