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## The Price of Coal: The Coal Mine Health and Safety Act of 1969

Congress declares that—the first priority and concern of all in the coal mining industry must be the health and safety of its most precious resource—the miner . . . .<sup>1</sup>

The mine explosion in November 1968 at Farmington, West Virginia,<sup>2</sup> provided the needed impetus for Congress to enact the Federal Coal Mine Health and Safety Act of 1969 (Act). A major portion of this Act was directed at the health problems of the coal miner rather than accident prevention.<sup>3</sup> According to William A. Boyle, President of the United Mine Workers of America, the miners' main health problem is "black lung"<sup>4</sup>—in medical terms, coal miners' pneumoconiosis (CMP), a "pathological condition of the lung induced by inhalation of small particles" of coal dust.<sup>5</sup>

The Congressional response was two fold: (1) dust prevention measures, and (2) a CMP compensation program. The preventive measures set maximum dust levels in underground coal mines and provide medical examinations to miners.<sup>6</sup> The CMP remedial provision establishes a program of work-

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1. Federal Coal Mine Health and Safety Act of 1969 30 U.S.C. § 801(a) (Supp. V, 1970).

2. 78 of the 99 miners on the "graveyard shift" were buried some 600 feet underground at Consolidation Coal Company's no. 9 mine in Farmington, West Virginia. *NEWSWEEK*, Dec. 2, 1968, at 39. Efforts are still continuing to reopen this mine. *United Mine Workers Journal*, Sept. 15, 1970, at 7, col. 1.

3. This is not meant to suggest that health and safety problems are unrelated but rather that no specific relationship exists between the problems of mine explosions and occupational disease. In fact, coal dust can cause explosions as well as disease. Witness to this fact was recently provided when federal mine inspectors determined that the explosion at the Finley Company's nos. 15 and 16 mines in Hyden, Ky., was "touched off by explosives and then 'propagated' by coal dust." *N.Y. Times*, Jan. 4, 1971, at 19, col. 3.

4. *Hearings on S. 355, 1094, 1178, 1300, 1907 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 91st Cong., 1st Sess., pt. 1, at 454 (1969) [hereinafter cited as *Senate Hearings*].

5. *Id.* pt. 2, at 719 (statement of William H. Stewart, Surgeon General).

6. 30 U.S.C. §§ 842-43 (Supp. V, 1970). In the case of CMP tiny particles of coal dust are inhaled. A complete listing of other occupational dust diseases including asbestosis, or white lung, copper dust lung, flour-mill lung, graphite lung, and wood workers' lung can be found at *Hearings on H.R. 1146 Before the Select Subcomm. on Labor of the House Comm. on Education and Labor*, 91st Cong., 1st Sess. 230 (1969) [hereinafter cited as *Select House Hearings*]. The causes of CMP were ascertained by English physicians several decades ago; but the American medical profession has only recently accepted coal dust as the cause of CMP. *Id.* at 255-56, 259; *Senate Hearings*, pt. 2, at 695. Some medical authorities asserted that coal dust was a helpful

men's compensation funded by the federal government for the first three years and thereafter by the states.<sup>7</sup> After a preliminary discussion of CMP, this article will evaluate the effectiveness of the Act in protecting the health of the coal miner.

### CMP

CMP is a progressive disease—*i.e.*, after a certain period of time its development does not require continued exposure to coal dust.<sup>8</sup> Initially, deposits of coal dust are retained by the lungs, and with continued exposure they increase in size and number until finally detected. Although early detection is not always possible by X-ray,<sup>9</sup> such examinations may be used to divide CMP into 3 stages. The initial stage usually appears after approximately 10 years in an underground coal mine.<sup>10</sup> Some concern has been occasioned by the low age, usually under 45, at which many miners show advanced symptoms of chronic coughing and shortness of breath.<sup>11</sup> Stages one and two are not particularly dangerous since little disability accompanies them. The disease is not progressive during these two stages.<sup>12</sup> However, once a miner develops stage three CMP progressive massive fibrosis (PMF) usually follows.<sup>13</sup> PMF involves the actual deterioration of the lung tissue due to the

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additive to the human lungs. Some physicians have been quite active on behalf of the miners, however, and have generated considerable concern about CMP. For example, Drs. Donald Rasmussen and I.E. Buff have done considerable lobbying in West Virginia for "black lung" compensation. N.Y. Times, Feb. 3, 1969, at 10, col. 1; *Id.*, Oct. 4, 1970, § 6 (Magazine), at 66, col. 5. The crippling effects of CMP have been known to coal miners for years. *Senate Hearings*, pt. 1, at 454-57; For a vivid description of French mining life and the plague of coal dust disease, see E. ZOLA, *GERMINAL* (1883). The United States was the last major coal mining nation to take steps to correct this situation. *Senate Hearings*, pt. 2, at 721. The dust standard was chosen as opposed to mandatory use of respiratory devices. The only device which is effective is a closed system because a dust filter mask which can remove particles below the dangerous five micron size (one micron equals 1/25000 of an inch) will impair breathing. The Czechs have developed a closed system which is practical for use in the close quarters of an underground coal mine. *Senate Hearings*, pt. 2, at 643-44, 863; *Hearings on H.R. 4047, 4295, 7976 Before the Subcomm. on Labor of the House Comm. on Education and Labor*, 91st Cong., 1st Sess. 314, 526 [hereinafter cited as *House Hearings*]. Section 842(h) provides for the use of devices in emergency or special situations.

