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**United Mine Workers of America v. Faerber: Full Roof Bolting Required in Auger Mines**

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I. INTRODUCTION

West Virginia's coal mine health and safety legislation is based substantially on the Federal Coal Mine Health and Safety Act of 1969, with virtually identical provisions relating to roof control included in the state and federal acts. In 1985, the West Virginia Code was amended to create a new Department of Energy ("DOE") with the Division of Mines and Minerals and the Board of Coal Mine Health and Safety within this department. The Board's duty is to adopt the standard rules and regulations as specified by the legislature and to promulgate rules and regulations for coal mine health and safety.

The adoption, promulgation, and enforcement of health and safety standards has been the subject of continuing litigation in West Virginia. The main instigator of this litigation has been the United Mine Workers of America ("UMWA"), which has used proceedings in mandamus to effect enforcement of standards and to advance interpretation of the statutes.

The trend has been for the West Virginia Supreme Court of Appeals to enlarge the scope of mandamus, "especially where there is an urgent question of public policy or where there is no reason for delaying adjudication of the issue."

The law in West Virginia as to when mandamus lies is well established. A writ of mandamus will not issue unless three elements coexist (1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy.

In his concurring opinion in Walls v. Miller, Justice Miller disagreed with the majority's statement that the writ of mandamus was being broadened for the good of the public. Instead, he reasoned that mandamus would

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4 W. Va. Code § 22-6-4(a) to (c) (1985).
6 Walls, 162 W. Va. at 566, 251 S.E.2d at 495.
7 UMWA v. Scott, 315 S.E.2d at 621.
9 Walls, 162 W. Va. at 573, 251 S.E.2d at 499 (Miller, J., concurring).
lie because the statutes were mandatory, not discretionary.10 "[W]here a duty is nondiscretionary or ministerial on the part of a governmental official or body, mandamus will lie to compel performance . . . [and] where the right sought to be enforced is a public one, mandamus can be sought by any citizen, taxpayer or voter."11

The writ of mandamus has been an especially effective tool for the UMWA. The West Virginia Supreme Court of Appeals consistently has held that the UMWA and union representatives are "members of the class which the provisions of Chapter 22 of the West Virginia Code were designed to protect, [and] have a clear right to have these laws enforced for their benefit."12 The latest in these actions was United Mine Workers of America v. Faerber13 in which the UMWA sought to have enforced its interpretation of West Virginia Code sections 22A-2-25(a) and (c).

II. Statement of the Case

In UMWA v. Faerber, the petitioners, UMWA, asserted that full roof bolting in underground coal mines using auger-type continuous mining equipment ("auger mines")14 was statutorily mandated by West Virginia Code sections 22A-2-25(a) and (c) and sought to compel enforcement by the Department of Energy. The UMWA relied upon three statutory sections:

(1) "The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs."15

(2) "Every operator shall require that no person may proceed beyond the last permanent support unless adequate temporary support is provided or temporary support is not required under an approved roof control plan and absence of such support will not pose a hazard to the miners."16

10 Id., 251 S.E.2d at 499.
11 Id., 251 S.E.2d at 499.
12 Id., 251 S.E.2d at 499.
13 UMWA v. Miller, 291 S.E.2d at 677; 315 S.E.2d at 621.
14 Faerber I, No. 17076, slip. op.
17 W. Va. CODE § 22A-2-25(c).
[3] "The method of mining followed in any coal mine shall not expose the miner to unusual dangers from roof falls."[17]

As of November 1, 1985, nine of the forty-four auger mine sections in West Virginia used full roof bolting, while the remaining thirty-five sections used a combination roof control plan.[18] At trial, evidence was introduced that, since 1974, "seventeen roof fall fatalities and numerous serious injuries" had occurred in auger mines without roof bolting while no fatalities had occurred in auger mines with full roof bolting.[19] In auger mines without full roof bolting, "persons in the work crew at the working face must proceed beyond the last permanent roof support to (1) install temporary supports, (2) remove temporary supports, (3) set manual pull jacks on models of auger machines not having automatic jacks and (4) to shovel up to the jacks."[20] The use of automated temporary roof support systems is not technologically feasible in the thin-seam auger mines.[21]

The Department of Energy contended that a "blanket" requirement of full roof bolting in all auger mines was statutorily precluded by the third sentence of West Virginia Code section 22A-2-25(a):[22]

