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A MINER'S BILL OF RIGHTS

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J. Davitt McAteeer**
Richard L. Webb***

I. INTRODUCTION

In 1969 Congress passed the strongest occupational health and safety statute in history covering this country's most dangerous industrial occupation, coal mining. The statute, the Federal Coal Mine Health and Safety Act,1 was further strengthened by amendments in 1977.2 The Act, as amended, establishes mandatory health and safety standards with which all coal-mine operators must comply if they wish to produce coal in the United States. A federal inspection corps, under the Mining Enforcement and Safety Administration (MESA), visits all mines to determine if operators are complying with the mandatory standards. The inspection corps alone, however, cannot adequately enforce the strict standards of the Act because resources are limited and inspectors cannot be continually present. If this national safety program is to be effective, miners themselves will have to play an active part in enforcement.3

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3 According to the Coal Mine Health and Safety Division of MESA, there are no figures to show exactly how long inspectors spend underground or at strip operations. A fairly reliable picture can be drawn, however, from MESA data and estimates.

There are approximately 750 federal inspectors who inspect coal mines on a daily basis—634 underground inspectors and 113 surface inspectors. Herschel Potter, Chief of the Division of Coal Mine Health and Safety of MESA, estimates that these inspectors spend no more than 50% of their time actually inspecting the mines. Additionally, there are 219 inspector specialists who spend no more than 25% of their time in the mines. Thus, using the figure of 217 working days per year (the average number of days coal miners worked in 1975 (National Coal Association, Coal Data 7 (ed. 1975)), MESA has approximately 750,000 available inspec-
The miners' role in improving safety is especially important because of the nature of the mine. A coal-mine workplace is a dynamic and threatening environment—dangerous conditions must be dealt with immediately. A dispute over health and safety conditions miles underground does not lend itself to slow, deliberate, after-the-fact solution. Coal-mine faces, the area of the mine where coal is extracted, may advance as much as 150 feet in a single work shift, creating changes in roof conditions, methane gas liberation, ventilation, or other physical conditions which affect significantly the quality of the work environment.

Such rapid changes without adequate safety precautions in the work environment are the cause of the explosions and roof falls that have killed many thousands of miners. In the fifty years before the 1969 Act was passed, more than one hundred thousand miners died and literally millions were injured; mine disasters were commonplace. Since 1969 there has been some improvement but not nearly enough. In the first six years the Act was in effect six major disasters occurred, more than one thousand miners died violently in the mines, and more than one hundred thousand suffered injuries (these figures do not include the countless miners disabled by lung disease).

4 As noted in Phillips v. Interior Bd. of Mine Operations Appeals, 500 F.2d 772, 778 (D.C. Cir. 1974), cert. denied, 420 U.S. 938 (1975):

Safety costs money. The temptation to minimize compliance with safety regulations and thus shave costs is always present. The miners are both the most interested in health and safety protection, and in the best position to observe the compliance or noncompliance with safety laws. Sporadic federal inspections can never be frequent or thorough enough to insure compliance.

5 In 1974 alone, the loss of income to the families of miners injured or killed in underground bituminous coal mines amounted to $26,743,000. BUREAU OF MINES, I Accident Cost Indicator Model to Estimate Costs to Industry and Society from Work-Related Injuries and Deaths in Underground Coal Mining (Sept. 1976). This figure undoubtedly is too low, given the operators' failure to report approximately 60% of the mine accidents required to be reported to the United States Department of the Interior, Office of Audit and Investigation in 1976. Moreover, this figure does not include the toll in human lives and misery which cannot be quantified.

Meanwhile, federal inspectors cited more than four hundred thousand violations of law and closed all or parts of mines more than seven thousand times because of imminent danger. An additional thirteen thousand closure orders were issued for failure to correct a violation once it had been pointed out or for flagrantly disregarding the safety and health standards. These figures are particularly impressive considering that inspectors were not present 97% of the time coal was being produced in these mines.\(^7\)

Coal-mine health and safety conditions, however, need additional improvement, and one promising approach lies with the miner himself. It is important, therefore, to analyze the rights a miner presently has, the rights he does not have, and the changes necessary to improve his safety.

II. Rights Granted to Miners

A. Right To Organize For Safety

A “representative of the miners,”\(^8\) is any person who, or organization which, represents two or more coal miners at a particular mine. The representative has only health and safety powers and may be, but need not be, the collective bargaining representative of the miners.

There are approximately 5,300 coal mines in the United States today. Of that number, the United Mine Workers of America (UMWA) represents about 1,000 mines, and of the remaining 4,300 all, except 13 bituminous mines, have no safety representative at all.\(^9\) These figures represent mines which have company unions (such as the Southern Labor Union (SLU)) that have never filed to represent the miners and consequently do not exercise the safety rights of the representative. Only three company unions have actually filed in the six years the Act has been in effect: two after UMWA organizing drives were instituted and the rights of the safety representative became an issue, and one after an accident.

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\(^7\) Id.

\(^8\) See text accompanying note 3 supra.


The International Union of Operating Engineers is the representative at three mines, the Redstone Workers Association at four mines, the Progressive Mine Workers of American at one mine, and the Scotia Employees Association at three mines. Recently, the Council of the Southern Mountains, Inc., a grass roots community organization, filed as a representative of the miners at the mines owned by the Martin County Coal Corporation, in Martin County, Kentucky.
in which twenty-six of its members were killed in the Scotia Coal Mine in Oven Fork, Kentucky. At that mine the Scotia Employees Association (SEA) represented the miners for collective bargaining and, it believed, safety purposes. The SEA safety committee, however, never filed under section 81\(^{11}\) to become a representative because, according to the president, no one in the organization knew about the section.\(^{12}\)

In the completely unorganized mines it is doubtful that anyone knows about a "representative of the miners." As a consequence of lack of knowledge, in whatever form, there is no one to look after the miners' interests in improving safety and health conditions.

A number of statutory rights were given to the representatives by the 1969 Act, and a number of other rights developed from the explicit statutory grants. The 1977 Amendments extend to individual miners many of the rights given to representatives by the 1969 Act.\(^{13}\) The representative, however, can still play a role in safety issues that individual miners cannot. The representative can serve as a buffer between management and individual miners; protect the complaining miner from discharge by concealing his identity; and serve as a channel of communication between the individual miner and the safety inspectors. The representative is apt to be more familiar with and competent in technical and legal matters than the average miner.\(^{14}\)

\(^{11}\) Supra note 9.

\(^{12}\) It was revealed during the hearings following the disaster that MESA did not inform the safety committee or any other employee representative of its inspections. The line inspectors did not know that SEA was not a representative, but nonetheless MESA used the failure to file as the reason for not informing the Association of its inspections.

\(^{13}\) These include the right to request an immediate inspection, compare 1969 Act, supra note 1, § 103(g), 30 U.S.C. § 813(g) with 1977 Amendments, supra note 2, § 103(g), U.S. Code Cong. & Ad. News at 1298-99, and the right to participate in certain administrative proceedings, compare 1969 Act, supra note 1, §§ 105, 109, 301(c), 30 U.S.C. §§ 815, 819, 861(c) with 1977 Amendments, supra note 2, §§ 101(c), 105(a), 105(d), U.S. Code Cong. & Ad. News at 1294-95, 1303, 1305. Other provisions of the 1977 Amendments extend new rights to both miners and representatives.

