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UNITED STEEL V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

UNITED STATES STEEL CORPORATION, CONTESTANT	Contest of Citations
v.	Docket No. / Citation And Date
	LAKE 81-102-RM 293736 1/22/81
SECRETARY OF LABOR,	LAKE 81-103-RM 293739 2/9/81
MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	Lake 81-114-RM 293740 3/9/81
RESPONDENT	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	Contest of Order
PETITIONER	Docket No. LAKE 81-115-RM
v.	Order No. 296501; 3/9/81
	Minntac Mine
UNITED STATES STEEL CORPORATION, RESPONDENT	Civil Penalty Proceedings
	Docket No. / Assessment Control No.
	LAKE 81-152-M 21-00282-05024 I
	LAKE 81-167-M 21-00282-05026 R
	LAKE 81-168-M 21-00282-05025 R
	Minntac Mine

DECISION

Appearances: Louise Q. Symons, Attorney, Pittsburgh, Pennsylvania, for United States Steel Corporation
Stephen P. Kramer, Esq., U.S. Department of Labor, for the Secretary of Labor and MSHA
Clifford Kesanen, Virginia, Minnesota, Miners' Representative, Local 1938, United Steelworkers of America

Before: Administrative Law Judge Steffey (FOOTNOTE 1)

This consolidated proceeding involves four notices of contest and three petitions for assessment of civil penalty. Two of the notices of contest were filed on February 23, 1981, by United States Steel Corporation (USS) in Docket Nos. LAKE 81-102-RM and LAKE 81-103-RM and the remaining two notices of contest were filed by USS on March 27, 1981, in Docket Nos. LAKE 81-114-RM and LAKE 81-115-RM. The Secretary of Labor filed the petition for assessment of civil penalty in Docket No. LAKE 81-152-M on June 22, 1981, and thereafter

filed the petitions for assessment of civil penalty in Docket Nos. LAKE 81-167-M and LAKE 81-168-M on July 20, 1981. All of the notices of contest and the civil penalty cases relate to three citations and one order of withdrawal which were written by an MSHA inspector after a truck had rolled over on January 22, 1981. The petitions for assessment of civil penalty seek to have penalties assessed for each of the four violations alleged in the three citations and order of withdrawal whose validity is challenged in the four notices of contest filed by USS.

Additions to the Record

The hearing record which I received from Judge Cook consisted of 390 pages of transcript. Although the transcript shows that Judge Cook received in evidence Exhibits M-1 through M-7 and subsequently gave them to the reporter to be returned to him with the transcript (Tr. 13; 390), no exhibits were with the transcript when I received it. After the reporter had advised me that she did not have the exhibits, I requested that MSHA's counsel provide me with replacement copies of Exhibits M-1 through M-7. Additionally, at my request, MSHA's counsel supplied me with two exhibits which are hereinafter identified as Exhibits M-8 and M-9 and those exhibits are received in evidence in the part of my decision which deals with the notices of contest filed in Docket Nos. LAKE 81-114-RM and LAKE 81-115-RM.

Issues

The issues raised by the notices of contest are (1) whether USS violated section 103(a) of the Act when it refused to allow an inspector to travel to the place where a truck had rolled over, (2) whether USS violated section 103(a) of the Act when it refused to allow an inspector to interview a foreman until an attorney provided by USS was present, and (3) whether USS violated 30 C.F.R. 55.9-1 and 55.9-2 when it allegedly failed to record and correct a misalignment in a truck and whether such alleged failure was unwarrantable under the provisions of section 104(d)(1) of the Act.

The issues raised by the three petitions for assessment of civil penalty are whether the violations which are the subject of the notices of contest occurred and, if so, what civil penalties should be assessed, based on the six criteria set forth in section 110(i) of the Act.

Counsel for USS and MSHA filed simultaneous posthearing briefs which were received on November 2, 1981, and November 3, 1981, respectively.

Findings of Fact

My rulings on the issues raised in this proceeding will be based on the findings of fact set forth below:

1. An MSHA inspector, James R. Bagley, was conducting a regular inspection at United States Steel Company's Minntac Mine

in Minnesota on January 22, 1981. The inspector was accompanied by James Barmore, a safety engineer who works for USS, and by Larry Claude, an auto mechanic who works

for USS and who is co-chairman of the Safety Committee of the United Steelworkers of America (Tr. 15-16; 134; 181). About noon, the three men interrupted their inspection and returned to the mine office building for the purpose of eating lunch. As they were walking down the hall to Barmore's office, another USS employee advised Barmore that there had been an accident involving a rollover of 2-1/2-ton Ford truck No. 856 used by three of USS's employees who were assigned to the Bull Gang or shovel-repair crew (Tr. 17-18; 136; 181-182).

2. Barmore considered it within the scope of his duties to investigate the accident (Tr. 209). He went into his office to obtain his camera, and at that time, he received a radio communication further advising him that the accident had occurred. When Barmore came out of his office, he stated to Claude, the Union's representative, that he and Claude would have to go to the scene of the accident (Tr. 182). Bagley, the inspector, walked behind Barmore and Claude to the main door of the office building. Claude passed through the main door in front of Barmore, at which time, Barmore turned to the inspector and asked him where in the ___ he thought he was going and what he intended to do (Tr. 18; 136; 182-183). The inspector stated that he intended to accompany Barmore and Claude to the site of the accident (Tr. 18; 137; 183). Barmore explained to the inspector that he had a contractual obligation to investigate accidents in conjunction with a Union representative, but that he could not permit the inspector to accompany him in USS's truck to the site of the accident because he did not want his arrival at the scene of the accident in the company of an inspector to be misinterpreted as the initiation of an MSHA investigation of an accident when, in fact, it was a combined company-union investigation (Tr. 19; 55; 137; 183; 209-212; 362). The inspector believed that Barmore was improperly precluding him from going to the scene of an accident and stated that Barmore should permit him to go to the accident site as a matter of courtesy even if Barmore felt the inspector's presence was intrusive during Barmore's initial examination of the accident site (Tr. 19; 137; 184).

3. When Barmore repeatedly insisted that the inspector could not travel to the accident site in the same vehicle with Barmore and Claude, the inspector acceded to Barmore's refusal to allow him to travel to the accident site. Barmore had assured the inspector that, after Barmore and Claude had returned from their inspection of the accident site, Barmore would give the inspector a report of what he had observed and show the inspector any pictures made (Tr. 19; 189). When Barmore arrived at the accident site, he found that other USS personnel were already at the accident site and that another Union representative was also at the scene (Tr. 139; 186-187). Since other USS personnel were measuring the length and depth of skidmarks and gouge marks in the roadway, Barmore made some pictures and concluded that he should rejoin the inspector at the mine office. The inspector ate lunch while waiting for Barmore and Claude to return (Tr. 20).

4. Barmore and Claude returned to the mine office from their investigation of the accident within a period of from 30 to 45 minutes (Tr. 20; 188). Barmore laid the pictures he had made on his desk and the pictures were

handed to the inspector by Claude (Tr. 21; 189; 203). Two employees beside the driver had been riding in the truck when it rolled over. All three employees had been taken to a clinic for examination and Barmore, at that time, was unsure of the extent of their injuries (Tr. 188). Eventually, it was found that two of the employees had strained backs and one employee had suffered a chipped elbow (Exh. M-7). They were all placed on restricted duty for a short time and did not suffer any permanent serious injuries (Tr. 39-40; 164-165; 278; 332; 375). The truck was damaged extensively in that the box or bed of the truck was torn off during the rollover, most of the leaves in the left rear spring were wrenched loose and strewn along the roadway, and the rear half of the drive shaft was jerked loose and thrown down on the roadway (Tr. 130; 145; 165; 252-259; 299-301; 303-304; 381).

5. The driver of the truck, Martin Kaivola, had reported to his supervisor, Cedric Roivanen, on January 21, 1981, the day before the rollover, that the left rear wheels had slipped backwards about 2-1/2 inches from their normal position (Exh. M-5; Tr. 37; 50; 99; 156; 322). The report to Roivanen was made about 1 p.m. and Roivanen asked Kaivola if the truck could be used for the remainder of Kaivola's day shift. Kaivola stated that it could and Roivanen told Kaivola to turn the truck in for repair at the end of his shift so that the problem could be corrected on the afternoon shift. Kaivola left early on January 21, 1981, with Roivanen's express permission and Kaivola's two assistants failed to turn in any report to the auto repair shop or to Roivanen's office that the shifting in the truck's rear end needed to be corrected (Tr. 155-156). Roivanen was so busy with his duties of determining the location of shovels in need of repair and ascertaining the availability of spare parts, that he forgot that Kaivola had reported the shifting problem in the rear end of Truck No. 856 (Tr. 327-328).

6. Truck No. 856 was continued in use on the afternoon shift of January 21, 1981, without being repaired (Tr. 47; 157). The truck was sitting in its usual location on the morning of January 22, 1981, when Kaivola came to work (Tr. 158). Kaivola and one of his assistants checked the oil in the truck's engine and examined the truck in general. Kaivola wondered whether the shifting in the rear end had been corrected (Tr. 97; 159; 380). The truck looked all right to him and was, therefore, driven to two different shovel-repair jobs on January 22 (Tr. 162; 381). Shortly after Kaivola and his two assistants had left the second job site and were on their way to turn in some parts for repair, Kaivola noticed smoke coming from the left rear dual wheels (Tr. 96; 162; 381). He stated that the rear end must have shifted again because smoke was coming from the left rear tires (Tr. 163). Richard Boucher and Richard Woullet, both of whom were apprentice wheelwrights, were riding in the truck with Kaivola (Tr. 88; 373). Boucher turned to look at the smoke mentioned by Kaivola. At that moment, some thumping noises were heard and the truck flipped completely over and landed back on its wheels (Tr. 165; 381).

7. The word "accident" is defined in section 3(k) of the

Act as including "* * * a mine explosion, mine ignition, mine fire, or mine inundation, or injury to, or death of, any person". The Secretary has defined

the word "accident" in 30 C.F.R. 50.2(h) as including 12 different situations, but the portion of section 50.2(h) which is most pertinent to the rollover involved in this proceeding is section 50.2(h)(2) which states that an accident is "[a]n injury to an individual at a mine which has a reasonable potential to cause death." If an operator finds that an accident within the meaning of section 50.2(h) has occurred, the operator is required by section 50.10 to notify MSHA immediately that an accident has occurred and MSHA is required by section 50.11(a) to notify the operator within 24 hours whether MSHA intends to conduct an investigation of the accident. Section 50.11(b) requires each operator to investigate all accidents which occur. If the operator's investigation results in a conclusion that no "accident" within the meaning of section 50.2(h) has occurred, the operator does not have to report the "accident" to MSHA immediately, but the operator is required by section 50.20 to report the accident to MSHA within 10 days after its occurrence on a Form 7000-1. "Immediately" reportable accidents also have to be reported to MSHA on a Form 7000-1 (Section 50.20-5).

8. All of USS's personnel who investigated the rollover of Truck No. 856 unanimously concluded that no "accident" within the meaning of section 50.2(h) had occurred and the accident was reported to MSHA only on a Form 7000-1 (Tr. 185; 226-227; 240; 278-283). The reason for their concluding that no accident within the meaning of section 50.2(h)(2) had occurred was that none of the three employees (Kaivola, Boucher, and Woullet) who were riding in the truck at the time the rollover occurred received an injury which had "* * * a reasonable potential to cause death" (Tr. 278). Steven D. Starkovich, Barmore's supervisor, took the position at the hearing that since the investigation showed that no "accident" reportable to MSHA under section 50.10 had occurred, MSHA had no reason to investigate the "accident" under section 50.11(a). Starkovich stated that Barmore had correctly refused to allow the inspector to accompany him and Claude to the accident scene because the inspector had no right to investigate an accident until USS's personnel had first investigated the accident in order to determine whether a reportable "accident" within the meaning of sections 50.2(h) and 50.10 had occurred (Tr. 276-278).

9. Barmore and Starkovich took the position that Barmore had only refused to allow the inspector to ride in the vehicle with Barmore and Claude to the accident scene. They maintained that the inspector was still free to go to the accident scene by an alternative means. Barmore and Starkovich agreed that it is the practice at the Minntac Mine for one of USS's safety engineers to accompany the inspectors on all inspections and to provide the vehicle in which they travel to the various inspection sites. Although Barmore's refusal to allow the inspector to ride with him left the inspector without any obvious means of transportation, Barmore and Starkovich stated that the inspector could have called Thomas Wasley, another MSHA inspector who was also at the Minntac Mine on January 22, 1981, for the purpose of requesting that Wasley bring his MSHA vehicle to the mine office so as to transport the stranded inspector to the

accident scene. Even though Barmore stated that the inspector could have requested permission to use any of about 50 USS vehicles which were parked close to the mine office, Starkovich

stated that if the inspector had called him, he would have refused to take the inspector to the accident site until after he had first checked with Barmore to find out whether a "reportable" accident within the meaning of sections 50.2(h)(2) and 50.10 had occurred (Tr. 184; 192; 197; 199-201; 211; 270; 273-275; 280; 287-291).

10. When the inspector returned to his office on January 22, 1981, he told his supervisor that he believed Barmore had interfered with his right to inspect and that he would like to write a citation for Barmore's refusal to allow him to go to the accident site (Tr. 23). His supervisor agreed with him, so the inspector thereafter wrote Citation No. 293736 dated January 22, 1981, under section 104(a) of the Act alleging that USS had violated section 103(a) of the Act because:

> During a regular inspection on January 22, 1981, at approximately 12:10 p.m. Jim Barmore, Safety Engineer, was informed in the presence of this inspector that an accident had occurred at the Prindle Road crossing in the East Pit. The accident involved the Number 856 Bull Gang Service Truck which rolled over with three employees in a six-man cab. Upon expressing my intent to accompany the safety engineer and the miners' representative to the accident site, I was told by the safety engineer that he did not have to and would not permit me to visit the accident site. This action by the safety engineer interfered with an authorized representative in carrying out the requirements of section 103(a) of the Act. I was not given the opportunity to evaluate the cause of the accident or to determine if any mandatory safety or health standard had been violated.

11. MSHA did not contest USS's determination that the rollover of Truck No. 856 on January 22, 1981, was an unreportable accident under section 50.2(h)(2) (Tr. 241). Therefore, MSHA did not have any reason to determine whether the accident should be investigated under section 50.11(a). On February 5, 1981, about 2 weeks after the occurrence of the accident, however, MSHA received a complaint requesting that MSHA conduct an investigation of the accident. Pursuant to the complaint, Inspector Bagley returned to Minntac Mine on February 9, 1981, along with Inspector James C. King, for the purpose of conducting an investigation of the rollover accident which had occurred on January 22, 1981 (Tr. 28). The inspector on January 23, 1981, had already served Citation No. 293736, described in Finding No. 10 above, on Barmore (Tr. 26-27). The inspector terminated the citation after Barmore's supervisor agreed to allow the inspector to examine Truck No. 856 and interview the employees who were riding in the truck (Exh. M-3, p. 4; Tr. 29). The inspector examined the truck which had been towed to the auto shop (Tr. 32). The truck had not been repaired in any way (Tr. 33-34). The inspector also interviewed Kaivola, the driver of the truck, on February 9, 1981, but the other two employees, Boucher and Woullet, who had been riding in the truck at the time of the

rollover (Tr. 39-40), were attending a vocational technical school and were unavailable for interviewing on February 9, 1981 (Tr. 41).

12. As previously indicated above, Starkovich was supervisor of Minntac operations. When Inspector Bagley requested that Starkovich permit him to interview Roivanen, the supervisor of the employees who were riding in the truck at the time of the rollover, Starkovich stated that the inspector could interview Roivanen only in the presence of an attorney to be provided by USS (Tr. 30). Although the inspector requested several different times on February 9 that he be permitted to interview Roivanen, Starkovich or Rantala, a safety engineer, repeated each time that no interview could be conducted until such time as one of USS's attorneys was present (Tr. 35-36). Starkovich called Pittsburgh to ask about an attorney's availability, but no date was set on which the inspector could return for interviewing Roivanen in the presence of an attorney. Starkovich indicated to the inspector that he would let him know when an interview of Roivanen in an attorney's presence could be arranged (Tr. 30).