7. 30 U.S.C. §§ 901-36 (Supp. V, 1970).

8. *House Hearings* at 337.

9. *Select House Hearings* 62-64; *House Hearings* 359.

10. This period varies with the extent of exposure and individual sensitivity to dust. W. LAINHART, H. DOYLE, P. ENTERLINE, A. HENSCHEL & M. KENDRICK, PNEUMOCONIOSIS IN APPALACHIAN BITUMINOUS COAL MINERS 4, 50-54 (G.P.O. 1969) [hereinafter cited as APPALACHIAN MINERS' PNEUMOCONIOSIS].

11. *House Hearings* at 357.

12. Progression only becomes irreversible when the quantity of dust accumulated in the lungs leads to deterioration of the lung tissue. See note 18 *infra*.

13. *Senate Hearings*, pt. 3, at 1022.

continued presence of coal dust.<sup>14</sup> However, PMF can and will develop long after exposure to coal dust discontinues.<sup>15</sup> A miner with PMF suffers severe disability since he requires 20 to 30 percent more energy to breathe than a normal person.<sup>16</sup> The prevention of CMP beyond the second stage is imperative.

In addition to the respiratory impairment of CMP, evidence now indicates that a correlation exists between coronary failure and CMP. Autopsy reports indicate that *cor pulmonale*, the massive enlargement of the right ventricle of the heart, has caused many deaths where only CMP and not PMF was present.<sup>17</sup> Since CMP results in the lung's inability to oxygenate blood properly, more blood is needed to circulate an adequate supply of oxygen. This, in turn, causes the right side of the heart, which supplies the lungs with blood, to overwork and eventually fail.<sup>18</sup>

### *Coal Dust Control Measures*

The preventive provisions of the Act are two-fold. Title II establishes a mandatory maximum dust level for all underground coal mines and a program of medical examinations for all miners.<sup>19</sup>

The coal dust level in American coal mines is particularly high due to mechanization<sup>20</sup> and round-the-clock operations. Moreover, the dust generated has little opportunity of settling. European coal mines have had dust standards for several decades but their experience in measuring the dust level was of limited value. Their method of measurement was recently abandoned by the International Labor Office (ILO) and the correlative data for the new gravimetric method has not been completed.<sup>21</sup>

The inclusion of all underground coal mines in the Act avoids one of the major defects of prior legislation.<sup>22</sup> However, strip or open pit mines

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14. APPALACHIAN MINERS' PNEUMOCONIOSIS 3-6.

15. *House Hearings* at 338; *Select House Hearings* at 61-62.

16. *Senate Hearings*, pt. 2, at 641.

17. The study done by Dr. H.A. Wells, Director of the Pulmonary Research Laboratory in Johnstown, Pa., found that 19 percent of 202 consecutive autopsies revealing only simple pneumoconiosis, as opposed to PMF, also showed massive enlargement of the right ventricle of heart. *House Hearings* at 366.

18. *Id.* 373; *Senate Hearings*, pt. 3, at 1022. See generally the 1967-68 ANN. REP. of the British Nat'l Coal Board, reprinted in *Senate Hearings*, pt. 3, at 1031-76.

19. 30 U.S.C. §§ 842-43 (Supp. V, 1970).

20. *Senate Hearings*, pt. 1, at 41-58. The continuous miner machine accounts for about 50 percent of the coal mined in the United States.

21. *House Hearings* at 313. As a result of the ILO conference of 1958 and the Johannesburg Conference of 1959 the old thermal precipitation method of weighing particles was adopted. The latter method is more accurate and there appears a correlation between the weight of the dust present in the lung and the extent of the disease.

22. Federal Coal Mine Safety Act, 66 Stat. 692, § 201(b) (1952). The plea was

are not covered by the Act since they present different dust problems than underground mines.<sup>23</sup> Nevertheless, there is some indication that open pit miners develop CMP.<sup>24</sup>

Although the standards established by Title II are only temporary, the Act provides that the permanent rules are to be no less stringent.<sup>25</sup> Section 202(a) requires that each coal mine operator take dust samples in places and the manner approved by the Secretary of Health, Education and Welfare (the Secretary). Without becoming enmeshed in the many details of coal dust sampling, the Act insures effective checks by placing the establishment of technologically adequate methods of dust sampling in the hands of Health, Education and Welfare (HEW) specialists. This structure avoids the problem of varying dust levels at different locations within the mine. To insure that an entire mine is safe it is necessary to sample the dust level at the faces or cutting areas as well as the less dusty loading areas.<sup>26</sup> The Secretary, pursuant to Section 202(a), requires that dust sampling be conducted every month on five separate days.<sup>27</sup> It is important for disease prevention that a continuous sample be maintained to determine if a new, more effective standard is required.