A roof control plan and revisions thereof suitable to the roof conditions and mining systems of each coal mine and approved by the director, in consultation with the deputy directors of permitting and safety, health and training, shall be adopted and set out in printed form before new operations.[23]

The Department of Energy further argued that this provision mandated that roof control plans be established on a mine-by-mine basis regardless of the type of mining technique used.[24] Since the West Virginia Department of Energy had formulated no regulations implementing the provisions of the West Virginia Code, the DOE contended that the corresponding federal regulations at 30 C.F.R. sections 75.200-1 through 75.200-14 applied.[25] These federal regulations provide for various types of roof control plans, including full roof bolting, conventional roof control plans, spot roof bolting, and combination roof control plans.[26] The parties

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17 W. VA. CODE § 22A-2-26(a).
18 Faerber I, No. 17076, slip op. at 5, 6.
19 Id. at 6.
20 Id. at 5.
21 Id.
22 Id. at 6.
23 W. VA. CODE § 22A-2-25(a).
24 Faerber I, No. 17076, slip op. at 6, 7.
25 Id. at 5.
26 Id. at 4, 5.

A "full roof bolting" plan is one in which roof bolts are the sole means of roof support at the working face. 30 C.F.R. § 75.200-7 (1985). A "conventional" roof control plan is one in which the installation of materials other than roof bolts, such as metal or wood posts, jacks, or cribs in conjunction with wooden cap blocks (half headers), footers
submitted evidence "that the casualties were caused not by flaws in the roof control plan, but by failure to adhere to the requirement of the plan." The court noted that the investigative reports of the fatalities were "silent on the effect of not having full roof bolting."27

The issues before the court were: (1) "whether the particular statutes upon which [the petitioners] relied provide[d] for the performance . . . they [sought] to compel"29 and (2) if the statutes did so provide, whether the apparently conflicting statutory requirement for mine-by-mine determination of roof control plans could be reconciled.

III. ANALYSIS

The court initially considered the liberal construction to be placed on the provisions of West Virginia Code sections 22A-2-25(a) and (c). In the court's view, the prime consideration in interpreting this remedial legislation was the health and safety of the miner,30 with "the statutes . . . to be viewed in the light most favorable to achieving the broad purpose of protecting the miner."31 With that primary concern stated, the court then addressed the Department of Energy's contention that West Virginia Code section 22A-2-25(a) mandated a mine-by-mine determination of roof control systems.

Three areas were surveyed by the court in construing section 22A-2-25(a). First, "the statute, as well as the other underground mine health and safety provisions set forth . . . are minimum or 'standard' health and safety 'rules and regulations'. . . ."32 The court determined that these minimum regulations are "subject to 'frequent review, refinement and improvement' " to enhance the health and safety of the miners.33 Finally, the regulation should be modified when experience indicates the need to do so.34 The court concluded that

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28 Justice Neely's dissent to Faerber I, No. 17076, was filed after the majority opinion.

29 Faerber I, No. 17076, slip op. at 6.

30 Miller, 251 S.E.2d at 677.


32 Faerber I, No. 17076, slip op. at 7.

33 Id. at 8.

34 Id. (quoting W. Va. Code § 22-6-1(a)(2) (1985)).
the mine-specific approach to roof control plans is not a fixed requirement; instead, such approach must be abandoned when it has been demonstrated that other roof control techniques improve or enhance coal mine health and safety. Life, limb and lungs of the miners are paramount, and each mining health and safety standard is subject to frequent refinement to achieve that paramount objective.\textsuperscript{35}

The court then turned to a consideration of whether the mine-specific approach to roof control plans in auger mines should be modified. The prevailing factor, in the court’s view, was the incidence of fatalities in auger mines without full roof bolting compared to the fatality-free history of those auger mines with full roof bolting.\textsuperscript{36} “Tragic experience in this State has taught that mine-specific roof control plans do not adequately protect persons from roof falls in thin seam coal mines.”\textsuperscript{37} Full roof bolting in auger mines appears “clearly superior” and provides “more secure roof support.”\textsuperscript{38}

Accordingly, the court, with one justice concurring and two justices dissenting, held that

“full roof bolting” is required to be utilized in all underground coal mine sections in this State using auger-type continuous coal mining equipment, under W. Va. Code, 22A-2-25(a) [1985], which provides that “[t]he roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs.”\textsuperscript{39}