\(^{14}\) Positive benefits may flow to the mine operator as well as the miners. For example, in Madisonville, Kentucky, dangerous roof conditions threatened the closing of the mine. In a cooperative effort, the safety committee and the company developed a roof control plan called "trussbolting" that eliminated roof falls and allowed the mine to remain open. *U.M.W.A. Journal*, March, 1977, at 23.
MINER'S RIGHTS

It is no wonder that 80% of United States coal mines have no one to represent the miners' health and safety interests when MESA's only effort to inform the miners of their rights under federal law was publication of a brochure, "Entitlement of Miners."\(^1\) The brochure is incomplete;\(^2\) the language is unintelligible to most laymen; and nowhere is it indicated how the statute has been interpreted under case law. The brochure, moreover, was distributed only to union offices,\(^3\) so miners at non-union mines were never told that they could exercise numerous health and safety rights.

B. Right To Request An Inspection

Extending enforcement powers to miners is justified by the continual presence of the miners in the mine in contrast to the sporadic presence of federal inspectors. If the miner notices a violation or danger when an inspector is not in the mine, he must have an effective way to report that violation, so Congress has provided a communication right:

\[(g)(1) \text{Whenever a representative of the miners } \ldots \text{ has reasonable grounds to believe that a violation of this Act or of a mandatory health or safety standard exists, or an imminent danger exists, such miner or representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, signed by the representative of the miners or by the miner, and a copy shall be provided the operator or his agent no later than at the time of inspection, except that, the operator or his agent shall be notified forthwith if the complaint indicates that an imminent danger exists. The name of the person giving such notice and the names of individual miners referred to therein shall not appear in such copy or notification. Upon receipt of such notification, a special inspection shall be made as soon as possible to determine if such violation or danger exists in accordance with the provisions of this title. If the Secretary determines that a viola-}

\(^1\) The only other attempt by MESA to inform miners of their rights was a poster required to be displayed on the company bulletin board informing miners of a toll-free telephone number for calling the MESA office in Washington to report suspected violations or dangers.

\(^2\) For example, there is no mention of miners' right of access to certain health and safety information, 1969 Act, supra note 1, § 111, 30 U.S.C. § 821, or their right to training in such matters as the use of a self-rescuer, 1969 Act, supra note 1, § 317(n), 30 U.S.C. § 877(n).

\(^3\) This information was provided by MESA, Division of Coal Mine Health and Safety.
tion or danger does not exist, he shall notify the miner or representative of the miners in writing of such determination.\footnote{18}

Section 103(g) of the 1969 Act also gave the representative the right to demand an immediate inspection whenever he suspected a violation or imminent danger, but it was a little-used provision. In the first six years the Act was in effect, section 103(g) was invoked only 620 times (about eight times a month),\footnote{19} because the non-UMWA miners were not aware they had the right to demand an inspection.

In non-UMWA mines, companies can easily retaliate when a miner does invoke his right to call in a federal inspector. For instance, in Pitkin County, Colorado, a miner discovered some primed dynamite hidden under rock dust bags about eight feet from a bare power line and called in a federal inspector who closed the mine because of the imminent danger of explosion. The next day the miner was reprimanded for calling a federal inspector and was told he would be fired if he did it again. When the miner insisted on his right to call MESA and tried to verify that right, he was fired along with the rest of his shift who supported him.

A proposal implemented to preserve the anonymity of reporting miners is the "hotline." The hotline is a means of reporting a violation or dangerous condition to federal inspectors without risk to the miner's job. It is a toll-free number by which any miner can call anonymously the Washington office of MESA to report a safety problem. Washington officials then call the appropriate district office, and in theory, an inspector is dispatched within twenty-four hours to investigate the complaint. The hotline is not effective in dealing with immediate threats, however, because miners are reluctant to make such calls when they would have to use company phones and because there is a delay while the call goes to a tape recorder in Washington before the message is relayed back to the MESA district office. The hotline could be an effective way to report persistent, longterm health or safety problems but, unfortunately, as with the section 103(g)(1) inspection right, the

\footnote{18} 1977 Amendments, supra note 2, § 103(g)(1), U.S. Code Cong. & Ad. News at 1298.
\footnote{19} 1977 Amendments, supra note 2, § 103(g)(1), U.S. Code Cong. & Ad. News at 1298. The 1969 Act limited the right to request such inspections to representatives. 1969 Act, supra note 1, § 103(g), 30 U.S.C. § 813(g). MESA, however, interpreted the provision so that miners as well as representatives were allowed to request inspections. That interpretation was incorporated into the 1977 Amendments.
hotline has been used infrequently. Since its inception in 1971 it has been used a total of 499 times (about 80 times a year).\(^2\)

One threshold problem with the hotline is that many miners do not know about it. MESA requires that a poster be placed on the company bulletin board, but this is inadequate notice. In a recent safety discrimination case involving a miner who was discharged for refusing to work in conditions he believed to be unsafe,\(^2\) company lawyers asked the miner why, if conditions were so unsafe, he had not called MESA in the five years he had worked at the mine. The operator produced MESA’s hotline poster that had been on the mine bulletin board for years. Why, the operator wanted to know, had the miner not read the poster and called MESA instead of refusing to work? The answer was simple and direct: the man could not read.\(^2\)

C. Right To Refuse To Work

The right to refuse to work in unsafe conditions was judicially developed under the 1969 Act\(^3\) and legislatively established under the 1977 Amendments.\(^4\) The federal court cases which developed

\(^2\) These figures were provided by MESA Coal Mine Health and Safety Division (December 1976).


\(^4\) Giving hotline information orally in training classes and reinforcing it periodically would be more effective than exhibiting a poster which may be ignored by new miners or never even seen. The Act as amended does provide for oral instruction in safety rights for all miners. 1977 Amendments, supra note 2, § 115, U.S. Code Cong. & Ad. News at 1315 (to be codified in 30 U.S.C. § 825).

\(^3\) See Phillips v. Interior Bd. of Mine Operations Appeals, 500 F.2d 772 (D.C. Cir. 1974), cert. denied, 420 U.S. 938 (1975). The source of the right to refuse to work in unsafe conditions is grounded partially in the overall purpose of the Act to protect the miner from unsafe and unhealthy conditions and particularly the right of miners to communicate to MESA the existence of violations or dangerous situations. Federal Coal Mine Health and Safety Act, Pub. L. No. 91-173, § 103(g), 83 Stat. 742 (1969) (current version at 30 U.S.C. § 813 (1977)). The court in Phillips alluded to each of these justifications, primarily focusing on the refusal to work as the first step in an attempt to notify MESA. Thus, if a miner cannot resolve the safety dispute with his immediate supervisor, he can withdraw in order to contact MESA to resolve the dispute. Accord, Munsey v. Morton, 507 F.2d 1202 (D.C. Cir. 1974).

\(^4\) The Committee intends that the scope of the protected activities . . . include . . . the refusal to work in conditions which are believed to be unsafe or unhealthful.

this concept arose in the context of defining the scope of miner discrimination protection under section 110(b) of the 1969 Act. Since the courts have decided that a miner who refuses to work in unsafe conditions is protected from retaliation, then one can infer that refusing to work in unsafe conditions is a substantive right. It is also the most important safety right a coal miner has, because it is his first line of protection should a federal inspector not be in the immediate vicinity. Not only does the right preserve life, it also provides a strong inducement to management to abate the unsafe condition so that mining operations, stalled by a safety dispute, can continue. This right is also infrequently used.25

The right to refuse to work lies at the heart of the private enforcement of mandatory health and safety standards. Assuming the miner is aware of the law governing safety conditions, he is in the best position to detect violations of law, and if he detects a violation, it is his responsibility to inform the foreman. He may then refuse to work until the violation is corrected or he may leave the work site to report the violation to MESA.

