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# Managed Cooperation in a Post-Sago Mine Disaster World

Patrick R. Baker\*

## I. Introduction to the Case Backlog: How Did We Arrive at Impasse?

The Sago Mine disaster in West Virginia caused the tragic deaths of twelve coal miners on January 2, 2006.<sup>1</sup> The nation became enthralled by the epic struggle for life and death, as rescuers attempted to free the thirteen trapped miners, only to learn that there was one survivor.<sup>2</sup> Following the accident, a federal and state investigation ensued and found that the mine operators received numerous safety violations before the disaster.<sup>3</sup> As the public became enraged over the lack of regulatory enforcement, Congressional hearings soon followed.<sup>4</sup>

The Sago Mine disaster sparked substantive legislative reforms and regulatory changes, and the industry, miners, and regulators witnessed the first major changes to mine safety in over thirty years.<sup>5</sup> The Mine Improvement and New Emergency Response Act of 2006 (“New Miner

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1. Patrick R. Baker, *The American Coal Miner, The Forgotten Natural Resource: Why Legislative Reforms are a Viable Solution to Solving the Case Backlog Before the Federal Mine Safety and Health Review Commission Sparked by Tougher Enforcement of New Coal Mining Health and Safety Laws and Regulations*, 13 VT. J. ENVTL. L. 141, 142 (2011) (citing RICHARD A. GATES ET AL., MINE SAFETY AND HEALTH ADMIN., U.S. DEP’T OF LABOR, REPORT OF INVESTIGATION: NO. 46-08791, at 1 (2006)).

2. *Id.* (citing GATES ET AL., *supra* note 1).

3. *Id.* (citing Editorial, *Lessons from the Big Branch Tragedy*, N.Y. TIMES, Apr. 14, 2010, at A26, available at <http://www.nytimes.com/2010/04/14/opinion/14wed2.html>).

4. LINDA LEVINE, CONG. RESEARCH. SERV., RL 34429, COAL MINE SAFETY AND HEALTH 2 (2008).

5. Baker, *supra* note 1.

Act”),<sup>6</sup> was signed into law on June 15, 2006.<sup>7</sup> President George W. Bush pledged that “[w]e make this promise to American miners and their families: We’ll do everything possible to prevent mine accidents and make sure you’re able to return safely to your loved ones.”<sup>8</sup>

The new law escalated penalties for safety violations, required the industry to install emergency underground shelters and new communication devices,<sup>9</sup> and mandated new guidelines for flame retardant equipment.<sup>10</sup> The new legislation focused primarily on oversight, enforcement, post-accident safety technology, and accident response, but did little to address accident prevention.<sup>11</sup> While the stakeholders argued over the new law’s effectiveness and broad reforms, the law was enacted with little consideration about how court challenges to the new legislation would likely increase. What no one seemed to recognize or appreciate was the voluminous surge in legal challenges to the New Miner Act that would soon follow.

The Mine Health and Safety Administration (“MSHA”), which is a division of the Department of Labor (“DOL”), is charged with enforcing the New Miner Act.<sup>12</sup> A review of MSHA’s litigation statistics provides a glimpse into this complex problem: in 2007, a total of 130,131 violations were assessed against coal operators and 19,578 of those violations were contested, equaling a fifteen percent challenge rate.<sup>13</sup> In 2008, oper-

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6. Pub. L. No. 109-236, 120 Stat. 493.

7. *Id.*

8. Brian Naylor, *Mine Deaths Stir New Debate on Federal Oversight*, NPR (Apr. 27, 2010), <http://www.npr.org/templates/story/story.php?storyId=126289636>.

9. Mike Lillis, *Failed Mining Reform Bill Might Have Prevented Tragedy*, WASH. INDEP. (Apr. 14, 2010 6:00 AM), <http://washingtonindependent.com/82129/failed-mining-reform-bill-might-have-prevented-tragedy>. “[O]nly [fourteen percent] of mines have complied with [the New Miner] Act requirements to install improved communication systems. Mark Guarino, *West Virginia Disaster: Will Congress Take on Coal Mining Companies?* CHRISTIAN SCI. MONITOR (Apr. 7, 2010, 6:10 PM), <http://www.csmonitor.com/USA/2010/0407/West-Virginia-disaster-Will-Congress-take-on-coal-mining-companies>. Only thirty-four of 491 coal mines have complied with the 2006 mandate requiring installation of “improved communication systems, such as two-way wireless devices that can talk with and locate trapped miners . . .” *Id.*

10. *See* Lillis, *supra* note 9.

11. *Id.*

12. 29 U.S.C. § 557a (2006). The Federal Mine Safety and Health Act of 1977, Pub. L. No. 95-164, 91 Stat. 1290, is the name of the original act, which was amended by the New Miner Act. Mine Improvement and New Emergency Response Act of 2006, Pub. L. No. 109-236, § 2, 120 Stat. 493, 493.

13. *See* MINE SAFETY & HEALTH ADMIN., U.S. DEP’T OF LABOR, NUMBER OF PENALTIES ASSESSED AND PERCENT CONTESTED: JANUARY 2007 – DECEMBER 2011 (2012) [hereinafter PENALTIES ASSESSED], *available at*

ators were assessed 198,605 violations and 47,034 were contested, yielding a 23.7% rate of appeal.<sup>14</sup> Thus, the Federal Mine Safety and Health Review Commission (“Commission”), an independent adjudicative body that provides both trial and appellate review of legal disputes arising under the Mine and New Miner Act,<sup>15</sup> endured an increase of 870 basis points in court challenges from fifteen percent in 2007 to 23.7% in 2008.<sup>16</sup> By 2009, MSHA assessed a total of 173,705 violations and 47,363 were contested before the Commission.<sup>17</sup> Violations dropped in 2010 to 166,366, but operators still challenged 45,005 of them.<sup>18</sup> The Commission received some relief in 2011 when the number of violations was reduced to 149,744 and operators only contested 37,545 or 25.1%.<sup>19</sup>

At first glance it appears that court challenges are decreasing, but converting violations into monetary penalties tells a different story. In 2005, MSHA assessed \$28,100,000 in penalties against operators, and in 2006, operators were assessed \$42,800,000 in penalties.<sup>20</sup> Civil penalties increased to \$74,431,611 in 2007 and \$193,291,971 in 2008, a 688% increase from 2005.<sup>21</sup> In 2009, civil penalties retreated to \$139,835,600 and \$133,761,974 in 2010.<sup>22</sup> However, in 2011, penalties increased to \$152,370,691.<sup>23</sup> While assessed violations and court challenges may be temporarily on the decline, the amount of penalty dollars assessed increased in 2011, and therefore, operators still have a clear incentive to contest violations. As a former MSHA official stated, “[i]f operators are

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<http://www.msha.gov/stats/ContestedCitations/Civil%20Penalties%20Assessed%20and%20Contested.pdf>.

14. *See id.*

15. *See* 30 U.S.C. § 823(d) (2006).

16. *See* PENALTIES ASSESSED, *supra* note 13.

17. *Id.*

18. *See id.*

19. *See id.*

20. *See* MINE SAFETY & HEALTH ADMIN., U.S. DEP’T OF LABOR, MSHA FACT SHEET: TOTAL DOLLAR AMOUNT ASSESSED: COAL AND METAL/NON METAL MINES 2002-2011 (2012), *available at* <http://www.msha.gov/MSHAINFO/FactSheets/MSHAbytheNumbers/CalendarYear/Assessments%20data.pdf>. Violation and appeal statistics are not available on MSHA’s website before 2007. MSHA does provide the total amount of dollars assessed against coal mines from 2002-2011. However, MSHA’s data reporting total dollars assessed and contested does not match the statistics provided at former citation. *See* PENALTIES ASSESSED, *supra* note 13.

21. *See* PENALTIES ASSESSED, *supra* note 13.

22. *See id.*

23. *See id.*

not contesting, penalties are not high enough.”<sup>24</sup> Based on the case backlog, the increased penalties are clearly “high enough.”<sup>25</sup>

From 2000 through 2005, an average of 2307 cases were filed each year with the Commission.<sup>26</sup> However, that number increased after the passage of the New Miner Act. In 2010, 11,087 cases were filed, and in 2011, 10,593 new cases were filed.<sup>27</sup> In 2011, the Commission began the year with 18,170 cases.<sup>28</sup> In comparison, the average trial-level caseload from 2000 through 2004 was only 1379.<sup>29</sup> As the number of cases has increased, frustration and delay with the system has skyrocketed.<sup>30</sup> In the end, the system teeters on collapse from its own weight.<sup>31</sup>

This article proposes a Commission mandated mediation process that will offer a solution to the case backlog that prevents regulatory capture while promoting managed cooperation and communication toward a common goal: safety. While the Commission has implemented new rules, procedures, and steps that have helped the backlog, these improvements have only addressed the symptoms and not the cause. Currently, the solutions have focused on how to reduce the case backlog, instead of creating a system that allows for communication and cooperation, while ensuring compliance and safety. While there has been disagreement as to whether or not the case backlog undermines miner safety,<sup>32</sup> it only seems logical that a system premised upon litigation, de-

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24. MICHAEL T. HEENAN, WHAT ABOUT THAT CASE BACKLOG? 1 (2010).

25. *Id.*

26. FED. MINE SAFETY & HEALTH REVIEW COMM’N, PERFORMANCE AND ACCOUNTABILITY REPORT: INDEPENDENT AUDITOR’S REPORT AND FINANCIAL STATEMENTS 1, 2 (2011) [hereinafter INDEPENDENT AUDITOR’S REPORT AND FINANCIAL STATEMENTS], available at <http://www.fmshrc.gov/par11.pdf>.

27. *Id.*

28. *Id.* at 2.

29. *Id.*

30. See Judith E. Rivlin, Assoc. Gen. Counsel, United Mine Workers of Am., The Civil Penalty Case Backlog at the Federal Mine Safety and Health Review Commission: What’s to be Done?, Address Before the Energy & Mineral Law Foundation Special Institute on Mine Safety and Health Law (Mar. 23, 2010) [hereinafter Rivlin Address], available at [http://www.emlf.org/Content/images/Speakers\\_Mine\\_Safety/1.%20Civil%20Penalty%20Case%20Backlog/1.C.-Rivlin.FMSHRC.Backlog.pdf](http://www.emlf.org/Content/images/Speakers_Mine_Safety/1.%20Civil%20Penalty%20Case%20Backlog/1.C.-Rivlin.FMSHRC.Backlog.pdf).

31. See *id.*

32. *Id.* at 1 n.1 (“On February 23, 2010, the House of Representatives’ Committee on Education and Labor held a Hearing on ‘Reducing the Backlog of Contested Mine Safety Cases.’ Cecil Roberts, President of the United Mine Workers of America, asserted the case backlog at the Federal Mine Safety and Health Review Commission adversely affects miners’ health and safety, while Bruce Watzman, Senior Vice President for Regulatory Affairs of the National Mining Association, contended the operators’ enhanced

lay, and frustration does little to enhance safety.<sup>33</sup> While there have not been any formal studies linking the case backlog to unsafe working conditions, the goal of any civil penalty system should be compliance, not litigation.<sup>34</sup>

The split-enforcement model was adopted to prevent regulatory capture and ensure mine safety,<sup>35</sup> and while some level of adversarial proceedings is healthy to preclude capture, it also stands to reason that too much litigation could be equally detrimental. Thus, it is simply illogical to think that all forms of cooperation and communication between the regulated and regulator are detrimental and promote malfeasance. Instead, the regulator and regulated should be able to work together and avoid unnecessary litigation and delay. Ideally, the regulated and regulator should work together toward the common goal of safety. While this theory is simply not always possible, simply abandoning it or demonizing it in every case is equally imprudent. Therefore, this question should be posed: Can a system or procedure be created that ensures compliance, but also allows for communication and collaboration? The answer is “yes” and one realistic solution is mandatory mediation.

Finally, it is worth noting that while there are numerous Dispute System Designs (“DSDs”), the following arguments will primarily focus, and be premised on only one option: a DSD adopted by a third-party, the Commission, for the benefits of the disputants, MSHA and the operator. In the end, a procedural process that provides for managed cooperation and compliance toward safer working conditions will reduce the case backlog, benefit the parties, and most importantly, improve safety.

## II. An In Depth Examination of Mine Safety and Health Legislation<sup>36</sup>

State, local, and federal laws have regulated the mining industry for over a century. When Congress created the Bureau of Mines within the Department of the Interior in 1910, it implemented the first comprehen-

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contest rate does not jeopardize miners’ health and safety.”).