There was considerable opposition to the executive rule-making structure of the Act. The coal mine industry asserted that this places extreme pressure on executive agencies<sup>28</sup> which could ultimately impair the federal-state liaison in coal mine inspection. There were many indications that rather than relying on the states for mine inspection more federal inspections were re-

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made to place small mines outside the scope of the proposed bill but since they were included within the terms of the 1952 Federal Coal Mine Safety Act by the 1965 amendments it seemed illogical to exclude them. *Senate Hearings*, pt. 2, at 713-14; *House Hearings* at 71-72. Economic assistance is provided to small mines by Section 504(a) of the Act under the terms of the Small Business Act. *See* 15 U.S.C. § 636(b) (5) (Supp. V, 1970).

23. *See* 30 U.S.C. §§ 901-36 (Supp. V, 1970).

24. *Senate Hearings*, pt. 2, at 641.

25. 30 U.S.C. § 811(b) (Supp. V, 1970). Under subsection (i) the Secretary had one year to publish a set of regulations. They were promulgated on April 3, 1970. 35 Fed. Reg. 5544 (1970).

26. APPALACHIAN MINERS' PNEUMOCONIOSIS at 50-54; *House Hearings* at 357. About 20 percent of those employed in underground coal mines actually work at the face areas, APPALACHIAN MINERS' PNEUMOCONIOSIS at 54. Men working in these areas develop the disease earlier, making more frequent checks in these areas necessary.

27. 35 Fed. Reg. 5546 (1970). Section 70.220 is the regulation establishing the standard sampling cycle. The working section rules are established by Sections 70.240-46. Section 70.240 requires that the sampling device remain in the mine for an entire shift. Sections 70.242-3 requires that each cutting machine operator wear a device or place it on the machine no more than 36 inches from him. Section 70.245 provides that 10 percent of hand loaders wear a device and Section 70.246 that a device be placed on an air intake within 200 feet of the face.

28. *House hearings* at 388, 475.

quired. John O'Leary, former Director of the Bureau of Mines, closed nearly one-third of the coal mines subjected to federal spot inspection for safety hazards under prior legislation.<sup>29</sup> The Act provides for more federal mine inspectors to facilitate additional inspections.<sup>30</sup> Provisions are made for continuing state liaison and economic assistance to those states seeking to enforce standards comparable to the federal regulations.<sup>31</sup>

While deferring the establishment of dust sampling procedures to the Secretary, Congress entertained considerable testimony on the dust level to be maintained. This testimony aroused controversy since a safe level has not been ascertained using the new gravimetric method of dust measurement.<sup>32</sup> The coal mining industry argued that an interim standard of 4.5 milligrams per cubic meter would suffice until a truly safe standard could be determined.<sup>33</sup> However, most authorities outside the industry feel that no standard above 3.0 milligrams per cubic meter is acceptable. The 4.5 standard would allow 50 percent more dust and allegedly 50 percent more CMP than the 3.0 level.<sup>34</sup> The Act establishes 3.0 as the standard with a reduction to 2.0 milligrams per cubic meter on January 1, 1973.<sup>35</sup> When advocating the U.S. standard an industry spokesman argued that the 3.0 limit was technologically impossible at the present.<sup>36</sup> Although some 1,318 applications were filed for non-compliance permits under Section 202(a), only 425 mines were issued permits. These permits represent 1,107 of 4,462 working coal mine sections listed by the Bureau of Mines.<sup>37</sup> While provid-

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29. The indications were that more reliance should be placed on federal inspection so little attention was paid to this argument. *Senate Hearings*, pt. 1, at 462.

30. 30 U.S.C. § 954 (Supp. V, 1970). Miners were urged by former Secretary of the Interior Walter Hickel to take qualifying examinations for these positions. *United Mine Workers Journal*, Sept. 15, 1970, at 18, col. 1.

31. 30 U.S.C. §§ 953(a), (b), 955(b) (Supp. V, 1970).

32. *See* note 21 *supra*.

33. The British have extensive experience in dust sampling; but it was of limited value to Congress due to the change in systems of measurement. An accurate comparison of the methods has not been completed. *Senate Hearings*, pt. 3, at 1027; *House Hearings* at 573-74.

34. This argument was advanced by Lorin Kerr, M.D., Director of Occupational Health for the United Mine Workers. *Select House Hearings* at 259; *House Hearings* at 376. It was suggested that the 4.5 standard was not really important but was only a stop-gap measure until a more effective one could be determined. *House Hearings* at 477; *Senate Hearings*, pt. 2, at 597-98.

35. 30 U.S.C. § 842(b) (Supp. V, 1970). Part (3) of this subsection establishes the procedure whereby an operator can claim he will be unable to comply with the Act's standards due to technological inability. He must apply 60 days in advance to the interim compliance panel established by Section 5 for a non-compliance permit. In no case will an operator unable to meet the 3.0 standard be allowed to exceed 4.5 nor will an operator unable to meet the 2.0 standard be allowed a level higher than 3.0. No permit will last for more than 18 months.

