STATE OF WEST VIRGINIA
OFFICE OF MINERS' HEALTH, SAFETY AND TRAINING
DEPARTMENT OF COMMERCE, LABOR AND ENVIRONMENTAL RESOURCES
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STEPHEN F. WEBBER
DIRECTOR

MEMORANDUM

TO: Stephen F. Webber, Director
Office of Miners' Health, Safety and Training

FROM: L. Eugene Dickinson
Senior Assistant Attorney General

DATE: July 29, 1996

SUBJECT: Enforcement of West Virginia Code § 22A-1-21(a)(1)
Legality of State Regulations CSR § 35-20-7.1
through 7.4

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As you know, the Office of Miners' Health, Safety and Training filed a counter-claim/cross-claim against the Board of Coal Mine Health and Safety and the Petitioner Coal Mining and Contractor Associations in Civil Action No. 95-MISC-565 in which it requested the Court to issue a declaratory judgment on the question whether the state regulations CSR 36-20-7.1 through 7.4 are void because they conflict with mandatory requirements of W. Va. Code § 22A-1-21(a)(1) and/or lessen the degree of safety afforded miners by that Code section or of W. Va. Code § 22A-1-14. After a series of procedural manipulations in that case the Office of Miners' Health, Safety and Training moved for a Default Judgment/Declaratory Judgment. The Court by memorandum opinion letter dated July 24, 1996, copy attached, denied the motion for

The reason that there is not at this time an actual case or controversy before the Court - i.e., that no actual fact scenario currently exists where a mine operator or owner has been issued a violation notice for an act committed by an independent contractor at the mine and the mine operator or owner did not, in fact, cause or contribute to the violation. The Court did not in its opinion either comment or give a legal opinion on the substantive question of whether CSR 36 20-7.1 through 7.4 are illegal because the provisions thereof reduce the degree of safety afforded miners by the provisions of W. Va. Code § 22A-1-21(a)(1).

It is my opinion that the administrative rules enacted by the Board of Coal Mine Health and Safety as CSR §§ 36-20-7.1 through 7.4 are illegal, invalid, null and void and that the Office of Miners' Health, Safety and Training is required and mandated by the provisions of W. Va. Code § 22A-1-21(a)(1) to always assess civil penalties against the operator of any coal mine in which a violation of any health or safety rule occurs regardless of the fault of said operator.

The following is the basis for that opinion.

I. THE REGULATORY SCHEME

As a result of our system of federalism, mine operators are subject to safety and health regulation by the states, as well as by the federal government. A brief overview of this dual regulatory scheme follows.

A. FEDERAL MINE SAFETY AND HEALTH ACT

1. Source Of Mandatory Safety Standards

The Federal Mine Safety and Health Act of 1977 ("Mine Act"), which is enforced and administered by the Mine Safety and Health Administration of the Department of Labor ("MSHA"), creates a complex and comprehensive structure to safeguard the health and safety of the nation's miners. The cornerstone of that structure is the provision for specific mandatory health and safety standards set forth in Titles II and III. The Secretary of Labor may modify or add to these statutory standards through notice and comment rule making procedures, so long as he does not reduce the level of miner protection afforded by the statutory

standard, and he may also promulgate emergency temporary standards in response to grave dangers or hazards (30 U.S.C. § 811). In addition, the Mine Act requires operators to submit mine-specific plans addressing such topics as roof control and ventilation (30 U.S.C. § 302(a); 303(o)).

B. STATE MINE SAFETY AND HEALTH ACTS

State laws enacted for the regulation of mine safety and health may be arbitrarily divided into three general categories: non-existent, minimal, and comprehensive. Twenty-two states have no state mine health and safety laws,[1] and 15 states impose relatively minimal statutory requirements.[2] The remaining 13 states including West Virginia generally impose mine safety and health requirements which are modeled upon and approximate the specificity and breadth of the federal Mine Act.[3] The following discussion of state regulation is limited to those states with comprehensive mine health and safety statutes.