This right is based on the anti-discrimination provision26 and the provision which allows a miner to contact MESA to report a violation.27 In the 1977 Amendments Congress expressly included within the ambit of protected activity "the refusal to comply with orders which are violative of the Act or any standard promulgated thereunder." Any order to mine coal rather than to abate an existing violation is an order "violative of the Act" and need not be obeyed until the violation is corrected.

Probably few miners have actually refused to work because of unsafe conditions or violations of law. For one thing, refusing to work, especially a non-union mine, could endanger one's job. For another, most non-union miners and many UMWA miners do not know that under existing federal law they may refuse to work

25 See text accompanying notes 37-47 infra.
27 1969 Act, supra note 1, § 103(g), 30 U.S.C. § 813(g). This section is essentially the same in the Amendments, except that it now explicitly extends coverage to individual miners. 1977 Amendments, supra note 2, § 103(g)(1), U.S. Code Cong. & Ad. News at 1298.
under conditions they believe constitute a violation or danger.\textsuperscript{29} If a miner read the entire 1969 Act, the 1977 Amendments, and all MESA safety education material, he would not find it expressly stated. Indeed, even if a miner talked with a federal inspector he is not likely to be informed of the right.

A Kentucky miner recently refused to work in an area of the mine he believed was unsafe and was fired for his refusal. Three days later he went to the local MESA office to find out whether he had any redress under federal law. The MESA official told him that MESA did not get involved in discharges or other personnel matters and suggested that he contact the state labor department. Because he relied on this information, the miner did not file a timely discrimination complaint and his case was dismissed.\textsuperscript{30}

Other cases underscore this point. A section foreman in Kentucky, who was fired for disobeying instructions to mine coal despite a federal closure order, did not know beforehand whether any relief was available. He said, "Nobody told me I had a 'right' to do anything. I just had a feeling I should be able to do something."\textsuperscript{31}

Five Colorado miners were discharged for refusing to work and for attempting to contact MESA concerning company policies which they believed violated their safety rights. They did not know of their right to refuse to work but they believed that they had a right to contact MESA regarding company policies which dangerously restricted their safety rights.\textsuperscript{32} As noted earlier, the right to refuse to work did evolve from the right to notify MESA of dangers or alleged violations.

D. Right To Participate In Administrative And Judicial Proceedings

A miner and his representative have the right to participate in a wide range of administrative and judicial proceedings under the Act as amended. In the area of rulemaking, for instance, both, as "interested persons," have the right to submit proposed rules, to comment on proposed rules, and to file formal objections re-

\textsuperscript{29} The UMWA had its own withdrawal right written into its 1974 contract, although it was not as strong as the right contained in federal law.


\textsuperscript{31} MOUNTAIN LIFE & WORK, Dec., 1976, at 7.

\textsuperscript{32} Rogers v. Anschutz Coal Corp., DENV 76-138 (Sept. 27, 1977).
questing a public hearing on any proposed rules.\textsuperscript{31} As persons who may be adversely affected, they may obtain court review of a final rule at the time of promulgation.\textsuperscript{32}

The 1977 Amendments allow miners and miner representatives to obtain informal administrative review of MESA's failure to require abatement of a danger or violation.\textsuperscript{33} Formal review of government enforcement actions is also available. The miner and his representative may contest the reasonableness of the time set for abatement of a violation\textsuperscript{34} and may contest the issuance, modification, or termination of any closure order based on failure to abate, unwarranted noncompliance with the Act, or a pattern of serious violations. The miner and miner representative may also review the merits of any notice or order regarding dangerous conditions in the mine.\textsuperscript{35} The UMWA has initiated only one review proceeding,\textsuperscript{36} although it has participated in numerous proceedings initiated by operators. No non-UMWA miner or representative has ever initiated or participated in such a proceeding.

Once a civil penalty is assessed for each violation found, an operator then has the right to request an informal conference, and if this proves fruitless he may request a formal adjudicative proceeding.\textsuperscript{37} An affected miner or his representative likewise may contest a proposed civil penalty\textsuperscript{38} and may participate fully as

\textsuperscript{33} 1977 Amendments, supra note 2, § 103(g)(2), [1978] U.S. CODE Cong. & Ad. News at 1299 (to be codified in 30 U.S.C. § 813). While the statute itself refers to the reporting of an alleged violation or imminent danger, the legislative history refers to suspected violations and "hazards" in general.
\textsuperscript{36} Affinity Mining Co., 6 IRMA 193 (1976) (on reconsideration).
parties to any hearing requested by the operator. Their participation is important to ensure that civil penalties are assessed at a level which effectively will deter future violations of the Act. The 1969 Act denied miners and their representatives all such rights of participation in civil proceedings.  

The 1969 Act permitted miners' representatives and operators—but not individual miners—to petition the Secretary for modification of the application to their mines of a mandatory standard. The 1977 Amendments also exclude individual miners from petitioning for variances but provide for their full participation in any proceedings brought by their representatives or by operators.

In regard to judicial proceedings, any miner or miner representative who is "adversely affected or aggrieved by an order of the Commission issued under the Act may obtain review of such order in any United States court of appeals. . . ." This would reasonably include any administrative proceeding in which the miner or miner representative had participated as an interested person, as well as proceedings in which the miner or representative had not participated but which would adversely affect him.

Miners and representatives have failed to participate fully in administrative and judicial proceedings under the 1969 Act as much because they lack legal resources as because they are unaware of their participation rights. Although the 1977 Amendments address the problem of ignorance, they do not address the problem of legal resources.

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46 MESA relied entirely on its "Entitlement" brochure to advise miners and their representatives of the participation rights.
47 The Council of the Southern Mountains, Inc., a representative of miners at mines in Martin County, Kentucky filed a Citizen Petition on April 15, 1977, with the Secretary of the Interior requesting rulemaking to provide reasonable costs and attorneys' fees to participants in agency proceedings who would not otherwise participate in such proceedings due to limited resources but who can reasonably be expected to contribute substantially to a fair determination of the issues.
E. Right To Compensation

The Act as amended provides for compensation to miners who are idled by the issuance of a closure order. Few formal applications for compensation were made under the 1969 compensation provision, but since the miner is entitled to compensation whether or not the withdrawal order was validly issued, there is rarely a serious legal issue as to entitlement. The UMWA has tried to ensure that its miners receive compensation, and UMWA miners are usually paid without filing a formal application.

No miner in a non-union mine, however, has ever filed an application for compensation—certainly not because withdrawal orders are never issued at those mines, and not because the miners are paid as a matter of course. Most non-union miners have never received compensation for time they have been idled by closure orders, and most of them do not know that they have a right to such compensation.

F. Right To Adequate Training

One of the historic problems in the American coal industry has been the inadequate training afforded coal miners; many miners still go underground with little or no training. Until recently, the federal requirements for training were minimal and poorly enforced. For example, the safety director at Scotia testified that some of the safety classes he taught had no students in attendance. He also testified that only 25% of those who had the responsibility to test for methane were actually trained as required by law.