36. *Senate Hearings*, pt. 2, at 592.

37. *United Mine Workers Journal*, Sept. 15, 1970, at 19, col. 3.

ing for federal spot inspections to insure compliance,<sup>38</sup> the Act delegates the manner of achieving compliance to the discretion of each operator.<sup>39</sup> Whether the remaining mines are complying with the Act's standards or ignoring the law is uncertain.

### *Medical Examinations*

The second part of the disease prevention program is embodied in Section 203.<sup>40</sup> To insure compliance and provide an accurate gauge of the effectiveness of dust suppression, Congress established a program of medical examinations. Section 203 requires an initial chest roentgenogram or X-ray for each coal miner within 18 months of enactment or at the commencement of employment, with a second check three years later and thereafter as provided by the Secretary.<sup>41</sup> The problem in this program is the questionable effectiveness of the X-ray as a diagnostic tool for CMP.<sup>42</sup> Considerable testimony, most notably from the British experts, indicated that X-rays should be supplemented with lung and heart function tests to insure early and accurate diagnosis.<sup>43</sup> It may be true that by providing expert administration and interpretation of the X-ray its reliability will be increased; but this still ignores the significant progress made by medical science with lung and heart function tests.<sup>44</sup> The Secretary may require these examinations at a later date under Section 203(a). For the present, the coal miner is without the benefit of this progress.

The administration of the medical examinations also presents problems. The regulations require the examination results to be submitted to the Appalachian Laboratory for Occupational Respiratory Diseases of the U.S. Public Health Service with documents identifying the miner.<sup>45</sup> The examinations

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38. 30 U.S.C. §§ 813(g), 842(g) (Supp. V, 1970).

39. *Id.* § 863. Ventilation requirements are aimed at gas rather than dust control but do have favorable effects on the dust level. Water spray devices are available for dust suppression; however, there is evidence to indicate that such devices were removed from the mining machinery. *Select House Hearings* at 40.

40. 30 U.S.C. § 843 (Supp. V, 1970).

41. The Secretary will conduct these examinations if the operator fails to do so, but still at the expense of the operator. The examinations must be performed by a trained physician and evaluated according to ILO standards. 35 Fed. Reg. 13208 (1970).

42. *Select House Hearings* at 157, 169, 252-53; *Senate Hearings*, pt. 2, at 719.

43. 26 percent of coal miners with normal lung X-rays were found to have significant air passage resistance on FEV/FVC Pulmonary Function Test compared with 18 percent in the non-mining population. *Select House Hearings* at 61-62. *See also Senate Hearings*, pt. 2, at 719; pt. 3, at 1028-29.

44. Dr. Jethro Gough, a British expert, testified that these tests are not a legal requirement in Great Britain but they are a standard procedure in medical examination of miners. *Senate Hearings*, pt. 3, at 1028-29.

45. 35 Fed. Reg. 13208 (1970).

are being conducted by the U.S. Public Health Service at the expense of the operators.<sup>46</sup> The Act apparently does not afford any protection to a minor who is discharged because his examination reveals the presence of CMP. This would avoid possible compensation payments under this Act or future state systems.<sup>47</sup> Section 110(b)<sup>48</sup> provides protection against discharge only when a miner reports a violation of the Act, commences a proceeding under the Act,<sup>49</sup> or testifies in a proceeding enforcing the Act.<sup>50</sup> A fair reading of this section provides no basis a miner can resist discharge following the examination results. Collective bargaining agreements will provide security for union miners<sup>51</sup> but the Act should have specifically provided this protection for all miners to insure employment security and promote co-operation with the medical examination program.

One of the health safeguards is Section 203(b)(1)<sup>52</sup> which provides that coal miners evidencing CMP (stage 2) may be transferred to a less dusty working area without prejudice to his employment or wages. When the general dust level is 3.0 milligrams per cubic meter the new work area can have a dust level no higher than 2.0. When the general standard is reduced to 2.0, the maximum permitted in the new area is 1.0.<sup>53</sup> Employment protection should include all miners, not just those whose conditions have deteriorated to the point where transfer is necessary.

In addition to providing a miner with accurate health analysis, the medical examination should provide a check on dust control measures. For if CMP continues to develop, new, lower dust levels will be required. Thus, accu-

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46. *Id.*

47. *Nease v. Hughes Stone Co.*, 114 Okl. 170, 244 P. 778 (1925), cited in *Lawson v. Suwanee Fruit & Steamship Co.*, 336 U.S. 198, 203 (1949). The effect of second injury compensation was that thousands of one eyed, one legged or one armed men were released from employment to avoid possible increased compensation if they were injured again. It is not unreal to suppose that such a thing could happen to a coal miner with evidence of CMP.

48. 30 U.S.C. § 820(b)(1)(A) (Supp. V, 1970).

49. *Id.* § 820(b)(1)(B).

50. *Id.* § 820(b)(1)(C).