1. General Scope Of State Acts

The laws of the states with comprehensive mine health and safety legislation parallel the federal Mine Act in the

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[1] Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Louisiana, Main, Massachusetts, Minnesota, Mississippi, Nebraska, New Hampshire, North Dakota, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, and Wisconsin. Some of these states do have mining laws governing matters such as reclamation.

[2] Alaska, Arizona, Arkansas, California, Iowa, Kansas, Maryland, Michigan, Montana, Nevada, New Jersey, New Mexico, New York, North Carolina, and Utah. Alaska's law provides that any state regulations promulgated thereunder must conform to their federal counterparts. See Alaska Stat. § 27.20.010 (1993). The Utah law provides that any rules adopted pursuant to its act are not enforceable until such time as the federal Mine Act and its regulations are no longer in force. See Utah Code Ann. § 40-2-1.5 (1993).

[3] Alabama, Colorado, Illinois, Indiana, Kentucky, Missouri, Ohio, Oklahoma, Pennsylvania, Virginia, Washington, West Virginia, and Wyoming.

designation of an agency responsible for enforcing the statutory provisions and promulgating administrative regulations. These state acts also generally include detailed safety standards governing the various aspects of mining. The comprehensive nature of these state statutes prevents a full discussion of specific provisions here; however, in many respects, West Virginia safety and health statutes are identical with parallel federal statutes. For instance, the statute which is the subject of this declaratory judgment action, W. Va. Code § 22A-1-21(a)(1) contains essentially identical language as its federal counterpart, 30 U.S.C. § 820(a). The federal statute provides:

> "§ 820. Penalties
> (a) Civil penalty for violations of mandatory health or safety standards. The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty by the Secretary which penalty shall not be more than $50,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense."

The state statute similarly provides:

> "§ 22A-I-21. Penalties.
> (a)(1) Any operator of a coal mine in which a violation occurs of any health or safety rule or who violates any other provisions of this law shall be assessed a civil penalty by the director under subdivision (3) of this subsection, which penalty shall be not more than three thousand dollars, for each such violation. Each such violation shall constitute a separate offense."

2. <u>W. Va. Code § 22A-1-21(a)(1) Imposes a Strict Standard of Liability Regardless of Fault Upon Operators for Violations of Safety and Health Laws</u>

While the West Virginia Supreme Court of Appeals has not

interpreted or otherwise directly addressed W. Va. Code § 21A-1-21(a)(1), there is a long line of decisions which construe the language of 30 U.S.C. 820(a) by both the Federal Mine Health, Safety and Review Commission ("FMHSRC") and Federal Courts which firmly establish the principle that owners and production operators of coal mines are liable for violations of the Mine Act without regard to fault. See, for example, Asarco, Inc., etc. v. FMHSRC et al, 868 F.2d. 1195 (10th Circ 1989) where the Court stated beginning on page 1197:

> "The resolution of these conflicting positions requires a close reading of the relevant statutory provisions. Section 110(a) of the Mine Act, 30 U.S.C. § 820(a) reads as follows: [1] The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or [2] who violates any other provision of this chapter shall be assessed a civil penalty by the Secretary which penalty shall not be more than $10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense (brackets added)."
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> To us the plain meaning of the first part of Section 110(a) is that when a violation of a mandatory safety standard occurs in a mine, the operator is automatically assessed a civil penalty. When a violation occurs, a penalty follows. The statute says nothing which would indicate that if the operator's supervisory employees are without fault, the citation should be dismissed.... (Emphasis supplied)

Opinions from other circuits support our reading of the Mine Act. See Sewell Coal Company v. Federal Mine Safety and Health Review Commission, 686 F.2d 1066 (4th Cir. 1982) and Allied Products v. Federal Mine Safety and Health Review Commission, 666 F.2d 890 (5th Cir. 1982). In Sewell, a coal mine

operator was cited for violations of safety standards in its mine. Sewell's defense was impossibility of compliance with the standards in question because of a strike which left is short handed of employees. The Fourth Circuit held that the Review Commission was correct in holding that the operator had not established that compliance was in fact impossible. In so holding the Fourth Circuit commented on 30 U.S.C. § 820(a) as follows:

> The legislative history of the predecessor to this section in the 1969 [Coal] Act discloses that it was intended to provide for liability for violation of the standards against the operator, without regard to fault....