13. When Inspector Bagley did not hear from Starkovich on Tuesday, February 10, 1981, he returned to the Minntac Mine on Wednesday, February 11, 1981, along with Inspector Wasley, and again asked that he be permitted to interview Roivanen. Starkovich repeated that Roivanen could be interviewed only in the presence of an attorney. Starkovich also advised the inspectors that if they were to go to see Roivanen out of an attorney's presence, that Roivanen would only look at them and would not attempt to answer their questions (Tr. 42-43; 244-245; 267; 365; 370).

14. When Inspector Bagley returned to his office on February 11, 1981, he explained to his supervisor that he believed that Starkovich's repeated refusals to allow him to talk to Roivanen was an interference with an MSHA investigation and that he thought a citation should be written for that refusal (Tr. 43-44). His supervisor agreed with him and Inspector Bagley wrote Citation No. 293739 dated February 9, 1981, alleging a violation of section 103(a) of the Act because:

> On February 9, 1981, at approximately 10:30 while attempting to continue an accident investigation involving the rollover accident of No. 856 Bullgang truck which occurred on January 22, 1981, in the East Pit, Inspector James C. King (A.R. #735) and myself (James R. Bagley, A.R. #782) were denied the right to confer with Cedric Roivanen, bullgang foreman. Upon expressing our intent to confer with the foreman, Steve Starkovich, supervisor of safety, U.S. Steel's Minnesota ore operations, informed us that we could not confer with the foreman unless a U.S. Steel corporate lawyer was present. On February 11, 1981, at approximately 11:00 a.m. during a subsequent attempt to confer with Cedric Roivanen, bullgang foreman, Steve Starkovich continued to deny Inspector Thomas C. Wasley (A.R. #902) and myself (James R. Bagley A.R. #782) the right to confer with the foreman. This action by Steve Starkovich constitutes interference with and impedence of three authorized MSHA representatives during the

course of an MSHA accident investigation.

15. When Inspectors Bagley and Wasley returned to the Minntac Mine

on February 12, 1981, they served the above-described Citation No. 293739 on Starkovich and he immediately called someone in order to find out when an attorney could be provided so that the citation could be abated. After he had completed the phone call, he advised Bagley that an attorney would be present the next day, February 13, at 1 p.m. so that they could interview Roivanen (Tr. 45; 246; 377). The inspectors also on February 12 interviewed Boucher and Woullet, the other employees who had been riding in the truck with Kaivola at the time of the rollover, by going to the vocational school and talking to them about 4 p.m. (Tr. 42; 248; 373-374).

16. Roivanen was interviewed by the inspectors on February 13, 1981 (Tr. 45; 248; 367). Roivanen stated that he had been advised by his supervisor that he should not talk to an MSHA inspector about the truck's rollover unless an attorney provided by USS was present (Tr. 334-335; 343). Roivanen experienced some anxiety when he was told that an attorney would have to be present at the interview, but it did not perturb him excessively because he said he did not think that he had done anything wrong (Tr. 334; 336). Roivanen was advised by Inspector Bagley that nothing might result from the inspectors' investigation of the truck's rollover, or that a citation or order might be written as a result of the investigation (Tr. 86; 336; 338; 369). Roivanen agreed that Kaivola had told him about the shifting of the truck's rear end and that he had forgotten about the matter at the end of the shift and did not make any oral or written report concerning the repair of the truck's rear-end alignment (Tr. 327-329). Roivanen also stated that he would have driven the truck after having been advised of the shifting rear end because shifting rear ends were common occurrences and that nothing, so far as he knew, had ever happened as a result of a shifting rear end prior to the accident on January 22, 1981, other than the fact that the tires would rub in the wheel wells so much that they would smoke extensively and would sometimes stall out the engines entirely so that the trucks couldn't be driven and had to be towed to the repair shop (Tr. 356; 358). Roivanen claimed that he was surprised when the rollover occurred on January 22, 1981, because he had never heard of such an accident as that prior to the time the truck flipped over (Tr. 333-334).

17. As to whether the shifting rear end had been properly reported and recorded, Roivanen said that they had tried to start a procedure which involved the writing of walk-around reports by the men in his shovel-repair department (Tr. 330). At first the walk-around reporting forms were given to all the men, but they failed to fill them out (Tr. 355). Then the foremen tried giving the forms or sheets only to the employees to whom vehicles were assigned. They received almost no cooperation from the 130 men in their department (Tr. 351-352). The only way that they could have enforced the written system of submitting daily inspection reports would have been to have handed out disciplinary action against those who failed to fill out the slips. The foremen felt that disciplining the men over their failure to fill out slips would only cause general turmoil and the foremen reluctantly resorted to their former procedure under which the employees were

still urged to fill out a walk-around sheet and place it on a clip board in the foremen's office if an actual repair was needed, but it was also

permissible for an employee merely to report a needed repair orally to his supervisor and then take a vehicle to the auto shop for repair after the supervisor had approved the making of the repair (Tr. 358). In the case of the rear-end problem reported by Kaivola in this proceeding, Roivanen said that Kaivola had reported the matter to him orally and that, if the matter had been taken care of as Roivanen intended, it would have been reported orally by Kaivola or Boucher or Woullet to the auto shop (Tr. 352; 355). The auto shop did keep written records of all repairs which were requested and the auto shop's records were maintained on a permanent basis with respect to approximately 654 vehicles used in the Minntac operations (Tr. 313-314).

18. John Primozich was foreman in charge of the auto repair shops which performed all maintenance and repair work on the vehicles used in the Minntac operations (Tr. 292). He said that from 900 to 2,850 vehicles passed through the shops for maintenance within a single month (Tr. 294). He testified that it was common to see vehicles with shifting rear ends and that employees did not always turn them in for repair (Tr. 294). Often he would see shifting rear ends and other problems and ask that the vehicles be brought to the shop for repair before they were further used. Sometimes it was necessary for him to appeal to a supervisor before a given employee would cease operating a vehicle long enough for it to be repaired in the shop (Tr. 298). Primozich said that he would not personally continue to drive a vehicle with a 2-1/2-inch shifting of the rear end because that sort of condition will continue to deteriorate and may cause a serious accident such as that which occurred on January 22, 1981 (Tr. 37; 322-323). It was Primozich's opinion that the rollover of Truck No. 856 was caused by leaves falling from the left rear spring so as to produce a lifting action between the wheels and the box or the ground (Tr. 304).

19. After he had completed his investigation of the rollover accident which occurred on January 22, 1981, Inspector Bagley wrote Order of Withdrawal No. 293740 dated March 9, 1981, under section 104(d)(1) of the Act alleging a violation of section 55.9-1 because:

> On January 22, 1981, at approximately 11:25 a.m., an accident occurred near the Prindle Road crossing in the East Pit. The accident involved the Number 856 Bull Gang service truck which rolled over injuring three employees. A subsequent investigation revealed that the left side rear axle housing apparently shifted back which allowed the rear duals to contact the truck box. Statements made by Martin Kaivola, driver of the truck, and Richard Boucher, injured and witness, indicated that on January 21, 1981, the day before the accident, it was reported to their foreman, Cedric Roivanen, that the truck's rear end was shifted back approximately 2-1/2 inches. During a follow-up interview with Cedric Roivanen, Bull Gang Foreman, he confirmed that the shifting rear end had in fact been reported to him on January 21, 1981, but that he had forgotten about it.

The company could produce no records of the unsafe condition being reported, hence did not demonstrate reasonable care in recording or maintaining a record

> of an equipment defect which was reported and which affected the safety of three employees. This constitutes an unwarrantable failure.

20. Inspector Bagley's investigation of the rollover of Truck No. 856 also caused him to write Order of Withdrawal No. 296501 dated March 9, 1981, under section 104(d)(1) of the Act alleging a violation of section 55.9-2 because:

> On January 22, 1981, an accident occurred near the Prindle Road crossing in the East Pit. The accident involved the Number 856 Bull Gang service truck which rolled over injuring three employees. A subsequent investigation revealed that the left side rear axle housing apparently shifted back, which allowed the rear duals to contact the truck box. Statements made by Martin Kaivola, driver of the truck, and Richard Boucher, injured and witness, indicated that on January 21, 1981, the day before the accident, it was reported to their foreman, Cedric Roivanen, that the truck's rear end was shifted back approximately 2-1/2 inches. During a follow-up interview with Cedric Roivanen, Bull Gang Foreman, he confirmed that the shifting rear end had in fact been reported to him on January 21, 1981, but that he had forgotten about it. The truck was not removed from service to correct the reported defect, but continued to be used for the remainder of the shift on which it was reported. The truck was also used on the following afternoon shift and again during the shift on which the accident occurred. The failure of the operator to act on information that gave him knowledge, or reason to know, that an unsafe condition existed, which affected the safety of three employees, is unwarrantable.

21. Starkovich testified that USS's investigation of the rollover accident resulted in a conclusion that the weight of the truck and the speed at which the truck was being driven contributed to the accident. USS's claim that the truck was traveling at a speed of at least 39 miles per hour when it turned over was based on a speed formula and calculations made by a highway patrolman using measurements supplied by USS's personnel (Tr. 249-250). The formula was not supported at the hearing because Starkovich did not know what assumptions the highway patrolman had made about the fact that the truck had rolled over, thereby losing much of its weight, or what assumptions had been made as to the number of wheels which may have been on the ground to slide at any given time (Tr. 250-258). Kaivola, the driver of the truck at the time of the accident, stated that he was traveling between 30 and 35 miles per hour just before the accident occurred (Tr. 164; 173). Boucher, one of the employees riding in the truck when it rolled over, stated that he had driven the truck on the day before the accident and had noticed that the speedometer was not working (Tr. 382). Moreover, Boucher testified that the truck was equipped with a governor which would not permit the truck to be driven at a high rate of

speed even if they had wanted to drive it fast (Tr. 382). Primozich, foreman of the repair shop, stated that he had driven a similar vehicle at 30 miles per hour after the accident, but that driving

another vehicle did not add much to his determination as to what caused Kaivola's truck to roll over and that he did not know for certain what effect speed might have had in causing the accident (Tr. 306).

22. The parties stipulated that James R. Bagley, James King, and Tom Wasley were duly authorized representatives of the Secretary at all relevant times, that Minntac Mine is owned and operated by USS, that products from the Minntac Mine enter commerce and that USS is subject to the jurisdiction of the Act and the Commission, that payment of penalties will not adversely affect USS's ability to continue in business, that USS demonstrated a good-faith effort to achieve rapid compliance after being cited for alleged violations, that USS's history of previous violations is that reflected in Exhibit M-1, and that USS is a large operator (Tr. 12).

Consideration of Parties' Arguments

Docket Nos. LAKE 81-102-RM and LAKE 81-167-M

Introduction

In a notice of contest filed on February 23, 1981, in Docket No. LAKE 81-102-RM, USS seeks review of Citation No. 293736 issued on January 22, 1981, pursuant to section 104(a) of the Act, alleging a violation of section 103(a) of the Act. In a proposal for a penalty filed on July 20, 1981, in Docket No. LAKE 81-167-M, the Secretary of Labor seeks assessment of a civil penalty for the violation of section 103(a) alleged in Citation No. 293736.

Citation No. 293736, as modified on February 26, 1981, alleges that USS violated section 103(a) when one of USS's safety engineers, James Barmore, refused to allow Inspector Bagley to accompany him to the place where one of USS's trucks had rolled over while a driver and two other USS employees were riding in it (Exh. M-3). Barmore heard about the truck's rolling over while he, the inspector, and Larry Claude, a miners' representative, were walking up the hallway in USS's office building about noon. Barmore obtained his camera from his office and stated that he and Claude would have to go to the site of the place where the truck had rolled over, but Barmore refused to allow the inspector to accompany him and Claude because Barmore claimed that he was contractually obligated to conduct a company-union investigation of accidents. The inspector told Barmore that it was wrong for Barmore to refuse to allow him to go with Barmore to the scene of the truck's rollover, but Barmore, nevertheless, refused to allow the inspector to ride with him and Claude to the place where the rollover had occurred (Finding Nos. 1 and 2, supra).

The inspector did not write Citation No. 293736 until he had returned to his office and had discussed the matter with his supervisor (Finding No. 10, supra). The inspector believed that Barmore's refusal to allow him to go with Barmore and Claude to the place where the truck had rolled over was

a violation of section 103(a) of the Act.(FOOTNOTE 2)

Inspection versus Investigation

USS's brief (p. 4) argues that the inspector was at USS's mine for the purpose of conducting an inspection under section 103(a) of the Act when he learned that an accident had occurred on mine property. Upon learning of the accident, USS claims that the inspector "decided that he should drop his regular inspection and begin an accident investigation" [Emphasis is part of USS's argument.]. USS's brief (p. 5) then claims that the Act clearly differentiates between regular inspections and accident investigations. A regular inspection, it is said, takes place under the authority of section 103(a), whereas accident investigations are governed by subsections (b), (d), (j), and (k) of section 103. USS notes that subsection (b) relates to hearings to be conducted by the Secretary with respect to accidents, subsection (d) requires operators to investigate all accidents, and that subsections (j) and (k) impose an obligation on operators to report accidents to the Secretary and give the Secretary authority to preserve the accident site and take necessary steps to protect people. USS emphasizes that absurd results would occur if operators had to preserve the scene of such minor accidents as a stubbed toe or a mashed thumb. Therefore, USS points out that the Secretary has defined the word accident in

30 C.F.R. 50.2(h)(2), to the extent here pertinent, as "[a]n injury to an individual which has a reasonable potential to cause death".

USS's brief (p. 6) points out further that section 50.10 requires an operator to report an accident to MSHA immediately only if the accident is of a type specified in section 50.2, that is, in this instance, an accident causing injuries which have a reasonable potential to cause death. Since the evidence in this case clearly shows that the three employees involved in the truck's rollover had sprained backs and a chipped elbow, no one has ever claimed that the accident here involved had a reasonable potential to cause death (Finding No. 4, supra). USS's brief continues its explanation by observing that if an accident does involve an injury with a reasonable potential to cause death, it must be reported to MSHA immediately under section 50.10, but once the accident is reported, section 50.11(a) requires the MSHA District or Subdistrict Manager to determine within 24 hours after notification whether to conduct an investigation.

Based on the provisions in the Act and regulations discussed above, USS's brief (p. 6) contends that the inspector had no decision-making authority to determine whether the truck's rollover was an accident requiring an MSHA investigation. USS argues that the inspector was insisting upon investigating an incident, rather than an accident having a reasonable potential to cause death. USS claims that the regulatory scheme can work only if USS and other operators are given a chance to determine what they are dealing with before deciding whether an accident has occurred which requires them to call MSHA immediately and await MSHA's 24-hour determination as to whether an investigation by MSHA will be conducted. USS's brief (p. 7) argues that Barmore explained to the inspector that it was necessary for Barmore to conduct a joint company-union investigation and that Barmore did not actually prevent the inspector from going to the place where the truck had rolled over, but simply had forbidden the inspector to ride in the same vehicle in which he and the miners' representative were riding. It is said that Barmore did not want the inspector to accompany him to the scene of the accident because other USS personnel at the accident site would be likely, upon seeing the inspector with Barmore, to believe that management had endorsed MSHA's taking over an investigation which should have been a joint undertaking by management and the union.

Disposition of USS's "Inspection versus Investigation Argument"

There are so many fallacious aspects to USS's argument to the effect that an inspector can't examine the site of an accident which occurs when he is present at a mine for the purpose of conducting a regular inspection, that it is difficult to decide which erroneous aspect of the argument to consider first. It should first be observed that the purpose and scope of Part 50 of the Code of Federal Regulations is explained in Section 50.1 which states that:

* * * The purpose of this part is to implement MSHA's authority to investigate, and to obtain and utilize information pertaining

to, accidents, injuries, and illnesses occurring or originating in mines. In utilizing information received under Part 50, MSHA will develop rates of injury occurrence * * * [and] * * * data respecting injury severity * * *.
Part 50, in carrying out its announced statistical purpose, requires operators to report all accidents, regardless of severity, to MSHA on Forms 7000-1. In promulgating Part 50, MSHA recognized, however, that section 103(j) of the Act requires operators not only to notify the Secretary of the occurrence of accidents, but also requires the operator to "take appropriate measures to prevent the destruction of any evidence which would assist in investigating the cause" of accidents. Therefore, section 50.2(h) categorizes 12 different kinds of accidents as to which an operator is required to give "immediate notification" under section 50.10. When MSHA receives "immediate notification" under section 50.10 that an accident has occurred, MSHA is then required by section 50.11(a) to determine within 24 hours whether MSHA plans to conduct an investigation of the accident. Section 50.12 provides that the operator may not alter an accident site, without MSHA's permission, until the investigation has been completed. It is obvious, therefore, that the purpose for requiring "immediate notification" of serious accidents is to provide an orderly and immediate procedure under which operators will know within 24 hours after reporting such accidents whether they are required by section 103(j) to "take appropriate measures to prevent the destruction of any evidence which would assist in investigating the cause" of the accident.