51. The United Mine Workers have requested members to designate the area Welfare Fund doctor as their physician for exam reports in order to help insure confidentiality. *United Mine Workers Journal*, Oct. 1, 1970, at 3, col. 3. This only affords protection to the unions' 95,000 members with some 35,000 non-members unprotected by confidential report or collective bargaining. *Select House Hearings* at 161. The examinations have already begun. *United Mine Workers Journal*, Oct. 1, 1970, at 3, col. 1. The initial phase must be completed by June 30, 1971. 30 U.S.C. § 843(a) (Supp. V, 1970).

52. *Id.* § 843(b) (Supp. V, 1970). Section 37.7 of the regulations establishes stage 2 of CMP as the level for a transfer. 35 Fed. Reg. 13208 (1970). This is a wise choice as continued exposure to dust will lead to irreversible progression and PMF. See note 13 and accompanying text, *supra*.

53. The change in mandatory levels occurs on December 31, 1972. 30 U.S.C. § 843(b)(2) (Supp. V, 1970).

rate diagnosis becomes crucial and the failure to provide such diagnosis even more distressing.

The same health problems which made mandatory dust standards necessary have existed since coal mining began. As a result, there are a large number of working or retired miners suffering from CMP. The estimates range from 16,000 to the Surgeon General's figure of 100,000.<sup>54</sup> Virtually no one has worked in an underground coal mine for any significant time and escaped the effects of coal dust. The second part of the Act's health program provides a remedy for those who suffer or will suffer from CMP.

### *CMP Compensation*

Nearly all states compensate some industrial disease<sup>55</sup> but only 30 states provide general coverage.<sup>56</sup> The Federal Employees Liability Act (FELA)<sup>57</sup> and the Longshoremen's and Harbor Workers' Act<sup>58</sup> also provide general disease coverage. Some jurisdictions place restrictions on dust disease compensation fearing the financial strain of full benefits.<sup>59</sup> Many states have statutes of limitation which impose an unfair disadvantage on disease claimants as the disease often does not develop until employment has terminated.<sup>60</sup> Federal legislation was necessary because state benefits were neither uniform nor adequate. Also if an operator is liable for CMP he will be more serious in complying with the Act's regulations.<sup>61</sup>

Establishing a program of workmen's compensation presented a number of problems. First was the alleged interference with state prerogatives.<sup>62</sup> In addition, each state already has a functioning compensation commission complete with the administrative machinery necessary to handle claims.

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54. The 16,000 estimate was provided by James Garvey, Vice-President of the National Coal Association, *Senate Hearings*, pt. 2, at 596. The figure of 100,000 is the Surgeon General's and, unlike Garvey's, includes inactive miners. *Id.* at 729.

55. The only state without disease coverage is Wyoming. 1 A. LARSON, *WORKMEN'S COMPENSATION LAW* § 41.11 (1968 ed.) [hereinafter cited as A. LARSON].

56. *Id.*

57. 5 U.S.C. § 8101 (1964). All employees of the District of Columbia are covered under FELA by 5 U.S.C. § 8139 (1964). Railroad workers and seamen are also within the terms of FELA. 3 LARSON § 91.70.

58. 33 U.S.C. § 902(a) (1964).

59. 1 A. LARSON § 41.12. The problem which arose with the silicosis statutes in the 1930's and the fear that the rash of claims would bankrupt the system was avoided since the federal government agreed to accept the initial burden.

60. *Id.* These statutes commonly limit the time for filing a claim to a definite period after employment has ceased and some statutes even bar any claim after termination of employment. The 1969 Act has no such limitation.

61. *Select House Hearings* at 252.

62. *Id.* at 83-85, 104-06; H.R. REP. NO. 91-563, 91st Cong., 1st Sess. 94-95 (1969). For a discussion of the entire problem of state and federal rights in the compensation area, see Lowery, *Federal Encroachment into the Historically State Administered Workmen's Compensation Programs*, 59 Ky. L.J. 93 (1970).

However, the states have a problem financing compensation benefits. The coverage envisioned by Congress would place a heavy burden on limited state funds or commercial industrial insurers.<sup>63</sup> This was especially true since serious consideration was given to benefits for retired miners presently ineligible for state benefits.<sup>64</sup>

It seemed illogical, if not unjust, to provide compensation for those still working while denying a remedy to those who are retired or unable to work due to CMP disability.<sup>65</sup> Insurance spokesmen asserted that state provision for those already retired would impair the employment contract in violation of the United States Constitution.<sup>66</sup> However, this argument has little merit.<sup>67</sup> The decision to provide federally funded workmen's compensation benefits was necessary because the resources of state and private insurance funds were unable to withstand the initial strain.<sup>68</sup> However, the federal benefits approach also presents a problem. It seems unfair to pay compensation from a fund drawing revenue from all taxpayers, rather than to place the burden on operators who can pass the expense on to coal consumers. This is only a temporary arrangement and when the federal program expires on January 1, 1973, the burden will shift to the coal and insurance industries and ultimately to coal consumers.<sup>69</sup> This approach is a new concept in federal-state relations. The message it carries is quite clear: if the states do not maintain proper standards, Congress will no longer push or cajole but intervene directly and pass legislation for all states.<sup>70</sup>

### *Distribution and Control*

Once it was decided to provide compensation, the remaining question was the manner in which it should be done. The Act defines CMP as "a chronic dust disease of the lung arising out of employment in an underground coal

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63. *Select House Hearings* at 95. Pennsylvania pays about 28 million dollars in benefits each year and as is indicated above any further addition is impossible. *Id.* at 91.