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50 The UMWA compiled the following chart from a survey of its members:

<table>
<thead>
<tr>
<th>Percentage of New Coal Mine Workers Offered Paid Training</th>
</tr>
</thead>
<tbody>
<tr>
<td>Safety Training</td>
</tr>
<tr>
<td>Training in Current Skill</td>
</tr>
<tr>
<td>Training in Other Skill</td>
</tr>
<tr>
<td>Equipment Operation</td>
</tr>
<tr>
<td>First Aid</td>
</tr>
<tr>
<td>No training of any kind offered</td>
</tr>
</tbody>
</table>


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Fortunately that situation is changing. The 1977 Amendments require at least forty hours of training for new underground miners, twenty-four hours of training for new surface miners, and eight hours of refresher training each year for all miners. Miners must be paid according to their normal rate of pay and must be reimbursed for any costs incurred while attending such training. If an inspector determines that a miner has not received the requisite training, then the miner must withdraw from the mine until his training is completed. Any miner so withdrawn may not, however, be discriminated against by the operator and is entitled to full compensation for the interim.

The Interior Department is now in the process of promulgating mandatory training standards which will spell out in some detail the rights of miners in training. Under the regulations, the miners or their representatives will have the following rights: to ask for changes in a training program once it is established; to request decertification of poor instructors; to request additional training; and to protest when the operator is offering no training or substandard training.

G. Right To Participate In Planning Operation Of Mine

Roof, ventilation, and dust control plans are developed individually, taking into account the unique characteristics of each mine. All such plans, however, must meet minimum performance standards prescribed by statute and regulation. Under existing regulations, before an operator may lawfully mine coal, he must submit a plan for roof ventilation and dust control to the district MESA office for approval. The plans, once approved, are reviewed every six months. Under the regulations implementing the 1969 Act, there was no allowance for miner participation in the development and review of these plans, despite the fact that the plans basically establish the way coal is produced at a particular mine. Congress, in the legislative history to the 1977 Amendments, approved the basic procedure for development and review of these

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[4] Interior, in a convoluted decision, did allow for petition for modification of these plans, under section 301(c) of the 1969 Act. This alternative was open to the representative of the miners. Affinity Mining Co., 6 IBMA 100 (1976).
plans, but stated that miners and their representatives were entitled to consult with the district manager regarding their adoption and implementation.54

While no specific provision of the Act as amended secures for miners the right to participate in all safety meetings between the operator and MESA, this right may be inferred from the other rights of participation which are specifically provided. The right to participate in informal meetings, inspections, and pre- and post-inspection conferences, would be diminished substantially if miners and representatives were not allowed to participate in meetings at which decisions are made which would affect the rights formally granted them by the Act. For example, a miner may contest the modification or termination of a closure order issued under section 104.57 It is not unusual for an operator to seek modification or termination of an order; since miners have the right to contest such a modification or termination, they should be included in discussions which might result in an informal decision to modify or terminate. Otherwise they have to wait until the informal decision is made and then engage in lengthy formal proceedings to contest the decision. There is no convincing policy argument that a miner does not have the right to participate in meetings or conferences that affect his own health and safety. At present, however, MESA does not ensure that miners or their representatives are included in all safety discussions.

Section 101(c) of the 1977 Amendments gives miner representatives the right to petition for variance in the application of a health or safety standard. Both miners and their representatives have full rights of participation in any section 101(c) proceeding. The only legal criterion for granting a variance petition is that the proposed method of meeting the mandatory standard will "at all times guarantee no less than the same measure of protection" or that application of the standard would result in a "diminution of health or safety to the miners."58 Thus, miners and representatives have important roles to play in guaranteeing that the protection of their health and safety is not diminished by variances proposed by the operator. Miner representatives may themselves petition for

any variance which would afford the miners greater protection than that afforded by the Act and regulations.

H. Right To Health And Safety Information

Congress had consistently recognized that if miners and representatives of miners are to fulfill their roles as private enforcers of the Act they must have access to health and safety information. The 1969 Act made available to all interested persons an operator's accident-investigation records and all other records which the Secretary reasonably requires of the industry to enable him to perform his statutory functions.\(^5\) Thus, miners had access to: the mine map;\(^6\) the roof control plan;\(^7\) the records of required company mine examinations, such as "fireboss" books;\(^8\) the records of company accident investigations;\(^9\) and the operator's Coal Accident, Injury, and Illness Reports.\(^10\)

The original Act also required that copies of "any notice, order, or decision required by this Act be given to an operator," be mailed immediately to any miner representative, and be posted by the operator on a bulletin board at the mine for the benefit of individual miners.\(^11\) The 1977 Amendments expand the right of access to health and safety information.\(^12\)

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\(^6\) 30 C.F.R. § 75.1203 (1977).
\(^7\) Id. § 75.200.
\(^8\) Id. §§ 75.1801-1808.
\(^9\) Id. § 80.23.
\(^10\) Id. § 80.31.
\(^11\) 1969 Act, supra note 1, § 107(a), (b), 30 U.S.C. § 817(a)-(b).
\(^12\) The Act as amended requires operators to maintain records of their activities which the Secretary deems necessary for enforcement purposes or for analysis and prevention of work-related accidents and illnesses. 1977 Amendments, supra note 2, § 103(d), (h), [1978] U.S. Code Cong. & Ad. News at 1298-1299 (to be codified in 30 U.S.C. § 813). This information may be released to all "interested persons" and must be available for public inspection. The amended Act further requires records of employee exposure to "potentially toxic materials or harmful physical agents," permits miners or their representatives to observe the monitoring or measuring of such exposure, grants each miner and former miner access to the records of his exposure to such substances, and requires the operator to notify promptly any miner who has been or is being exposed to unlawful concentrations of such substances. 1977 Amendments, supra note 2, § 103(c), [1978] U.S. Code Cong. & Ad. News at 1298 (to be codified in 30 U.S.C. § 813). The Amendments require, as does the original Act, copies of all notices, orders, citations, and decisions to be posted on the mine bulletin board and to be mailed to any existing representatives of the miners. 1977 Amendments, supra note 2, § 109(a)-(d), [1978] U.S. Code Cong. & Ad. News at 1310 (to be codified in 30 U.S.C. § 819).
The Interior Department proposed mandatory safety training for all American coal miners. In the comments and hearings which followed publication of the proposed rule, the Council of the Southern Mountains, a community group in Appalachia, suggested that several hours of instruction be given in miners' safety rights. Similarly, in testimony before Congress, the Council proposed that the 1977 Amendments include a provision for training in miners' safety rights. The Interior Department findings of fact indicate that training in safety rights will be required by the regulations. The 1977 Amendments contain a provision for training in miners' safety rights which has been publicly lauded by both Secretary of the Interior Cecil D. Andrus and the UMWA.

III. RIGHTS DENIED TO MINERS

Certain substantive rights to which miners should be entitled have been withheld from them. These omissions include the right to sue operators when injury is caused by violation of the Act, the right to sue the government for failure to enforce the Act, and the right to recover an award of attorneys' and experts' fees.

Civil tort actions by miners against operators are barred by state workmen's compensation statutes which base awards for injuries on a contractual rather than a civil right. "[T]he law takes from the employee his common-law right to sue his employer for damages for negligence in return for payment from the fund of limited or scheduled benefits. . . ." In order to get limited liability, the employer gave up his common-law defenses of contributory

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67 See text accompanying notes 52, 53 supra.