The West Virginia Supreme Court of Appeals was compelled to consider two sections of the West Virginia Code, each containing plain statutory language. One section required that “roadways, travelways, and working places shall be supported or otherwise controlled adequately.”\textsuperscript{40} The other section required that a roof control plan “be suitable to the roof conditions and mining systems of each mine.”\textsuperscript{41} Both of these standards had to be construed in light of the plainly stated legislative purpose of the provisions emphasizing the health and safety of the miner.\textsuperscript{42}

The court’s analysis followed a logical progression. The court reasoned that the statute mandated that the mine roof and rib be supported or adequately controlled and that a roof control plan be suitable to the conditions and mining system of each coal mine. These are minimum standards which frequently should

\textsuperscript{35} Id.
\textsuperscript{36} Id. at 9, 10.
\textsuperscript{37} Id. at 10.
\textsuperscript{38} Id.
\textsuperscript{39} Id.
\textsuperscript{40} W. VA. CODE § 22A-2-25(a) (emphasis added).
\textsuperscript{41} Id.
\textsuperscript{42} W. VA. CODE § 22-6-1(a)(1).
be reviewed, revised, and improved, and whose level of protection cannot be reduced. Seventeen fatalities since 1974 provided an "inescapable inference"\textsuperscript{43} that the roof and rib in auger mines not using full roof bolting was not supported or adequately controlled. The court concluded that the standard providing for mine-specific roof control plans should be revised, the level of protection increased, and that mines using auger-type continuous mining systems required full roof bolting.

Both sections of the statute construed by the court in \textit{UMWA v. Faerber} are accorded equal weight in citations for violations and may be the subject of two separate counts.\textsuperscript{44} The sections require both a safe roof and an approved roof control plan.\textsuperscript{45} Few cases, however, have discussed the mine-by-mine application of the standards contained in the West Virginia and federal statutes. The District of Columbia Circuit, in \textit{Zeigler Coal Co. v. Kleppe}, commented on the standards for ventilation plans on a mine-by-mine basis under the Federal Act.\textsuperscript{46} In that case, the provision stated that the plan was to be "suitable to the conditions and the mining system of the coal mine."\textsuperscript{47} The court commented that

\begin{quote}
The . . . provisions . . . which set forth fairly specific standards pertaining to mine ventilation . . . suggests [sic] that the plan idea was conceived for a quite narrow and specific purpose. It was not to be used to impose general requirements of a variety well-suited to all or nearly all coal mines, but rather to assure . . . a comprehensive scheme for realization of the statutory goals in the particular instance of each mine.
\end{quote}

Thus an operator might contest an action seeking to compel adoption of a plan, on the ground that it contained terms relating not to the particular circumstances of his mine, but rather imposed requirements of a general nature which should more properly have been formulated as a mandatory standard.\textsuperscript{48}

A possible factor distinguishing the above dicta in \textit{Zeigler Coal Co.} from the \textit{UMWA v. Faerber} decision is that in \textit{Faerber}, full roof bolting plans will not apply to "all or nearly all coal mines." Instead, the blanket requirement for full roof bolting in \textit{UMWA v. Faerber} affects a relatively small block of forty-four mining sections using auger-type continuous mining machinery; and the blanket requirement is founded on safety problems generated by this particular mining method. The temporary protection provided by automated temporary roof support systems in other continuous mining operations is not technologically feasible in

\textsuperscript{43} \textit{Faerber I}, No. 17076, slip op. at 10.
\textsuperscript{44} United States v. Consolidation Coal Co., 504 F.2d 1330, 1332 (6th Cir. 1974) (holding 30 U.S.C. § 862(a) not unconstitutionally vague).
\textsuperscript{45} \textit{Zeigler Coal Co.}, 2 Interior Bd. of Mine Operations Appeals 216, 220 (1973).
\textsuperscript{46} \textit{Zeigler Coal Co. v. Kleppe}, 536 F.2d 398 (D.C. Cir. 1976).
\textsuperscript{47} \textit{Id.} at 407 (quoting § 303(o), 30 U.S.C. § 863(o) (1970)).
\textsuperscript{48} \textit{Zeigler Coal Co. v. Kleppe}, 536 F.2d at 407.
the thin-seam mines that use auger-type continuous mining machinery, and this type of mining regularly requires workers to go beyond the last permanent roof support to perform certain tasks.\(^4\)

On the basis of Zeigler Coal Co. v. Kleppe, one commentator has flatly stated that, under the federal statute, "[t]hese plans are to be proposed to MSHA [Mine Safety and Health Administration] by operators for approval, and their contents cannot be dictated by MSHA."\(^5\) The Board of Mine Operations Appeals has made detailed comments on the Secretary's duties and obligations under the federal statute and revision of mine plans.