33. *Id.* at 1.

34. *Id.*

35. See George Robert Johnson, Jr., *The Split-Enforcement Model: Some Conclusions from the OSHA and MSHA Experiences*, 39 ADMIN. L. REV. 315 (1987).

36. See Baker, *supra* note 1, at 146-52, for a more thorough review of the history of mine safety and health legislation.

sive federal legislation in the country.<sup>37</sup> However, it would take almost seventy years before Congress would address almost a complete lack of miner safety legislation. Between 1967 and 1968, a series of mine disasters took the lives of 533 miners,<sup>38</sup> igniting public outrage and prompting immediate action from Congress.<sup>39</sup>

In 1969, Congress took its first proactive step in regulating safety within the mining industry when it enacted the Federal Coal Mine Health and Safety Act (“1969 Coal Act”).<sup>40</sup> The 1969 Coal Act broadened the Mine Enforcement and Safety Administration’s (“MESA”) power and authority to inspect mines, to increase frequency of inspections within hazardous operations, and to shut down hazardous areas within mines.<sup>41</sup> Although this legislation addressed some mine safety issues, it had limited effectiveness because it did not prevent regulatory capture.<sup>42</sup>

In 1977, Congress passed the Federal Mine Safety and Health Act,<sup>43</sup> (“the Mine Act”) which created the Mine Safety and Health Administration (“MSHA”) to replace MESA as the agency charged with enforcement of the Act.<sup>44</sup> Most notably, the Act created a split-enforcement model, which authorized the Department of Labor and MSHA to enforce safety and health standards.<sup>45</sup> However, disputes arising between MSHA and operators would then be adjudicated before the Commission.<sup>46</sup>

Over the next thirty years, advances in engineering, technology, and safety, and an emerging collaborative relationship between MSHA and the mining industry, created a safer workplace for miners.<sup>47</sup> For example, in 2005 there were only twenty-three coal-related deaths in the United

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37. H.R. Rep. No. 91-563, at 2 (1969), *reprinted in* 1969 U.S.C.C.A.N. 2503, 2504.

38. *Id.* at 3, *reprinted in* 1969 U.S.C.C.A.N. at 2505.

39. *See* Federal Mine Safety and Health Act of 1977, Pub. L. No. 95-164, 91 Stat. 1290 (codified as amended at 30 U.S.C. §§ 801-962 (2006)).

40. Pub. L. No. 91-173, 83 Stat. 742 (1969).

41. S. REP. NO. 95-181, at 1-6 (1977), *reprinted in* 1977 U.S.C.C.A.N. 3401, 3401-06.

42. *Id.* at 44, *reprinted in* 1977 U.S.C.C.A.N. at 3444.

43. Pub. L. No. 95-164, 91 Stat. 1290 (codified as amended at 30 U.S.C. §§ 801-962 (2006)).

44. S. REP. NO. 95-181, at 5, *reprinted in* 1977 U.S.C.C.A.N. at 3405.

45. 30 U.S.C. § 811(a) (2006).

46. *Id.*

47. Mark E. Heath & Timothy D. Houston, *Increased Enforcement and Higher Penalties Under the MINER Act: Do They Improve Worker Safety?*, in 30 ENERGY AND MINERAL LAW INSTITUTE ANNUAL PROCEEDINGS 301, 302 (Energy & Mineral Law Found. ed., 2009).

States, a record low.<sup>48</sup> Reflective of this collaborative relationship was the consensus among industry and MSHA that emphasizing technology and corporate safety over profits created safer mines.<sup>49</sup>

However, on January 2, 2006, only one of thirteen coal miners survived a tragic underground explosion at the Sago Mine in West Virginia, which had received multiple safety violations prior to the disaster.<sup>50</sup> Less than three weeks later,<sup>51</sup> machinery malfunctions at West Virginia's Aracoma Alma Mine Number One resulted in two more fatalities.<sup>52</sup> Approximately four months later, an underground explosion at Darby Mine Number One in Harlan County, Kentucky took the lives of five additional miners.<sup>53</sup> These three disasters within such a short time frame forced Congress to once again overhaul safety laws and regulations.<sup>54</sup> As one former MSHA official stated, "it's unfortunate it took a disaster to bring renewed attention to the issue. 'That's the history of coal mining legislation in the U.S.—it's always born out of disaster and as it's said the safety laws are written with the blood of miners. That's what it takes.'"<sup>55</sup>

Congress enacted the New Miner Act on June 15, 2006.<sup>56</sup> The law required individual mines to develop Emergency Response Plans ("ERPs"), which significantly increased both preventative and post-accident safety measures.<sup>57</sup> Additionally, the Act required the National Institute of Occupational Safety and Health ("NIOSH") to analyze the costs and benefits of refuge chambers,<sup>58</sup> and the Technical Study Panel ("TSP") to research and report on various functions of conveyor belts in underground mining.<sup>59</sup> The Act significantly increased civil and criminal

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48. MINE SAFETY AND HEALTH ADMIN., U.S. DEP'T OF LABOR, COAL MINING FATALITIES BY STATE BY CALENDAR YEAR (2012), available at <http://www.msha.gov/stats/charts/coalbystates.pdf>.

49. Heath & Houston, *Increased Enforcement and Higher Penalties Under the MINER Act: Do They Improve Worker Safety?*, in ENERGY AND MINERAL LAW INSTITUTE ANNUAL PROCEEDINGS, *supra* note 47, at 302.

50. GATES ET AL., *supra* note 1, at 1.

51. KENNETH A. MURRAY ET AL., MINE SAFETY AND HEALTH ADMIN., U.S. DEP'T OF LABOR, REPORT OF INVESTIGATION: NO. 46-08801 1 (2006).

52. *Id.* at 2.

53. *Id.*

54. *Underground Coal Mining Disasters and Fatalities – United States, 1900-2006*, CDC (Jan. 2, 2009), <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5751a3.htm>.

55. Naylor, *supra* note 8.

56. Mine Improvement and New Emergency Response Act (MINER Act), Pub. L. No. 109-236, § 1, 120 Stat. 493, 493 (codified as amended at 30 U.S.C. § 801 (2006)).

57. New Miner Act § 2.

58. *Id.* § 13.

59. *Id.* § 11.



penalties.<sup>60</sup> Also, MSHA promulgated several regulations increasing penalties and creating new types of violations.<sup>61</sup>

On April 5, 2010, just four years after the New Miner Act became law, the tragic deaths of twenty-nine miners at the Upper Big Branch Mine (“UBB”) in West Virginia reintroduced the public and lawmakers to the need for more oversight.<sup>62</sup> UBB received 124 safety violations in 2010 prior to the explosion, dozens of which related to improper ventilation.<sup>63</sup> In fact, in 2009, Massey Energy Company (“Massey”), operator of the UBB, challenged seventy-eight percent of its assessed safety violations.<sup>64</sup> After the UBB explosion, Massey attempted to lessen public and political scrutiny by writing to the Governors of Kentucky, West Virginia, Virginia, and Illinois, alleging that MSHA’s regulations played a role in the explosion.<sup>65</sup> The company’s CEO, Don Blankenship,<sup>66</sup> emphasized Massey’s position when he stated the company had “developed grave and serious concerns about the MSHA imposed ventilation system employed at UBB.”<sup>67</sup>

In a press release following the Governor’s Independent Investigation Panel’s report (“GIIP”), which provided insight into the cause of the UBB explosion,<sup>68</sup> MSHA countered Massey’s position, stating the UBB

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60. *Id.* § 8.

61. See Criteria and Procedures for Proposed Assessment of Civil Penalties, 30 C.F.R. §§ 100.3, 100.5 (2012).

62. David Zucchini & Kim Geiger, *Mine Operator Accused of Abusing Safety Appeals Process*, L.A. TIMES (Apr. 28, 2010), <http://articles.latimes.com/2010/apr/28/nation/la-na-mine-safety-20100428>.

63. *Id.*

64. *Id.*

65. Tim Huber, *Massey Says Feds Require Unsafe Mine Ventilation*, SEATTLE TIMES (June 8, 2010, 10:33 AM), [http://seattletimes.com/html/business/technology/2012059396\\_apusmineexplosionmasseyletter.html](http://seattletimes.com/html/business/technology/2012059396_apusmineexplosionmasseyletter.html).

66. The embattled, and often controversial CEO, stepped down on December 3, 2010, due to board and public pressure. Clifford Krauss, *Under Fire Since Explosion, Mining C.E.O. Quits*, N.Y. TIMES, Dec. 4, 2010, at B7, available at [http://www.nytimes.com/2010/12/04/business/energy-environment/04massey.html?\\_r=0](http://www.nytimes.com/2010/12/04/business/energy-environment/04massey.html?_r=0).

67. Letter from Don L. Blankenship, Chairman & CEO, Massey Energy Co., to Steven L. Beshear, Governor, State of Ky., Joseph Manchin, III, Governor, State of W. Va., Robert F. McDonnell, Governor, State of Va., & Patrick J. Quinn, III, Governor, State of Ill. (June 7, 2010), available at <http://wvgazette.com/static/coal%20tattoo/Don%20Blankenship%20to%20governors%20UBB%20June%207%202010.pdf>.

68. See J. DAVITT MCATEER ET AL., UPPER BIG BRANCH, THE APRIL 5, 2010, EXPLOSION: A FAILURE OF BASIC COAL MINE SAFETY PRACTICES (2011), available at <http://media.npr.org/documents/2011/may/giip-massey-report.pdf>.

disaster was “entirely preventable.”<sup>69</sup> The GIIP report claimed that Massey failed to address known compliance issues,<sup>70</sup> ignored basic safety practices,<sup>71</sup> and fostered a corporate culture that “placed the drive to produce above worker safety.”<sup>72</sup> The report identified that faulty water sprayers caused the explosion when they ignited built-up methane gases.<sup>73</sup> MSHA stated that it largely agreed with the GIIP report and claimed that it “echoes many of [*sic*] findings that MSHA ha[d] been sharing with victims’ families and the public.”<sup>74</sup>

Although the UBB and subsequent mine disasters have propelled Congress to increase regulation, political deadlock has prevented at least three proposed pieces of legislation from passing: the Robert C. Byrd Miner Safety and Health Act of 2010 in the House<sup>75</sup> and the Senate’s Robert C. Byrd Miner Safety and Health Act of 2010.<sup>76</sup> After the Senate’s version of the bill failed, it was reintroduced to the 112th Congress as S. 153; however, this legislation also failed.<sup>77</sup>

All three pieces of legislation called for more oversight, more enforcement, and higher penalties. For example, H.R. 5663 called for a separate investigation team in accidents with at least three deaths,<sup>78</sup> and increased civil penalties, and personal and criminal liability.<sup>79</sup> H.R. 5663 also increased MSHA’s enforcement authority by targeting mines that have a history of repeated violations<sup>80</sup> and by expanding its consideration of any violations of the Mine Act,<sup>81</sup> compared to the current narrower consideration of health and safety violations.<sup>82</sup> However, the legislation

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69. See Press Release, Mine Safety & Health Admin., U.S. Dep’t of Labor, Statement by MSHA Assistant Secretary Joseph A. Main on the Release of Upper Big Branch Independent Investigation Report (May 19, 2011), available at <http://www.dol.gov/opa/media/press/msha/MSHA20110767.htm>.

70. See MCATEER ET AL., *supra* note 68, at 73.

71. See *id.* at 108.

72. See *id.* at 99.

73. See *id.* at 73.

74. Joseph Main, *MSHA Chief on UBB Independent Report Findings*, DEP’T. OF LABOR (May 19, 2011), <http://social.dol.gov/blog/msha-chief-on-ubb-independent-report-findings/>.

75. H.R. 5663, 111th Cong. (2010).

76. S. 3671, 111th Cong. (2010).

77. S. 153, 112th Cong. (2011).

78. H.R. 5663 §101.

79. *Id.* § 302.

80. *Id.* § 202.

81. *Id.* § 201.

82. 30 U.S.C. § 814(a) (2006).

substantially failed to address the paramount issue of the case backlog.