The fact that an operator is required to provide "immediate notification" as to a specific type of accident does not, however, relieve the operator of the obligation of reporting the accident to MSHA on a Form 7000-1, just as the operator is required to report any other accident not serious enough to be included within the 12 categories of "immediate-notification" accidents listed in section 50.2(h). Section 50.20-5 not only requires the reporting of "immediate-notification" accidents on Forms 7000-1, but provides the operator with code numbers for identifying the 12 categories which are applicable to "immediate-notification" accidents.

It can be seen from the explanation set forth above, that Part 50 was designed to provide MSHA with statistical data pertaining to all kinds of accidents regardless of their seriousness. MSHA is not precluded from investigating accidents which are of a less serious nature than "immediate-notification" accidents. Investigation of accidents not in the "immediate-notification" category, in my opinion, are provided for in section 103(a)(1) which Inspector Bagley's Citation No. 293739 claimed, until modified to section 103(a), was violated by USS in this proceeding. As the quotation of section 103(a) in footnote 2, page 12, supra, shows, inspectors are authorized to "make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines * * *"

[Emphasis supplied.]

The inspector's (Tr. 75) and my reliance on the phrase "the causes of accidents" in section 103(a)(1) has, however, been taken away by the opinion of the D.C. Circuit Court of Appeals in United Mine Workers of America v. Federal Mine Safety and Health Review Commission, et al., Nos. 79-2518, et al., ___ F.2d ___, decided February 23, 1982, in which the court majority stated on page 9 of its slip opinion that the Secretary of Labor is given no authority under clauses (1) and (2) of section 103(a) because the functions enumerated in those two clauses "appear" to have been delegated only to the Secretary of Health, Education, and Welfare [now Secretary of Health and Human Services]. Judge Tamm's dissenting opinion, at page 7, states that:

> * * * It is beyond cavil that only two of the four sets of purposes18 for which mine inspections are to be conducted fall under the aegis of the Secretary of Labor, * * *

It is not surprising that the inspector was uncertain as to the exact portion of section 103(a) to rely on in writing his Citation No. 293739 (Tr. 63) because, up to the time I read the court's opinion in the UMWA case, supra, I thought that the Secretary of Labor had authority to perform the functions set forth in both clauses (1) and (2) of section 103(a) and I thought that the only difference between the Secretary of Labor's and the Secretary of Health and Human Services' functions under those two clauses was that the Secretary of Health and Human Services could give advance warnings in doing his functions under section 103(a)(1) and (2), whereas the Secretary of Labor could not. Since the inspector has modified Citation No. 293739 to allege a violation of section 103(a), his citation is on sound legal footing, but USS is still entitled to know exactly what provisions of section 103(a) authorize an inspector to investigate an accident if the inspector is on mine property in the first instance for the purpose of engaging in a regular inspection. It is sufficient for upholding the inspector's citation if a review of the Act's provisions shows that the inspector had authority to go to the scene of the accident which occurred while he was on mine property.

The court's UMWA opinion, supra, leaves the Secretary of Labor fully clothed with the following powers under section 103(a):

Authorized representatives of the Secretary [of Labor] or the Secretary of [Health and Human Services] shall make frequent inspections and investigations in coal or other mines each year for the purpose of * * * (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirements of this Act. * * * [Emphasis supplied.]

The language quoted above shows beyond dispute that even though the inspector had come to the Minntac Mine on January 22, 1981, to make a regular inspection, he is authorized to make frequent inspections and investigations and that there is nothing in section 103(a) which requires that such investigations be restricted to those which have been reported by an operator as "immediate-notification" accidents under section 50.10. Proceeding further into section 103(a), it is further beyond dispute that the inspector on January 22, 1981, had authority to inspect or investigate any place on mine property where an imminent danger might exist or where a violation of a mandatory health or safety standard might occur.

It is worth noting that both section 104(a) of the Act, governing the issuance of citations for violating the mandatory health and safety standards, and section 107(a), governing issuance of imminent danger orders, provide that those provisions are applicable regardless of whether an inspector is engaging in an "inspection or investigation". There is nothing in either section 104(a) or in section 107(a) which provides that the word "inspection" applies only if the inspector is conducting an inspection authorized under section 50.11 after an "immediate notification" of an accident under section 50.10.

It would be fairly easy to argue that there is nothing about a truck's rolling over which could possibly be considered to be an imminent danger. That sort of conclusion, however, is not supported by the facts because Barmore, one of USS's safety engineers, testified that one of the primary concerns he had when he got to the scene of the accident was whether a leaking tank might cause a fire and that he asked one of the foremen to keep people away from the truck for that reason (Tr. 186-187). After the inspector conducted an investigation of the truck's rollover at a subsequent time, pursuant to a complaint filed under section 103(g)(1) of the Act, the inspector cited USS for two violations of the mandatory health and safety standards with respect to events leading up to the truck's rolling over.

The foregoing considerations show that Inspector Bagley had authority under section 103(a) to go to the scene of the truck's rollover for the purposes given in clauses (3) and (4) of section 103(a) and that Barmore unlawfully restrained the inspector from carrying out his functions under the Act when Barmore refused to allow the inspector to travel to the scene of the truck's rollover.

The position taken in USS's brief to the effect that the inspector had no authority to investigate the truck's rollover

was, in some respects,

not supported by USS's own witnesses. If it were true, as USS argues, that an inspector may only investigate "immediate-notification" accidents, then the inspector would have no authority to investigate the truck's rollover even if he had been standing within 1 foot of the place where the truck flipped over. Yet Starkovich, one of USS's witnesses, slated that if the inspector had been riding by the place where the truck rolled over at the time it flipped over, he would have had a right to investigate it because "[h]e's got a right to stop there at that time" (Tr. 281). Starkovich recognized that he couldn't logically use the various provisions of the Act like a straitjacket to prevent the inspector from investigating an accident which has occurred in his presence, even if the inspector may have come to the mine in the first instance only to engage in a regular inspection.

USS's argument that an inspector should not be permitted to go to the site of an accident until the operator has had a chance to determine whether it is an "imm
ediate-notification" accident has other serious flaws. One of them is that if the truck's rollover could be considered to be an "immediate notification" accident only if it resulted in injuries having a reasonable potential to cause death, that determination did not depend at all on Barmore's claim that he had to go to the scene of the accident to determine whether an "immediate-notification" accident had occurred. Barmore had no medical training which qualified him to make a conclusion that an injury might have a reasonable potential to cause death (Tr. 180). The three USS employees injured in the truck's rollover were taken to a clinic before Barmore ever arrived at the scene of the accident (Tr. 140; 188; 219). The determination of whether an accident has occurred involving a reasonable potential to cause death would have to be based on the opinion of the medical experts who examined anyone suffering from injuries caused by the accident.

Since the injured employees had been taken to a clinic immediately after the accident, Barmore, the inspector, and the miners' representative could have eaten their lunch in a normal fashion and then Barmore could have called the clinic or hospital and could have asked the physician who examined the three employees whether their injuries had a reasonable potential to cause death. Inasmuch as all of the injuries were minor in nature, the physician's answer would have been in the negative and Barmore could then have advised Bagley that the rollover had not resulted in an "immediate-notification" accident, that the accident would be reported in due course on a Form 7000-1, and that there would be no occasion for MSHA to determine within 24 hours under section 50.11(a) whether an investigation would have to be conducted. If the procedure outlined above had been followed, there would have been no reason for Barmore to go to the scene of the rollover nor for Barmore to have prohibited the inspector from going to the scene, if the only reason for Barmore's conducting a combined company-union investigation was to determine whether an "immediate-notification" accident had occurred.

Exclusivity of Management-Union Investigation

USS's brief (p. 7) claims that Barmore "explained why it was not appropriate for the inspector to ride with him to a joint union/management

safety investigation". The preponderance of the evidence shows that Barmore did not explain anything in detail until after he had returned from the accident investigation. Claude, the miners' representative, testified that the entire conversation between Barmore and the inspector, before they left to investigate the rollover, did not take more than 2 minutes (Tr. 362) and that the most that was said about the joint union-management investigation was stated by Barmore after he had returned from the accident scene (Tr. 363). The inspector could recall no specific reference to the union contract and said Barmore had, at most, referred to his contractual obligation to take Claude with him when he went to investigate the accident (Tr. 55; 65; 122). Even Barmore's testimony about the nature of his explanation of the joint union-company investigation is unconvincing because his answers are evasive and he was not even certain as to the specific section or wording of the contract which required him to conduct a joint union-management investigation (Tr. 211). A "detailed" explanation of USS's obligation to conduct joint union-management investigations ought to include a reading of the portion of the contract which allegedly required such an exclusive investigation out of the presence of an MSHA inspector.

According to Barmore's testimony, so many USS personnel had gathered at the scene of the accident, that it was necessary for him to ask someone to keep people away from the scene because Barmore was fearful that a leaking tank might cause a fire (Tr. 186-187). Moreover, there were other USS personnel, such as Tim Jayson, at the scene with more expertise in investigating vehicular accidents than Barmore possessed (Tr. 187; 189). Additionally, Barmore saw Jim Dunston, another miners' representative, at the scene of the accident and Barmore asked him to participate in the accident investigation so that Barmore and Claude could return to the mine office where Barmore had left the inspector (Tr. 186). When it is considered that Barmore left the measurement of distances of skid marks, etc., to the discretion of other USS personnel, when it is realized that Barmore entrusted the union aspect of the investigation to a miners' representative other than the representative who had accompanied Barmore to the scene, when it is considered that Barmore left the determination as to the cause of the rollover to other USS personnel, when it is recognized, as hereinbefore noted, that Barmore had to leave the determination of whether the accident involved injuries having a reasonable potential to cause death to other persons, it is hard to find anything about the accident which depended upon anything which Barmore himself did--other than perhaps the making of some pictures. The facts discussed above largely destroy Barmore's claim that if the inspector had accompanied Barmore to the scene, USS personnel would have concluded that the investigation of the truck's rollover was being conducted by MSHA, instead of by USS and the union, because the inspector would have been only a single person amid a host of USS personnel who had come to look at the scene of the truck's rollover.

It should also be pointed out that most investigations of

accidents are conducted by a group of people who represent the company, the union, and both State and Federal agencies charged with administering safety regulations. Each person who participates in an accident investigation makes

his or her own conclusions as to the cause of the accident and arrives at his or her own recommendations as to the steps which should be taken to avoid similar accidents in the future. Having an MSHA inspector present when investigations are being made would have no deleterious effect on USS's ability to conduct a joint company-union investigation.

Inspector's Shortcomings

USS's brief (p. 7) finds fault with the inspector for failing to request that he be taken to the site of the accident after Barmore and Claude had returned from the scene of the rollover and had shown him the pictures Barmore had made and had given him a description of what had happened. As I have indicated above, Barmore spent more time after his return from the accident investigation, than he had before the investigation, explaining why he could not take the inspector to the accident site. The inspector, having just heard the reasons for his being precluded from going to the accident site reemphasized, would hardly have had any reason to reassert his desire to be taken to the scene of the accident.

USS's brief (p. 7) also criticizes the inspector for having failed to issue an order to preserve the scene of the accident. That criticism is inconsistent with USS's primary argument that the inspector had no decision-making authority to determine whether an accident would be conducted under section 50.11(a). As previously explained, the primary purpose for requiring "immediate notification" of accidents under section 50.10 is to enable MSHA to advise the operator within 24 hours whether the scene of the accident has to be preserved. The inspector 's testimony shows that he had not intended to go to the scene of the accident for the purpose of conducting an investigation under section 50.11(a) (Tr. 57). Therefore, he certainly would have had no reason to issue an order pursuant to section 103(j) of the Act requiring USS to preserve the scene of the accident.

It is a fact, however, that the inspector could have argued, pursuant to section 103(k) of the Act, that since he was present when Barmore learned about the accident, the inspector had an absolute right to accompany Barmore to the scene of the accident because, under section 103(k), when an inspector is present at the scene of an accident, as Inspector Bagley was in this instance, the inspector has authority to issue appropriate orders "to insure the safety of any person in the coal or other mine" where the accident occurred. Section 103(k) also provides that if a recovery plan needs to be implemented, the operator is required to obtain the approval of the MSHA inspector before the recovery plan is implemented. When a truck rolls over, it is often necessary to extricate injured people from the truck and such recovery efforts may take hours to accomplish. Therefore, since Inspector Bagley was present when Barmore learned of the accident, Barmore should have taken the inspector with him to the scene of the accident lest he encounter some difficulties about which the inspector's advice and consent would have been useful, if not required.

The Factual Question of Inspector's Preclusion from Going to Accident Site

USS's brief (pp. 7-9) argues that Inspector Bagley was only told that he could not be permitted to ride to the scene of the accident with Barmore. It is contended that nothing was said or done which would have precluded the inspector from continuing his inspection of the mine property. It is further claimed that the inspector was left in an office with a phone and that he was free to call other USS personnel or the other MSHA inspector, who was elsewhere on mine property, for the purpose of obtaining a substitute truck to continue his inspection or travel to the scene of the accident. USS claims that while it was USS's policy to have a management representative accompany an inspector while he is on mine property, that he has the power under the Act to go anywhere on mine property he may choose to go even if USS's management does not consent to his traveling alone.

The facts are at odds with the foregoing arguments. When Barmore initiated his conversation with the inspector, advising him that he was precluded from going to the accident site, his attitude was belligerent. Both the inspector and the miners' representative indicated that Barmore asked the inspector where in the blank he thought he was going (Finding No. 2, supra). The use of objectionable words in a question of that nature does not initiate a conversation in a manner which shows that the person asking the question is planning to take much time to explain why the question has been asked. The miners' representative testified that the initial conversation with the inspector did not take more than 2 minutes and that most of the explanation was done after Barmore and he had returned from the scene of the accident (Tr. 362-363).

The inspector's view of Barmore's actions and statements are best expressed in the following questions and answers (Tr. 118):

> Q. Was there anything he [Barmore] said to you which you -- you personally would have -- would have or could have interpreted as saying that "You can't go to the accident scene in my vehicle, but you can walk down there if you want to"?
>
> A. No.
>
> Q. Okay. So the impression you got from everything he said to you was that you can't go, period?
>
> A. That's true.

Barmore's attitude after his return from the accident scene continued to be bellicose, as is obvious in the inspector's testimony at transcript pages 22-23:

> Q. I see. During -- during this conversation in the -- in the office, did you have any conversations with

Mr. Barmore

> concerning your right to -- to speak with the employees of U. S. Steel while you were on the mine property?
>
> A. Now, there was one incident when I came back to the office after I'd eaten my lunch and Larry Claude had called me and told me that I could come back to Mr. Barmore's office. After I went back to the office, it was, um -- there was a few moments of silence there. It was tense. And, ah, sort of in order to get a conversation going, I mentioned that, ah, on my way down to the hygienist's office, I'd been talking to an employee of U. S. Steel. I don't know his name. This employee had asked me if I was an MSHA inspector on the property. I said yes, I was, and he wanted to discuss with me some things that had taken place earlier at the property, ah, about citations, orders, things of that nature.
>
> But I mentioned that to Mr. Barmore, that this guy was a pretty nice guy. And Jim [Barmore] got kind of upset. He said I didn't have any right to talk to anybody on the property about those kinds of things without him or another safety engineer present.
>
> Q. I see.
>
> A. I pointed out that it wasn't me that had solicited that -- that conversation. I was -- I was asked the question, and I answered it.

Since the testimony of the miners' representative corroborates the inspector's testimony to the effect that Barmore made no detailed explanation about his obligation to perform a union-company investigation, and since Barmore's attitude was belligerent to every effort made by the inspector to bring about amiable discussions, I conclude that the inspector was fully entitled to believe that he had been precluded from going to the accident site at all on January 22, 1981, the day the accident occurred.