69 In testimony on S. 717 before the Subcommittee on Labor of the Senate Committee on Human Resources, Secretary Andrus stated, "We heartily concur in the need for mandatory training . . . in the statutory rights afforded to miners and their representatives under the Act." Proposed Act to Promote Safety and Health in the Mining Industry: Hearings on S. 717 Before the Subcommittee on Labor of the Senate Committee on Human Resources, 95th Cong., 1st Sess. 319 (1977). Arnold Miller, President of the UMWA, in testimony submitted to the Subcommittee, stated that "no safety training program should be approved that does not provide for safety training in the safety rights of miners under the Act." Proposed Act to Promote Safety and Health in the Mining Industry: Hearing on S. 717 Before the Subcommittee on Labor of the Senate Committee on Human Resources, 95th Cong., 1st Sess. 159 (1977).

70 See W. VA. CODE §§ 23-1-1 to -6-1 (1978 Replacement Vol.).

negligence, assumption of the risk, and the fellow-servant doctrine.\textsuperscript{72} State workmen's compensation laws, however, only "provide short term payments to the injured miners to carry them over the period of disability, but do not compensate them fully for lost wages or pain and suffering resulting from these injuries."\textsuperscript{73} This bar on civil tort actions by miners has an important impact on the issue of miners' safety rights. Because of the emphasis placed on high production in the coal industry,\textsuperscript{74} the limited amount of damages guaranteed by workmen's compensation statutes does not provide an effective economic incentive for operators to comply with federal safety standards.

Several attempts have been made in recent years to amend the 1969 Act in order to add an effective economic incentive for operators to encourage safe and healthful conditions in their mines. One plan, proposed by former Congressman Ken Hechler,\textsuperscript{76} would have granted to federal district courts jurisdiction over personal injury actions brought by miners for injuries sustained in the course of their employment.\textsuperscript{78} An earlier proposal by former Congressman Hechler would have permitted miners to sue only where their operators had been grossly negligent.\textsuperscript{77} A private right of action for miners which holds operators liable for injuries caused by violation of a mandatory standard (in lieu of or in addition to a cause of action under workmen's compensation statutes) would compensate miners or their survivors for losses and at the same time cause operators to place a premium on safe and healthful conditions in their mines. Mine disasters would subject operators to multi-million dollar lawsuits.\textsuperscript{78} The number of deaths and injuries which occur one at a time, day after day would be reduced.

\textsuperscript{72} Id.
\textsuperscript{73} Id.
\textsuperscript{74} 115 Cong. Rec. 32051-32052 (1969). In Great Britain, a miner may sue for damages caused by the negligence of the operator in addition to receiving the equivalent of workmen's compensation.
\textsuperscript{75} In 1974, underground bituminous coal mines produced 277,309,000 tons of coal valued at an average of $15.75 per ton for a total of $4,367,616,750. \textit{National Coal Assoc., Coal Data}, 7, 15 (ed. 1975). At the same time, accidents in underground bituminous coal mines cost the industry 53\% of $56.9 million or $30,157,000. \textit{Bureau of Mines, I Accident Cost Indicator i.} Thus, the cost to operators of their employees' deaths and injuries was less than 1\% of the market value of the coal their employees produced.
\textsuperscript{76} Democrat, West Virginia.
\textsuperscript{77} H.R. 5555, 94th Cong., 1st Sess. (1975).
\textsuperscript{79} The amount of damages for which operators would be liable, however, would be limited so as not to impose a crushing burden on them. H.R. Moch Co. v. Rensselaer Water Co., 247 N.Y. 160, 159 N.E. 896 (1928).
Another method for improving the enforcement of coal mine health and safety standards has not been accepted yet by Congress. In a 1973 bill to reform the Act, former Congressman Hechler included a provision which would have allowed miners and their representatives to bring a civil action against the Secretary of Labor for his alleged failure to perform any nondiscretionary act or duty. Such a provision, like the citizen-suits sections found in other recent federal legislation, would give to miners the power to compel the Secretary to enforce certain provisions of the Act. The Secretary might even voluntarily reconsider his prior decision not to act upon receiving notice of the impending lawsuit.

Federal legislation should also include provisions for the award of attorneys' fees to miners who prevail in administrative and federal court proceedings. Recent strip mine legislation, for example, contains provisions allowing the award of such fees, and the right of action proposed by former Congressman Hechler in 1973 would have included the right to recover the costs of litigation. Although hundreds of lawyers have represented the coal companies, few have represented the miners. The UMWA, it is true, often participates in proceedings involving union mines, but the legal resources of the operators overpower those of the UMWA. No non-union miner has ever participated in a safety-related proceeding other than a discrimination one. A provision which shifts attorneys' and experts' fees to the unsuccessful party would aid miners in finding lawyers to represent them and experts to testify in their behalf.

IV. Protection Against Retaliation For Safety Activity

In order to make substantive safety rights meaningful, Con-

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79 H.R. 5555, 94th Cong., 1st Sess. 49-51 (1975).
81 Under the Hechler provision a citizen suit cannot be brought sooner than twenty days after the Secretary and the company have been notified unless there are special circumstances. H.R. 5555, 94th Cong., 1st Sess. 49-51 (1975). Such notice requirements give the offending party an opportunity to take voluntary action to achieve compliance. See, e.g., Natural Resources Defense Council v. Train, 510 F.2d 692, 728 (D.C. Cir. 1975).
83 H.R. 5555, 94th Cong., 1st Sess. 51 (1975).
gress provided the miner with a weapon to deter and to remedy retaliation for safety activity. Without the protection afforded by the anti-discrimination provisions, the miner would be caught in the dilemma of choosing between exposing himself to danger or risking his job. In introducing the amendment on the Senate floor, Senator Kennedy stated:

[The rationale for . . . [§ 110(b)] is clear. For safety's sake, we want to encourage the reporting of suspected violations of health and safety regulations . . . . But miners will not speak up if they fear retaliation. This amendment should deter such retaliation, and, therefore, encourage miners to bring dangers and suspected violations to public attention.]

Comparatively few discrimination complaints—approximately sixty—have been filed since the inception of the Act, and only about 10% of all complaints filed have involved non-UMWA members. This is probably because of miners' ignorance of their safety rights under federal law, and even those miners who are outspoken on health and safety matters and who are fired for being so are probably not aware that they have a cause of action.

A. Scope of Protection Afforded by Anti-Discrimination Provision

Section 110(b) of the 1969 Act protected miners and their representatives from discharge or other forms of discrimination for having engaged in certain protected safety activities, such as notifying the authorities of an alleged danger or violation, filing or instituting a proceeding, or testifying at enforcement or administrative proceedings under the Act. This protection is extended to include applicants for employment in the 1977 Amendments.

Congress also expanded the scope of protected safety activities. The anti-discrimination provision is to be broadly construed so as to

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assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation. This section is intended to give miners, their representatives, and applicants, the right to refuse to work in conditions they believe to be unsafe or unhealthful and to refuse to comply if their employers order them to violate a safety and health standard promulgated under the law.\footnote{S. Rep. No. 181, 95th Cong., 1st Sess. 36, reprinted in [1978] U.S. Code Cong. & Ad. News 5193, 5228.}

The amendments to the anti-discrimination provision make it clear that a miner is protected from retaliation if he engages in any safety activity and that activity contributes to the retaliatory conduct.\footnote{Id. Additionally, no one may be discriminated against because he is being examined for black-lung disease and for transfer to another job class under section 101(c)(7) of the Act. 1977 Amendments, supra note 2, § 105(c)(1), [1978] U.S. Code Cong. & Ad. News at 1304 (to be codified in 30 U.S.C. § 815 (c)(1)).}

In the 1977 Amendments, Congress rejects previous attempts by the Interior Department to limit the protection against retaliation that Congress afforded the miners and their representatives in the 1969 Act. Although the federal courts had broadly interpreted the anti-discrimination provision in that Act,\footnote{See, e.g., Phillips v. Interior Bd. of Mine Operations Appeals, 600 F.2d 772 (D.C. Cir. 1974), cert. denied, 420 U.S. 938 (1975); Munsey v. Morton, 507 F.2d 1202 (D.C. Cir. 1974).} the Office of Hearings and Appeals, the adjudicative arm of the Interior Department, consistently undercut the protection afforded miners by the Act. Several of the rulings of the Interior Department illustrate how enlightened legislation can be thwarted by an unresponsive bureaucracy.