Increased regulation and penalties appear to be Congress's primary solution to improving mine safety; however, it has been argued that this singular approach is not sufficient.<sup>83</sup> For instance, the National Mining Association supports the latter position, stating "[r]egulations alone are not sufficient to see continued improvement"<sup>84</sup> and "a more cooperative relationship between the industry and its regulators" is the solution to protecting the lives of miners.<sup>85</sup>

Perhaps one of the few issues on which both industry and regulators agree, is the limited number of alternatives to reducing the case backlog before the Commission.<sup>86</sup> Industry takes the position that the case backlog is due to undertrained MSHA investigators who improperly or inconsistently apply the law.<sup>87</sup> However, federal regulators reject this view and have no intention of retreating from industry pressure.<sup>88</sup> These entrenched positions and perpetual stalemate illustrate the need that some level of collaboration is needed between federal regulators and the mining industry.

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83. Ian Urbina, *Authorities Vow to Close Mines Found to Be Unsafe*, N.Y. TIMES, Apr. 28, 2010, at A16, available at <http://www.nytimes.com/2010/04/28/us/28mine.html>.

84. *Id.*

85. *Id.*

86. Hal Quinn, Letter to the Editor, *Backlog of Mining Cases*, N.Y. TIMES (Mar. 4, 2010), <http://query.nytimes.com/gst/fullpage.html?res=9F07E1DF163CF937A35750C0A9669D8B63>.

87. Halimah Abdullah, *Committee Accuses Mining Industry of Slowing Safety Sanction Process*, MCCLATCHY NEWSPAPERS (Feb. 23, 2010), <http://www.mcclatchydc.com/2010/02/23/87764/committee-accuses-mining-industry.html>.

88. Hilda L. Solis, *Make Mines Safe: Fatalities Hit an All-Time Low Last Year but Coal Miners Need More Protection*, PITTSBURGH POST-GAZETTE (Mar. 28, 2010), <http://www.post-gazette.com/stories/opinion/perspectives/make-mines-safe-fatalities-hit-an-all-time-low-last-year-but-coal-miners-need-more-protection-230542/>.

I and MSHA Assistant Secretary Joseph A. Main are redoubling the department of labor's commitment to ensure that every miner can return home at the end of every shift – safe and healthy. For only the second time ever, MSHA last year completed 100 percent of its mandated inspections of all surface and underground mines. Robust hiring of mine inspectors will enable us to continue this.

*Id.*

### III. A Closer Analysis of Commission Proceedings

#### A. *How Cases Proceed Before the Commission*

Once a case reaches the Commission, it is assigned a docket number and referred to the Chief Administrative Law Judge (“Chief ALJ”).<sup>89</sup> In some cases, the Chief ALJ will accelerate the decisional process by reviewing the case and issuing orders of settlement, dismissals, or defaults.<sup>90</sup> After review by the Chief ALJ, cases are then referred to, and decided by, Administrative Law Judges (“ALJs”).<sup>91</sup> The ALJ then rules on motions, signs off on a settlement proposal, or schedules the case for hearing.<sup>92</sup> If the parties are unhappy with the ALJ’s ruling, they can appeal the decision to the Commission.<sup>93</sup> The Review Commission is comprised of five members that provide an administrative appellate review of ALJ decisions.<sup>94</sup> Afterwards, the parties can appeal Commission decisions to the proper U.S. Court of Appeals.<sup>95</sup>

There are six types of Commission proceedings: contesting the occurrence of the violation,<sup>96</sup> disputing the amount of civil penalty assessed against the operator,<sup>97</sup> alleging employee discrimination,<sup>98</sup> arguing for temporary reinstatement,<sup>99</sup> disputing the contents of an emergency response plan,<sup>100</sup> and compensation proceedings.<sup>101</sup> The case backlog is fueled primarily by cases that contest the occurrence of the violation and the civil penalty assessed.<sup>102</sup> These two categories comprise approximately 10,500 cases, or 63,000 separate violations of the Commission’s

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89. *Strategic Plan 2007-2012*, FED. MINE SAFETY & HEALTH REV. COMM’N, <http://www.fmshrc.gov/plans/strategicplan121907.htm> (last visited Nov. 12, 2012).

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *See* 30 U.S.C. § 815(a) (2006).

97. *See id.*

98. *See id.* § 815(c)(2).

99. *See id.* § 815(b)(2).

100. *See id.* § 876(b)(2)(G).

101. *See id.* § 821.

102. U.S. DEP’T OF LABOR & FED. MINE SAFETY & HEALTH REVIEW COMM’N, CASE BACKLOG REDUCTION PROJECT JOINT OPERATING PLAN 2 (2010) [hereinafter CASE BACKLOG REDUCTION PROJECT JOINT OPERATING PLAN], *available at* <http://www.fmshrc.gov/jointoperatingplan.pdf>.

docket, an overwhelming majority.<sup>103</sup>

In a “contest” proceeding, the operator challenges the citation or order before MSHA assesses a penalty.<sup>104</sup> Essentially, the operator is attacking whether the alleged conduct constitutes a violation.<sup>105</sup> Once MSHA files an answer, the case is assigned to an ALJ.<sup>106</sup> In civil penalty proceedings, the mine operator files a complaint with the Commission within thirty days of receipt of a civil penalty.<sup>107</sup> The mine operator can contest some or all of the proposed penalty assessment.<sup>108</sup> Here, the operator is challenging the severity of the violation and the financial liability that accompanies the assessment of penalty.<sup>109</sup> Once MSHA receives notice, it notifies and provides the Commission and the operator with a “petition for assessment of penalty.”<sup>110</sup> Once the operator receives the petition, the operator has thirty days to file an answer with the Commission challenging the proposed penalty assessment.<sup>111</sup> It is important to note the operator must correct the alleged violation regardless of whether or not the operator appeals the alleged violation.<sup>112</sup> Therefore, appealing violations does not by itself hamper or relieve the operator of its duty to comply with safety laws and regulations.<sup>113</sup>

B. *Implemented Procedural Improvements and Initiatives Aimed at Resolving the Case Backlog*

The Commission has taken several steps with Congressional support to reduce the case backlog and stem the tide of litigation.<sup>114</sup> The Commission received \$3,800,000, available for one year to reduce and address the case backlog.<sup>115</sup> The Commission chose to allocate a large por-

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103. *Id.*

104. 30 U.S.C. § 815(d).

105. *See Guide to Commission Proceedings*, FED. MINE SAFETY & HEALTH & REV. COMM’N, <http://www.fmshrc.gov/guides/englishguide.htm#contest> (last visited Nov. 12, 2012).

106. *Id.*

107. 30 U.S.C. § 815(a).

108. *See Guide to Commission Proceedings*, *supra* note 105.

109. *See id.*

110. *Id.*

111. 30 U.S.C. § 815(a).

112. *See Guide to Commission Proceedings*, *supra* note 105.

113. *See id.*

114. INDEPENDENT AUDITOR’S REPORT AND FINANCIAL STATEMENTS, *supra* note 26, at 2.

115. *Id.*

tion of the funding toward hiring new personnel.<sup>116</sup> Additional support staff, as well as six new ALJs, were hired.<sup>117</sup> The Commission reported that additional staff and ALJs dedicated to reducing the case backlog have made a significant impact.<sup>118</sup>

The Commission also explored the implementation of an electronic case management system.<sup>119</sup> The Commission hopes to establish an electronic system that would allow the parties direct access online to file and manage all documents involved in a case.<sup>120</sup> In March of 2011, the Commission reported to Congress, laying out the options, costs, and timelines associated with the project.<sup>121</sup> Additionally, the Commission initiated several pilot projects aimed at increasing the use of technology, exploring e-filing, and identifying any possible barriers to technological improvements aimed at making the system more efficient.<sup>122</sup> Furthermore, the Commission promulgated several new rules aimed at reducing the case backlog and facilitating the adjudicative process.<sup>123</sup> In the fall of 2010, the Commission published a final rule<sup>124</sup> in order to streamline the settlement process.<sup>125</sup> The rule makes case settlements more efficient and less time consuming by requiring parties to file a proposed decision with their settlement motions.<sup>126</sup> Also, the rule requires that settlement motions and proposed orders be filed electronically.<sup>127</sup> From December 2010 through the end of 2011, over 7200 cases had been filed pursuant to the new rule and settled.<sup>128</sup>

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116. *Id.*

117. *Id.*

118. FED. MINE SAFETY & HEALTH REVIEW COMM'N & U.S. DEP'T OF LABOR, FINAL REPORT ON THE TARGETED CASELOAD BACKLOG REDUCTION PROJECT 3 (2011) [hereinafter FINAL REPORT ON THE TARGETED CASELOAD BACKLOG REDUCTION PROJECT], available at [http://www.fmshrc.gov/4DOL\\_FMSHRC\\_report.pdf](http://www.fmshrc.gov/4DOL_FMSHRC_report.pdf).

119. See INDEPENDENT AUDITOR'S REPORT AND FINANCIAL STATEMENTS, *supra* note 26, at 2.

120. CASE BACKLOG REDUCTION PROJECT JOINT OPERATING PLAN, *supra* note 102, at 15.

121. INDEPENDENT AUDITOR'S REPORT AND FINANCIAL STATEMENTS, *supra* note 26, at 2.

122. *Id.*

123. *Id.*

124. Penalty Settlement, 29 C.F.R. § 2700.31 (2012).

125. INDEPENDENT AUDITOR'S REPORT AND FINANCIAL STATEMENTS, *supra* note 26, at 2.

126. *Id.*

127. *Id.*

128. *Id.* at 2-3.

Additionally, MSHA attempted to improve the review system and increase settlements by inserting conferencing opportunities at the beginning of the formal review procedure.<sup>129</sup> Due to the case backlog, MSHA relies upon its own employees to serve as Conference and Litigation Representatives (“CLRs”), rather than the attorneys in the Labor Department Solicitor’s Office.<sup>130</sup> Operators and MSHA attempt to work out settlements before investing too much in litigation.<sup>131</sup> CLRs often request a ninety-day extension from the Commission to explore settlement.<sup>132</sup> Thus, a settlement may be reached before the issuance of the formal Petition for Assessment of Civil Penalty is filed and the case is subject to Commission procedures.<sup>133</sup>

Despite MSHA and the Commission’s attempts to facilitate settlement, this approach has been rife with difficulties, shortcomings, and conflicts. One issue that undermines the settlement procedure is that neither MSHA nor the CLR take into account what can or cannot be proven at trial.<sup>134</sup> Instead, the government enters the process inflexible and generally unwilling to compromise.<sup>135</sup> Consequently, unless the operator simply gives up or accepts liability, nothing of any real consequence gets resolved.<sup>136</sup> Thus, the one mechanism that enables the parties to opt out of litigation and that should encourage communication is undermined by a general lack of good faith.<sup>137</sup> “As a result, neither side can get serious until right before trial. That is when what can be proved becomes more important than insisting the inspector was right in [every aspect].”<sup>138</sup> This type of procedure, without more safeguards and protections, only fuels the case backlog and operator frustration with the system, because the operator simply wants a fair review and possible modification or adjustment of the possible violations and penalties.<sup>139</sup> However, MSHA’s stance and position toward settlement serves an important function because it precludes regulatory capture and ensures compliance.<sup>140</sup>

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129. HEENAN, *supra* note 24, at 2-3.

130. *Id.*

131. *Id.*

132. *Id.*

133. *See id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *See id.*

138. *Id.* at 6.

139. *Id.* at 2-3.

140. *Id.*

In December of 2010, the Commission published a final rule, establishing a new simplified proceeding procedure in civil penalty cases.<sup>141</sup> On March 1, 2011, the simplified proceeding pilot program commenced for a period of nine to twelve months with the goal of streamlining the procedures for handling certain types of cases.<sup>142</sup> Under the new rule, cases may be designated for simplified proceedings if the controversy involves no fatality, injury, or illness.<sup>143</sup> Additionally, such controversies are also characterized by one or more of the following: (1) contain only § 104(a) citations; (2) require no special assessments; (3) lack complex issues of law or fact; (4) involve a limited number of citations; (5) involve a limited penalty amount; (6) their prospective hearing will be only for a limited duration; (7) do not involve any questions of law; and, (8) do not require expert testimony.<sup>144</sup> After applying the criteria, the ALJ determines whether the case is suitable for simplified proceedings.<sup>145</sup> Additionally, either party can request a simplified proceeding,<sup>146</sup> but if a party disagrees, it may opt-out.<sup>147</sup>

After the ALJ designates a case for simplified proceedings, the attorneys must file a notice of appearance.<sup>148</sup> However, an answer is not required.<sup>149</sup> The parties then have forty-five days to provide the other with copies of all non-privileged documents, electronically stored information, and any additional evidence used to support claims or defenses.<sup>150</sup> Formal discovery is not permitted unless leave of court is granted.<sup>151</sup> Once the documents are exchanged, the ALJ holds a pre-hearing conference in an attempt to reach a settlement, narrow the issues, make factual stipulations, establish defenses, and identify the planned witnesses, exhibits, motions, and any other relevant matters.<sup>152</sup> After completion of the pre-hearing conference, the ALJ schedules a hearing.<sup>153</sup> However,

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141. Simplified Proceedings, 29 C.F.R. §§ 2700.100-2700.110 (2012).