The evidence also shows that Barmore's refusal to allow the inspector to accompany him and Claude to the accident site effectively precluded the inspector from going there by any other means. First, it is agreed that it was USS's practice to provide a safety engineer to accompany inspectors on mine property and it was USS's policy to provide a vehicle, driven by USS's employee, to transport the inspectors to any place on mine property where inspections were to be made (Finding No. 9, supra). Further, it was USS's policy to have the safety engineer make all arrangements for inspections to be made, including obtaining a miners' representative to accompany the inspector during his tour of the mine, pursuant to section 103(f) of the Act (Tr. 267; 269). In such circumstances, when Barmore refused to permit the inspector to accompany him and Claude to the accident scene, the inspector was precluded from going at all because the inspector was left without transportation, without a safety engineer to

accompany him, and without a miners' representative to accompany him. Although Barmore claimed that the

inspector could have requested permission to use any of about 50 USS vehicles parked near the mine office (Tr. 197), it is a fact that Starkovich, Barmore's supervisor, testified that if the inspector had asked him for a vehicle to go to the scene of the accident, he would have refused to take the inspector to the scene of the accident until he had first checked with Barmore to find out what sort of accident was involved (Tr. 275; 280).

Although USS also claimed that Inspector Bagley could have called the other inspector who was on mine property that day, Bagley said that he did not know where the other inspector was and Starkovich also stated that he didn't know for certain where the other inspector was (Tr. 56; 272). Even if the other inspector had been located, a controversy would undoubtedly have occurred because the other inspector was also accompanied by another safety engineer who would have been reluctant to allow the other inspector to leave his presence for the purpose of taking Inspector Bagley to the scene of an accident to which Barmore had already ruled that Inspector Bagley could not go.

Therefore, I find that none of the excuses given by USS for refusing to allow the inspector to accompany Barmore to the scene of the accident are supported by the facts in this case, or the provisions of the Act, or Part 50 of the Code of Federal Regulations, and that USS violated section 103(a) of the Act when its agent prevented Inspector Bagley from going to the scene of the accident on January 22, 1981. I also find that Citation No. 293736 was properly issued and should be affirmed.

Assessment of Civil Penalty

In the preceding portion of this decision, I have found that a violation of section 103(a) of the Act occurred when Barmore refused to permit the inspector to examine the place where the truck rolled over. MSHA has requested that a civil penalty be assessed for that violation in the proposal for a penalty filed in Docket No. LAKE 81-167-M. The six criteria set forth in section 110(i) of the Act must be considered in assessing civil penalties.

On February 1, 1982, Unit B of the Fifth Circuit issued an opinion in Allied Products Co. v. Federal Mine Safety and Health Review Commission, No. 80-7935, reversing an administrative law judge's decision as to which the Commission had denied a petition for discretionary review. The court agreed that the violations alleged by MSHA had occurred, but it remanded the case so that the amounts of the penalties could be recalculated. The court found that MSHA had waived the normal formula set forth in 30 C.F.R. 100.3 for assessing penalties and then had failed to make the narrative findings which are required to be made when MSHA waives the routine penalty formula. The court also found that the administrative law judge had failed to explain how he had considered some of the six criteria.

There is nothing in the court's decision to show that the court was aware of the fact that the Commission has ruled in

several of its decisions that administrative law judges are not bound, in cases in which hearings have

been held, by the assessment procedures which are employed by the Assessment Office in proposing civil penalties (Rushton Mining Co., 1 FMSHRC 794 (1979); Shamrock Coal Co., 1 FMSHRC 799 (1979); Kaiser Steel Corp., 1 FMSHRC 984 (1979); U. S. Steel Corp., 1 FMSHRC 1306 (1979); Pittsburgh Coal Co., 1 FMSHRC 1468 (1979); and Co-Op Mining Co., 2 FMSHRC 784 (1980)). Of course, when a judge determines the size of a civil penalty on the basis of evidence presented in a hearing, he must specifically show how he has considered the six criteria. I do not believe that the court's decision in the Allied Products case requires me to determine a penalty by using the provisions of section 100.3 so long as I explain clearly how I have applied the six criteria in arriving at a penalty.

History of Previous Violations

It has always been my practice to increase a penalty under the criterion of history of previous violations if the evidence in a given proceeding shows that the operator has previously violated the same section of the regulations which is before me in a given case. Since I did not preside at the hearing in this proceeding, I could not inquire of MSHA's counsel whether USS has previously violated section 103(a) of the Act. Inasmuch as the record does not contain the sort of information which I normally use for assessing penalties under the criterion of history of previous violations, it is necessary in this proceeding for me to depart from my usual practice and use the assessment formula in section 100.3(c) for the purpose of evaluating USS's history of previous violations.

Exhibit M-1 reflects that for the 24 months preceding the occurrence of the violations involved in this proceeding, USS paid penalties for a total of 560 violations, or an average of 280 violations per year. Section 100.3(c)(1) shows a table which assigns penalty points based on an operator's average penalties per year. According to that table, if an operator has an average of over 50 penalties per year, five penalty points are required to be assigned for each violation being considered. Inasmuch as USS has paid penalties for more than 50 violations per year, USS's history of previous violations requires that five penalty points be assigned in this proceeding for each violation which is hereinafter found to have occurred.

Section 100.3(c) also contains paragraph (2) which is required to be used in assigning penalty points under the criterion of history of previous violations. Under paragraph (2), up to 15 penalty points are assignable if the violations written by an inspector on each day he works at a given mine total more than 1.7 violations. Paragraph (2) of section 100.3(c) cannot be used in this proceeding to assess penalties because Exhibit M-1 does not show the inspection days which were involved in USS's having paid penalties for 280 violations per year. Because of the lack of information in the record, I cannot use paragraph (2) of section 100.3(c) to assign any penalty points under the criterion of history of previous violations.

It should also be noted that if the formula in section 100.3 is used only for determining a portion of a given civil penalty under a single

criterion, an under-assessment as to that criterion will result because the assignment of penalty points under section 100.3 is intended to be cumulative as the points are determined in sequence for each of the six criteria and the size of the penalty should increase as each criterion is, in turn, considered. For example, when the five penalty points determined above under section 100.3(c)(1) are applied in the conversion table in section 100.3(g), the amount of the penalty is only $10, whereas if those same five penalty points were to be added to a cumulative total of 30 assigned points, so as to increase the number of penalty points from 30 to 35, the additional five points would increase the total penalty from $90 for 30 penalty points to $130 for 35 penalty points, or would increase the penalty by $40, instead of the penalty of $10 which results if one applies five penalty points to the bottom of the conversion table. Since I am using the provisions of section 100.3(c)(1) solely because of limitations in the record, I do not believe that my assessment of a penalty of $10 under history of previous violations can be considered to be improper, even though I shall be assessing a smaller amount under the criterion of history of previous violations than is warranted for an operator as large as USS.

Size of the Operator's Business

Finding No. 22, supra, indicates that the parties have stipulated that USS is a large operator. It has always been my practice to use the criterion of the size of an operator's business as a gauge of how large a penalty should be assessed under the other criteria. For example, if a violation is so serious in a small mine that its occurrence is very likely to kill or seriously injure one or more employees, I would normally assess a penalty of not more than $3,000 or $4,000 under all six criteria. If a moderately large operator should be involved, I would probably increase the penalty up to $6,000 or $7,000 under all six criteria. If a large company, such as USS, should be involved, I would probably assess a maximum penalty of $10,000 under all six criteria.

Under the foregoing principles, any penalty assessed in this proceeding should be in an upper range of magnitude if I should find that the other five criteria have adverse implications.

Effect of Penalties on USS's Ability To Continue in Business

Finding No. 22, supra, shows that the parties have stipulated that the payment of penalties will not adversely affect USS's ability to continue in business. The criterion of economic condition is of primary importance only in those cases in which an operator proves that it is experiencing financial losses of such magnitude that payment of penalties would prevent it from being able to discharge the interest on its indebtedness, pay its employees, and purchase necessary supplies. In this proceeding, the fact that payment of penalties will not affect USS's ability to continue in business will be applied only in the sense that any penalty required by the other criteria will not

need to be scaled down to prevent the obligation of payment of the penalty from causing USS to discontinue in business.

Good-Faith Effort To Achieve Rapid Compliance

Finding No. 22, supra, shows that the parties have stipulated that USS demonstrated a good-faith effort to achieve compliance after the inspectors had issued the citations involved in this proceeding. Under the assessment formula in section 100.3, an operator may be assigned up to a maximum of 10 points under the criterion of whether the operator made a good-faith effort to achieve rapid compliance. Under section 100.3(f), if the operator demonstrates a normal good-faith effort to achieve compliance, that is, the operator achieves compliance within the time allowed by the inspector, the penalty is neither increased nor decreased under the good-faith abatement test. If the operator shows recalcitrance about compliance with the standard cited, up to 10 penalty points may be assigned. On the other hand, if the operator demonstrates an outstanding effort to achieve compliance by correcting the violation in much less time than that given by the inspector, the penalty otherwise assessable under the other criteria is reduced by up to 10 penalty points.

It has been my practice to use the same principles set forth in section 100.3(f) insofar as penalties are determined by the operator's good-faith effort to achieve rapid compliance, the only difference being that I sometimes add more than an equivalent of 10 penalty points when an operator deliberately refuses to correct a violation which has been cited, and I have decreased a penalty by more than the equivalent of 10 penalty points when the evidence in a given proceeding showed that the operator had shut down his entire operation in order to correct a violation in much less time than the inspector had allowed.

In this proceeding the parties have stipulated that USS "demonstrated good faith in abating the citations at issue within the time given for abatement" (Tr. 12). The stipulation is satisfactory for assessing a penalty under the criterion of good-faith abatement with respect to Citation No. 293736 because, although the inspector failed to insert any termination due date in the citation when it was written, the inspector modified the citation on February 26, 1981, to insert a termination due date of February 9, 1981. The inspector had terminated the citation on February 9, 1981, by stating that USS had allowed him to inspect No. 856 truck and interview the three employees involved in the rollover of the truck. Since USS abated the violation within the period of time allowed by the inspector, there was normal abatement and the penalty otherwise assessable under the other five criteria should neither be increased nor decreased as a result of USS's normal effort to achieve rapid compliance.

Gravity

The violation of section 103(a) was moderately serious because Barmore's refusal to permit Inspector Bagley to accompany him and Claude to the scene of the truck's rollover prevented an MSHA inspector from being able to carry out his functions as an inspector, those functions being, as hereinbefore explained, the

checking of accident sites to determine whether an imminent

danger exists and whether violations of the mandatory health and safety standards have occurred. USS claims that inspectors have the power to go anywhere on mine property without the operator's permission, citing Judge Melick's decision in Summitville Tiles, Inc., 2 FMSHRC 740 (1980), in which he held that "a warrantless nonconsensual MSHA inspection of Summitville was legally permissible". USS asserts also that it was not necessary for the inspector to obtain the operator's knowing consent prior to making an inspection. The fact remains that Barmore's sudden, hostile, and arrogant manner of forbidding the inspector to accompany him precluded the inspector from being able to inspect the scene of the accident when he could have been in a position to determine whether an imminent danger existed and whether any health and safety standards had been violated. In depriving the inspector of a means of transportation, in terminating his ability to have one of USS's safety engineers as an escort, and in preventing the inspector from having a miners' representative available to accompany him, Barmore effectively denied the inspector from being able to travel to the scene of the accident (Finding Nos. 1 through 4, 9 and 10, supra).

Barmore's refusal to permit the inspector to go to the scene of the accident on January 22, 1981, was so upsetting to the inspector that he returned to his office so as to discuss the matter with his supervisor and wrote a citation alleging that USS had violated section 103(a) of the Act in precluding him from inspecting the scene of the truck's rollover. That citation was served upon Barmore the next day, January 23, 1981. The citation was not terminated until February 9, 1981, when the inspector was permitted to examine the truck after it had been towed or hauled to USS's auto repair shop. The delay which resulted in the inspector's being able to examine the truck and interview witnesses not only prevented the inspector from being able to get first-hand information at the scene of the accident, but brought about a considerable duplication of effort which could have been avoided if the inspector had been permitted to accompany Barmore to the scene of the accident in the first instance.

Considering the demoralizing effect which Barmore's action had on MSHA's inspection responsibilities, a penalty of $500 is warranted under the criterion of gravity.

Negligence

Barmore's action in preventing the inspector from going to the scene of the accident was deliberate and constituted a high degree of negligence. Barmore had a certain amount of disdain for the inspector simply because the inspector tries to do his job with as little abrasiveness as possible. The foregoing conclusion is supported by Barmore's answers to the following questions (Tr. 201-202):

> Q. I'll attempt to rephrase it. So it would be reasonable, would it not, on the part of Inspector Bagley to take your refusal to allow him to accompany you to the accident site as a refusal to permit him to

go to the accident site at all?

> A. I can't read Jim Bagley's mind. I don't know how he thinks.
>
> Q. I'm not asking you that.
>
> A. Yeah. Okay.
>
> Q. I'm just asking if it would not be reasonable.
>
> A. Well, considering Jim Bagley, yeah. But not -- for me. If I was an MSHA inspector, I would not have, you know --

The Commission has indicated that judges are to avoid being critical of management (Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508 (1981), but it is difficult to appraise negligence in a given case without examining the attitude of the operator's supervisory personnel. Barmore's indifference about the way he treated inspectors would not be as strong a reason for adversely evaluating USS's management if Barmore's supervisor had not believed that Barmore should be upheld in his denial of the inspector's right to go to the scene of the accident and if Barmore's supervisor had not also stated that he would have refused to take the inspector to the scene of the accident until he had first checked with Barmore to see if such action was consistent with Barmore's refusal to take the inspector to the scene of the accident in the first instance (Tr. 275; 280; Finding No. 9, supra.).

Barmore's use of rough language in addressing the inspector at the outset of the denial was an indication of his lack of ordinary courtesy (Tr. 19; 136-137). Barmore's attitude toward the inspector after Barmore had returned from the scene of the accident continued to be hostile and bellicose in that he upbraided the inspector even for talking to a USS employee who asked the inspector a question while the inspector was walking down the hall toward Barmore's office (Tr. 22). In short, at no time during the hearing did any of USS's supervisory personnel make any effort to show that they disagreed with the manner in which Barmore had acted even though they otherwise approved of his action as a matter of general principle.

In view of the fact that USS's violation of section 103(a) was deliberate and was done with considerable animosity and hostility which had an adverse effect on MSHA's inspection program in general, I find that the refusal to permit the inspector to go to the scene of the accident was done with a sufficiently high degree of negligence as to warrant assessment of a civil penalty of $1,000 under the criterion of negligence.

By way of summary, I have found that a large operator is involved, that there was a normal good-faith effort to achieve compliance, that there is insufficient evidence to support more than a minimal penalty under the criterion of history of previous violations, that payment of penalties will not adversely affect USS's ability to continue in business, that the violation was

moderately serious, and that it involved a high degree of negligence. The total penalty of $1,510 assessed under the criteria of gravity,

negligence, and history of previous violations would, of course, be less than that amount if a large operator were not involved, if payment of penalties would have an adverse effect on USS's ability to continue in business, and if USS had showed other than a normal good-faith effort to achieve rapid compliance.

I am aware that MSHA's brief (pp. 8 and 13) proposed a penalty of only $600 for the violation of section 103(a), but it is obvious that MSHA's brief did not consider in detail the evidence of record which makes the violation more serious and more negligent than the violation would have been if it had been done in an atmosphere of professionalism and courtesy which should prevail when the personnel involved have been trained in their fields of endeavor as is true of those who comprise USS's management (Tr. 180-181; 238-239).

Docket Nos. LAKE 81-103-RM and LAKE 81-168-M

Introduction

In a notice of contest filed on February 23, 1981, in Docket No. LAKE 81-103-RM, USS seeks review of Citation No. 293739 issued on February 9, 1981, pursuant to section 104(a) of the Act, alleging a violation of section 103(a) of the Act. In a proposal for a penalty filed on July 20, 1981, in Docket No. LAKE 81-168-M, the Secretary of Labor seeks assessment of a civil penalty for the violation of section 103(a) alleged in Citation No. 293739.

Citation No. 293739 alleges that Starkovich, USS's supervisor of Minntac operations, refused to allow Inspector Bagley and two other inspectors to interview Roivanen, USS's foreman of three employees who were riding in a truck when it rolled over, unless one of USS's lawyers was present. The inspectors asked to talk to Roivanen three different times on February 9, 1981, and returned to the mine for the purpose of interviewing Roivanen on February 11, 1981. All requests were denied until such time as an attorney could be obtained. Inspector Bagley returned to the mine on February 12, 1981, and served Starkovich with Citation No. 293739 alleging a violation of section 103(a) because the inspector believed that Starkovich's refusal to allow him to talk to Roivanen until an attorney could be provided amounted to interference and impedence of three inspectors who were engaged in an accident investigation. After Starkovich was served with the citation, he made a phone call to USS's lawyers in Pittsburgh and an attorney was made available so that the inspectors were able to interview Roivanen the next day, February 13, at 1:00 p.m. (Finding Nos. 12 through 15, supra).