[T]he Secretary is obliged to require that operators revise an existing roof control plan if changed circumstances or perceptions reveal such a necessity. However, he is not empowered to "prescribe" such revisions ... because ... he cannot impose them regardless of operator disagreement. In other words ... section 302(a) does not vest the Secretary with the power or obligation to issue or adopt revised roof control plans. The Secretary is limited to exercising an "approval" function and in applying statutory sanctions after due notice for the failure of an operator to take the necessary steps to adopt an appropriate revised plan and file the same for approval.\(^5\)

The West Virginia Supreme Court of Appeals, however, did not base its analysis of the requirement for full roof bolting in auger mines on this essentially mandatory procedural aspect. Instead, a crucial element of its analysis in reaching its holding was that the mine-by-mine plan provision was a minimum standard, subject to the same frequent review and revision as other standards of the safety regulations. It is well established that the standards set forth in the health and safety statutes are interim rules and regulations.\(^5\) As the court has previously emphasized, "any regulation the Board promulgates may not reduce the level of protection afforded by [the W. Va. Code], which mandates the minimum standards."\(^5\) The Board of Mine Operations Appeals has affirmed in dicta that the requirement for mine-by-mine roof control plans is a minimum requirement.\(^5\)

Once that element of the analysis was established, the statutory path for revision of standards was open if experience indicated the need for modification.

Early in its discussion in UMWA v. Faerber, the West Virginia court noted that "[t]here are no regulations promulgated by the West Virginia Department of Energy's Director of the Division of Mines and Minerals implementing the

\(^4\) Faerber I, No. 17076, slip op. at 5.


\(^1\) W. VA. CODE §§ 22-6-1(b)(2)(3). 22-6-4(c)(2) (1985).

\(^2\) UMWA v. Miller, 291 S.E.2d at 681.

\(^3\) Zeigler Coal Co., 2 Interior Bd. of Mine Operations Appeals at 220.
roof support provisions of West Virginia Code sections 22A-2-25 and 22A-2-26 [1985]." One of the main sections of the court's later analysis of the code provisions emphasized the transitory nature of the standard rules and regulations and the necessity to modify these standards when experience under the statute indicated the need to do so.56 " ‘Standards must be generated on demonstrated needs of miners. This has not, in the past, been the case.' "57

Questions regarding the section of the code relating to roof bolting have arisen only tangentially in a case decided in 1984 by the West Virginia Supreme Court of Appeals. In UMWA v. Scott, the UMWA brought a proceeding in mandamus to compel the Board of Coal Mine Health and Safety to promulgate regulations in response to mining fatalities and injuries.58 The West Virginia statute mandated review and hearing procedures to determine the causes of fatal accidents and the promulgation of "‘such rules and regulations as are necessary to prevent the recurrence of such fatality, unless a majority of the quorum present determines that no rules and regulations, shall assist in the prevention of the specific type of fatality.' "59 The court listed four areas recognized as significant causes of fatalities and injuries in which the Board had failed to promulgate regulations, including (1) fatalities and injuries at surface areas of underground mines; (2) fatalities related to transportation and equipment; (3) minimum standards for safe levels of respiratory dust exposure; and (4) fatalities caused by roof falls and rib rolls.60

Inaction by the agency in promulgating regulations after roof fall and rib roll accidents brought forth the following comments by the court:

[D]espite the recognition by the Administrator, in a report presented to the Board, that, “‘Roof falls and rib rolls are the chief causes of fatalities in Underground mines in West Virginia today,'” no rules or regulations have been promulgated which address this major cause of fatalities. In fact, the Administrator indicates that, of the seventeen fatalities occurring since the Board’s reorganization in 1982, eight have been the result of roof falls. Yet, while the lives and limbs of our state’s coal miners, legislatively recognized as the industry's most precious resource, are threatened by roof and rib practices, . . . the Board of Coal Mine Health and Safety dallies and fails to promulgate rules and regulations which address these major causes of illness, injury, and death.61