142. Presentation from Stephanie L. Ojeda, Dir., Alpha Natural Res., Coal Law Update at the EMLF Kentucky Mineral Law Conference, at 3 (Oct. 21, 2011).

143. 29 C.F.R. § 2700.101.

144. *Id.*

145. *Id.* § 2700.102(a).

146. *Id.* § 2700.103(a).

147. *Id.* § 2700.104(b).

148. *Id.* § 2700.102(c).

149. *Id.* § 2700.102(d).

150. *Id.* § 2700.105.

151. *Id.* § 2700.107.

152. *Id.* § 2700.106.

153. *Id.* § 2700.106(b).



the ALJ who presides over the pre-hearing conference is conflicted out of the hearing.<sup>154</sup>

In addition to the new rules, the Commission has implemented Global Settlement Conferences (“Global Settlements”).<sup>155</sup> As an attempt to consolidate the docket and dispose of multiple cases at one time, the conferences group together multiple violations of one mine operator, mine, or law firm.<sup>156</sup> The Commission then generates an order to the Secretary and the operator, or operator representative, appears via teleconference or in person to address those issues that can be settled.<sup>157</sup> Settlements reached at the conference are approved immediately.<sup>158</sup> If some issues remain unresolved, they are assigned to an ALJ and placed on the docket.<sup>159</sup> By employing this strategy, the Commission is able to resolve less complicated issues and reserve the hearing docket for more controversial and complex matters.<sup>160</sup> The Commission reported that during the period of April 29, 2011, through July 29, 2011, seventeen Global Settlements were conducted, totaling ninety-nine cases including 854 separate citations.<sup>161</sup> Consequently, seventy-seven of those cases, totaling 706 citations, were settled producing a seventy-eight percent success rate.<sup>162</sup>

Also, in 2010, the Commission unveiled a plan to prioritize undecided cases.<sup>163</sup> The cases which received the highest priority involved “fatalities, injuries, flagrant violations, emergency response plans, and discrimination complaints.”<sup>164</sup> Next, cases designated the second highest priority were calendar calls.<sup>165</sup> Finally, the third category prioritizes cases by the date the initial pleading was filed.<sup>166</sup> The Commission reported

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154. Simplified Proceedings, 75 Fed. Reg. 81,459-01 (Dec. 28, 2010) (to be codified at 29 C.F.R. pt. 2700).

155. FINAL REPORT ON THE TARGETED CASELOAD BACKLOG REDUCTION PROJECT, *supra* note 118, at 6.

156. *See id.* at 9.

157. 29 C.F.R. § 2700.106(a).

158. *Id.* § 2700.106(b).

159. *Id.*

160. FINAL REPORT ON THE TARGETED CASELOAD BACKLOG REDUCTION PROJECT, *supra* note 118, at 14-15.

161. *Id.* at 7.

162. *Id.*

163. CASE BACKLOG REDUCTION PROJECT JOINT OPERATING PLAN, *supra* note 102, at 13-14.

164. *Id.* at 13.

165. *Id.*

166. *Id.*

547 cases designated as priority cases.<sup>167</sup> At year's end, the Commission disposed of 308 of those cases, assigned 228 to ALJs, and had eight settlement motions pending before the Chief Judge.<sup>168</sup>

Similar to Global Settlements, the Commission has implemented a calendar call program as another tool to fight the case backlog.<sup>169</sup> Calendar calls are prioritized and organized around specific operators or geographic locations.<sup>170</sup> Hearings are held in one location and occur sequentially over the course of a week or two.<sup>171</sup> Operators are able to attend multiple hearings in conjunction with one another in order to save time and resources, rather than attending different hearings in different locations.<sup>172</sup> In its final report, the Commission reported that between April 29, 2011, and July 28, 2011, twelve calendar calls were scheduled.<sup>173</sup> ALJs heard seventy-seven different cases, totaling 241 separate citations; consequently, sixty-four cases were resolved, totaling 211 separate citations.<sup>174</sup>

The new regulations aimed at settlement and simplified proceedings, as well as the other initiatives, are promising. In 2010, the Commission ALJs disposed of only 7132 cases, and the Commission initiatives resulted in 12,944 cases being disposed of in 2011.<sup>175</sup> The Commission received approximately 10,600 new cases in 2011.<sup>176</sup> The Commission estimated that each ALJ would dispose of approximately 450-500 cases per year.<sup>177</sup> However, even with the new procedures and initiatives, the system is still largely inefficient at disposing of cases in a timely fash-

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167. FINAL REPORT ON THE TARGETED CASELOAD BACKLOG REDUCTION PROJECT, *supra* 118, at 6.

168. *Id.* Three cases had pending show cause orders because the operator failed to file a timely answer. *Id.*

169. FED. MINE SAFETY & HEALTH REVIEW COMM'N & U.S. DEP'T OF LABOR, FIRST QUARTERLY PROGRESS REPORT: TARGETED CASELOAD BACKLOG REDUCTION 4 (2010), [hereinafter FIRST QUARTERLY PROGRESS REPORT], available at [http://www.fmshrc.gov/DOL\\_FMSHRCReport.pdf](http://www.fmshrc.gov/DOL_FMSHRCReport.pdf).

170. *Id.*

171. *Id.*

172. CASE BACKLOG REDUCTION PROJECT JOINT OPERATING PLAN, *supra* note 102, at 7.

173. FINAL REPORT ON THE TARGETED CASELOAD BACKLOG REDUCTION PROJECT, *supra* 118, at 7.

174. *Id.*

175. INDEPENDENT AUDITOR'S REPORT AND FINANCIAL STATEMENTS, *supra* note 26, at 3.

176. *Id.* at 4.

177. *Id.*

ion.<sup>178</sup> In 2006, on average, cases were decided 188 days after Commission receipt, approximately a six-month adjudicative period.<sup>179</sup> However, in 2011, cases were disposed of on average 524 days after receipt, or roughly an eighteen-month adjudicative period.<sup>180</sup> In 2006, eighty-one percent of cases were decided within one year, compared to only thirty-three percent in 2011.<sup>181</sup> In 2006, only fourteen percent of the Commission's cases were still pending after one year.<sup>182</sup> That percentage roughly tripled in 2011 to forty-five percent.<sup>183</sup>

The "additional staff and new backlog reduction initiatives" may have made modest gains in reducing the case backlog;<sup>184</sup> however, the quicker disposal of cases and pressure placed upon ALJs to meet those goals have increased appeals to the Commission.<sup>185</sup> The Commission primarily hears two types of appeals: (1) substantive cases and (2) default cases.<sup>186</sup> Substantive cases are those in which an ALJ "issued a decision on the merits and either a party has filed a petition for review with the Commission or at least two commissioners have decided to grant review on their own initiative . . . ."<sup>187</sup> Default cases are those contests "where [the] operator has failed to timely contest a proposed penalty or to respond the Secretary's penalty petition and the operator has filed a motion to reopen the final order."<sup>188</sup>

In 2008, eight petitions for review of substantive cases were filed with the Commission, and only four were granted.<sup>189</sup> In 2011, sixty-six petitions for review of substantive cases were filed with the Commission, and forty-three of such petitions were granted.<sup>190</sup> Historically, less than fifty motions to reopen default cases were filed with the Commission.<sup>191</sup>

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178. See *Reducing the Growing Backlog of Contested Mine Safety Cases Before the H. Comm. on Educ. & Labor*, 111th Cong. 24 (2010) (statement of Cecil E. Roberts, President, United Mine Workers of America).

179. INDEPENDENT AUDITOR'S REPORT AND FINANCIAL STATEMENTS, *supra* note 26, at 4.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. See *id.* at 3.

185. *Id.* at 5.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

Since 2008, approximately 200 motions to reopen default cases are being filed annually.<sup>192</sup> Each default case petition is carefully reviewed by an Office of General Counsel (“OCG”)<sup>193</sup> attorney advisor, who then prepares a draft order for the Commission’s consideration.<sup>194</sup>

While the Commission’s reforms and attempts to reduce the case backlog are commendable and have produced marginal results, their treatments and solutions only address the symptoms of the backlog and fail to adequately provide a cure to the underlying disease. Consequently, the number of cases pending before the Commission is approximately the same as it was in 2011,<sup>195</sup> the year in which the rules for simplified proceedings became effective.<sup>196</sup> Over ninety percent of the cases filed with the Commission eventually settle,<sup>197</sup> which begs the question, why are so many cases being filed if the parties are willing to reach settlement? One answer: there is no legitimate escape valve for the parties during the litigation process that allows for meaningful communication aimed at resolving disputes over mine safety, while still ensuring compliance and precluding regulatory capture.

### C. *Proposed and Pending Solutions Focused on Solving the Case Backlog*

The demise of the traditional “Pre-Penalty Safety and Health Conference” (“Pre-Penalty Conference”) is one catalyst fueling the case backlog.<sup>198</sup> Before February 2008, MSHA held the Pre-Penalty Confer-

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192. *Id.*

193. *Id.* The OCG plays an important role in handling cases. The OCG is responsible for handling the initial legal research, preparing draft orders and opinions for the Commission, evaluating FOIA requests, as well as formulating and drafting the Commissioner’s rules. *Id.*

194. *Id.*

195. See FED. MINE SAFETY & HEALTH REVIEW COMM’N, JUSTIFICATION OF APPROPRIATION ESTIMATES FOR COMMITTEE ON APPROPRIATIONS 16 (2011).

196. *Id.* at 11-12.

197. Richard W. Manning, Admin. Law Judge, Fed. Mine & Safety Review Comm’n, Improving the Efficient Adjudication of Penalty Proceedings, Address Before the Energy & Mineral Law Foundation Special Institute on Mine Safety and Health Law (Mar. 23, 2010) [hereinafter Manning Address], available at [http://www.emlf.org/Content/images/Speakers\\_Mine\\_Safety/3.%20Practicing%20Before%20the%20ALJs/3.C.-Manning.FMSHRC.432030.pdf](http://www.emlf.org/Content/images/Speakers_Mine_Safety/3.%20Practicing%20Before%20the%20ALJs/3.C.-Manning.FMSHRC.432030.pdf).

198. Keith E. Bell, Attorney, U.S. Dep’t of Labor, The Civil Penalty Case Backlog from the Government’s Prospective, Address Before the Energy & Mineral Law Foundation Special Institute on Mine Safety and Health Law (Mar. 23, 2010) [hereinafter Bell Address], available at

ence prior to the assessment of a civil penalty<sup>199</sup> and Commission jurisdiction.<sup>200</sup> At the conclusion of the Pre-Penalty Conference, MSHA would take into account any mitigating factors, extenuating circumstances, or modifications to the violations resulting from the conference.<sup>201</sup> Disputes that were resolved during the Conference did not require Commission approval,<sup>202</sup> and therefore, operators did not need to file as many cases with the Commission. However, MSHA eventually abandoned the Pre-Penalty Conference because operators were requesting conferences for every violation, abusing the system, and justified violations and penalties were being unfairly compromised and settled.<sup>203</sup> In March of 2009, MSHA implemented the “Enhanced Safety and Health Conference” (“Enhanced Conference”) to reduce operator abuse and prevent regulatory capture.<sup>204</sup> The significant change in the procedure required the operator to first contest the violations and penalties before it could request the Enhanced Conference.<sup>205</sup> As a result, the operator is forced to file a claim with the Commission before it can attempt settlement with MSHA, thus fueling the current case backlog.<sup>206</sup> As a result, once a claim is filed, the Commission is required to approve any “compromise, mitigation, [or] settlement.”<sup>207</sup> Consequently, disputes that could have been settled without Commission intervention require Commission action and clog up the docket.<sup>208</sup>

For most of MSHA’s existence, the operator could easily request a Pre-Penalty Conference, and it would be granted.<sup>209</sup> The parties could then meet informally and discuss the violations, corrective actions, miti-

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[http://www.emlf.org/Content/images/Speakers\\_Mine\\_Safety/1.%20Civil%20Penalty%20Case%20Backlog/1.B.-Bell.Case.Backlog.pdf](http://www.emlf.org/Content/images/Speakers_Mine_Safety/1.%20Civil%20Penalty%20Case%20Backlog/1.B.-Bell.Case.Backlog.pdf)

199. *Id.* “Once the operator files its written notice to contest the proposed penalty, MSHA notifies the Commission and its jurisdiction is officially invoked over the case.” Baker, *supra* note 1, at 159.