The Right to Counsel

USS's brief (pp. 9-13) argues for five pages that it did not impede the inspectors' investigation by insisting that Roivanen be provided with representation by one of USS's attorneys before he was interviewed by the inspectors. The only case cited

throughout USS's purely legal arguments is the Commission's decision in Everett Propst and Robert Semple, 3 FMSHRC 304

(1981), in which the Commission ruled that an inspector does not have to give a Miranda warning to personnel he interviews when he is conducting an investigation because such warnings apply only when the person being interviewed has been taken into custody (3 FMSHRC at 309). Since the Commission's Propst decision supports MSHA's contentions in this proceeding, rather than USS's arguments, I spent several days in the law library trying to find some cases which support USS's position and I discovered that I couldn't find any cases to support USS's arguments. Likewise, MSHA's brief (pp. 8-9) failed to cite a single case in support of its legal argument that USS violated the Act in refusing to allow the inspectors to interview Roivanen unless an attorney was present, but I found several cases which support MSHA's position.

USS's brief (p. 9) refers to Roivanen's "right to experienced counsel" (Br. p. 11). A person's right to counsel is based on the Sixth Amendment to the Constitution which provides, in pertinent part, "In all criminal prosecutions, the accused shall * * * have the Assistance of Counsel for his defense." USS's brief (p. 9) strives to bring the aspect of a criminal prosecution into play in this proceeding by observing that it was possible that the inspectors' investigation of the truck's rolling over would result in the inspectors' writing a citation pursuant to section 104(d), or the unwarrantable failure provisions of the Act. USS argues that since Starkovich was aware of the fact that MSHA routinely audits unwarrantable-failure citations and orders for the purpose of determining whether criminal charges should be made, that the inspectors' desire to interview Roivanen carried with it a sufficient threat of criminal prosecution to require that Roivanen be furnished with an attorney to be provided by USS.

The Supreme Court held In Re Groban, 352 U.S. 330 (1957), that an Ohio State Fire Marshall could investigate the cause of a fire and prohibit the witnesses' attorneys from being present. The Court stated (at p. 332):

> The fact that appellants were under a legal duty to speak and that their testimony might provide a basis for criminal charges against them does not mean that they had a constitutional right to the assistance of their counsel.

The Court went on to say (p. 333):

> Obviously in these situations evidence obtained may possibly lay a witness open to criminal charges. When such charges are made in a criminal proceeding, he then may demand the presence of counsel for his defense. Until then his protection is the privilege against self-incrimination. * * * The mere fact that suspicion may be entertained of such a witness, as appellants believed exists here, though without allegation of facts to support such a belief, does not bar the taking of testimony in a private investigatory proceeding.

Of course, the Administrative Procedure Act, 5 U.S.C. 1005, provides that "[a]ny person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied,

represented, and advised by counsel." The Supreme Court's holding in the Groban case is still applicable except when a formal trial-type atmosphere is provided for by an agency's rules. In Hannah v. Larche, 363 U.S. 420 (1960), the Supreme Court held that the Civil Rights Commission, in compelling persons to appear before it for investigations, should permit such persons to have the advice of counsel, but the Court agreed with the Commission that such counsel, as a matter of right, could not participate in the investigations. The Court said that investigations should not be transformed into trial-like proceedings which would result in the injection of collateral issues and reduce the investigations to a shambles and stifle the agency's fact-finding efforts. In United States v. Mandujano, 425 U.S. 564 (1976), the Supreme Court held that a witness in a grand jury proceeding does not have to be given the equivalent of Miranda warnings and that he may not testify falsely as a means to keep from incriminating himself. A witness may refuse to answer under the Fifth Amendment, but if the prosecutor believes that the witness' testimony is vital to assist him in bringing action against others, the prosecutor may obtain his testimony by offering him immunity against prosecution. In his concurring opinion in the Mandujano case, Justice Brennan noted at page 603 that it was ironic that the Groban and Hannah cases had been used for denial of assistance of counsel in administrative proceedings, but the Court specifically reaffirmed its holdings in the Hannah case in 1969 in Jenkins v. McKeithen, 395 U.S. 411, although it ruled in the Jenkins case that the due process requirements of the Fourteenth Amendment apply in proceedings before a state commission if the commission's function is solely that of exposing individuals to violations of criminal laws.

The cases discussed above deal with situations in which counsel were actually present, but their participation was limited either by their being excluded from the place of interrogation or their freedom to object to questions and make oral arguments was curtailed. The Supreme Court recognized in the Groban case that in purely fact-finding situations, counsel could be excluded entirely from the place of questioning, whereas in the Hannah case, the attorneys' right to cross-examine, object, and argue was curtailed.

In this proceeding, USS claims that it wanted to provide Roivanen with an attorney who was well versed in the meaning of the Act so that he would have known that the reason Roivanen needed an attorney was to assist Roivanen in answering questions which might lead to his being charged with a criminal violation if the inspectors should happen to write an unwarrantable-failure citation or order. USS's brief (p. 10) argues that the inspectors' writing of the citation forced USS to abate it the next day with the result that USS was forced to have Roivanen represented at the interview by one of its attorneys who was not at all versed in the intricacies of the Act. Therefore, USS's brief (p. 11) contends that the inspectors' insistence upon speed deprived Roivanen of one of his most fundamental rights, "the right to experienced counsel".

Purely apart from the factual question of whether the inspectors forced USS to act so quickly that only an inexperienced attorney could be made

available, the broad legal implications of its argument are not well established. The "right" to an attorney under the Sixth Amendment depends upon an interrogation coming within the ambit of the Supreme Court's rulings in Miranda v. Arizona, 384 U.S. 436 (1966). The absolute right to an attorney first comes into play only when a person suspected of a crime is actually taken into custody and is cut off from the outside world. At such times, he must be advised that he has a right to be represented by counsel during any interrogation and, since the right to an attorney under the Sixth Amendment does not depend upon a person's financial ability to pay, the person in custody must be advised not only that he has a right to counsel, but that if he cannot afford to hire competent counsel, an attorney will be appointed for him (384 U.S. at 472-473).

In this proceeding, Roivanen was to be interviewed at USS's mine and his freedom was at no time threatened in any way. He had not been accused of any crime. Therefore, his right to counsel under the Sixth Amendment was not brought into play. Under the Fifth Amendment, a person is entitled to refuse to answer questions which might tend to incriminate him. Roivanen had the right to claim the privilege against self-incrimination, but Roivanen did not claim that privilege in this proceeding. Instead, USS notified Roivanen that he should talk to the inspectors only if an attorney provided by USS was present. At no time does the transcript reflect that USS advised him of his right to claim the privilege against self-incrimination. As indicated above, Roivanen could be asked to answer questions, subject to his right against self-incrimination, without his actually being provided with counsel during the interrogation unless the proceeding at which the questions are to be asked are the equivalent of a hearing so as to bring into play the Administrative Procedure Act's provision that a person compelled to appear before an agency "shall be accorded the right to be accompanied, represented, and advised by counsel."

None of the trial-type procedures involved in actual hearings were involved in this proceeding. Roivanen had not been subpoenaed or even requested to appear before any agency. He was simply going to be interviewed by inspectors at his regular place of work in familiar surroundings. Starkovich said that he believed the inspectors were actually conducting a special investigation under section 103(g)(1) of the Act (Tr. 241). That was a fair evaluation of the type of investigation the inspectors were conducting because the investigation was being conducted solely because MSHA had received a complaint under section 103(g)(1) asking that an investigation be made of the incident involving the rollover of a truck on mine property. Although Citation No. 293739 refers to the claims that USS interfered and impeded an "accident investigation", it is a fact that the accident was being investigated solely because MSHA had received a request under section 103(g)(1) that the accident be investigated.

Regardless of whether the inspector was conducting an accident investigation or a "special inspection" under section

103(g)(1), the inspectors were certainly not involved in an accusatory, trial-type proceeding. MSHA does not have rules published in the Code of Federal Regulations to govern

investigations which may be conducted under section 103(b) of the Act, but MSHA apparently still follows a Manual for Investigation of Coal Mining Accidents prepared by MESA when that organization was a part of the U. S. Department of the Interior. That manual may be purchased from the Superintendent of Documents as Stock No. 024-019-00022-5. With respect to accident investigations, the manual presumes that a preliminary gathering of information would precede a formal hearing at which witnesses would be asked to testify with a court reporter. As to such preliminary gathering of facts, the manual states on pages 7 and 8:

> 3. Statements of Persons--Statements shall be obtained from all persons having information relevant to the investigation. As determined by the team leader, such statements shall be taken either (a) verbatim--if recorders are used, the person giving the statement shall be so informed and his consent shall be obtained, (b) by a court reporter, or (c) informally with a summary thereof. Statements shall be taken from each person separately to obtain his personal recollection of the relevant events and circumstances. If State officials are simultaneously conducting an investigation, they may be afforded an opportunity to take testimony from persons jointly with MESA; however, should a person desire to give testimony to MESA alone, he shall be given the right to do so.

The manual explains that if an actual public hearing is deemed necessary in connection with an accident investigation, notice of the hearing will be given in the Federal Register. For that type of actual hearing, the manual specifies on page 8:

> A. All witnesses, whether subpoenaed or appearing voluntarily, shall be sworn and advised of their legal rights with regard to the giving of testimony.
>
> * * *
>
> E. When circumstances warrant, further procedural rules applicable to the hearing may be issued prior to and/or during the hearing.

Inasmuch as the manual provides for advising each witness of his or her legal rights, it is assumed that, as in the Hannah case, supra, each witness would be permitted to have the advice of counsel, but since the hearing is solely a fact-finding investigation, the attorneys would not be permitted to turn an investigation into a trial-type proceeding where they would be permitted to object to questions, call witnesses of their own choosing, or argue the merits of any legal or factual issue. Thus, even in an accident investigation involving a hearing, a witness is not entitled to the right to counsel under the Sixth Amendment in the sense that such right is explained in the Supreme Court's Miranda decision, supra.

The interviews which the inspectors conducted with respect to the truck's rollover were taped with the witnesses' consent, but if the witness objected to having his interview taped, the interview was conducted without use of any recording equipment (Tr. 36-37). It is certain, therefore, that the type of interview, as to which USS insisted upon having an attorney present, was an informal investigation which did not carry with it the right of counsel under the Sixth Amendment.

The Privilege Against Self-Incrimination

The Fifth Amendment to the Constitution provides, in pertinent part, that "[n]o person * * * shall be compelled in any criminal case to be a witness against himself". As far back as 1892, the Supreme Court held in Counselman v. Hitchcock, 142 U.S. 547, that a person testifying before a grand jury is entitled to claim the privilege against self-incrimination and that privilege has been extended to apply to any kind of proceeding, regardless of whether it is criminal or civil in nature, or involves an administrative or court proceeding. The privilege protects any disclosures which a witness has reason to believe could be used against him in a criminal prosecution (In re Gault, 387 U.S. 1 at 49 (1967); Murphy v. Waterfront Commission, 378 U.S. 52 at 94 (1964)).

Therefore, if Starkovich had explained to the inspectors that Roivanen had the right to refuse to answer any question which might tend to incriminate him, the inspectors could not have objected to Roivanen's asserting that privilege in reply to any question that might have been asked him. Starkovich, however, did not take that approach. Instead, he forbade the inspectors to talk to Roivanen unless an attorney of USS's own choosing were present. Moreover, Roivanen was not asked if he wanted an attorney present when he talked to the inspectors. Roivanen was simply told that USS would rather that he have an attorney provided by USS present when he talked to the inspectors. Roivanen's own testimony shows how he reacted to USS's order that he not talk to the inspectors unless an attorney provided by USS was present (Tr. 334):

> Q. Okay. Now, when did you first learn that the Mine Safety and Health Administration was interested in this accident?
>
> A. I believe, ah, probably Bob Wittbrodt [his immediate supervisor], ah, called me. This was several -- several days. I'm not sure of the date. And, ah, told me that, ah, the Company would prefer that I use counsel concerning this 856 truck accident. And, ah, that really got my head spinning, you know, wondering what really is going on now because I hadn't been, um, really involved other than the -- I believe the -- the accident investigation. And, ah, I knew nothing of the fact, that I hadn't really done anything wrong.
>
> * * *

Q. Did Mr. Wittbrodt tell you that you should or should not Safety and Health Administration?"

A. No. He just called me, and it was a short, short conversation. He just said, "The Company would prefer that you had counsel regarding the 856 truck." And, ah, I said, "Okay".

Despite the fact that Roivanen says he was not advised to refuse to talk to the inspectors at all, Starkovich testified as follows (Tr. 265-267):

Q. You're saying that on -- on February 9th, you told the inspector that he could go talk to the foreman?

A. On when? No. I said on February 11th during the conversation. We -- we were talking back and forth, and Jim [Inspector Bagley] was stating his position, and I was stating our -- my position, our position.

Q. Okay.

A. And during this conversation, I made a comment to him, "Well, if you want to go up there and look at him for five hours, you can, but he's not -- he won't say anything to you."

* * *

Q. So you're -- you're denying that you made a statement that "Even if we did let you go up," your're denying --

A. I never said, "If we let you go up." I said, "If you went up there, you'd -- he'd just look at you for five hours anyway, and he wouldn't say anything."

On the other hand, Inspector Wasley testified as follows (365; 370):

Q. Did he [Starkovich] make any reference to -- to your being able to go down and talk with him [Roivanen] at all?

A. He did say that even if we were allowed to talk to the foreman [Roivanen], he would not answer for us.

Q. Do you specifically remember him saying it in this way?

A. Well, because I considered it a denial both ways.

* * *

Q. Okay. Now, during the meeting of February 11th, 1981, when you were talking to Mr. Starkovich --

A. Yes.

Q. -- do you remember him making any comment about talking to Mr. Roivanen for five hours?

A. For five hours?

Q. Yes.

A. Well, he said that even if we were allowed to talk to Cedric [Roivanen], that he wouldn't answer. Regardless of what the time was, five hours or whatever, he would not answer any of our questions. That's what Steve [Starkovich] said.

Q. Well, do you remember Mr. Starkovich saying that you could look at -- that even if you looked at Mr. Roivanen for five hours, he wouldn't answer your questions?

A. That was a -- yeah. That part of the statement was there, yes.

The importance of the statement by Starkovich that Roivanen would not talk to the inspectors if they tried to interview him out of the presence of an attorney provided by USS is that the only constitutional right which Roivanen had, when interviewed by the inspectors, was the right to refuse to answer questions which he felt might incriminate him, but when the inspectors insisted on asking questions before an attorney was provided, Starkovich prevented them from talking to Roivanen because Roivanen had been given instructions to say nothing unless an attorney provided by USS was present.

After USS provided an attorney on February 13, 1981, Inspector Bagley was permitted to interview Roivanen. The testimony does not show, however, that the attorney ever cautioned Roivanen about his right to refuse to answer questions which might incriminate him. The inspector was carefully questioned about what kind of warnings the inspector gave Roivanen before the interview started (Tr. 86-87):

Q. Did you give Mr. Roivanen any Miranda warnings at the beginning of that interview?

A. Miranda? Oh. Is that where you warn somebody of their rights. I, um -- as far as I know, the inspectors were not required to give Miranda warnings. However, at the request of the -- the U. S. Steel attorney that was present -- his name was Ron Fischer -- um, he asked at the beginning of our interview if I would inform Mr. Roivanen of the possible, you know, consequences of the interview, of the accident investigation, that would be -- there would be a possibility of citations being issued, orders, could be unwarrantable, could

be willful. I just tried to discuss with Mr. Roivanen, um, what he was doing there, what could come of it.

> Q. Okay. Was Mr. Roivanen surprised at what could come of it?
>
> A. No.
>
> Q. Did Mr. Fischer indicate to you that he understood the provisions of the Act?
>
> A. No. He never, ah -- he never interjected himself hardly at all.

There is nothing in the record which indicates that Roivanen was ever actually advised that he had the right to refuse to answer any questions which might result in providing information which might tend to incriminate him. USS's brief (pp. 9-11) claims that the attorney who represented Roivanen at the interview was not experienced in interpreting the Act and that USS was forced to send an inexperienced attorney to represent Roivanen because the inspector had issued a citation which USS was compelled to abate by sending an inexperienced attorney instead of the experienced attorney which USS would have preferred to send.