64. *Senate Hearings*, pt. 2, at 596, 729, 837.

65. *Id.*; *Select House Hearings* at 8, 140.

66. This view relies on the concept that workmen's compensation benefits are a part of the employment contract and any retroactive alteration of that contract is impermissible. See *Gordon v. New York Life Ins. Co.*, 300 N.Y. 652, 90 N.E.2d 898 (1952) for a rejection of this position.

67. The better view is that liability for injury or disease is the essence of the obligation. 1 A. LARSON § 3.40.

68. H.R. REP. NO. 91-761, 91st Cong., 1st Sess. 89 (1969).

69. 30 U.S.C. § 931(a) (Supp. V, 1970).

70. *Select House Hearings* at 75. This concept of federalism is also evident in the Voting Rights Act of 1965, 42 U.S.C. § 1973b(a) (Supp. V, 1970), and the Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314, which permit 18 year olds to vote.

mine."<sup>71</sup> This definition is well chosen since the broad wording avoids many of the problems created by restrictive state definitions.<sup>72</sup> CMP is linked by the classical compensation formula to "employment in an underground coal mine."<sup>73</sup> This leaves the claimant with the burden of proving only that he was employed in the mine for a requisite number of years.

In order to claim benefits a miner must be able to establish that he is totally disabled and that his disability arose out of CMP. Section 411(a)<sup>74</sup> covers totally disabled persons (within the terms of the Act) and dependants of miners who have died from CMP. The standards for total disability, which were established by the Secretary, require that an X-ray examination reveal at least one or more opacities larger than one centimeter in diameter.<sup>75</sup> In the case of death, an autopsy or biopsy must reveal the presence of PMF.<sup>76</sup> An examination which demonstrates either of these conditions establishes that a miner has CMP for the purpose of Section 411(c)(3).<sup>77</sup> But a claimant need only show evidence of CMP (any stage) for recovery under subsections (a) and (b) of Section 411.<sup>78</sup> Compensation will also be allowed if demonstrated that the claimant is unable to engage in any gainful employment for 12 months due to CMP disability.<sup>79</sup> The standard for recovery under the latter regulation includes the lung function test.<sup>80</sup>

Title IV's most unique feature is the substantial deviation from the classi-

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71. 30 U.S.C. § 902(b) (Supp. V, 1970).

72. 1 A. LARSON § 41.12.

73. 30 U.S.C. § 921(c) (Supp. V, 1970) states:

(1) if a miner who is suffering or suffered from pneumoconiosis was employed for ten years or more in one or more underground coal mines there shall be a rebuttable presumption that his pneumoconiosis arose out of such employment; (2) if a deceased miner was employed for ten years or more in one or more underground coal mines and died from a respirable disease there shall be a rebuttable presumption that his death was due to pneumoconiosis; and (3) if a miner is suffering or suffered from a chronic dust disease of the lung which (A) when diagnosed by chest roentgenogram, yields one or more large opacities (greater than one centimeter in diameter) . . . (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung, or (C) when diagnosis is made by other means, would be a condition which could reasonably be expected to yield results described in clause (A) or (B), then there shall be an irrebuttable presumption that he is totally disabled due to pneumoconiosis or that his death was due to pneumoconiosis, as the case may be.

74. 30 U.S.C. § 921(a) (Supp. V, 1970).

75. 35 Fed. Reg. 5624 (1970).

76. *Id.*

77. *Id.*

78. *Id.* Standards for recovery under these subsections were established in the Federal Register.

79. *Id.*

80. *Id.*

cal formula for workmen's compensation recovery. Rather than requiring a claimant to demonstrate that his disease "arose out of and in the course of" his employment,<sup>81</sup> the Act establishes a series of presumptions in the claimants favor if certain requirements are met. Section 411 (c)(1)<sup>82</sup> provides that if a man works in an underground coal mine for ten or more years there is rebuttable presumption that his CMP arose from his employment. The same presumption will operate in favor of his widow and surviving minor children if he died as a result of any respirable disease.<sup>83</sup> Due to the uncertain character of lung disease diagnosis, the varying and sometimes confusing terminology can bar recovery of compensation benefits. However, as long as death is due to a respiratory disease and the decedent was employed in the coal mines for more than ten years,<sup>84</sup> a miner's dependents can collect benefits based on these presumptions. No recovery is allowed if a miner's death was attributed to pulmonary failure and his CMP went undetected.