200. *See* Bell Address, *supra* note 198.

201. *Id.*

202. *Id.*

203. Rivlin Address, *supra* note 30, at 3-4.

204. Bell Address, *supra* note 198.

205. *Id.*

206. *Id.*

207. 30 U.S.C. § 820(k) (2006).

208. *See generally* Pre-Hearing Conference, 29 C.F.R. § 2700.106 (2012). The new regulation has streamlined the settlement process and has resolved some of the case backlog created because of the statutory requirement found in 30 U.S.C. § 820(k) that requires Commission approval of all settlement agreements reached between MSHA and the operator.

209. *See* HEENAN, *supra* note 24, at 2-3.

gating factors, and any modifications to the violations. The process was not a hearing, but an opportunity for MSHA to review its own actions as well as educate the operator on safety compliance.<sup>210</sup> Both parties welcomed the process, and for most operators, “this was all the review [and due process] they felt they needed.”<sup>211</sup> However, once the Enhanced Conference was implemented, the process naturally propelled both parties toward litigation and undermined the parties’ ability to communicate with one another.<sup>212</sup> Today, operator requests for conferences are often met with “[a] conference [that] will be scheduled after . . . penalties . . . have been assessed. . . . Failure to timely contest the proposed penalties will result in your conference request being cancelled.”<sup>213</sup> In the end, the one procedural mechanism that encouraged communication and promoted settlement was replaced by formal, time-consuming, and costly litigation initiated before the Commission.<sup>214</sup> Elimination of the Pre-Penalty Conference “has made formal contests the only reliable avenue for dialogue.”<sup>215</sup>

All the parties concerned agree the best approach would be to hold the Safety and Health Conference before the penalty is formally contested before the Commission.<sup>216</sup> However, in order for the change to be effective, a dialogue and willingness to cooperate must be fostered between the parties without compromising safety. On August 20, 2010, MSHA unveiled a pilot mediation program to help stem the tide of legal contests.<sup>217</sup> MSHA’s goal was to “alter [the] safety and health conferences so that mine operators can informally dispute citations before filing a formal appeal with the [Commission].”<sup>218</sup>

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210. *Id.*

211. *Id.* at 2.

212. *Id.* at 3.

213. *Id.* at 3 (internal quotations omitted).

214. Rivlin Address, *supra* note 30, at 5.

215. HEENAN, *supra* note 24, at 3.

216. *See generally id.*

217. Victoria VanBuren, *US MSHA Unveils Pilot Mediation Program*, [MEDIATE.COM](http://www.mediate.com/articles/BayerKbl20100830b.cfm), <http://www.mediate.com/articles/BayerKbl20100830b.cfm> (last visited Feb. 18, 2012).

218. *Id.* (internal quotations omitted).

On November 28, 2011, MSHA released its evaluation of the pilot mediation program.<sup>219</sup> The program yielded modest success as sixty-seven percent of the violations that went to conference were settled, while thirty-three percent were eventually contested to the Commission.<sup>220</sup> MSHA estimated that pilot conferences reduced the case backlog by up to seventeen percent.<sup>221</sup> Interestingly enough, MSHA reported the parties found the process improved communication and, overall, the parties were pleased with it.<sup>222</sup> The stakeholders reported the conferencing procedure was useful and felt it would decrease the number of violations contested in the long term.<sup>223</sup> A majority of participants stated they did not intend to litigate issues discussed in the conference.<sup>224</sup> MSHA's plan is to institute the Pre-Assessment Safety and Health Conference ("Pre-Assessment Conference") in every district by March 2013.<sup>225</sup>

However, a closer examination of the new Pre-Assessment Conference reveals some troubling trends. First, the new conferencing procedure is eerily similar to the one abandoned by MSHA in 2008, which enabled too many abuses and had become largely ineffective.<sup>226</sup> Further, the new procedure is optional and ninety percent of contested violations did not use the conferencing procedure.<sup>227</sup> Of those responding to the survey, operators reported that they did not conference because there were dissatisfied with previous results, while some stated they contested violations automatically based on the proposed penalty amount.<sup>228</sup> Finally, the process and procedure is still controlled by MSHA and presents a clear lack of impartiality.<sup>229</sup> CLRs are MSHA employees and "operators stated that they felt that the person conducting the conferences should be

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219. MINE SAFETY & HEALTH ADMIN., U.S. DEP'T OF LABOR, EVALUATION OF MSHA'S PRE-ASSESSMENT SAFETY AND HEALTH CONFERENCING PILOT 1 (2011) [hereinafter HEALTH CONFERENCING PILOT], available at <http://www.msha.gov/PreAssess/PreAssessConfEval2011.pdf>.

220. *Id.*

221. *Id.*

222. *See id.*

223. *Id.* at 9.

224. *Id.* at 10.

225. *See* Letter from Kevin G. Stricklin, Adm'r, Coal Mine Safety & Health, to Neal H. Merrifield, Adm'r, Metal and Nonmetal Mine Safety & Health (Dec. 20, 2011) (on file with author). MSHA has not universally instituted this conference framework at the time of publication.

226. *See* HEALTH CONFERENCING PILOT, *supra* note 219.

227. *Id.*

228. *Id.* at 7.

229. *See id.* at 10.

independent from the district management and allowed to make decisions at the conference in order to speed up the conferencing process.<sup>230</sup>

As a result, several additional ideas have been floated to help improve the negotiation and settlement process.<sup>231</sup> First, allow mini-trials where the parties could only call one witness and exhibits would have to be submitted in advance of the hearing.<sup>232</sup> Second, allow more simplified written submittals of positions, as well as stipulations, to resolve more issues before trial.<sup>233</sup>

Interestingly enough, some have called for a formal mediation process and procedure as a solution to the case backlog.<sup>234</sup> While in the theoretical sense this is a well-reasoned solution, there are numerous questions that remain unresolved and that must be addressed if the mediation process is going to serve as a real solution to the current stalemate. When is the most opportune time to conduct the mediation? What DSD will be adopted and is the most effective at reducing the case backlog as well as addressing the underlying conflicts? What type of mediator style will best facilitate the process and increase the chances of success? Additionally, how can a mediation process be implemented that encourages cooperation and compliance without sacrificing miner safety? In the end, a Commission-mandated mediation process offers a solution to reducing the case backlog, creates a system that encourages cooperation and collaboration toward miner safety, and prevents regulatory capture.

#### IV. Considerations for Designing a Mandatory Mediation System and Its Impact on the Case Backlog

##### A. *Benefits of Mediation and Why the Process Works*

The benefits of mediation in lieu of litigation are widely accepted and understood within the legal community. Attorneys and judges have embraced mediation as an effective alternative to traditional litigation that generally yields a result both parties find amenable. While the populace may be unfamiliar with the intricacies of the mediation process, more and more participants in the judicial system are finding their dis-

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230. *Id.*

231. HEENAN, *supra* note 24, at 6.

232. *Id.* at 7.

233. *Id.*

234. *Id.*



putes resolved through this important system.

Mediation accelerates and facilitates possible settlement. In fact, ninety-five percent of cases filed in the California state judicial system eventually settle before trial.<sup>235</sup> Some cases settle early and some settle on the eve of trial; however, the key difference between the former and latter is the amount of time, resources, money, and psychological toll one is willing to invest or sacrifice in the process.<sup>236</sup> In many cases, the simple process of telling one's story to a mediator facilitates the settlement process.<sup>237</sup> One important advantage of mediating disputes is avoiding the financial burden associated with litigation.<sup>238</sup> The cost of mediation generally pales in comparison to the cost incurred through the life of a lawsuit.<sup>239</sup> While cost and outcome are important considerations, there are other benefits that are generated from the process. For example, an intangible benefit of mediation is that it fosters an environment that encourages and promotes communication in lieu of litigation tactics that often undermine and serve as impediments to communication.<sup>240</sup>

Additionally, in most states and mediation systems, "what takes place in mediation is confidential."<sup>241</sup> Generally, mediators cannot be forced to testify about communications during the mediation process.<sup>242</sup> Also, offers, counter-offers, and concessions are confidential if the case does not settle in mediation.<sup>243</sup> While there are some exceptions, parties to the most typical forms of dispute over money and negligent conduct are generally protected by confidentiality laws.<sup>244</sup>

"The American Arbitration Association ["AAA"] reports that over [eighty-five percent] of all mediations result in . . . settlement."<sup>245</sup> Whereas settlement offers during the litigation process may be perceived as showing weakness, mediation provides a secure environment for ne-

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235. Adrienne Krikorian, *Litigate or Mediate?: Mediation as an Alternative to Lawsuits*, MEDIATE.COM, <http://www.mediate.com/articles/krikorian.cfm> (last visited Feb. 18, 2013).

236. *See id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *See generally* Sandra E. Purnell, Comment, *The Attorney as a Mediator—Inherent Conflict of Interest?*, 32 UCLA L. REV. 986, 1005-07 (2004).

241. Krikorian, *supra* note 235.

242. *Id.*

243. *Id.*

244. *Id.*

245. Michael Roberts, *Why Mediation Works*, MEDIATE.COM, <http://www.mediate.com/articles/roberts.cfm> (last visited Feb. 18, 2012).

gotiation.<sup>246</sup> Mediators provide structure to the communication process and aid in avoiding unproductive discussions.<sup>247</sup> Next, hard bargaining and posturing are reduced or eliminated during the mediation process.<sup>248</sup> Instead of each party focusing on the differences in their positions, mediation provides an opportunity to seek common ground and agreement.<sup>249</sup> Further, mediation brings together the decision makers who are essential to reaching a settlement.<sup>250</sup> During mediation, each party has an opportunity to be heard, present information, educate, and provide a realistic viewpoint unfiltered by lawyers or precluded by the fog of litigation.<sup>251</sup> Also, mediation provides the parties with a realistic assessment of their case's strengths and weaknesses.<sup>252</sup> Finally, the mediator can aid the parties in generating options for settlement instead of getting bogged down with legal and factual issues.<sup>253</sup>

B. *Dispute System Designs, Mediator Approaches, Defining the Problem, and the Benefits of Third Party Designed Mandatory Mediation Systems*

There are several different DSDs and mediation styles that one must consider when designing and participating in a mandatory DSD. Based on today's political and budgetary constraints, and the economic feasibility of working within the existing regulatory and procedural framework, some DSDs, styles of mediation, specific mediators, and styles of negotiation may not be well-suited or practical in addressing the case backlog in a timely and cost-effective format. Therefore, I only provide a brief overview of different DSDs, mediator approaches, and the benefits of mandatory mediation.

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246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

### 1. Dispute System Designs

DSDs vary from giving the disputant full control to very little control over the system.<sup>254</sup> One key factor affecting DSDs and their success depends on who is exercising control during and over the process.<sup>255</sup> Three key components to consider when designing a DSD or selecting a DSD are: “1) who is designing the system, 2) what are their goals, and 3) how have they exercised their power [during the process].”<sup>256</sup> Traditionally, public civil justice system mediation has been designed by a third-party DSD, provided by the courts, through the support of the legislature and for the benefit of the disputants,<sup>257</sup> whereas private justice systems developed mediation DSDs to resolve contract disputes, labor grievances, and other commercial issues.<sup>258</sup>

Mediation DSDs can be categorized as one-party, two-party, or third-party DSDs.<sup>259</sup> One-party DSDs are a newly emerging trend whereby one party to the conflict has superior economic power and designs the entire system through which the conflicts are mediated.<sup>260</sup> Under this method, the party who designs the system generally has complete control over it.<sup>261</sup> More often than not these DSDs create restrictive outcomes, such as binding arbitration.<sup>262</sup>

Two-party DSDs bring the parties together to design a system that will hopefully resolve their conflict.<sup>263</sup> These systems are generally seen as fair and efficient ways to resolve conflicts.<sup>264</sup> They are usually tailored to address specific disputes that might arise and are most often seen in private international commercial arbitrations.<sup>265</sup> Such systems also occur

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254. See Lisa Blomgren Bingham et al., *Dispute System Design and Justice in Employment Dispute Resolution: Mediation at the Workplace*, 14 HARV. NEGOT. L. REV. 1, 4 (2009).