56 Faerber I, No. 17076, slip op. at 4.
57 Id. at 8, 9.
59 Scott, 315 S.E.2d at 618.
60 W. VA. CODE § 22-2-4(e) (1978) (corresponds to W. VA. CODE § 22-6.4(e) (1985)).
61 Scott, 315 S.E.2d at 624 (quoting Report of the Health and Safety Administrator (Aug. 29, 1983)).
62 Id. at 625 (citation omitted).
The operations of the Board of Coal Mine Health and Safety were found to be obstructive of the promulgation of health and safety rules and regulations, and the Board had not been "diligent in the performance of its mandatory duties" in eight areas. The writ of mandamus was granted to compel the Health and Safety Administrator, the Chairman of the Board of Coal Mine Health and Safety, and the Board of Coal Mine Health and Safety to perform their statutory duties.

In *Faerber*, the court held that seventeen fatalities since 1974 in auger mines without full roof bolting was evidence other roof control plans used in these mines did not support or otherwise adequately control the danger of roof falls in working places. Based on this determination, it followed that mine-by-mine roof control plans providing for methods other than full roof bolting needed to be revised to insure the safety of the miner. The agency had not performed its statutory duty to improve the minimum requirement of mine-by-mine roof control plans in response to these fatalities. Therefore, the statutes upon which the petitioners relied did compel enforcement by the Department of Energy of full roof bolting in all auger mines in West Virginia.

IV. THE DISSENT

Two justices of the West Virginia Supreme Court of Appeals dissented from the majority's opinion. The dissent essentially rested on two grounds: (1) The evidence before the court that full roof bolting in mines using auger-type continuous mining equipment would decrease fatalities or increase safety was inconclusive; and (2) the promulgation of safety rules and regulations required administrative technical expertise, therefore, the court should defer to the Board.

The majority found the fact that seventeen fatalities in auger mines without full roof bolting, while there were no fatalities in fully bolted auger mines, created

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6 Id. at 632-33. The court found the Board had not been diligent in the performance of its mandatory duties in the following areas:
1) failure to conduct a formal vote following the review of coal mine fatalities to determine whether promulgation of rules and regulations could assist in preventing recurrence of specific fatalities or major causes of injury;
2) failure to promulgate rules and regulations in response to coal mine fatalities and major causes of injury;
3) failure to publish reasons for not promulgating rules and regulations in response to fatalities and major causes of injury;
4) failure to promulgate rules and regulations governing the conformance of underground mining equipment to the height of the coal seam being mined;
5) consideration of procedural rules that obstructed promulgation of rules and regulations;
6) creation of committees designed to obstruct the Administrator's performance;
7) failure to properly consider member suggestions of subject areas for regulation; and
8) failure to employ sufficient support personnel to comply with its mandatory duties.

63 Id. at 633, 634.
an "inescapable inference" that full roof bolting provided "more secure roof support than other types of roof control."\textsuperscript{64} The dissent viewed the facts in a different light. Of the thirty-five auger mines without full roof bolting, nineteen had experienced no fatalities since 1974. The inference that full roof bolting is the superior method, the dissent noted, "is hardly inescapable."\textsuperscript{65} The dissent emphasized, as did the majority, that there was no evidence before the court on the question of the relationship of lack of roof bolting and the occurrence of the fatalities.\textsuperscript{66}

Neither the petitioners nor the majority make any showing that it was the lack of roof bolting which caused the fatalities. Nor do they show how roof bolting would have prevented any of the casualties. Nor do the petitioners or the majority offer any explanation why nineteen mines in this State have operated without a single roof fall casualty in the last twelve years while employing either conventional or combination roof control plans.\textsuperscript{67}

There was a "plethora of affidavits from operators, miners, and mine safety experts" disagreeing with the majority's factual conclusions.\textsuperscript{68} These affidavits maintained that (1) auger mines using other than full roof bolting plans were adequately safe; (2) a blanket full roof bolting requirement for all auger mines would not increase the safety of these mines and in some cases would decrease the safety; and (3) the fatalities in the auger mines were caused by failure to follow the approved roof control plans.\textsuperscript{69} The dissent did not feel that the court was competent to assess the conflicting contentions presented in the case and "should defer to the considered opinion of our expert board."\textsuperscript{70}

The West Virginia Legislature began the section of the code relating to the Board of Coal Mine Health and Safety's structure and functions with a declaration of legislative findings and purpose.\textsuperscript{71} That declaration states, in part:

(a)(2) Coal mining is highly specialized, technical and complex and it requires frequent review, refinement and improvement of standards to protect the health and safety of miners;

(3) During each session of the Legislature, coal mine health and safety standards are proposed which require knowledge and comprehension of scientific and technical data related to coal mining;

(4) The formulation of appropriate regulations and practices to improve health and safety and provide increased protection of miners can be accomplished

\textsuperscript{64} Faerber I, No. 17076, slip op. at 10.
\textsuperscript{65} Id.; Faerber, No. 186-86, slip op. at 4 (Neely, J., dissenting).
\textsuperscript{66} Id.; Faerber, No. 186-86, slip op. at 6.
\textsuperscript{67} Id. at 2.
\textsuperscript{68} Id. at 2, 3.
\textsuperscript{69} Id.
\textsuperscript{70} Id. at 2.
\textsuperscript{71} Id.
\textsuperscript{72} W. VA. CODE § 22-6-1 (1985).
more effectively by persons who have experience and competence in coal mining and coal mine health and safety.

(b) In view of the foregoing findings, it is the purpose of this article to:

1. Continue the board of coal mine health and safety;
2. Require such board to continue as standard rules and regulations the coal mine health and safety provisions of this code;
3. Compel the board to review such standard rules and regulations, and, when deemed appropriate to improve or enhance coal mine health and safety, to revise the same or develop and promulgate new rules and regulations dealing with coal mine health and safety. . . .

The dissent focused on three elements in its analysis of the deference that should be accorded the Board’s technical expertise. The bedrock of this analysis is the legislative determination that coal mining is technical and complex and the formulation of rules and regulations has been delegated to those “who have experience and competence in coal mining and coal mine health and safety.” When this legislative delegation of authority on matters of technical expertise is combined with the statutory requirement that roof control plans for individual mines be approved by the Director, the conclusion, the dissent notes, is that “this Court should be wary of overturning the considered decisions of the board on technical matters.”

The dissent, as did the majority, also noted that the West Virginia Code is “patterned after and is virtually identical to 30 U.S.C. 862(a) and (b) of the Federal Coal Mine Health and Safety Act of 1969.” The implementing regulations of the 1969 Act, formulated by “the federal government’s panel of mine safety experts,” recognize full roof bolting, conventional roof control plans, and combination roof control plans as adequate. The dissent concluded that this is federal corroboration that “full roof bolting is not the only adequate means of roof support in thin-seam mines employing auger mining techniques.” “In light of this federal corroboration, we [the court] should be even more wary of second-guessing the judgment of the board.”

The final element considered in the dissent’s deference to the Board’s formulations and interpretations is the court’s incompetence to decide issues relating to roof control plans. The factors determining the adequacy of a roof control plan were not before the court and if such evidence was available, the court “could

7 W. Va. Code § 22-6-1(a)(2) to -(b)(3).
8 W. Va. Code § 22-6-1(a)(2) to -(4); Faerber, No. 186-86, slip op. at 1 (Neely, J., dissenting).
9 Faerber, No. 186-86, slip op. at 2 (Neely, J., dissenting).
10 Id. at 3; Faerber I, No. 17076, slip op. at 3.
11 Faerber, No. 186-86, slip op. at 3 (Neely, J., dissenting).
12 Id. at 3, 4.
13 Id. at 4.
not begin to comprehend its import.”

The West Virginia court indirectly addressed the deference to be given the agency responsible for administering the coal mine health and safety regulations in *Walls v. Miller*. The court held in *Walls* that the Director of Mines was required to enforce code provisions as written and not emasculate the provisions by interpretations contrary to the plain language of the statutes. The Director maintained that institutional interests, such as a “recognition that administrative agencies possess special expertise,” barred issuance of the writ of mandamus. The court disagreed. “[W]hile the Director has an expertise in mining, when he exceeds the authority given to him by the Legislature, the courts may intervene, especially where there is no factual dispute.” In *UMWA v. Faerber*, the contention was that the Commissioner was not performing his statutory duty, and there was certainly a factual dispute. The court, however, demonstrated that it may intervene as readily when the agency does not perform as when it exceeds its authority.