USS had been advised on February 9 that the inspectors wanted to interview Roivanen. The citation was not issued until February 12. If USS had acted promptly, it could have sent an experienced attorney to the Minntac Mine by February 13, the day on which the interview was actually conducted. Although Starkovich claims that he thought he had the date of February 17 established as the date on which Roivanen, Boucher, and Woullet would be interviewed, the two inspectors who were present when USS insisted upon having an attorney present for the interview both testified unequivocally that no specific dates were ever mentioned (Tr. 80; 84; 365; 374). I think the inspectors' testimony is more credible than Starkovich's on the question of a date because Starkovich at no time ever claimed that he reminded the inspectors when the citation was served that he understood he had until February 17 to provide an attorney. I do not believe that Starkovich, who was very forceful in maintaining his position on all other matters, would have been timid about insisting to the inspectors that he understood he had until February 17 to provide an attorney at the time they handed him Citation No. 293739. In any event, there is nothing in the record to show that Starkovich even asked the inspectors to give him time enough to get an attorney with more experience in interpreting the Act than the one who was provided.

Assuming, arguendo, that USS did rely on a less experienced attorney than it would have preferred, it is clear that all the attorney had to do was to advise Roivanen that the answer to a given question might tend to incriminate him. No extensive knowledge of the Act would have been required for that kind of representation, particularly if the allegedly

inexperienced attorney had been briefed by USS's experienced attorneys before he appeared at the interview. Moreover, the courts have held that, even when the right to an attorney within the purview of the Sixth Amendment exists, which was not true in this case, the Sixth Amendment does not require a defendant to be represented by an attorney who is perfect, or errorless (Cardarella v. United States, 375 F.2d 222, 232 (8th Cir. 1967); Sherrill v. Wyrick, 524 F.2d 186 (8th Cir. 1975), cert. den., 424 U.S. 923 (1976); MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960)).

Additionally, the claim in USS's brief to the effect that the inspector's writing of Citation No. 293739 prevented USS from providing Roivanen with adequate counsel is not supported by the record, as the following testimony of Starkovich shows (Tr. 261):

> Q. Okay. What I asked you was is there any reason in your mind why any licensed attorney could not adequately represent the rights of the foreman who was to be interviewed by the MSHA inspector?
>
> A. Well, the answer to that question, we've got lawyers, as Mr. Fischer was hired by the corporation to work for the corporation. So why should we go and hire a lawyer?
>
> Q. Right. But in other words, you're saying that you feel -- you felt that Mr. Fischer was adequately qualified to perform that function, is that not right?
>
> A. To sit in the interview?
>
> Q. Yes.
>
> A. Oh, definitely.

As has been shown above, the only justifiable reason that USS had for insisting that Roivanen be represented by counsel at the interview would have been for the purpose of having an attorney present to advise him when he should refuse to answer a given question on the ground that the answer might tend to incriminate him. As has also been shown above, Roivanen did not ask to be represented by counsel and it does not appear that he was ever advised that he had a right to refuse to answer any particular question. One reason that USS may have for failing to mention Roivanen's right against self-incrimination may be that it is a personal right which can only be raised by the person who wishes to use it. A corporation cannot plead the privilege against self-incrimination (Hale v. Henkel, 201 U.S. 41, 74 (1906); Baltimore & Ohio R. Co. v. I. C. C., 221 U.S. 612, 622 (1911); and Wilson v. United States, 221 U.S. 361 (1911)). In the Wilson case, the court explained that an individual has no duty to the state or his neighbors to divulge his business as he receives nothing from the state, whereas a corporation is a creature of the state which is incorporated for the benefit of the public. Since a corporation receives special privileges and

franchises, its officers

may not refuse to produce the corporation's books and records in response to a subpoena even if such production results in the officers' being indicted along with the corporation.

For the foregoing reason, there is considerable merit to the argument in MSHA's brief (pp. 8-9) to the effect that only Roivanen was entitled to ask that he be represented at the interview by counsel.

Conflict of Interest

Since it has been demonstrated above that Roivanen did not have a Sixth Amendment right to be represented by counsel at the interview and that the only constitutional right he had at the interview was his right against self-incrimination, there is also considerable merit to the argument in MSHA's brief (pp. 8-9) to the effect that USS could not properly insist upon Roivanen's being represented at the interview by counsel employed by USS to do its own corporate work. If a person does have a Sixth Amendment right to counsel, he must be given a fair opportunity to secure counsel of his own choice (Chandler v. Fretag, 348 U.S. 3, 9-10 (1954); Powell v. State of Alabama, 287 U.S. 45, 71 (1932)).

Wholly apart from the question of whether USS had the right to provide Roivanen with counsel, is the question of whether Fischer was representing Roivanen at the interview or his real client, USS. In Castillo v. Estelle, 504 F.2d 1243 (5th Cir. 1974), the court held that a person who was entitled to counsel under the Sixth Amendment had been denied due process because the defense attorney also represented the principal witness for the prosecution. The court stated that (504 F.2d at 1245):

> * * * In these circumstances, counsel is placed in the equivocal position of having to cross-examine his own client as an adverse witness. His zeal in defense of his client the accused is thus counterpoised against solicitude for his client the witness. The risk of such ambivalence is something that no attorney should countenance, much less create. We hold that the situation presented by the facts of this case is so inherently conducive to divided loyalties as to amount to a denial of the right to effective representation essential to a fair trial.

In MacKenna v. Ellis, 280 F.2d 592, 595 (5th Cir. 1960), the court held that an accused person is entitled to have the "wholehearted assistance of counsel and to the undivided loyalty of counsel."

In United States ex rel. Hart v. Davenport, 478 F.2d 203 (3d Cir. 1973), the court reversed Hart's conviction of gambling charges because a single attorney, retained by his employers, had represented Hart, his employers, and three other codefendants at the trial. The attorney did not differentiate Hart's position from that of the other codefendants. The court explained (478

F.2d at 209-210):

> The legal standard to be applied to a claim of prejudice from joint representation is clear enough. The right to counsel guaranteed by the sixth and fourteenth amendments contemplates the service of an attorney devoted solely to the interests of his client. The right to such untrammelled and unimpaired assistance applies both prior to trial in considering how to plead, * * * and during trial * * *. Recognizing that the right to such assistance of counsel may be waived, * * * we refused to find any such waiver from a silent record. * * * we have rejected the approach that before relief will be considered the defendant must show some specific instance of prejudice. * * * Instead, we have held that upon a showing of a possible conflict of interest or prejudice, however remote, we still regard joint representation as constitutionally defective. Walker v. United States, 422 F.2d 374 (3d Cir.), cert. den., 399 U.S. 915, 90 S.Ct. 2219 (1970). * * * The Walker test of possible conflict of interest or prejudice, however remote, must be applied, moreover, in light of the moral competency standard of adequacy of representation by counsel adopted in this circuit. * * * Normal competency includes, we think, such adherence to ethical standards with respect to avoidance of conflicting interests as is generally expected from the bar. [Citations to cases omitted.]

In this proceeding, USS insisted on Roivanen's being represented by counsel on the ground that the inspectors might write unwarrantable failure citations or orders which, in turn, might be reviewed by MSHA for possible criminal violations. That which might have resulted in commencement of a criminal action against Roivanen would not necessarily result in a criminal action against USS. It appears that if the test used by the court in the Davenport case, supra, namely, a showing of possible conflict of interest, however remote, were to be applied to Fischer's representation of Roivanen at the interview, the representation by Fischer would have to be held to have been defective because of the possible conflict of interest. The record shows that Roivanen was not sure that USS's attorney was there solely to protect his interests (Tr. 345-346).

The Right to a Miranda Warning

USS's brief (p. 11) states as follows:

> * * * According to MSHA and its Review Commission, an MSHA inspector does not have to give a foreman Miranda warnings or even mention the possibility that criminal sanctions may be invoked before interviewing an employee. Everett Propst and Robert Semple, 2 MSHRC 1156 (1981). Thus in MSHA's view, a car thief apprehended in the streets is entitled to more information than a mine foreman.

As I have already observed, supra, the Commission held in the Propst case that MSHA inspectors do not have to give Miranda warnings because the

persons being interviewed are not in custody and their freedom is not in any way threatened when they are interviewed by MSHA inspectors. There are hundreds of cases holding that the police do not have to give Miranda warnings unless they have narrowed their search for a suspect to a person to such an extent that they have placed the suspect under arrest so that his freedom to go and come as he pleases is restricted. USS's claim that a car thief apprehended in the streets is entitled to more information than a mine foreman, is incorrect. In Lowe v. United States, 407 F.2d 1391 (9th Cir. 1969), a car thief was apprehended by the police and was not given any Miranda warnings before the police asked him for his driver's license and vehicle registration card. When he was unable to provide those articles, he was further asked about his employer and his destination. When he later complained that he had not been given Miranda warnings, his claims were rejected. The court stated, in part, as follows (407 F.2d at 1397):

> It follows that the time when the officer's intent to arrest is formed has no bearing on the question of whether or not there exists "in-custody" questioning. Whether a person is in custody should not be determined by what the officer or the person being questioned thinks; there should be an objective standard. Although the officer may have an intent to make an arrest, either formed prior to, or during the questioning, this is not a factor in determining whether there is present "in-custody" questioning. It is the officer's statements and acts, the surrounding circumstances, gauged by a "reasonable man" test, which are determinative. [Emphasis is part of court's opinion.]

In United States v. Marzett, 526 F.2d 277 (5th Cir. 1976), the court held that a Miranda warning did not have to be given to a suspect, not in custody, who answered questions of the police concerning the location of a shotgun. The court held in United States v. Evans, 438 F.2d 162 (D.C. Cir. 1979), cert. den., 402 U.S. 1010, that a Miranda warning did not have to be given in a situation in which a policeman apprehended a thief who had been recognized on the street on the basis of a police radio broadcast. The suspect was taken back to the place where a burglary victim had recognized him for the purpose of determining whether the policeman had apprehended the proper person.

In Birnbaum v. United States, 356 F.2d 856 (8th Cir. 1966), the court held that a defendant had no constitutional right to counsel when he was interrogated by an FBI agent prior to the time when any charge had been lodged against him. In United States v. Robson, 477 F.2d 13 (9th Cir. 1973), the court held that where a taxpayer was not deprived of his freedom in any way, an agent of the Internal Revenue Service was under no duty to inform him of his constitutional rights, or advise the taxpayer of the fact that the investigation could have potential criminal consequences, or tell the taxpayer of the fact that the agent had an informant's tip suggesting possible tax evasion. It was further held in the Robson case that the taxpayer's consent to

search of his records for audit by the agent could reasonably be accepted as a waiver of warrant even though the record did

not disclose that the taxpayer was aware of the precise nature of his Fourth Amendment rights. In United States v. Irion, 482 F.2d 1240 (9th Cir. 1973), cert. den., 414 U.S. 1026 (1973), the court held that questioning of a defendant in his motel room by customs officers who learned that defendant had been on a sailboat which landed without clearing customs did not constitute "in custody" interrogation requiring Miranda warnings to be given before such statements may be used at trial. In United States v. Hickman, 523 F.2d 323 (10th Cir. 1975), cert. den., 96 S.Ct. 778 (1976), the court held that the initial stopping of a towing truck and boat containing contraband did not constitute a sufficient impairment of defendants' freedom by customs agents to require Miranda warnings.

A Violation of Section 103(a) Occurred

In this proceeding USS is charged by MSHA with a violation of section 103(a) (FOOTNOTE 3) in Citation No. 293739 because USS's supervisor of Minntac operations refused to allow the inspectors to interview a foreman unless an attorney provided by USS was present. The citation claims that such restriction "* * * constitutes interference with and impedence of three authorized MSHA representatives during the course of an MSHA accident investigation." I believe that I have already cited enough legal support to show that USS had no right to insist that a foreman could not be interviewed until USS provided one of its attorneys to be present during the interview. There are many cases which specifically hold that persons are not entitled to be represented by counsel in circumstances almost identical to those which occurred in this proceeding.

The case which is most analogous to the situation involved in this proceeding is F. J. Buckner Corp. v. N.L.R.B., 401 F.2d 910 (9th Cir. 1969), cert. den., 393 U.S. 1084. In the Buckner case, Buckner was interviewed by an attorney who worked for NLRB. Buckner's responses were taken down in longhand and later were typed and were signed by Buckner. The trial examiner, or administrative law judge, admitted Buckner's "affidavit" in evidence and

considered its contents in finding Buckner guilty of unfair labor practices. As to the use of Buckner's statements obtained by NLRB's attorney, the court stated (401 F.2d at 914):

> In an effort to secure a person's privilege against self-incrimination, prosecutors are required to demonstrate that certain procedural safeguards were used before the statements of a defendant may be used against him. Critical among those procedural safeguards is a warning that the defendant has the right to an attorney. A defendant has this right at every stage of a proceeding against him [Powell v. State of Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932)], and it does not depend upon a request [Carnley v. Cochran, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962); People v. Dorado, 62 Cal.2d 338, 42 Cal.Rptr. 169, 398 P.2d 361 (1965)].
>
> However, the point at which this warning must be given has been the subject of much controversy. In Escobedo v. State of Illinois, 378 U.S. 478 at 490, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964), it was held that this point is reached when an investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect. In Miranda v. State of Arizona, 384 U.S. 436 at 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), it was held that this point was reached when law enforcement officers initiated questioning after a person had been taken into custody or otherwise deprived of his freedom of action in any significant way.
>
> Petitioner herein argues that since Buckner could at some time in the future become the subject of a criminal proceeding upon matters involved in the instant case, statements made in the absence of a Miranda warning should have been excluded from consideration by the Trial Examiner. An extension of the Miranda doctrine to situations where there is no criminal charge under investigation and where a statement is given by a person who has been in no way deprived of his freedom would be wholly unwarranted.

It cannot successfully be argued that the inspectors had no right to investigate the rollover of the truck. It is not necessary to base the inspectors' investigation on the question already extensively considered in this decision, that is, whether the truck's rollover was a reportable accident under section 50.2(h) requiring an immediate decision by MSHA as to whether an investigation should be undertaken within 24 hours. The reason that it is not necessary to consider the question of whether an accident reportable under section 50.2(h) or section 50.10 existed is that the inspectors had received a request for an investigation to be made under section 103(g)(1) of the Act. That section provides that "* * * upon receipt of such notification, a special inspection shall be made as soon as

possible to determine if such violation or danger exists in accordance with the provisions of this title." Starkovich said that he understood that the

inspectors had come to the Minntac operation to perform a "103(g)(1) special investigation (Tr. 241). Therefore, the inspectors could have based their investigation of the truck's rollover on the authorization contained in section 103(a) as that section gives them authority to determine "whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirements of this Act." They also have the authority under section 103(a) to inspect mines to assist the Secretary in developing "guidelines for additional inspections of mines based on criteria including, but not limited to, the hazards found in mines subject to this Act, and [the Secretary's] experience under this Act and other health and safety laws." In performing such inspections, the inspectors are given "a right of entry to, upon, or through any coal or other mine."

MSHA received on February 5, 1981, a request that the truck's rollover be investigated. The request was given to Inspector Bagley and he went to the Minntac Mine on Monday, February 9, 1981, to investigate the accident. Starkovich allowed the inspector to talk to the driver of the truck, but Starkovich wouldn't let the inspector talk to the driver's foreman, Roivanen, until an attorney could be provided. The inspectors asked to talk to Roivanen three different times on February 9, but all requests were denied. The delays which the inspectors encountered are described in Finding Nos. 11 through 14, supra, and need not be repeated here. There can be no question but that USS impeded the inspectors' investigation, which section 103(g)(1) states should be performed "as soon as possible", by simply asserting that Roivanen had a right to counsel.

A few more holdings by the courts in circumstances almost identical to the facts in this case should be cited to show beyond any doubt that USS did not have a right to insist that Roivanen be afforded counsel before he could be interviewed by MSHA inspectors. In Ferguson v. Gathright, 485 F.2d 504 (4th Cir. 1973), cert. den., 415 U.S. 933, the court affirmed a denial of a writ of habeas corpus involving a person who was convicted of driving a motor vehicle after his driving license had been revoked under the Virginia Habitual Offender Act. His claim was based on a contention that his rights were violated at the license revocation hearing by the fact that he was not provided with assistance of counsel. The court stated (485 F.2d at 505-506):

> A right to counsel must find its constitutional basis in either the commands of the Sixth Amendment or the general guarantee of fundamental due process granted by the Fourteenth Amendment. The petitioner apparently rests his claim primarily on the Sixth Amendment. In pressing such claim, he is confronted at the outset with the fact that the right to counsel given by the Sixth Amendment extends only to criminal or quasi-criminal cases, and proceedings for the revocation of a driver's license under the Virginia

Habitual Offender Act have been authoritatively held to be a civil and not a criminal action. * * *
[Footnotes omitted.]