Under Section 411(c)(3) a miner suffering from CMP due to his peculiar sensitivity or massive over-exposure to coal dust, may claim compensation regardless of the length of his employment. If any of the standards of Section 411(c)(3) are met an irrebuttable presumption is established that the CMP arose out of employment in an underground coal mine.<sup>85</sup>

In most situations Section 411 will shift the burden from the claimant once he proves the basic elements. This change is grounded in reality. It is illogical to suppose that a miner suffering from CMP might have contracted it anywhere other than in a coal mine. The statistics clearly show a straight line progression in disease development after ten years employment.<sup>86</sup> Therefore, it is reasonable to accord a claimant such a presumption after ten years of employment.

The benefits paid to a disabled miner or his dependents are computed on the basis of the disability pay of a grade GS-2 government employee.<sup>87</sup> Each successful claimant will receive one-half of all government pay raises. This approach avoids the problem of fixed statutory benefits becoming inadequate as the cost of living increases.<sup>88</sup> A miner with dependents will receive grad-

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81. This is the classical compensation recovery formula. 1 A. LARSON § 6.10.

82. 30 U.S.C. § 921(c)(1) (Supp. V, 1970).

83. *Id.* § 921(c)(2).

84. *Id.*

85. The standards prescribed for this presumption are contained in § 410.404, 35 Fed. Reg. 5625 (1970).

86. This is based on the British experience. *Senate Hearings*, pt. 3, at 1045. However, it should be remembered that the disease can and does develop earlier among those working in the dustiest areas. See note 10 and accompanying text, *supra*.

87. 30 U.S.C. § 922(a)(1) (Supp. V, 1970).

88. Even a progressive state like California has fallen behind on benefit levels. *Select House Hearings* at 27, 77.

uated increases for those dependents up to 100 percent of basic benefits for a miner with three or more dependants.<sup>89</sup>

It is difficult to assess the adequacy of benefit payments since a disabled miner may have various sources of income. A complete integration will differ for almost every miner. State benefits are deducted from the total federal payment,<sup>90</sup> and thus do not affect the over-all benefits. It may appear unjust to deprive a man of benefits to which he is entitled as a matter of law merely because he has some other compensation. But the entire purpose of Title IV is to provide interim income replacement for those not properly covered by state acts. The set-off provision is designed to bring all benefits to a uniform national level prior to reversion to state coverage. Social Security benefits and pension funds also substantially affect a disabled miner's financial status. Social Security benefits average about \$100 per month and United Mine Workers of America pensions produce about \$150 per month.<sup>91</sup> But to be eligible for the pension, a miner must be 55 years old with a minimum of 20 years services in the mines.<sup>92</sup>

To be eligible for Social Security disability benefits a claimant must make an independent demonstration of his physical or mental disability from which death will result or render him unfit for gainful employment for 12 months.<sup>93</sup> Section 413(b) provides that the standards for establishing total disability under the Act shall be no stricter than those used to establish total disability under Section 423 of the Social Security Act.<sup>94</sup>

One of the major problems with Social Security benefits is the high cost of establishing a claim. In most cases this imposes a substantial burden reducing the overall benefits awarded.<sup>95</sup> All reasonable medical, but

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89. 30 U.S.C. § 922(a)(3) (Supp. V, 1970) declares:

[Benefit payments shall be increased at the rate of 50 per centum of such benefit payments, if such individual has one dependent, 75 per centum if such individual has two dependents, and 100 per centum if such individual has three or more dependents.

90. *Id.* § 922(b).

91. *United Mine Workers Journal*, Sept. 1, 1970, at 15, col. 1.

92. *Id.* at 18, col. 1.

93. 42 U.S.C. § 423(a), (d) (1964). *Laws v. Celebrezze*, 368 F.2d 640 (4th Cir. 1966), holds that mere receipt of state disability benefits is not adequate evidence for the purpose of qualifying for benefits under the Social Security Act. Training and employment conditions are to be considered in this determination. *Trestigiacomo v. Celebrezze*, 234 F. Supp. 999 (D. La. 1964). This is an important ruling for miners as they often live in economically depressed areas and have no skill except coal mining.

94. 30 U.S.C. § 921 (Supp. V, 1970).

95. *Senate Hearings*, pt. 1, at 498. In addition, the 1965 amendments to the Social Security Act contain a workmen's compensation offset provision which limits the total compensation and social security benefits to 80 percent of the average earnings prior to disability. 42 U.S.C. § 424(a) (Supp. V, 1970). This will affect only one miner in twenty claiming benefits under the Act. Statement of Bernard Popick, Director,

no legal, costs of establishing a claim under the Act are refundable.<sup>96</sup> In the case of death the cost of an autopsy for the purpose of establishing a claim to survivor's compensation will be assumed by the Secretary.<sup>97</sup> The simplified burden of proof under the recovery formula should reduce the legal cost of establishing a valid claim.

### *Reversion to State Compensation*

Part C of Title IV provides the mechanism for reversion of benefit payments to state compensation agencies. It was felt that the states had the facilities to provide adequate coverage but lacked the finances. The interim coverage by federal funds was devised to avoid the silicosis scare which plagued state compensation programs with the enactment of silicosis benefits several decades ago.<sup>98</sup> The reversion to state compensation will occur for all state programs in compliance with the federal standards on December 31, 1973.