The District of Columbia Circuit carefully considered the standard of review of administrative technical expertise in a suit against the Environmental Protection Agency. In *Ethyl Corp. v. Environmental Protection Agency*, the statute required a highly deferential standard of review. The court was required “to strike ‘agency action, findings, and conclusions’ that [were found] to be ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’” This did not mean that the court automatically would approve the agency decision. Instead, the reviewing court should make a substantial, searching, and careful inquiry into the facts, particularly in technical cases.

There is no inconsistency between the deferential standard of review and the requirement that the reviewing court involve itself in even the most complex evidentiary matters. . . . The close scrutiny of the evidence is intended to educate the court. It must understand enough about the problem confronting the agency to comprehend the meaning of the evidence relied upon and the evidence discarded; the questions addressed by the agency and those bypassed; the choices open to the agency and those made. The more technical the case, the more in-

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79 Id. at 2.
80 Id.
81 *Walls*, 162 W. Va. at 571, 251 S.E.2d at 497, 498.
82 Id. at 495 n.6.
83 Id.
84 See Scott, 315 S.E.2d 614; *UMWA v. Miller*, 291 S.E.2d 673.
86 Id. at 34 (quoting 5 U.S.C. § 706(2)(A) (1970)).
87 Id.
88 Id. at 34, 35 (citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415, 416 (1971)).
tensive must be the court's effort to understand the evidence, for without an appropriate understanding of the case before it the court cannot properly perform its appellate function. But that function must be performed with conscientious awareness of its limited nature. The enforced education into the intricacies of the problem before the agency is not designed to enable the court to become a superagency that can supplant the agency's expert decision-maker. To the contrary, the court must give due deference to the agency's ability to rely on its own developed expertise.9

The United States Supreme Court has accorded particular deference to administrative technical expertise. "[W]hen we consider a purely factual question within the area of competence of an administrative agency . . . and when resolution of that question depends on 'engineering and scientific' considerations, we recognize the . . . agency's technical expertise and experience and defer to its analysis unless it is without substantial basis in fact." However, this deference should not cause reviewing courts to "rubber-stamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute."9

The majority in Faerber did not discuss or analyze the relevant factors the agency used in approving roof control plans. Apparently there was no evidence before the court as to these factors. Instead, the majority based its opinion on statutory construction, on the statutory duty of the agency to promulgate regulations to prevent fatalities, and the occurrence of fatalities in auger mines without full roof bolting. It did deem the administrative decisions "inconsistent with a statutory mandate" that frustrated the legislative policy underlying the statute. In contrast, the dissent emphasized the factual technical question of the effectiveness of full roof bolting plans and concluded that the majority based its opinion on the "possibility that full roof bolting will make mines marginally safer" instead of conclusive evidence.

[When our own health and safety board, the Federal Mine Safety and Health Administration, the coal operators, and most important of all, the miners themselves have concluded, based on extensive experience, that mines without full roof bolts are as safe as those with them, we should not substitute our judgment for theirs.9

9 Id. at 36 (citing Market Street Ry., 324 U.S. 548, 559-61, reh'g denied, 324 U.S. 890 (1945)).
92 Faerber, No. 186-86, slip op. at 5 (Neely, J., dissenting) (emphasis in original).
93 Id. at 6.
One aspect of the case that the majority and dissent agreed upon, with varying emphasis and interpretation, was the economic impact of the decision. The majority briefly noted such considerations and rather summarily dismissed them because of countervailing concerns. "We are aware of the concern of the coal operators that their economic interests are involved in this case. This court will not, however, ignore the loss of life and limb in view of the fact that the statutes place the highest value on the health and safety of the miners." The dissenters, in contrast, were not convinced that the full roof bolting requirement would save more lives and limbs.

Due to our lack of expertise, we simply do not know whether full roof bolting will prevent more miners from losing their lives. However, we do know that today's decision will cause more miners to lose their jobs. . . . If operators forced to employ full roof bolting can no longer operate their mines, the mines will close and the miners will lose their jobs. . . . [W]e had ample evidence at oral argument that full roof bolting will close many mines.

The economic impact of a standard is a legitimate concern. When the Federal Mine Safety and Health Act of 1977 was under consideration in Congress, "Senator Williams, the 1977 Act's architect, emphasized that while the objective of standards is miner protection, it would be capricious . . . to impose economically burdensome standards when the benefit would be minimal." It remains to be seen whether the requirement for full roof bolting in auger mines will fulfill its intended purpose, to save lives, and whether miners will lose jobs because of the requirement.