In Kirby v. Illinois, 406 U.S. 682 (1972), the Supreme Court held that a defendant was not entitled to counsel before he was identified by a victim in a police station. The circumstances were that the defendant had been picked up and was taken to the police station after he had produced three travelers' checks and a Social Security card bearing Willie Shard's name. Shard was brought to the police station to see if he could identify the suspect. Shard recognized the defendant as soon as he walked into the police station and saw the defendant sitting at a table. The Court said that the question raised was not the defendant's right against self-incrimination, but his right to counsel. The Court stated (406 U.S. at 688):

> In a line of constitutional cases in this Court stemming back to the Court's landmark opinion in Powell v. Alabama, 287 U.S. 45 (1932), it has been firmly established that a person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him. * * *

By way of summary, the cases hereinbefore cited show that when the inspectors sought to interview Roivanen on February 9, 1981, the only constitutional right he had was his privilege against self-incrimination. That was a personal privilege which only Roivanen had a right to assert. It was improper for USS to refuse to permit the inspectors to talk to Roivanen until such time as USS could provide one of its corporate lawyers to be present at the interview because the corporate lawyer's primary client at the interview was USS, not Roivanen. Even if a lawyer were allowed to be present at the interview, he could only advise Roivanen as to his privilege against self-incrimination. The lawyer would not be entitled to object to questions or make legal arguments so as to turn the interview into a quasi-judicial proceeding. Even if Roivanen had personally asked the inspectors if he could have an attorney present at the interview, the most that the inspectors would have had to allow would have been the opportunity to discuss questions with his attorney, if he suspected the answers would tend to incriminate him, but the inspectors could have required that Roivanen's attorney be excluded from the room where the interview was conducted, subject to Roivanen's right to leave the room to seek his attorney's advise about whether he should claim his privilege against self-incrimination as to any specific question.

Since Roivanen was not in custody or charged with any kind of violation of law, he was not entitled to be given a Miranda warning and he was not entitled to a Sixth Amendment right to be represented by counsel at the interview. Therefore, when USS delayed the interview from Monday, February 9, 1981, to Friday, February 13, 1981, it delayed and impeded an investigation which the inspectors, under the exhortations in section 103(g)(1) of the Act, were obligated to complete "as soon as possible." Such delay constituted a violation of section 103(a) as alleged in Citation No. 293739. For the foregoing reasons, I find that Citation No. 293739 dated February 9, 1981, was validly issued

and should be affirmed.

Assessment of a Penalty

The proposal for a penalty filed in Docket No. LAKE 81-168-M seeks assessment of a civil penalty for the violation of section 103(a) alleged in Citation No. 293739. Inasmuch as I have found that the violation occurred, it is now necessary that a penalty be determined for the violation pursuant to the six criteria. I have already considered the six criteria in considerable detail with respect to the previous violation of section 103(a) under consideration in this proceeding. Specifically, I have already found that respondent is a large operator and that payment of penalties will not cause it to discontinue in business.

History of Previous Violations

I have already explained, in assessing a penalty for the prior violation of section 103(a), that the record in this proceeding is not complete enough to permit me to make a finding as to whether USS had violated section 103(a) before January 22, 1981, when the first violation of that section involved in this proceeding was cited.

The second violation of section 103(a) occurred in a citation written on February 9, 1981, which means that the second violation occurred about 18 days after the first violation. The record in this proceeding, therefore, shows that USS has a history of a previous violation of section 103(a) which occurred on January 22, 1981. I believe that the prior history of one violation should be considered because Starkovich was advised on February 9, 1981, that an attorney should be obtained "as soon as possible" (Tr. 30). When the inspector returned to the mine on February 11, 1981, and was again denied permission to talk to Roivanen because an attorney was not present, he was warned that a citation would be issued for USS's refusal to allow him to talk to Roivanen (Tr. 43). Barmore claims that he would have allowed the inspector to go to the scene of the truck's rollover on January 22, 1981, if the inspector had warned him that a citation would be written (Tr. 202). Here, Starkovich was warned that a citation would be issued if an attorney were not obtained promptly.

Consequently, Starkovich should have profited from USS's previous experience when the prior violation of section 103(a) was cited and should have realized that his failure to obtain an attorney promptly would again result in the inspector's writing a citation for a violation of section 103(a). It has been my practice to increase a penalty by a small amount when I find that the same section of the Act which is before me for assessment of a penalty has been violated on a single prior occasion. I believe that the criterion of history of previous violations should be used to increase a penalty when there is an indication of a large number of previous violations. If a penalty has been increased because of a very adverse history of previous violations and, thereafter, in a subsequent proceeding, the evidence shows that, over a recent time period, respondent has succeeded in reducing the number of violations in the recent

period as compared with the number which occurred in a prior period, the penalty should accordingly be decreased.

In this instance, since there is only a single prior violation of section 103(a), I believe that the penalty should be $50 more than it would have been if USS had not ever previously violated section 103(a). Additionally, as pointed out in considering respondent's history of previous violations in connection with the prior violation of section 103(a), I found that respondent should be assessed $10 under the criterion of respondent's history of previous violations because USS has an average of more than 50 previous violations per year. Therefore, the penalty for the second violation of section 103(a) should be a total of $60 under USS's history of previous violations.

Negligence

If the circumstances otherwise warranted it, the fact that the second violation of section 103(a) was deliberate and intentional, could be used to find that the violation was associated with gross negligence because the advice of USS's legal staff in Pittsburgh had been sought at the time Starkovich refused to allow the inspector to interview Roivanen until one of USS's attorneys could be present at the interview. On the other hand, USS appears to have been acting in good faith when it asserted that it was entitled to insist upon the presence of counsel at any interview which might involve the issuance of an unwarrantable-failure citation or order.

A respondent ought to be able to claim an erroneous constitutional right, if that right is claimed in good faith, without exposing itself to a large civil penalty, provided that respondent, in asserting that right, does not expose its miners to any hazard. In Bituminous Coal Operators' Association, Inc. v. Ray Marshall, 82 F.R.D. 350 (D.D.C. 1979), the court noted that it would be necessary for an operator to violate section 103(f) of the Act in order to obtain judicial review of the enforcement procedures which MSHA intended to use with respect to a miner's walk-around rights. The court also recognized that the operator would be subject to a civil penalty for violating the section just to test MSHA's enforcement procedures. The court then stated (82 F.R.D. at 354) that "* * * it would seem improbable that stiff supplemental civil penalties would be imposed where a genuine interpretative question was raised as to section 103(f), a provision which normally is not absolutely vital to human health and safety."

In this instance, the matter which the inspector wished to investigate involved a truck which had rolled over on January 22, 1981. The three miners riding in the truck received only minor injuries and were placed on restricted duty. When the inspectors went to investigate the incident on February 9, 1981, one of the injured miners was back at work and the other two were attending a training class. The truck which had rolled over had been hauled from the scene of the accident to the vicinity of USS's repair shops and no repairs had been performed on it. Therefore, although USS's assertion that it wished to have an attorney present when Roivanen was interviewed did prevent the investigation from being completed "as soon as possible", the

4-day delay in the inspectors' interview with Roivanen did not seriously impede the gathering of any important facts.

For the reasons given above, I conclude that an amount of $10 is the most that should be assessed under the criterion of negligence for USS's

second violation of section 103(a).

Gravity

A considerable amount of what has been said above about the criterion of negligence is applicable to the criterion of gravity. If USS's refusal to let the inspectors interview Roivanen for a period of 4 days had occurred in connection with a serious violation which exposed miners to unsafe conditions while Starkovich and the inspectors argued the merits of USS's contention that Roivanen could not be interviewed unless one of USS's attorneys was present, it could then be said that the insistence on the presence of an attorney was a serious violation.

MSHA's brief (pp. 9-10) agrees that the violation was not serious because Roivanen's statements at the interview provided the inspectors with little additional information which they had not already obtained from interviewing other USS employees. MSHA, however, states that the practice of operators' insisting upon having an attorney present before supervisory employees may be interviewed would constitute a serious threat to MSHA's abilities to carry out its functions if such tactics were to be used on a wide scale. There is considerable merit to MSHA's argument about a wide-spread use of the contention that no supervisory employee can be interviewed unless an attorney is present, but there seems to be no indication that USS is employing the tactic on a wide-spread basis--at least pending the decision in this proceeding where it appears that USS is testing its legal position. Moreover, since the issuance of a citation in this instance produced an attorney overnight, I assume that MSHA now knows how to deal with such contentions when and if operators insist on having attorneys present at future interviews by inspectors.

In light of the considerations above, I find that the violation was nonserious and that a penalty of $10 should be assessed under the criterion of gravity.

Good-Faith Effort To Achieve Rapid Compliance

It has been my practice neither to increase nor decrease a penalty otherwise assessable under the other five criteria if I find in a given case that an operator has corrected a violation within the time provided by an inspector in his citation. That is also the procedure which is used when one applies the assessment formula set forth in section 100.3(f). In this instance, the inspector did not provide an abatement period in his citation until he arrived at USS's mine and had served the citation on Starkovich, supervisor of Minntac operations. After Starkovich received the citation, he immediately called USS's legal staff and asked when he could abate the alleged violation. Starkovich could have argued that an attorney would have to be sent from Pittsburgh and that one could not be there before Monday of the following week. Instead, he arranged for one of USS's attorneys near the mine site to be made available on the next day at 1 p.m.

It appears that USS acted with extraordinary speed in abating the violation once the inspector cited it. It is to USS's credit that once the inspector cited it for a violation in connection with its refusal to allow Roivanen to be interviewed unless an attorney was present, USS acted as promptly to abate the violation as could have been expected. Since the record shows that the inspector placed a compliance date on the citation of Friday, February 13, 1981, at 1 p.m., solely because Starkovich stated that an attorney would be provided by that time, it must be concluded that USS is responsible for the rapid abatement of the violation.

In such circumstances, I would ordinarily be able to find that the penalty assessable under the other five criteria should be reduced because of USS's extraordinary speed in achieving compliance. USS's brief (pp. 10-11) complains, however, that the inspector's insistence upon rapid abatement coerced USS into providing a USS attorney with less competence in mine safety law than USS wanted to send. USS's complaints about its having to abate the violation largely offsets a conclusion that the speed of abatement should be used as a reason for reducing the penalty otherwise assessable because section 110(i) refers to "good faith" in achieving rapid abatement, rather than to a grudging or reluctant compliance. Therefore, I do not believe that USS should be given credit for more than normal good-faith abatement. Such a finding is consistent with the parties' stipulation to the effect that USS showed good faith abatement as to all violations after the citations were written (Tr. 12). When normal good-faith abatement has been found to have occurred, the penalty otherwise assessable under the other five criteria is neither increased nor decreased under the criterion of demonstrated good-faith in achieving rapid compliance.

For the reasons given above, USS should be assessed a penalty of $80 for the second violation of section 103(a). The $80 penalty is comprised of $60 under the criterion of history of previous violations, $10 under the criterion of negligence, and $10 under the criterion of gravity. The penalty would be less than $80 if USS were not a large operator and would be less than $80 if USS had shown that payment of penalties would adversely affect its ability to continue in business.

Docket Nos. LAKE 81-114-RM, LAKE 81-115-RM and LAKE 81-152-M

Introduction

In notices of contest filed on March 27, 1981, in Docket Nos. LAKE 81-114-RM and LAKE 81-115-RM, USS seeks review of Order Nos. 293740 and 296501, respectively. Both orders were issued on March 9, 1981, pursuant to section 104(d)(1) of the Act. Order No. 293740 alleges a violation of 30 C.F.R. 55.9-1 and Order No. 296501 alleges a violation of 30 C.F.R. 55.9-2. In a proposal for a penalty filed on June 22, 1981, in Docket No. LAKE 81-152-M, the Secretary of Labor seeks assessment of civil penalties for the violations of sections 55.9-1 and 55.9-2.

Order No. 293740 alleges that USS violated section 55.9-1 by failing to record a defect affecting safety on a truck at a time when the truck's rear end had shifted back 2-1/2 inches. Order No. 296501 alleges that USS

violated section 55.9-2 by failing to correct the shifted rear-end in the same truck cited in Order No. 293740 before the truck was used. Both orders are being considered simultaneously because the facts are interrelated (Finding No. 16 (in part) and Nos. 17-21, supra).

Defect Affecting Safety

The pertinent part of section 55.9-1 which is alleged to have been violated in Order No. 293740 reads as follows:

> * * * Equipment defects affecting safety shall be reported to, and recorded by the mine operator.

Section 55.9-2 was alleged to have been violated in Order No. 296501. Section 55.9-2 reads as follows:

> Equipment defects affecting safety shall be corrected before the equipment is used.

USS's brief (p. 14) argues that before either section 55.9-1 or section 55.9-2 can become operative, there must exist one or more "equipment defects affecting safety". USS argues that normal understanding of that phrase would have to mean that the standards involved were "* * * intended to cover defects which are normally associated with safe operation of a vehicle" (Br. 14). The brief continues with its argument by contending that whether the mechanical problem cited by the inspector constituted an equipment defect affecting safety should be interpreted in light of the knowledge and understanding of USS's personnel at the time the problem was first observed, rather than after a truck had rolled over under circumstances which had never previously been known to cause a truck to turn over.

USS concludes the above-described argument by contending that since the mechanical problem cited by the inspector was not one which normally could be considered to be a defect affecting safety, USS's personnel were justified in not reporting and recording its existence immediately and were justified in considering the problem to be something which could be postponed and corrected as a routine maintenance item in due course. It is further argued that pending such maintenance work, USS's personnel properly continued to use the equipment until such time as routine maintenance work would eventually have corrected the problem (Br. 15-16).

The foregoing argument is not supported by the facts. The first aspect of USS's argument which must be addressed is that USS's brief insists on referring to the problem in the rear end of its No. 856 truck as "a one-half inch shift in the rear end of" (Br. 16) its truck. An employee named Kaivola was the driver of the truck at the time it rolled over. According to Inspector Bagley, Kaivola told him that "* * * the left-side rear duals were dogged back about two and a half inches" (Tr. 37). During cross-examination by USS's attorney, Kaivola stated "* * * the axle had shifted maybe half an inch or so" (Tr. 168). The dual

wheels on the truck were enclosed by an elliptical indentation in the truck's bed which Kaivola called a "wheel well"

(Tr. 175). There was not much clearance between the wheel and the well in which it turned. Therefore, the 2-1/2-inch shift in the "rear duals" is not the same as the 1/2-inch shift in the "axle". USS's brief uses the reference to 1/2-inch because such usage makes the shift in the truck's rear end sound minimal and enhances its argument that a driver, observing only a 1/2-inch shift in an axle would certainly be justified in assuming that correction of a 1/2-inch shift in an axle could be postponed until such time as the truck was in the shop for routine maintenance work.

The fact is, however, that a shift of 1/2-inch in an axle is not like a 1/2-inch dent in a fender or a 1/2-inch misalignment in a license plate. Primozich, USS's foreman of the repair shops, made that clear when he stated that "* * * the wheel and the axle assembly can walk back and forth to break the spring" (Tr. 296). He also stated that "* * * depending how far it shifts back, we've had it where they've shifted back, and the drive shaft literally fell on the ground. Well, then the vehicle won't move" (Tr. 311). Primozich testified that the shifting of rear ends was not as much a problem now as it used to be. He stated that (Tr. 305-306):

> * * * For a while there, it was terrible. I had springs on racks up there you wouldn't believe, and I must have two to three hundred drive shafts stored at Minntac.

In other words, even though the axle had shifted only 1/2-inch, the rear dual wheels had shifted 2-1/2 inches in the wheel well on the left side. It was easier for Kaivola to see a 2-1/2-inch shift in the wheel well than it was to see a shift of 1/2-inch in the axle, but the two conditions existed simultaneously and served as the basis for Kaivola's conclusion that the shifting of the rear end should be reported to his foreman, Roivanen.