For instances, the Interior Board of Mine Operations Appeals first ruled that miners were protected from retaliation only when they complained to him or to his designee, the federal coal mine inspector, and not when they reported a safety problem to mine management.\footnote{Phillips v. Smitty Baker Coal Co., 1 IBMA 144 (1972).} If no inspector was on a miner's working section at the time, a miner could not engage in safety activity even to protect his life without facing the possibility of retaliation. This ruling was reversed by the federal courts, which extended protection to a miner who complains to his foreman about health or safety matters.\footnote{Phillips v. Interior Bd. of Mine Operations Appeals, 500 F.2d 772 (D.C. Cir. 1974), cert. denied, 420 U.S. 938 (1975); Munsey v. Morton, 507 F.2d 1202 (D.C. Cir. 1974).} One administrative law judge, undaunted by the federal
court decisions, ruled that two miners who had been fired for refusing to work under dangerous roof conditions, should have taken their complaint to higher management and that their failure to do so rendered their previous action unprotected. In the 1977 Amendments, Congress rejects this attempt to restrict miners' rights and specifically protects any miner who makes a safety complaint to his foreman.93

Another ruling which lessened the safety protection afforded a miner required that a miner intend to notify the federal government when he engaged in safety activity.94 When no inspector was present and a bona fide safety dispute arose, the miner was not protected unless he had shown his intent to notify the Secretary. On the other hand, when the Secretary's representative was at the scene, the miner could complain to him. The inspector, however, is not always there, and the non-union miner must turn to his foreman.95 Despite this, various administrative law judges and the Board of Mine Operations Appeals have ruled against miners who could not show such an intent to notify the Secretary.96 The Interior Department had not informed miners that they had a right to notify the Secretary of a danger or alleged violation, but the Department nonetheless required that miners intend to exercise a right about which they had not been informed. The 1977 Amendments require only that a miner have an honest belief that a danger or violation exists.97 Representative Carl Perkins,98 Chairman of the House Committee on Education and Labor, reported on this effect of the legislation:

this legislation also provides broader protection for miners who invoke their rights and to enforce the act as we intend, they must be protected from retaliation. In the past, administrative rulings of the Department of the Interior have improperly denied the miner the rights Congress intended. For example,

93 1977 Amendments, supra note 2, § 105(c), [1978] U.S. CODE CONG. & AD. NEWS at 1304 (to be codified in 30 U.S.C. § 815(c)).
95 UMWA miners may turn to their safety committee, guaranteed to them by contract. Often, UMWA miners, however, must go through their foreman to contact their committeemen.
97 1977 Amendments, supra note 2, § 105(c), [1978] U.S. CODE CONG. & AD. NEWS at 1304 (to be codified in 30 U.S.C. § 815(c)).
98 Democrat, Kentucky.
Baker v. North American Coal Co., 8 IBMA 164 (1977) held that a miner who refused to work because he had a good faith belief that his life was in danger was not protected from retaliation because the miner had no 'intent' to notify the Secretary. This legislation will wipe out such restrictive interpretations of the safety discrimination provision and will insure that they do not recur.29

The Court of Appeals for the District of Columbia reversed another Interior Department Ruling when it held that the Act protected a miner who refused to work in conditions he believed in good faith to be unsafe.100 The question presented was whether the test of the miner's good faith belief in a danger or violation should be subjective or objective: whether the miner's honest belief that a danger or violation existed was enough to protect him from retaliation, or whether his belief should be supported by objective evidence.101

The objective-evidence test accepted by several administrative law judges tends to chill complaints. The coal company will

100 Under federal court decisions, the miner need not accept the judgment of the foreman on the danger posed by a condition or practice. In Phillips v. Interior Bd. of Mine Operations Appeals, 500 F.2d 772 (D.C. Cir. 1974), cert. denied, 420 U.S. 938 (1975), the court stated that

[It] is conceded by Respondent that, pending a resolution of a safety or health complaint, a miner at the Ken Car Mine had the right to refuse work under conditions which he believed in good faith to be hazardous to his safety or health. 500 F.2d at 780 (emphasis deleted). In Munsey v. Morton, 507 F.2d 1202 (D.C. Cir. 1974), another panel of the court of appeals made it clear that a miner was protected by section 110(b) if he refused to work "under conditions believed in good faith to be dangerous." 507 F.2d at 1209 (emphasis added).

101 The administrative law judges have issued decisions in which they concluded that the miner had a sincere apprehension or a genuine, good faith fear of injury or he believed that there was a danger. In other decisions the judges have applied an objective standard. See Parks v. L & M Coal Corp., NORT 75-377 (on remand) (Nov. 9, 1977); Baker v. North American Coal Corp., VINC 74-872 (March 3, 1975). One judge has applied both the subjective and objective test, ruling that the issue was unresolved. Dozier v. Mead Corp., BARB 74-688 (Jan. 30, 1976). These confused decisions contrast with other decisions which explicitly require an honest belief on the part of the miner that there was a danger or violation and objective evidence. Munsey v. Smitty Baker Coal Co., NORT 71-96 (on remand) (June 25, 1976). Once it is determined that a miner's honest belief is not enough, the court must determine how much objective evidence is necessary before a miner's complaint will be protected. Again there is confusion with both "preponderance of the objectively ascertainable evidence" and "reasonably prudent miner" tests utilized by the judges.
hire lawyers and expert witnesses to testify about the objective conditions, but miners have few or no resources to use in preparing their cases. It takes courage for a miner, especially one in a non-union mine, to advocate safe practices; understandably, few do so. To require the miner's complaint to meet some vague objective standard insulates discriminatory acts from review, especially in non-union mines. Under the objective-evidence test, miners who report conditions that they honestly believe to be unsafe would be subject to discharge or other forms of discrimination.

The legislative history of the 1977 Amendments illustrates Congress' displeasure with the rulings of the Interior Department which restrict the miners' protection from discrimination, and the 1977 Amendments themselves provide that miners are to be afforded "the greatest possible protection." Prior to the passage of the 1977 Amendments, the Administrative Appeals Board at the Interior Department clarified its position and ruled that only subjective belief was necessary. The objective-evidence test, it would seem, has been eliminated largely as a result of congressional action.