255. See *id.*

256. *Id.* at 5.

257. *Id.*

258. *Id.*

259. See *id.*

260. Lisa Blomgren Bingham, *Designing Justice: Legal Institutions and Other Systems for Managing Conflict*, 24 OHIO ST. J. ON DISP. RESOL. 1, 23 (2008).

261. See *id.* at 23-24.

262. *Id.* at 23.

263. Lisa Blomgren Bingham et al., *Participatory Governance in South Korea: Legal Infrastructure, Economic Development, and Dispute Resolution*, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 375, 379 (2007).

264. *Id.*

265. *Id.*

where the parties are “repeat players,” such as those participating in labor relations and collective bargaining.<sup>266</sup>

Again, this analysis primarily focuses on a public DSD adopted by a third-party for the benefit of the disputants and, in this case, an administrative adjudicative process. Due to existing regulatory and legislative constraints, mandated one-party or two-party designs are not practical or workable solutions without significant Congressional and regulatory reform.

## 2. Mediation Styles and Approaches

A mediator’s approach to dispute resolution typically falls somewhere on a continuum from an evaluative approach on one side to a more facilitative role on the other.<sup>267</sup> A mediator who utilizes the evaluative approach generally “intend[s] to direct some or all of the outcomes of the mediation.”<sup>268</sup> Using this strategy, the mediator “help[s] the parties understand the strengths and weaknesses of their positions and the likely outcome of litigation.”<sup>269</sup> The evaluative mediator typically stresses his education and experience and provides an in-depth review of court documents, pleadings, and evidence.<sup>270</sup> At the outset of the mediation, the mediator allows each party to present their case and positions.<sup>271</sup> Most discussions take place in private caucuses where the mediator is able to employ his evaluative techniques.<sup>272</sup> Finally, the mediator pushes the parties toward settlement in hopes of arriving at a “position-based compromise agreement.”<sup>273</sup>

By providing assessments and direction, the evaluative mediator removes some of the parties’ decision-making powers.<sup>274</sup> In some instances, this allows the parties to reach settlement more efficiently.<sup>275</sup> However, the evaluative approach may undermine settlement because the neutrality of the mediator can come into question and the parties’ flexi-

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266. *Id.*

267. Leonard L. Riskin, *Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 23-24 (1996).

268. *Id.* at 24.

269. *Id.* at 26.

270. *Id.*

271. *Id.*

272. *Id.* at 27.

273. *Id.*

274. *Id.* at 44.

275. *Id.*

bility and decision-making power is limited.<sup>276</sup>

However, the facilitative mediation approach fosters a more communicative style between the parties, allowing each party more opportunities to express differing viewpoints.<sup>277</sup> Additionally, the mediator enhances the communication between the parties by helping them determine the outcome.<sup>278</sup> Typically, parties will make opening remarks and statements and caucuses are conducted during the process.<sup>279</sup> However, the focus of the mediation is not on the legal merits of the dispute or on the mediator's knowledge, but instead on the parties' underlying needs and how they can be met through an interest-based settlement, and therefore, the mediator generally avoids case evaluation.<sup>280</sup> Finally, the facilitative model supports brainstorming and suggests options for reaching settlement.<sup>281</sup>

The facilitative model can offer certain advantages if the parties are capable of understanding opposing interests and developing solutions.<sup>282</sup> This model provides the parties with more control over the process, the decision-making, and the agreement.<sup>283</sup> Finally, this system offers greater opportunities for the parties to educate one another about different viewpoints, interests, and positions.<sup>284</sup> In the end, the process should help the parties' future ability to work together.<sup>285</sup>

### 3. Mediator Experience, Expertise, and Impartiality

In the design of a dispute resolution system, consideration must be given to the mediator's level of knowledge, expertise, and experience. Ideally, the mediator should have expertise in both the subject-matter of the dispute, as well as the mediation process.<sup>286</sup> However, combining those two characteristics are not always feasible. "Subject-matter expertise [is defined as a] substantial understanding of . . . administrative pro-

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276. *Id.*

277. *Id.* at 33.

278. See Blomgren Bingham et al., *supra* note 263, at 12.

279. *Id.*

280. See *id.*

281. *Id.* at 13.

282. Riskin, *supra* note 267, at 45.

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.* at 46.

cedures, customary practices, or technology associated with the dispute.<sup>287</sup> Subject-matter expertise generally increases in proportion to the parties' needs for evaluation.<sup>288</sup> Therefore, parties looking for an evaluative approach will most likely prefer a mediator with a strong background in the disputed subject-matter.<sup>289</sup> For instance, parties looking to propose new government regulations may want a mediator who understands that particular area of administrative law and procedure.<sup>290</sup> Conversely, parties capable of understanding the problems, issues, and working toward their own agreement may want a mediator with greater knowledge of the mediation process and procedure.<sup>291</sup>

Impartiality is also essential to the mediation process and its success.<sup>292</sup> When the parties desire a more evaluative approach, the need for actual impartiality, or the perception of impartiality, generally increases.<sup>293</sup> Therefore, a system that utilizes an evaluative approach must use mediators who remain impartial throughout the process and gain the trust of the parties.<sup>294</sup> However, when the parties desire a facilitative approach, the neutrality of the mediator is less essential to the process, due to the decision-making ability and creativeness given to the parties.<sup>295</sup>

#### 4. Defining the Problem and Focusing the Mediation

Defining the problem, and the vast expanse between narrowing the issues and broadening the result, are other considerations the parties and mediator must determine in the process.<sup>296</sup> A narrow problem-definition generally increases the efficiency of mediation and the chances for settlement.<sup>297</sup> This is accomplished by limiting the number of issues and including only relevant information, thus avoiding the pitfalls of a broader

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287. *Id.* (internal quotations omitted).

288. *Id.*

289. *Id.*

290. *Id.* at 47.

291. *Id.*

292. *Id.*

293. *Id.* at 48.

294. *Id.*

295. *Cf. id.* at 46-48. When the parties possess a sufficient level of subject-matter expertise, the need for a neutral mediator diminishes. When the parties are looking for facilitation, a partial "mediator might be just what [the parties] need, especially since her selection may be the only way to get the case into mediation." *Id.* at 48.

296. *See id.* at 43.

297. *Id.* at 42.

approach.<sup>298</sup> However, this narrow approach can increase the possibility of impasse because it limits the decision-making of the parties and their creativity toward designing a settlement agreement.<sup>299</sup>

In contrast, a broad problem-definition approach can facilitate an agreement that addresses the parties' underlying issues.<sup>300</sup> Also, broadening the problem can increase the likelihood of settlement because it permits party creativity and increases the range of possible solutions to the problem.<sup>301</sup> However, this approach can have the opposite effect; by broadening the problem, the likelihood of impasse can increase, thereby increasing time and expense required for mediation.<sup>302</sup>

### 5. Mandatory Mediation Viability and Success

Third-party designed mandatory mediation as an avenue for settling disputes has proved itself successful in some of the most contentious arenas. For example, the Equal Employment Opportunity Commission ("EEOC") extensively mediates discrimination claims<sup>303</sup> and has one of the largest programs for workplace mediation. The program consists of a staff of internal mediators, as well as "external mediators as independent contractors."<sup>304</sup> Every mediator receives training in mediation, as well as EEOC laws, and generally uses an evaluative approach in aiding resolution.<sup>305</sup>

There have been several studies on the EEOC mediation process and its success.<sup>306</sup> In 1994, 267 exit mediation surveys and 125 mail surveys showed that sixty-six percent of the charging parties and seventy-two percent of the supervisors were "satisfied with the process and outcome."<sup>307</sup> Furthermore, ninety-five percent of the parties reported that they "trusted the mediator," and roughly eighty-four percent of the charging parties and supervisors stated that they would use mediation

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298. *Id.*

299. *Id.* at 43.

300. *Id.*

301. *Id.*

302. *Id.*

303. Blomgren Bingham et al., *supra* note 263, at 17.

304. *Id.* at 18.

305. *Id.*

306. *Id.*

307. *Id.*

again.<sup>308</sup> In 2000, a study of over 11,700 EEOC mediations, revealed that “[ninety-one percent] and [ninety-six percent] of charging parties and supervisors respectively would use mediation again.”<sup>309</sup> Such a high rate of satisfaction evinces that, in the end, the third-party DSD performed well in handling and resolving discrimination complaints within the workplace.<sup>310</sup> In fact, the studies showed the parties generally perceived the process as fair given the fact it was designed by authoritative third-parties and not by one disputant, whereas a one-party design carries a higher burden to establish fairness for the disputants.<sup>311</sup>

Another example of a successful mandatory mediation emerged at the turn of the twenty-first century, when the mortgage meltdown put the country into recession.<sup>312</sup> As the financial crisis continues, mandatory mediation will become a viable solution for resolving foreclosures between banks and homeowners.<sup>313</sup> In fact, twenty-one states now offer some form of mediation that allows the homeowners to negotiate with the bank in hopes of finding a faster remedy.<sup>314</sup> Six states offer an automatically-scheduled mandatory mediation process and fifteen states offer an opt-in mediation process once the lending institution initiates the foreclosure process.<sup>315</sup> Those states offering automatic scheduling reported a seventy-five percent participation rate,<sup>316</sup> whereas those states providing opt-in mediation reported a participation rate below twenty-five percent.<sup>317</sup> Due to the high participation rate, many opt-in states are beginning to switch to mandatory mediation,<sup>318</sup> because success and settlement is premised upon participation and good faith. Courts, states, and governments can mandate participation, but they cannot legislate good faith. Despite the mandatory nature of the process, homeowners reached a set-

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308. *Id.* at 18-19.

309. *Id.* at 19.

310. *Id.* at 20.

311. *Id.*

312. Kendall D. Issac, *Pre-Litigation Compulsory Mediation: A Concept Worth Negotiating*, 32 U. LA VERNE L. REV. 165, 169 (2011).

313. *See id.*

314. *See* ALON COHEN & ANDREW JAKABOVICS, CTR. FOR AM. PROGRESS, NOW WE’RE TALKING: A LOOK AT CURRENT STATE-BASED FORECLOSURE MEDIATION PROGRAMS AND HOW TO BRING THEM TO SCALE 1-3 (2010), available at [http://www.americanprogress.org/wp-content/uploads/issues/2010/06/pdf/foreclosure\\_mediation.pdf](http://www.americanprogress.org/wp-content/uploads/issues/2010/06/pdf/foreclosure_mediation.pdf).

315. *Id.* at 3.

316. *Id.* at 4.

317. *Id.* at 5.

318. *Id.* at 4.



tlement seventy to seventy-five percent of the time, with sixty percent of homeowners being able to stay in their homes.<sup>319</sup> Thus, the mandatory requirement did not serve as a large impediment to settlement or negotiating in good faith.

In some states, mandatory mediation has yielded positive results in one of the most contentious arenas of dispute: domestic relations.<sup>320</sup> Beginning in 2005, the State of Utah launched a mandatory mediation process.<sup>321</sup> Once an answer is filed in a contested divorce case, “all remaining contested issues are referred to [mandatory] mediation.”<sup>322</sup> “Parties are required to participate in at least one session” before their case can move forward, unless the parties are excused for good cause.<sup>323</sup> Utah states that mediation is appropriate in domestic conflicts because “it encourages collaborative problem solving by the parties . . . [and] offers an environment well-suited to identifying and addressing the strong emotional issues associated with divorce and parenting conflicts.”<sup>324</sup> Most importantly, Utah notes that mediation allows the parties to find solutions to their own disputes, resolves cases more quickly, requires less expenses, and promotes relationships and communication.<sup>325</sup> While this rationale may over-simplify the benefits of mediation, those principles are nonetheless legitimate and serve as influential motivating factors.

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319. *Id.* at 5.

320. Some states require mediation for domestic relation conflicts. *See, e.g., Clatsop County Circuit Court – Services: Family Court Programs*, OREGON.GOV, [http://courts.oregon.gov/Clatsop/Services/Family\\_Court\\_Program.page](http://courts.oregon.gov/Clatsop/Services/Family_Court_Program.page) (last visited Jan. 30, 2013); *Divorce Mediation Program*, UTCOURTS.GOV, <http://www.utcourts.gov/mediation/divmed/> (last visited Jan. 30, 2013) [hereinafter *Utah Divorce Mediation Program*]; *Mandatory Appellate Mediation*, MT.GOV, <http://courts.mt.gov/clerk/filing/mediation.mcp>x (last visited Jan. 30, 2013). Montana requires mandatory mediation for all appeals from district court to the supreme court involving money judgments, domestic relations, or workers' compensation claims, a program which has historically reduced the number of appeals actually heard at the supreme court by approximately ten percent. *See Mandatory Appellate Mediation, supra*.