In Bituminous Coal Operators Association, Inc., v. Secretary of Interior, 547 F.2d 240, (CCA4, 1977) the Fourth Circuit Court of Appeals made clear that in an independent contractor scenario there can be multiple "operators." It also held under § 819(a) of the Mine Act of 1969[4] that the Secretary of Labor in such a context could hold the mine operator liable for the independent contractor construction company's violation without fault on the operator's part. More specifically, at page 246, the Court said:

> We, therefore, conclude that the Act authorizes the Secretary to issue withdrawal orders under §814 and to impose monetary sanctions under §§ 819 and 820 against a construction company that violates the Act while it is exercising supervision and control over a facility that is to be used for extracting or processing coal.

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[4] § 819(a) of the 1969 Mine Safety Act is identical to § 820(a) of the 1977 Mine Safety Act.

> Because the definition of operator also includes the owner or lessee, we further hold that the Secretary can impose liability on a mining company for a construction company's violations. Without exemption or exclusion, § 819 makes the operator of a coal mine in which a violation occurs subject to a civil penalty. Similarly, § 820 makes the operator of a coal mine liable to compensate coal miners who are idled by a withdrawal order. These sections, when read with the definition of operator, impose liability on the owner or lessee of a mine regardless of who violated the Act or created the danger requiring withdrawal. Since we have held that a construction company's work is performed in a coal mine, it follows that any violations of the Act committed by it in the performance of its work occur in a coal mine, making the owner or lessee of that coal mine liable for a monetary sanction under §§ 819 and 820. (Emphasis supplied)

See also: UMW v. FMHSRC, 840 F.2d 77 (D.C. Circ. 1988).

Because the use of the word "shall" in the statute should be afforded a mandatory connotation, Syl. 3, UMWA v. Miller, W. Va. _, 291 S.E.2d 673 there is no reason to believe that when it enacted the penalty provision of the state mine act, the West Virginia Legislature by adopting identical language for the state mine act as contained in the federal statute intended anything other than to impose a strict liability standard upon mine operators for violations of coal mine health and safety laws and regulations and (2) that the mine operator should be cited at any time a violation occurs at the mine site.

3. Imposition of Notice of Violation and Penalty is Mandatory.

Further, under both federal and state law, assessment of a civil penalty is mandatory and non-discretionary when a violation is discovered. See: Tazco, Inc., v. FMHSRC, 1895 (1981) and UMWA v. Miller, supra, at 683, where the West Virginia Supreme Court

of Appeals discussed former W. Va. Code §§ 22-1-13 (now 22A-1-14) and 22-1-14 (now 22A-1-15) and held:

> "Finally, the petitioners seek to compel the respondents to issue notices or orders for all violations of law found during mine inspections. Inspection of the relevant statutes indicates that the respondents clearly have this duty.
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> W. Va. Code § 22-1-13 provides that during an inspection of a mine "it shall be the duty of each inspector to note each violation he finds and issue a finding[,] order or notice, as appropriate for each violation noted." W. Va. Code § 22-1-14 provides that if an inspector "finds that an imminent danger exists, such representative...shall issue forthwith an order requiring the operator of the mine or his agent to cause immediately all persons...to be withdrawn...." If the inspector "finds that there has been a violation of the law, but the violation has not created an imminent danger, he shall issue a notice to the operator or his agent...." The statute further provides that "[n]otice and orders...shall contain a detailed description of the conditions or practices which cause and constitute an imminent danger or a violation of any mandatory health or safety standard...." and that "[e]ach notice or order...shall be given promptly to the operator...and all such notices and orders shall be in writing and shall be signed by [the inspector] and posted on the bulletin board at the mine."
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> Thus the statutes explicitly provide that an inspector who finds a violation during the course of an inspection has a non-discretionary duty to issue a notice or order, which is in writing and signed by the inspector." (Emphasis added)