The Secretary is obliged by the Act to publish a list of approved states in the Federal Register.<sup>99</sup> In those states not approved by the Secretary, the mine operators must provide compensation benefits under the Longshoremen's and Harbor Workers' Act.<sup>100</sup> This presents a problem of statutory interpretation. To be included on the Secretary's list, the coverage provided must be "adequate." Section 421 (b)(2) provides that coverage shall include benefits for death or total disability<sup>101</sup> in the same or greater amounts than the benefits provided in Section 412(a) of Title IV.<sup>102</sup> Section 412(a) declares that the benefits are based on the GS-2 rate for government employee disability. A fair reading of Section 412(a) seems to include a graduated scale as a factor in determining state coverage rather than mere dollar compliance at the time of certification. Even if this interpretation is not adopted, the Secretary, armed with Section 421(b)(1), should not include in future lists any state whose benefit level falls below the level specified by the Act. Any other approach would defeat the intent of Congress in providing this type of benefit scale.<sup>103</sup>

The standards of eligibility under a state compensation program must be

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Bureau of Disability Insurance, Social Security Administration, before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, Aug. 20, 1970.

96. 30 U.S.C. § 923(b) (Supp. V, 1970).

97. *Id.* § 843(d).

98. 1 A. LARSON § 41.40.

99. 30 U.S.C. § 931(b)(1) (Supp. V, 1970).

100. *Id.* § 932(a).

101. *Id.*

102. *Id.* § 932(d).

103. H.R. REP. NO. 91-761, 91st Cong., 1st Sess. 89 (1969).

“substantially equivalent” to those outlined in Section 411.<sup>104</sup> This assures that the presumptions of the Act will not be lost when the states administer compensation. Like the benefits provisions, any erosion of the presumption through state legislative, judicial, or administrative action will be grounds for exclusion from any future list.<sup>105</sup>

If a state is not included on the Secretary's list, an operator must comply with the Longshoremen's Act by qualifying himself as a self-insurer or providing for industrial compensation insurance with a private company or fund.<sup>106</sup> Any such policy must include benefit payments based on requirements prescribed by the Secretary of Labor and Section 411 and must be equal in sum to the payments under Section 412(a). Section 422 payments are not forthcoming because the operator has failed to comply with the insurance provisions of the Longshoremen's and Harbor Workers' Act or because no operator is liable, the Secretary will pay those entitled. In the former case the operator is liable for any payments made.<sup>107</sup>

All claims by the secretary under state compensation acts must be filed within three years of discovery of CMP or three years of death.<sup>108</sup> This is, in effect, a statute of limitations. However, it begins to run only with the discovery of the disease rather than the termination of employment. Thus, delayed development of CMP or PMF does not prevent a compensation award.

### Conclusion

The Coal Mine Health and Safety Act of 1969 continues the piece-meal approach of Congress to income replacement. The essential purpose of workmen's compensation is to provide an income substitute for a disabled worker. At the very least the standards for establishing disability should be uniform. The Act is just another patch on the endless quilt of federal programs with conflicting standards and time consuming procedures.

Although the Act has substantive defects, it represents a tremendous improvement over previous legislation. The true value of this Act will only be shown if strictly enforced. There is some doubt that it is being enforced.<sup>109</sup> For example, on December 30, 1970, one year after the passage

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104. 30 U.S.C. § 931(b)(2)(C) (Supp. V, 1970).

105. *Id.* § 931(b)(1).

106. *Id.* § 933(a).

107. *Id.* § 933(b).

108. *Id.* § 932(f).

109. News Release from the Office of U.S. Congressman John H. Dent, April 21, 1970; Washington Post, Nov. 26, 1970, at L 1, col. 5; THE NEW REPUBLIC, Dec. 12, 1970, at 13. The scope of this criticism is not limited to Bureau of Mines enforcement of the health and safety provisions which Congressman Dent characterized as “high

of the Act, a mine explosion in Hyden, Kentucky took the lives of 38 coal miners.<sup>110</sup> This same mine was closed on November 23, 1970 because of "imminent danger"<sup>111</sup> from coal dust. It was later reopened without additional inspection.<sup>112</sup> If the Act is not to be reduced to a hollow statement, it is the executive's responsibility to insure that all provisions, not just those which are politically advantageous or economical, are enforced.

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handed and capricious" action completely disregarding "the intent of Congress in several key areas." The administration of the compensation program by HEW is under attack by the mining community as well as the press.

110. N.Y. Times, Jan. 3, 1971, at 3, col. 1.

111. "[I]mminent danger' means the existence of any condition or practice in a coal mine which could reasonably be expected to cause death . . ." 30 U.S.C. § 802(j) (Supp. V, 1970). In this mine coal dust was described as the source of "imminent danger"—a most prophetic appraisal of the situation. N.Y. Times, Jan. 3, 1971, at 3, col. 1. *Id.*, Jan. 4, 1971, at 19, col. 3.

112. *Id.*, Jan. 3, 1971, at 3, col. 1.