In another case, the Interior Department ruled that a miner's complaint is protected only when he believes in good faith that his own health or safety is endangered and not when his concern is with the well-being of another miner. This ruling was contrary to the anti-discrimination provisions of the 1969 Act as interpreted by the appellate court in Phillips v. Interior Board of Mine Operations Appeals. Congress, through the 1977 Amendments, more-

103 Munsey v. Smitty Baker Coal Co., 8 IBMA 43, 50 (1977) (on remand). The Board previously had not ruled on the issue; however, earlier in remanding the Munsey case to the administrative law judge, the Board directed him to determine "whether the refusal by applicants to work was reasonable in light of the surrounding facts and circumstances." Memorandum and Order, Munsey v. Smitty Baker Coal Co., IBMA 72-21 (July 7, 1975) at 4 (emphasis added).
105 The plaintiff in Phillips v. Interior Bd. of Mine Operations Appeals, 500 F.2d 772 (D.C. Cir. 1974), cert. denied, 420 U.S. 938 (1975), was fired for refusing to continue his work until he had finished helping another individual correct a violation on his machine. Phillips, as well as the operator of the machine, was endangered by the defect (although to a lesser extent), but the court did not rely on that fact. The court instead construed the Act broadly, stating, "We find that Phillips brought himself within the penumbra of the Safety Act by notifying his foreman of defective equipment creating dangerous working conditions." 500 F.2d at 774. Accord, Munsey v. Morton, 507 F.2d 1202, 1209 n.58 (D.C. Cir. 1974).
over, resolves any doubt on this point by stating that a miner is protected from retaliation "because of the exercise by such miner . . . on behalf of himself or others."

The 1977 Amendments also remedied a problem concerning the period for filing claims. In *Christian v. South Hopkins Coal Co.*, the miner had complained to MESA about his discharge and had been told by the agency to file his complaint with the state labor department instead. He relied on this information and as a consequence MESA dismissed his complaint because it was untimely and held that the thirty-day period for filing discrimination claims is a requirement of jurisdiction rather than a statute of limitations which may be extended for cause. But the appeals board reversed and remanded because the time period for filing discrimination claims is extended to sixty days in the 1977 Amendments, and the notion that the timely filing of claims is a jurisdictional prerequisite is specifically rejected in the legislative history:

The bill provides that a miner may, within 60 days after a violation occurs, file a complaint with the Secretary. While this time-limit is necessary to avoid stale claims being brought, it should not be construed strictly where the filing of a complaint is delayed under justifiable circumstances. Circumstances which could warrant the extension of the time-limit would include a case where the miner within the 60 day period brings the complaint to the attention of another agency or to his employer, or the miner fails to meet the time limit because he is misled as to or misunderstands his rights under the Act.

B. Procedural Aspects of Anti-Discrimination Provision

Under the 1969 Act, when the miner felt that he had been discriminated against for engaging in protected activities, he could apply to the Secretary for relief. The Secretary would then, as a matter of course, hold an adjudicative hearing, issue a decision based on the hearing, and either conclude that a violation of law had occurred (and usually reinstate the miner with back pay) or dismiss the claim as unfounded. This hearing proved inadequate

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107 BARB 77-184 (June 28, 1977), rev'd, 8 IBMA 195 (1977).
108 Id.
because the enforcement arm of the Secretary, the Mining Enforcement and Safety Administration, had usually not conducted an investigation of the complaint, as it was required to do by law. The Secretary, therefore, could determine whether there was evidence to support the miner's complaint. Consequently, the United Mine Workers of District 12 and the Council of the Southern Mountains jointly sued the Interior Department in the United States District Court for the District of Columbia to force the Department to conduct investigations whenever a complaint alleging discrimination was filed and to participate as a party in the subsequent proceedings. As a result of the suit, the Interior Department agreed to conduct such investigations and to participate in the subsequent proceedings.\footnote{See Council of the Southern Mountains v. Andrus No. 76-1986 (D.D.C. March 6, 1978); 43 Fed. Reg. 2723 (1978).}

The 1977 Amendments set forth the continuing obligation of the Department to conduct such investigations and provide in greater detail the procedural steps for discrimination cases.\footnote{1977 Amendments, \textit{supra} note 2, \textsection 105, 1978 U.S. \textit{Code Cong. \& Ad. News} at 1303 (to be codified in 30 U.S.C. \textsection 815).} Under the new provisions, the miner files his complaint with an independent commission, whose members are subject to Senate confirmation.\footnote{Under the 1969 Act, the Board of Mine Operations Appeals held all adjudicative hearings. No member of the board, however, had had any experience in coal mine safety law or in coal mining before being appointed, notwithstanding the fact that the board constantly decides complicated technical issues of mine safety. Nor were any of the members outstanding lawyers in administrative law or procedure. By and large, they were simply politically active Republicans rewarded for their efforts and connections with well-paying sinecures for life.} The Secretary must then conduct an investigation. If, as a result of the investigation, the Secretary believes that a violation has occurred, he must file to intervene in the proceedings and prove to the commission that a violation has occurred. If the Secretary concludes that no violation has occurred, the miner can still prosecute his case before the commission. Even where the Secretary participates in the proceeding, the miner has the right to offer any evidence he wishes, cross-examine the respondent's witnesses, and generally participate as a party.

C. Relief Available When There Has Been Discrimination

Under section 110(b) of the 1969 Act, miners were often forced to undergo severe hardship to prosecute their cases. Even if they overcame all other obstacles, they and their families would endure
economic hardship during the year or two it took to litigate their claims. The average time lapse between the filing of a complaint alleging discrimination and an initial decision by an administrative law judge is one year, and the average length of an administrative appeal is another year. 14 A section foreman, for example, was discharged because he refused to mine coal in violation of a federal closure order. 15 He ultimately prevailed, but he had endured considerable hardship before he got his job back and thirteen thousand dollars in back pay. It took him ten months to obtain relief even though the company defaulted.

Typically, when a miner is fired for safety activity and files a complaint alleging discrimination he has no source of income to support himself during the litigation. The company usually fights the unemployment compensation claim. Jobs are hard to find in the coalfields, especially when one is fired for opposing management’s profitable but unsafe practices. Delay is on the side of the company, and operators can and do “starve out” miners and force them to abandon their claims or to accept a low settlement.

The 1977 Amendments solve this problem by requiring the Secretary to make an initial determination, after a factual investigation, as to whether the miner’s complaint is frivolous. If the Secretary determines that the complaint is not frivolous, he must petition the commission for temporary reinstatement of the miner, and the commission must order reinstatement absent a showing of bad faith on the part of the Secretary. This measure should provide practical protection for the miner who is discharged because he exercised his safety rights.

Both the 1969 Act and the 1977 Amendments have provided for reinstatement with back pay for discharged miners who prevail on their discrimination claims. 16 The 1977 Amendments add interest to an award of back pay in order to compensate the miner for the deprivation of the use of his wages during the course of the litigation. 17

14 This conclusion is based on a survey of fifty cases filed with the Office of Hearings and Appeals; United States Department of the Interior.
The loss of income that occurs when a miner is fired, however, presents many serious setbacks that back pay and interest alone fail to remedy. The miner may suffer foreclosure on his house or trailer for failure to meet monthly mortgage payments. He may be blacklisted for having difficulty with the mine owner, and consequently, he may be unable to obtain interim employment. He or his family may be denied medical care because of his inability to pay for it. Since the purpose of damages under the Act is to place the miner in the same position he would have been in had the discriminatory action not occurred, these injuries must be compensated.

Neither the 1969 Act nor its legislative history explicitly provided for the award of special damages to a miner who had been discriminated against for the exercise of safety rules. With no absolute mandate, the Interior Department never awarded special damages, even where economic damages resulted from a discriminatory act.

The position of the Interior Department is specifically rejected in the legislative history of the 1977 Amendments which authorize the award of special damages:

It is the Committee's intention that the Secretary propose, and that the Commission require, all relief that is necessary to make the complaining party whole and to remove the deleterious effects of the discriminatory conduct including, but not limited to reinstatement with full seniority rights, back-pay with interest, and recompense for any special damages sustained as a result of the discrimination. The specified relief is only illustrative. Thus, for example, where appropriate, the Commission should issue broad cease and desist orders and include requirements for the posting of notices by the operator. 118

The congressional statement on this matter indicates a recognition that back pay and reinstatement alone are often insufficient to remedy the damage done by the discriminatory act.