4. CSR 36-20-7.1 through 7.4 Reduces and Compromises the Level of Safety and Protection Afforded by Chapter 22A.

In Article 6 of Chapter 22A, the Legislature delegated to the Board of Coal Mine Health and Safety the duty to promulgate health and safety rules and regulations for the protection of coal miners as a guarantee against erosion of primary health and safety standards initially adopted by the Legislature. It further provided in W. Va. Code § 22A-6-4(c)(2) that "[n]o rules promulgated by the Board shall reduce or compromise the level of safety or protection afforded by this chapter."

When the Board first promulgated CSR §§ 36-20-1 et seq. to become effective on May 2, 1991, the definition of "operator," in CSR § 36-20-3.1(a), was expanded beyond the code definition found in W. Va. Code § 22A-1-2(a)(8) to include independent contractors at a coal mine[5]. At that time, by promulgating CSR §§ 36-20-7.1 through 7.4, the Board created a scheme whereby a mine inspector was not required or mandated to issue a notice of violation to a mine operator where its independent contractor was solely responsible for the violation and the mine operator did not in any way contribute to the violation (See: §§ 7.3(a), (b), and (c)) and the mine operator has complied with the requirements of CSR §§ 36-20-4 relating to the Independent Contractor Register. The Board later re-promulgated §§ 36-20-1 et seq., when it added additional reporting requirements in 1995, for contractors [these regulations are the regulations which were struck down in Civil Action No. 95-C-1109]. It is my opinion that §§ 7.1 through 7.4 are illegal, null and void because they authorize mine inspectors upon finding a violation of health or safety rules and regulations at a coal mine to exercise discretion whether or not to issue a notice of violation to the mine operator. Such authorization to exercise discretion whether or not to cite an operator conflicts with the mandatory requirements of both W. Va. Code § 22A-1-14 and § 21A-1-21(a)(1) hereinabove discussed, and, therefore, the provision of the statute governs.

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[5]A separate statutory definition of "operator" was later specifically enacted to include contractors when in 1993 the Legislature enacted 22A-2-63(e), at least insofar as requirements for licensing are concerned.

Further, it is also my opinion that by diluting the statutory requirements for mandatory issuance of notice of violation and assessment of penalties, mine operators are actually encouraged to adopt a policy of "hear no evil, see no evil" insofar as monitoring or controlling improper safety practices of independent contractors which they hire is concerned. The policy statement of Consol found during the investigation of the Blacksville accident is a perfect example of the potential for abdication by a mine operator of responsibility for the safety of miners working in its mines which such a relaxed enforcement standard may generate. In contrast, strict enforcement of the Legislature's policy of strict liability for contractors regardless of their own fault created by W. Va. Code § 21A-1-21(a)(1) would foster vigilant attention by mine operators to insure that both its employees and independent contractors comply with health and safety standards.

Because we were not able to obtain a ruling from a Court on this important question, I suggest that you as Director of the enforcement agency issue to all mine inspectors a letter statement of a change in current enforcement policy that, based upon opinion of counsel that the provisions of CSR 36-20-7.1 through 7.4 are illegal and void, the future policy of the Office of Miners' Health, Safety and Training will be to strictly enforce the mandatory requirement of W. Va. Code § 21A-1-21(a)(1) that all operators of a mine - including owners, mine operators or independent contractors or any combination of them - will be cited for all violations which are caused or contributed to by an independent contractor which occur at the mine site regardless of the degree, if any, of contributing fault of the mine operator or owner.