321. *See Utah Divorce Mediation Program, supra* note 320.

322. *Id.*

323. *Id.*

324. *Id.*

325. *Id.*

V. Creating a Post-Litigation Mandatory Mediation Process at the Commission Level

A. *The Mandatory Mediation Procedure and Designing the System*

First, the split-enforcement model adopted by Congress in the 1970s serves a very critical purpose in ensuring mine safety and precluding regulatory capture. However, under today's high-stakes litigation, the system is inefficient and ineffective. The proposed system and process not only improve efficiency and outcomes, but can be done in such a way as to preclude regulatory capture. The procedures for contesting cases before the Commission must be amended and adapted if the system is going to be saved. Therefore, not only is the mandatory mediation process essential to saving the split-enforcement model and solving the case backlog, establishing a mandatory mediation process within the current procedures for contesting mine safety violations is practical, efficient, and should be embraced by all the parties. It is unreasonable to think that to prevent regulatory capture a system must preclude all cooperation and communication. On a basic level, both the system and safety are improved if the regulator and regulated can communicate and work toward a common goal: safety. Mandatory mediation with Commission oversight facilitates this goal and permits managed cooperation.

Clearly, the Commission has launched numerous initiatives to address the case backlog. Some of these programs have created a partial escape valve to traditional litigation, but have failed to bring about the types of substantive changes and reforms needed to overhaul an overwhelmed system. While the split-enforcement model<sup>326</sup> stymies regulatory capture, it was never intended to handle the volume of litigation that exists today due to increased penalties, violations, and court challenges. The split-enforcement model still offers a viable blueprint for the efficient administration of justice, as well as an essential check on the regulator-regulated relationship; however, it must be amended and updated to function in today's high-stakes litigation world. As it stands, the Commission has implemented simplified proceedings, Global Settlements, calendar calls, and new rules to expedite the settlement process, all in an effort to reduce the case backlog. Recently, MSHA announced they planned to turn back the clock and institute the new Pre-Assessment Conference, which is eerily similar to the old Pre-Penalty Conference.

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326. See 30 U.S.C. § 811(a) (2006).

The new Pre-Assessment Conference presents many of the same complaints, conflicts, and abuses as the old conferencing process.

The reforms have yielded modest results and the data suggests that ninety-six percent of cases eventually settle at some point during the litigation process.<sup>327</sup> However, a mandatory mediation process at the onset of litigation would yield even better results in a more efficient time frame, while improving the split-enforcement model. The characteristics of mediation not only encompass most of the Commission's goals in one avenue, but more importantly, create a dialogue that should reduce the amount of cases being filed in the future. If more than ninety percent of the cases eventually settle, why not capitalize on that fact by offering parties one clear, efficient, and fair alternative at the beginning of the litigation process, rather than years into the process?

Under the proposed mandatory mediation process, much of the Commission's procedures already allow for a smooth transition into a clear and effective alternative to litigation. Currently, each case is assigned a docket number when it reaches the Commission by the Chief ALJ.<sup>328</sup> The Chief ALJ could still accelerate the process by ruling on orders of settlement, dismissals, or default judgments.<sup>329</sup> Under the mediation system, the Chief ALJ's authority would remain unchanged and both of these procedural steps would remain intact.

However, instead of the Chief ALJ referring each case to an ALJ for a contested proceeding, the Chief ALJ would refer every case to mandatory mediation. There, the parties would have to participate in at least one mediation session before being allowed further access to the courts. Similar to Utah's mandatory mediation process implemented in domestic relations cases,<sup>330</sup> a good cause exception would be available to the parties to opt out of the mediation procedure. However, that exception must be rarely granted and zealously guarded in order for the mediation process to produce the desired outcomes. If mediation is unsuccessful, the parties would then find themselves back in the throes of formal litigation—an all too familiar place. In the end, a mandatory mediation system would capitalize and streamline many of the programs and initiatives already implemented by the Commission.

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327. Manning Address, *supra* note 197, at 1 (referring to settlement rates in the 2010 fiscal year).

328. INDEPENDENT AUDITOR'S REPORT AND FINANCIAL STATEMENTS, *supra* note 26, at 1.

329. *Id.*

330. See *Utah Divorce Mediation Program*, *supra* note 320.

## B. *Mediating the Dispute*

### 1. The Mediator's Approach

While establishing a mandatory escape valve for the parties is achievable, understanding who will mediate the disputes and their role and style in the process is a much different consideration. Will the mediator offer an evaluative or facilitative approach? What is each mediator's expertise and knowledge about mining, technology, and mine safety? How will impartiality be established and maintained? All these considerations will have a very important impact on the process and its long-term success.

Ideally, in this third-party designed system, an evaluative approach would offer the most effective and efficient style for the parties, as well as for remedying the backlog. The evaluative style would allow the mediator the opportunity to help each party understand their case's strengths and weaknesses. As it stands, there is already a relatively ineffective conferencing system at the beginning of the litigation. Under the current approach, MSHA relies on its own employees to serve as CLRs and facilitate settlement.<sup>331</sup> The CLRs request a ninety-day extension from the Commission in hopes of reaching settlement.<sup>332</sup> However, this process has been somewhat ineffective and undermined because CLRs and MSHA fail to consider what can or cannot be proven at trial.<sup>333</sup> The reports suggest that all too often, when MSHA enters the process, they are inflexible and unwilling to compromise; thus, the operator becomes frustrated and effectively withdraws from the process.<sup>334</sup>

An evaluative approach and style would solve both of these issues. First, the process is undermined because the regulator is also serving as the mediator, and therefore, there is a clear absence of impartiality. Thus, the operator enters the process with hesitation and distrust. Secondly, there is no objective party offering insight into strengths and weaknesses of the government's case. A simple glance at this quagmire shows that any opposing party should not serve as both the regulator and mediator in the same proceeding. Thus, an evaluative approach by an independent third party produces impartiality, as well as important perspective about

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331. HEENAN, *supra* note 24, at 6.

332. *Id.*

333. *Id.*

334. *Id.*

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each case's strengths and weaknesses, and thereby helps the parties educate each other and make more informed decisions.

Also, an evaluative approach would provide an in-depth review of court documents, pleadings, and evidence. Ideally, the mediator should stress his experience with mine safety and the regulatory climate, so as to establish his credibility with the parties and help facilitate settlement. This will have the intended effect of pushing the parties toward settlement in a more efficient manner and arriving at a position-based agreement. Unlike parties unfamiliar with the system and enthralled in an emotional tug of war, both MSHA and the operator are complex parties and are very knowledgeable with the subject matter, law, and process. Therefore, a successful system should adopt an evaluative approach because settlement will be more position-based, rather than interest-based.

## 2. Disputant Communication

One frustration expressed by operators under the current procedural framework is an inability to have their voice and concerns heard about MSHA's enforcement of higher penalties, inspections, and violations. As the system stands now, this opportunity does not transpire until much later in the process after the parties are well into the litigation process. An evaluative approach at the outset of the case would permit each party the opportunity to make opening statements and present their positions. However, most of the discussions and negotiations would still take place in private caucuses, and therefore, allow the mediator an opportunity to employ evaluative techniques. One weakness of the evaluative approach is that this direction and control can end in impasse because the parties have diminished control over the process and decision-making power. However, regardless of which style is employed, the parties already have diminished control over the process because the regulations and rules control the parameters around settlement, and the Commission controls the ultimate outcome because it must approve every settlement agreement.<sup>335</sup>

Also, substantive communication between MSHA and the operator is a real source of frustration that fuels the current backlog. This point is bolstered by MSHA's recent evaluation of the pilot mediation program where the parties reported that the process "improved" communica-

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335. 30 U.S.C. § 820(k) (2006).

tion.<sup>336</sup> Within the current stalemate, there is a very real interest-based component as some operators choose to spend more capital on litigation than the actual penalty itself. Thus, a facilitative approach could offer each party more opportunities to communicate. However, within the current regulatory framework, the legal merits control the outcome and the parties are extremely limited as to their settlement options, both from a regulatory and practical perspective. Therefore, the constraints surrounding settlements squarely restrict interest-based settlement options. Thus, a facilitative approach would create a self-defeating strategy and result. The facilitative model would improve communication; but, at the end of the process, the law and Commission restrict the parties' ability to be creative about settlement. Therefore, an evaluative approach is simply more realistic and practical. This approach would provide a chance to improve and facilitate a dialogue, but still arrive efficiently at position-based settlement agreements.

### 3. Mediator Expertise and Impartiality

Another consideration is the mediator's approach, expertise, and impartiality. The importance of these characteristics must be instilled in the mediator and become a benchmark of the process if this proposed system is truly going to serve as a legitimate solution to the case backlog. In the current regulatory environment, and with the technological and safety issues associated with mining, the mediator must possess a high level of "subject-matter expertise." In order for the parties to receive a legitimate evaluation of their case, the mediator must understand the complexities of mining and the challenges facing regulators.

The parties will require a high-level of "subject-matter expertise." One practical and efficient option would be to employ retired ALJs, solicitors, or attorneys with extensive legal experience in this area of the law to serve as mediators.<sup>337</sup> Beneficially, the mediators would require little training as to the nuances of mine safety and current administrative law issues.<sup>338</sup> However, formal mediation training would be a worthwhile and critical investment for the program's success.<sup>339</sup> Instead of the Commission hiring more ALJs and staff to promote litigation, the money

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336. HEALTH CONFERENCING PILOT, *supra* note 219, at 9.

337. Baker, *supra* note 1, at 174.

338. *Id.*

339. *Id.*

could more wisely allocated toward hiring, retaining, and training mediators, similar to the staff mediators found within the EEOC process.<sup>340</sup> Quicker judgments simply do not get to the heart of the problem and merely treat the symptoms. Thus, only a system that enables managed cooperation and communication, while not sacrificing safety, offers a real solution.

Also, by retaining retired ALJs, solicitors, and attorneys to serve as third-party neutrals, impartiality becomes achievable and transparent. Impartiality is essential to the success of an evaluative approach. Under the current conferencing systems, impartiality is limited, and through no individual's fault, undermined. First, during the conferencing opportunity at the outset of the formal review procedure, the CLR's are MSHA employees.<sup>341</sup> Thus, the process is automatically tainted and a shadow is cast over any attempt at impartiality. While the CLR has admirable goals and works hard to facilitate settlement, this conflict of interest undermines the process. Additionally, the system places the CLR in a difficult position, attempting to negotiate settlement agreements without undermining safety, and in the end both parties wind up in unworkable situations. This is evidenced by MSHA's recent evaluation concerning the pilot mediation program that showed that operators in cases involving ninety percent of the contested violations did not participate in the optional conference.<sup>342</sup> Operators clearly stated that one reason they avoided the conference is because the CLR is not an independent third party.<sup>343</sup> The process requires an independent third party.

Alternatively, if a case is not resolved during this initial conferencing opportunity or in MSHA's new Pre-Assessment Conference, it may be designated for a simplified proceeding.<sup>344</sup> During this process, the ALJ holds a pre-hearing conference in an attempt to reach settlement.<sup>345</sup> The ALJ who presides over the simplified proceedings is conflicted out of the actual proceeding, precluding the obvious conflict.<sup>346</sup> However, on a macro scale, the dual role each ALJ is required to fulfill affects perceptions of their impartiality.

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340. See Blomgren Bingham et al., *supra* note 263, at 18.

341. HEENAN, *supra* note 24, at 6.

342. HEALTH CONFERENCING PILOT, *supra* note 219, at 6.

343. *Id.* at 10.

344. Simplified Proceedings, 29 C.F.R. §§ 2700.100-2700.110 (2012).

345. 29 C.F.R. § 2700.106.

346. Simplified Proceedings, 75 Fed. Reg. 81,462 (Dec. 28, 2010) (to be codified at 29 C.F.R. pt. 2700).

It would be naïve to ignore that each ALJ most likely has specific perspectives and ideas regarding mine safety, enforcement, and an opinion as to what or who is fueling the backlog. Obviously, the parties are aware of these realities from their own knowledge and experience. Regardless of one's perspective on the best course for mine safety, the reality is that both conferencing opportunities are undermined by either the appearance of a lack of impartiality or the actual lack thereof. By retaining and hiring experienced third-party neutrals outside of MSHA and the Commission, impartiality will improve, as well as each party's contribution to the process and eventual outcome of the conference.