In addition to compensatory relief, the 1977 Amendments authorize the use of affirmative relief, such as cease and desist orders, where appropriate. 119 Some administrative law judges have been fashioning creative affirmative relief under the 1969 Act. In one case, for example, the administrative law judge ordered the opera-

119 Id.
tor to cease and desist from threatening to discharge miners for safety activity and from otherwise discriminating against the miners for such activity, and he also ordered the Solicitor to so advise the company.120

V. Conclusion

In passing the Federal Court Mine Health and Safety Act of 1969, Congress recognized that enforcement of the strict health and safety standards of the Act could not be accomplished adequately without the active participation of miners and their representatives. To further the purposes of the Act, Congress granted miners and their representatives certain rights whereby they could protect their health and safety and could be protected from operators' retaliation for engaging in safety activity. Unfortunately the invocation of these rights has been rare, and the protection from retaliation has proven a hollow promise for many of those who have exercised their rights.

The failure of miners to pursue their rights is due in large part to a lack of knowledge of their existence. Not every miner, once informed of his rights, will invoke them, but some will. Whether or not miners actually exercise their rights, they at least are entitled to know what their rights are and to make the decision to exercise them. The 1977 Amendments expand miners' safety rights and require that every American miners be educated as to those rights.

Coal miners who have engaged in safety activity have been victimized by the Department of the Interior's myopic and grudging rulings on the issue of retaliation. Political cronyism and pro-industry sentiment have resulted in deprivation of the rights afforded miners by the 1959 Act. The 1977 Amendments clarify miners' substantive rights and add new procedural safeguards to ensure that the law is carried out.

The 1969 Act and the 1977 Amendments give the American miner extensive rights which, if properly exercised, could substantially improve health and safety in the nation's mines. If miners are informed that these rights exist and are given adequate protection against retaliation, there is hope that miners will assume their necessary and proper enforcement role. If this happens the health of miners and the safety of mines must improve.

120 Parks v. L & M Coal Corp., NORT 75-377 (on remand) (Nov. 9, 1977).
MINER'S RIGHTS

ADDITIONUM

Due to a delay in publication, there have been a number of important developments in the area of miners' rights which do not appear in the foregoing article. The U.S. Court of Appeals for the District of Columbia Circuit has handed down two decisions interpreting miners' rights under section 110(b) of the 1969 Act, both involving the scope of protection afforded miners who raise safety complaints on the job.

In Baker v. Board of Mine Operations Appeals, Civ. Act. No. 77-1973 (Nov. 29, 1978), the court ruled that a miner is protected under section 110(b) for making a safety complaint to company officials although he has no intent at the time to notify federal authorities. In Munsey v. Federal Mine Safety & Health Comm., Civ. Act. No. 77-1619 (Nov. 29, 1978), the court reversed a decision by the old Interior Board of Mine Operations Appeals requiring that a miner's safety complaint be made in good faith. The court interpreted the Phillips case not to require such a showing. In both cases, the court emphasized Congress' intent that miners be encouraged to make safety complaints and held that the imposition of such difficult showings would frustrate that objective.

With respect to section 203(b) of the 1969 Act, which gives miners the right to transfer to a less dusty mine area based upon black lung determinations, the court ruled that miners who elect to transfer are entitled to the wage rate they were earning immediately prior to transfer, rather than the old job classification rate reflecting increases subsequent to transfer. See Jessee Higgins v. Secretary of Labor, Civ. Act. No. 77-1829 (July 25, 1978).

Responsibility for enforcement of mine safety and health legislation passed from the U.S. Department of the Interior to the U.S. Department of Labor and its Mine Safety and Health Administration on March 9, 1978. Preliminary indications are that miners are exercising their rights in far greater numbers under the 1977 Amendments than under the 1969 Act, perhaps as a result of the greater substantive protections and procedural guarantees afforded them. It has been reported that in the first six months under the 1977 Amendments, miners filed 176 discrimination complaints. McGraw-Hill, Inc., MINE REG. & PROD. RPT. at 7 (Sept. 8, 1978).
It is anticipated that miners' exercise of their rights will increase even more substantially in the future. At the suggestion of the Council of the Southern Mountains, Congress made the instruction of miners' rights a part of mandatory safety training in the 1977 Amendments. Miners' and their representatives, moreover, have the right to participate in the formulation of the training plan for their mine. The Department of Labor recently promulgated regulations to implement the 1977 Amendments' mandatory safety training provisions. 43 FED. REG. 47454 (Oct. 13, 1978). New regulations governing "representatives of miners" also have been published. 43 FED. REG. 29516 (July 7, 1978).

To aid miners and their representatives in exercising their right to participation in many agency proceedings, the Council of Southern Mountains has filed a new Citizen Petition with the Federal Mine Safety and Health Review Commission seeking awards of reasonable costs and attorneys' fees to participants in agency proceedings who would not otherwise be able to participate, but who reasonably can be expected to make a substantial contribution to a full and fair determination of the issues.

There have been two cases thus far on the controversial issue of temporary reinstatement of discharged miners who bring non-frivolous discrimination claims. In both cases, the operators sought injunctive relief against the order of the new Federal Mine Safety and Health Review Commission requiring them to reinstate a discharged miner pending the outcome of the miner's discrimination complaint. In one case, the injunction was granted on due process grounds, since the operator was given no opportunity for a hearing prior to the issuance of the Commission's order. Southern Ohio Coal Co. v. Marshall, No. C-2-78-1041 (S.D. Ohio 1978). In the other case, the injunction was denied on the ground that the Commission should rule first on the due process issue. Youghiogheny & Ohio Coal Co. v. Secretary of Labor, No. C-2-78-974 (S.D. Ohio 1978). That issue is now before the Commission in rule-making proceedings on its permanent procedural rules. 43 FED. REG. 50,712 (Oct. 31, 1978). It is likely that operators will be given the opportunity to contest the Secretary's not-frivolous determination, on grounds that it is totally unfounded or was made in bad faith, thereby rendering moot any possible due process claims.
Another miners' rights controversy under the 1977 Amendments involves the "walk-around rights" of miners' representatives, that is, the right to accompany federal inspectors during the mine inspections without loss of pay under section 103(f). The Department of Labor has issued a policy statement with its interpretation of the walk-around provision. 43 Fed. Reg. 17,546 (April 25, 1978). The coal industry has sought, unsuccessfully so far, to block enforcement of the provision's pay guarantee as an unconstitutional taking of property without just compensation. Bituminous Coal Operators Assoc. v. Marshall, Civ. Act. No. 78-0731 (filed April 25, 1978).

Finally, there have been a number of decisions on whether the federal government may be sued for damages under the Federal Tort Claims Act, 28 U.S.C. § 2671 (1971), for negligent inspection and enforcement of mine safety and health legislation. The courts are split on whether such an action may be maintained. See Gill v. United States, C-76-0117-L(B), Civ. Act. No. 2734 (W.D. Ky. 1978); Raymer v. United States, C-76-0118-L(B), Civ. Act. No. 2735 (W.D. Ky. 1978); Mercer v. United States, C-2-77-107 (S.D. Ohio 1978); Holland v. United States, C-75-0158-0(G) (W.D. Ky. 1978); Mosley v. United States, Civ. Act No. 2-77-177 (E.D. Tenn. 1978).