V. The Aftermath

In September 1986, the UMWA petitioned the West Virginia Supreme Court of Appeals to hold Commissioner of the Department of Energy Kenneth R. Faerber in contempt for failing to enforce the court's July decision. The Department apparently did little to implement full roof bolting in auger mines until the contempt motion was filed. "[S]ome meetings were held with the alleged purpose of implementing the new (roof-bolting) regulations, [but] it was at best a marginal effort."
On October 20, 1986, while the contempt action was pending, a miner was killed by a roof fall in a Nicholas County auger mine.\(^{100}\) Although an MSHA spokesman stated that the miner was beyond the last row of roof bolts in violation of the roof support plan,\(^{101}\) this death further fueled the controversy over the Department's inaction. The Department of Energy issued an "emergency rule" on roof bolting to comply with the court's July decision shortly after October 23.\(^{102}\)

The contempt hearing was held on November 6, 1986, and in an opinion issued November 19, the court unanimously held the Commissioner in contempt of court, stating that the Commissioner "did stall and delay the speedy implementation of the Court's order."\(^{103}\) The court's decision contained three orders: (1) New roof bolting plans for auger mines must be filed within ten days; (2) auger mines must be in compliance with the Department of Energy's emergency regulations by January 27, 1987; and (3) the Commissioner must personally pay "the UMWA's costs and reasonable attorneys' fees . . . and $100 compensatory damages."\(^{104}\) Justice Neely dissented from the latter order,\(^{105}\) and controversy continues regarding the Commissioner's personal liability for the damages.

Mines that could not comply with the court's ruling have furloughed workers.\(^{106}\) The extent and permanency of this loss of jobs is yet to be determined. Fairchild International, the manufacturer of the Wilcox miners used in the affected West Virginia auger mines, "apparently is working on a way to adapt the machines to perform full roof-bolting in the sections."\(^{107}\)

VI. Conclusion

The future of the auger mines affected by the West Virginia court's ruling remains unclear. The competing interests of economic production and worker safety clashed in UMWA v. Faerber, as they have since the inception of safety legislation. This conflict was complicated by the technological questions presented and the problem of what the history of fatalities in these mines proved.

The majority opinion did not focus on technical aspects of the problem but on interpreting the statutory mandate in light of the underlying legislative policy. The majority was satisfied that the fatalities in auger mines proved that more stringent measures were necessary to protect workers' lives. The Department of

\(^{100}\) Charleston Gazette, Oct. 22, 1986, at 1A, col. 1.

\(^{101}\) Id.

\(^{102}\) Faerber II, No. 17076, slip op. at 2.

\(^{103}\) Id. at 2, 3.

\(^{104}\) Id. at 5, 6.

\(^{105}\) Id. at 1 (Neely, J., dissenting in part).

\(^{106}\) Dominion Post, Jan. 31, 1987, at 5-A, col. 3.

\(^{107}\) Wilcox Miners Are No Longer Exempt in West Virginia, COAL AGE, Sept. 1986, at 23.
Energy maintained that the history of fatalities was the result of violations of existing roof control plans and proved nothing. The dissent professed incompetence in the matter and deferred to the agency.

The West Virginia Supreme Court of Appeals previously chastised the Department of Energy's predecessor for its inaction in promulgating rules and regulations to prevent fatalities as mandated by the safety statutes. The court noted in Faerber that no regulations implementing the roof control provisions of the statute had been promulgated by the Department. The West Virginia court appears ready to intervene in technical disputes when it perceives workers' safety imperiled by agency inaction and to do so on the basis of liberal statutory construction set forth in legislative policy.

Before the enactment of the Federal Coal Mine Health and Safety Act of 1969, when regulations and enforcement procedures were largely a state function, Congress found that state standards were "enforced on an indifferent and hazardous basis." Congress warned then that if the states "could not ensure coal mine safety, the federal government would." The West Virginia court appears to be operating under a similar philosophy— if the state agency will not promulgate statutorily mandated regulations to prevent fatalities, the court will.

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108 Scott, 315 S.E.2d at 625.
109 Faerber I, No. 17076, slip op. at 4.
110 1 COAL LAW & REGULATION, supra note 50, § 1.01 [3] at 1-8 to 1-11.
111 Id. at § 1.01[1] at 1-10, citing S. REP. No. 431, 80th Cong., 1st Sess. 2 (1947), reprinted in 1947 U.S. CODE CONG. SERV. 1549, 1550.