Finally, experienced mediators who can offer an evaluative approach, defining the problem and narrowing the issues, will create more efficiency and facilitate settlement. By narrowing the issues, a mediator may avoid many of the pitfalls that accompany a broad problem approach. Although narrowing can result in impasse, while broadening issues may address underlying sources of disagreement, here the parties enter the process knowing the limitations of the settlement process. In most cases, the operator is contesting the level of the violations and points assigned to each of them. Thus, the regulatory regime and framework place extreme limits on creativity, providing clear parameters around settlement.

C. *Embrace of the Mandatory Mediation Process and Why It Will Work*

1. Allocation of Resources and the Cost-Benefit Analysis

Parties should embrace a mandatory mediation process because they are already mediating most of their disputes in one form or another. In fact, the Commission's statistics show that matters referred to Global Settlements settled seventy-eight percent of the time.<sup>347</sup> The same source reveals that ninety percent of all cases eventually settle before trial,<sup>348</sup> evidencing the fact the parties want off the "litigation highway." Additionally, MSHA's new Pre-Assessment Conference witnessed violations settle sixty-seven percent of the time, even though only ten percent of

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347. FINAL REPORT ON THE TARGETED CASELOAD BACKLOG REDUCTION PROJECT, *supra* note 118, at 7.

348. *Id.*



operators chose to participate.<sup>349</sup> In an attempt to resolve the current backlog, the Commission has adopted a buffet-style approach to the problem. Currently, the Commission offers an assortment of settlement proceeding options: expedited settlement process in some situations,<sup>350</sup> while less-complex issues are designated for simplified proceedings.<sup>351</sup> Meanwhile, conferences are requested by the CLR's at the case's onset,<sup>352</sup> and Global Settlements are held to resolve numerous issues that one lawyer, firm, mine, or coal operator has pending with the Commission.<sup>353</sup> A calendar call system organizes cases geographically.<sup>354</sup> Each of these procedures and/or programs is geared toward the central goal of forcing the parties to resolve their issues without resorting to the long, expensive, and winding road of litigation. However, instead of the current buffet approach adopted by the Commission, why not have one process and a single "escape valve" to which the parties are referred to resolve their conflicts and get out of the litigation gridlock? Further, many of the existing programs and procedures could still be utilized during the mediation process.

If ninety percent of the cases settle at the Commission level,<sup>355</sup> one central issue that bears uncovering is: why do these cases settle? The main difference between a case that settles during the initial conferencing opportunity at the formal outset of the case,<sup>356</sup> and one settling on the eve of trial, is the amount of time, resources, and money invested or sacrificed during the case. One central benefit of a mandatory mediation process at the outset will be the financial savings reaped by both parties. Extrinsicly and practically, coal operators and companies are driven by profits, shareholders, and production. Logically, a process that offers legitimate cost savings, while not sacrificing due process rights or disadvantaging either litigant, and most importantly, not sacrificing safety, should be embraced by the parties. Many operators feel as if they do not have a voice or believe that their concerns about MSHA's oversight and

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349. HEALTH CONFERENCING PILOT, *supra* note 219.

350. Penalty Settlement, 29 C.F.R. § 2700.31 (2012).

351. 29 C.F.R. § 2700.100.

352. HEENAN, *supra* note 24, at 6.

353. CASE BACKLOG REDUCTION PROJECT JOINT OPERATING PLAN, *supra* note 102, at 14.

354. FIRST QUARTERLY PROGRESS REPORT, *supra* note 169.

355. INDEPENDENT AUDITOR'S REPORT AND FINANCIAL STATEMENTS, *supra* note 26, at 7.

356. HEENAN, *supra* note 24, at 6.

regulation go unheard until too late in the litigation process.<sup>357</sup> A formal mediation process at the outset allows for critical dialogue between the operator and MSHA.

There is little room for debate that federal revenue is and will continue to shrink, and that austerity measures are most likely on the horizon. MSHA and the government spend countless resources, time, and money litigating issues that could be more efficiently resolved. Obviously, with a shrinking federal budget leading to reduced resources being made available for MSHA, the organization would directly benefit from reducing these expenses. This would allow MSHA to allocate their limited resources instead toward better training of mine inspectors, increasing mine inspection time and visits, and working with operators to improve mine safety. While some may take the contrary position, there is no correlative support for the notion that mine safety is somehow improved by the amount of time spent within the administrative courtrooms found within the Beltway. Instead, mandatory mediation offers both parties a chance to resolve disputes while working within the confines of the split-enforcement model. The proposed system improves both cooperation and safety at the same time.

Further, by hiring and retaining retired ALJs, attorneys, or solicitors to serve as mediators, the current Commission ALJs would have more time to hear the more contentious and important cases. Mediation would save vital Commission resources currently directed toward ad hoc programs meant to plug the proverbial “holes in the dike.” The pressure to dispose of cases quickly, and the incentive to meet arbitrary guidelines set by bureaucrats, would be replaced by a sense of full adjudication and an attention to detail. Thus, for those parties who could not resolve their disputes in mediation, the litigation process and result would yield a more substantive and meaningful outcome.

## 2. Managed Communication and Cooperation

Importantly, mediation promotes communication, whereas hardball litigation tactics often undermine and impede this essential function. We want a certain amount of adversarial proceedings and positions in the regulatory process to ensure compliance and safety, and clearly, regulatory capture has been a detriment to mine safety. However, the Commission sponsored mandatory mediation process offers a rare opportunity to

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357. *See id.* at 3.

promote managed cooperation and improved communication, without sacrificing safety. Instead of each side being solely focused on the zero-sum game of winning in litigation, mediation would foster greater communication and collaboration toward a common goal: improving safety. In the current litigation-based model, communication is almost non-existent. One positive yielded by the pilot mediation program is that, overall, the parties reported that the process improved communication.<sup>358</sup> Surely, some form of communication and collaboration must take place between the regulated and regulator in order for the regulatory framework to work effectively. It is simply wrong to think that any form of collaboration and communication between the parties is detrimental to safety, and instead, only leads to abuse.

A mandatory mediation process would force the parties to the table with the hopes that civil discourse and open communication between them would resolve a legitimate portion of the conflicts that are currently overwhelming the system. While Congress cannot legislate good faith or discernment, mechanisms can be put in place that will foster and ensure these goals. As with most mediation procedures, rules could be put in place that promote and ensure open and effective communication. Also, negotiations would remain confidential and mediators would be precluded from testifying at trial. In the end, a system is created that allows the operator and MSHA to arrive at a neutral table for meaningful discourse without sacrificing safety. The Commission would still be charged with approving all settlement agreements and would have authority to reject unjust settlements and abuse.

### 3. Mandatory Mediation Success

Cost savings and improved communication will go a long way in resolving the backlog and restoring faith in an otherwise damaged process. Further, statistics show that mandatory mediation is successful and the parties are generally pleased with the process and outcomes. The 1994 EEOC study detailing the mandatory mediation process found that over sixty-five percent of the parties were pleased with the process, ninety-five percent of the parties trusted the mediator, and over eighty percent reported that would use mediation again.<sup>359</sup> The 2000 study revealed that over ninety percent of the parties would use mediation again to solve

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358. HEALTH CONFERENCING PILOT, *supra* note 219.

359. Blomgren Bingham et al., *supra* note 263, at 19.

their disputes.<sup>360</sup> Therefore, imposing mandatory mediation on MSHA and the operator will likely produce favorable results.

Similar to the EEOC third-party designed process, whereby most participants found the process fair because it was designed by a third-party and not by the disputants, a mediation system established by the Commission aimed at resolving disputes should help establish fairness and credibility with the parties. While some may argue the process will produce more meaningful results if the parties chose mediation, a low participation rate would likely nullify the processes' ability to resolve the backlog. One fundamental flaw with MSHA's new Pre-Assessment Conference is that only ten percent of parties participated in the process, while ninety percent of parties chose to litigate.<sup>361</sup> Commission backed opt-in procedure will not produce the type of results needed to resolve the backlog. Additionally, as the state mortgage mediation programs show, participation rates in mandatory mediation programs are significantly higher than opt-in programs. Consequently, opt-in states are beginning to switch to mandatory participation mediation.<sup>362</sup>

In fact, seventy to seventy-five percent of homeowners reached settlements with their banks in the mandatory mediation states.<sup>363</sup> This outcome can be attributed to a whole host of factors, but one factor that relates closely to the current case backlog is the cost-benefit analysis that should be conducted by the operator and MSHA. First, mediation is a much more cost effective choice for foreclosing banks than paying voluminous amounts of attorneys' fees and court costs. Also, it makes more financial sense for the bank to work out a compromise with the homeowner and recoup a larger percentage of the loaned capital, rather than continuing to flood the market with foreclosed properties and recoup even less of their initial capital investment.

The same principles rings true for the homeowner who compromises with the bank and recoups part of her investment, instead of walking away with nothing. Additionally, the often times desperate or frustrated homeowner has a voice and decision in the outcome, instead of simply allowing the case to proceed until foreclosure. These same principles and motivating factors apply to the relationship between MSHA and the operator. These controlling principles should override most of the initial skepticism or concerns the parties have regarding the new mandatory

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360. *Id.*

361. HEALTH CONFERENCING PILOT, *supra* note 219.

362. COHEN & JAKABOVICS, *supra* note 314, at 3.

363. *Id.*

mediation program. A mandatory mediation process serves as a cost savings to both parties, but just as important, provides the parties a voice and input in the final outcome.

No matter how successful the program, there will be those participants who do not want to participate, try to undermine the process with dilatory tactics, or act in bad faith. In fact, the AAA reported that even in those cases where one party did not want to participate in the mediation, forty to fifty percent of those cases still resulted in settlement.<sup>364</sup> Thus, even in those situations where one participant did not want to participate, almost half of those cases still reached settlement. Therefore, regardless of whether or not the proposed mandatory mediation program yields a seventy-five percent success rate or a forty percent success rate, the success rates illustrate that a mandatory program at the Commission level would work.

A real concern that must be factored into the process is those individuals who simply want their day in court. Obviously, there will be circumstances where MSHA or the operators choose litigation. While this will always be an issue, and especially true for conflicts involving emotionally charged issues or controversies such as domestic relations or employee-employer based conflicts, here, the parties consist of the government and corporations. Therefore, while emotions are still running high, emotional decision-making in this process should be reduced because of the parties' beginning positions.

Finally, a successful mandatory mediation program will not only reduce the case backlog and expedite matters in the future, it will also reduce the amount of cases filed. As a dialogue begins and communication improves, conferencing opportunities before Commission jurisdiction will benefit from improved communication. Additionally, by installing the process at the Commission level and requiring Commission approval of all settlement agreements, an environment of managed cooperation can be achieved that enhances safety and precludes regulatory capture. Therefore, disputes between MSHA and the operator can be successfully resolved, and in the end, an environment can be fostered that promotes collaboration and cooperation towards the goal of mine safety.

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364. See *Paths to Mediation, with Sample Clauses*, UTAH ST. BAR (Dec. 7, 2001, 6:30 AM), [http://webster.utahbar.org/barjournal/2001/12/paths\\_to\\_mediation\\_with\\_sample.html](http://webster.utahbar.org/barjournal/2001/12/paths_to_mediation_with_sample.html). The American Arbitration Association reported that eighty-five to ninety percent of voluntarily mediated cases settle. *Id.* In those cases where one party was opposed to mediation, forty percent reached settlement in Tenth Circuit Court of Appeals and fifty percent in the Utah Court of Appeals cases. See *id.*

## VI. Conclusion

A civil penalty system should encourage cooperation and compliance. In this context, the split-enforcement model has become ineffective in today's litigation environment. While the split-enforcement model serves an important function, it must be amended to meet the problems inherent to the current climate. A Commission mandated mediation process will create an environment of managed cooperation with vital oversight. At the same time, it will improve communication and collaboration between the parties. Mediation offers an efficient, cost effective option to traditional litigation. It will not only help resolve the case backlog, but it should be embraced by the parties because, in most instances, they are already settling cases in one of the varying programs and formats offered by the Commission. The new process will not only benefit the parties and the Commission, but will help spark a renewed focus, energy, and collaboration towards a common goal: safety.