The preponderance of the evidence controverts USS's claim that prior experience with shifted rear ends would not have enabled USS's personnel to believe that a shift in a truck's rear end could result in an accident if not soon corrected. Although Roivanen said that past experience did not cause him to think that a shifted rear end would cause a truck to flip over, he stated that shifted rear ends in the past had caused the tires to burn in the wheel well and that the rubbing could be severe enough to stop the truck's operation (Tr. 356).

Kaivola, the driver of the truck which rolled over, testified as follows (Tr. 172):

> I considered it a safety problem. But I didn't think that it -- it was bad enough to where we couldn't drive it up out of the pit. Like -- like was mentioned earlier, we sometimes drive them up to the shops unless they're to the point where they have to come and retrieve them.

Primozich, the repair shop foreman, testified that he felt shifted rear ends were maintenance problems, but he refused to categorize them as safety items because he feared that USS would impose on him an obligation to check rear ends on each piece of equipment just as he is required to check brakes as a

safety item. Primozich made that point clear in the following statement (Tr. 312):

> A. I wouldn't consider it a safety problem. We seem to go from one extreme to the other here. Ah, we either catch them when they come to the shop for routine maintenance, or we go to the other extreme where we wind up with either the tires flat or the differential sitting under the truck. There doesn't seem to be a happy what you would call median in this. So I don't consider it a safety problem. Also going through twenty-eight hundred vehicles at a maximum to 900, there's no way that my people can go through each individual unit as a safety item.

At other places in his testimony, Primozich stated that shifted rear ends would cause "excessive tire wear" (Tr. 310) and could stretch the brake lines so much that the brakes would fail and also could cause the drive shaft to fall out (Tr. 322). Primozich also testified that he would not drive a truck if the rear end had shifted back 2-1/2 inches because he would not feel safe in doing so (Tr. 322). USS's brief (p. 16) argues that Primozich testified that he would not drive a vehicle with a shift of 2-1/2 inches only as a result of the rollover in this proceeding, but the testimony (Tr. 310 and 322) cited in USS's brief shows only that Primozich was having a considerable amount of difficulty in reconciling his conflicting testimony which, on the one hand, classified shifting rear ends as a maintenance problem, and on the other hand, showed that shifting rear ends could lead to worn tires and blowouts, ruptured brake lines, and disengaged drive shafts.

The testimony which I have reviewed above shows that a shift of 2-1/2 inches in a rear end is a defect affecting safety within the meaning of section 55.9-1 and section 55.9-2. The word "defect" is defined in Webster's Collegiate Dictionary as a "shortcoming" or "imperfection" and the word "safety" is defined as "the condition of being safe from undergoing or causing hurt, injury, or loss". It should be recalled that on the same day that Kaivola found the 2-1/2-inch shift in the rear end of Truck No. 856, he also found that the right front tire was worn down to the cords (Tr. 160; 385). Excessive tire wear is one of the signs of a shifted rear end (Tr. 310). Shifted rear ends can also cause tires to rub in the wheel wells and cause complete stoppage of a truck (Tr. 356). Shifting of rear ends can also lead to broken brake lines and cause drive shafts to fall out (Tr. 296; 324).

Since the evidence clearly shows what can happen to trucks when they are continued in operation after a shift in the rear ends occur, it is certain that a shifted rear end is a "shortcoming" or "imperfection" in any truck having a shifted rear end. Inasmuch as a "shortcoming" or "imperfection" is a "defect" and since excessively worn tires, brake failure, and the falling out of drive shafts constitute conditions which would prevent persons riding in a vehicle with a shifted rear end from

feeling "safe from undergoing" an "injury or loss", I believe that the record supports a finding, and I so find, that a shift of 2-1/2 inches in the rear end of the No. 856 truck constituted a "defect affecting safety" within the meaning of section 55.9-1 and section 55.9-2.

Occurrence of Violations

The evidence unequivocally shows that the driver of the truck, Kaivola, reported the shifted rear end to his foreman, Roivanen, but Kaivola went home early and reminded Roivanen that he would not be on hand at the end of his shift to take the truck to the repair shops (Tr. 156-157). Therefore, the defect in the rear end of the truck was reported to Roivanen, one of USS's supervisory employees. He candidly testified that he was so busy with identifying the locations of shovels requiring repair that he forgot about the defect which Kaivola had reported to him (Tr. 328-329). Roivanen also testified that USS's plan for the reporting and recording of defects in his section had deteriorated so much that the oral report of the defect to him was all that Kaivola was required to do at the time the defect was reported to him on January 21, 1981 (Tr. 351). Although USS has a well-organized repair shop where all reported defects are recorded, the repair shops can't record defects which are never reported to its personnel (Tr. 298; 314). Therefore, Roivanen's failure to pass on to the repair shop the defect reported to him by Kaivola was a violation of section 55.9-1 because the defect, although reported to Roivanen, was never recorded by anyone because Roivanen completely forgot about the defect.

The violation of section 55.9-2 was a direct consequence of Roivanen's failure to record the defect or advise the repair shop that the defect existed. The failure to take the No. 856 truck to the repair shop on either the afternoon or evening shift resulted in the truck's being found on the "ready" line by Kaivola when he came to work on the day shift on January 22, 1981 (Tr. 158). Although Kaivola wondered about whether the shift in the rear end had been corrected, he made no actual inquiry to find out for certain and drove the truck to the site of repair jobs without realizing that the shift in the rear end had not been repaired (Tr. 159). Kaivola saw smoke coming from the left rear dual wheels just a few seconds before the truck flipped over (Tr. 163). The foregoing facts support my conclusion that section 55.9-2 was violated because the equipment defect in the No. 856 truck was not corrected before the equipment was used.

In Ideal Basic Industries, Cement Division, 3 FMSHRC 843, 844 (1981), the Commission interpreted section 56.9-2 [which is identical to the wording of section 55.9-2] to mean "* * * that use of a piece of equipment containing a defective component that could be used and which, if used, could affect safety, constitutes a violation of 30 CFR 56.9-2". The evidence in this proceeding shows that the No. 856 truck was used while its rear wheels and drive shaft were out of alignment so that the truck was traveling at an angle causing excessive wear of the tires and exposing the driver and other personnel to possible injury as a result of blowouts, dropping out of the drive shaft, and brake failure.

The Violations Were Unwarrantable Failures

Both USS's brief (p. 16) and MSHA's brief (p. 12) refer to the definition given by the former Board of Mine Operations

Appeals in Zeigler Coal Co., 7 IBMA 280 (1977), in their arguments with respect to whether the violations of sections 55.9-1 and 55.9-2 resulted from unwarrantable

failure on the part of USS's employees. The Board held in the Zeigler case that an unwarrantable failure may be said to have occurred if it involves a "* * * violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of a lack of due diligence, or because of indifference or lack of reasonable care". (7 IBMA at 295-96).

The first argument raised by USS's brief (p. 17) in support of its claim that the violation was not the result of unwarrantable failure is that the foreman thought that the shifted rear end was a maintenance item which should be taken care of in due course in the interest of good scheduling of repairs and economy. That argument has already been found to be fallacious in the preceding section of this decision and need not be reconsidered here except to note that the foreman of the repair shops emphasized that it was important that shifts in rear ends be reported to the repair shops promptly because the longer the repairs were delayed, the more expensive the costs of repairs became. The foreman specifically pointed out that tires wear excessively and springs, brakes, etc., may fail if the repairs are delayed (Tr. 295; 298; 318). Consequently, USS's argument that the shifted rear end could have been delayed to be repaired as a maintenance item in the interest of good scheduling and economy is rejected as not supported by the record.

The second argument in opposition to the inspector's finding of unwarrantable failure in USS's brief (p. 17) is that the foreman who failed to report the shifted rear end is conscientious and always has defects corrected when they affect safety. USS cites the testimony of Boucher, one of the passengers in the truck which rolled over, at transcript page 379, where Boucher testified that the foreman had Kaivola take the No. 856 truck to the repair shop as soon as they reported to him the fact that the right front tire was worn down to the cords. As I have already pointed out, the severe wearing of tires is one of the characteristics of a shifted rear end. Therefore, when the foreman was advised of the wearing of a tire down to the cords, he should have been more concerned than he was, of the report that the rear end of the truck had shifted. The foreman was aware of the fact that the wheels would rub in the wheel well and smoke and even stall out the trucks' engines when their rear ends had shifted (Tr. 356). Consequently, while the record shows that the foreman ordered a tire worn down to the cords to be replaced, the record also shows that that same foreman was so busy with determining the location of shovels which needed repairing, that he completely forgot to have the No. 856 truck taken to the repair shop to have the rear end realigned. The foreman's failure in this instance not only exposed the men using the truck to possible injury, but also resulted in USS having to purchase a replacement truck because No. 856 was a total loss, according to the inspector (Tr. 32).

The next argument in USS's brief (p. 17) in opposition to the inspector's finding of unwarrantable failure is that USS asks why the action of the driver in failing to fill out the required inspection form was not also an unwarrantable failure and why the

failure of the driver on the next shift to report the truck's misalignment was not also the result of

an unwarrantable failure. The short answer to both of those questions is that they were unwarrantable failures. Roivanen testified that he and the other foremen had permitted the reporting of needed repairs in writing on forms provided by USS to deteriorate to a system under which it was permissible for the employees to report orally any defects which needed repairing. In fact, Roivanen specifically stated that the employees under his supervision were "just not inspecting" the vehicles assigned to them (Tr. 351-352).

The fact that Roivanen and the other foremen could not control the 130 "guys" (Tr. 152) in their department sufficiently to require them to fill out written forms pertaining to needed repairs is not a reason to hold that the inspector made a mistake in finding that Roivanen's failure to see that truck No. 856 was repaired was an unwarrantable failure. As the Commission majority stated in El Paso Rock Quarries, Inc., 3 FMSHRC 35, 40 (1981), the Act "* * * does not permit an operator to shield itself from liability for a violation of a mandatory standard simply because the operator violated a different, but related, mandatory standard".

Effect of Modifying the Underlying Citation

The inspector's Order Nos. 293740 (Exh. M-5) and 296501 (Exh. M-6) here under review were both issued under section 104(d)(1) of the Act and both were based on underlying Citation No. 293731 (Ech. M-2) issued under section 104(d)(1) of the Act. The second sentence of section 104(d)(1) (FOOTNOTE 4) requires that an unwarrantable-failure citation be issued under the first sentence of section 104(d)(1) before an inspector may issue an order of

withdrawal under that section. USS's brief (p. 18) states that it contested underlying Citation No. 293731 in a proceeding before Judge Vail and that Judge Vail granted the Secretary's motion to amend Citation No. 293731 to show that it was issued under section 104(a) of the Act, instead of under section 104(d)(1) of the Act. USS correctly points out that when MSHA changed the basis for issuance of Citation No. 293731 to that of a citation issued under section 104(a), there was no longer in existence an underlying citation to serve as the foundation for Order Nos. 293740 and 296501.

When USS's counsel pointed out at the hearing before Judge Cook that underlying Citation No. 293731 was the subject of a review proceeding before a different judge, it was agreed that Judge Cook would not write the decision in this proceeding until the results of the other proceeding were known (Tr. 9; 387). At the hearing, MSHA's counsel stated that if the underlying citation should be modified or vacated, that MSHA would either amend the orders here involved or ask Judge Cook to do so (Tr. 387). After the cases in this proceeding were transferred to me, I wrote a letter on February 4, 1982, to counsel for both parties and suggested that MSHA modify the orders in this proceeding in accordance with the statement of MSHA's counsel at the hearing.

In response to the aforementioned letter, MSHA's counsel mailed to me on March 2, 1982, modifications of Order Nos. 293740 and 296501. The modifications provided by MSHA's counsel will be given exhibit numbers and made a part of the record. The last exhibit received in evidence at the hearing by Judge Cook was Exhibit M-7. There is marked for identification and received in evidence as Exhibit M-8 a one-page modification of Order No. 293740 and there is marked for identification and received in evidence as Exhibit M-9 a one-page modification of Order No. 296501. Exhibit M-8 modifies Order No. 293740 to Citation No. 293740 issued under section 104(d)(1) of the Act. Exhibit M-9 modifies Order No. 296501 to show that the order is based on Citation No. 293740 instead of Citation No. 293731 which, of course, has already been modified to be a citation issued under section 104(a).

Inasmuch as Order No. 293740 has now been modified to Citation No. 293740 issued under section 104(d)(1) of the Act, it is necessary to examine the allegations made in the citation to determine whether it was validly issued under the provisions of section 104(d)(1). Most of the prerequisites for issuance of a citation under section 104(d)(1) have already been reviewed and need little additional discussion. The first requirement for issuance of a citation under section 104(d)(1) is that the inspector must find that a violation occurred. I have already found above under the heading of "Occurrence of Violations" that the violation of section 55.9-1 alleged in Citation No. 293740 occurred and that the violation of section 55.9-2 occurred as alleged in Order No. 296501.

The next prerequisite for issuance of Citation No. 293740 is that the inspector must determine whether the violation

constitutes an imminent danger. I have already shown in my discussion under the heading "Defect Affecting Safety" that the violations of sections 55.9-1 and 55.9-2 did

not constitute imminent dangers because Kaivola, the driver of the truck which rolled over, thought it could be driven on January 21, 1981, out of the pit to the repair shop if it were driven in a careful manner. It is true that the shifted rear end caused an imminent danger on January 22 just before the truck's left rear spring disintegrated and caused the truck to roll over. The truck's rolling over on January 22, however, occurred after Roivanen had failed to record the defective rear end or have the defect repaired. The truck was again driven on the afternoon shift without having had the shifted rear end repaired. Therefore, at the time the violation of section 55.9-1 occurred, there was not an imminent danger.

Having ruled out the existence of an imminent danger, the next step in issuing a citation under section 104(d)(1) is determining whether the violation of section 55.9-1 "* * * could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard". The Commission has recently redefined the question of what constitutes a violation which may be considered to be "significant and substantial" in its decision in Cement Division, National Gypsum Co., 3 FMSHRC 822 (1981). In that case the Commission noted that the word "hazard" connotes a "danger" or "peril" and that both "significant" and "substantial" mean "important" and "notable". With those terms in mind, the Commission then stated that a violation may be considered to be significant and substantial under section 104(d)(1) if the violation involves at least a remote possibility of injury and, additionally, that there should exist a reasonable likelihood of occurrence of an injury or illness of a reasonably serious nature.

I have also shown in my discussion under the heading of "Defect Affecting Safety" that USS's personnel had sufficient knowledge from occurrence of shifts in rear ends of vehicles before the one reported by Kaivola on January 21, 1981, that such shifts were associated with a remote possibility of an injury which would have a reasonable likelihood of occurrence and be of a reasonably serious nature. The driver of the truck, Kaivola, the foreman, Roivanen, and the foreman of the repair shops, Primozich, all testified that shifted rear ends cause wheels to rub in the wheel wells so that they smoke and stall out trucks' engines and that shifted rear ends cause excessive wear of tires and blowouts. Additionally, at least Primozich knew before the truck rolled over that shifted rear ends cause drive shafts to fall out and brake lines to rupture. All the aforementioned hazards were known by USS's personnel to be associated with shifted rear ends before No. 856 truck rolled over on January 22, 1981, as a result of the foreman's failure to record the shifted rear end so that the truck could be taken out of service and repaired before it was continued to be used. Failure to take the truck out of service caused it to roll over with the result that the truck became a total loss and the three men riding in it miraculously suffered only minor back injuries and a chipped elbow (Finding Nos. 4-6, supra).

The discussion under "Defect Affecting Safety" shows beyond any doubt that the violation of section 55.9-1 and the violation of section 55.9-2 were significant and substantial when those terms are considered in light

of the facts in this proceeding and under the definition given by the Commission in its National Gypsum decision, supra.

The final step in determining whether Citation No. 293740 was properly issued under section 104(d)(1) is whether the violation of section 104(d)(1) was caused by an unwarrantable failure of USS's personnel. My discussion above under the heading "The Violations Were Unwarrantable Failures" shows that Roivanen, under the pressure of his other duties, forgot about Kaivola's having reported the shifted rear end to him and forgot that Kaivola was leaving early so that someone other than Kaivola would have to take the truck to the repair shop for correction of the rear-end problem. The facts also show that Roivanen and the other foremen in his department had allowed the reporting of defects in equipment to deteriorate to the point that the employees were simply not inspecting their trucks (Finding Nos. 17 and 18, supra). There can be no doubt but that the violation of section 55.9-1 and the violation of section 55.9-2 were the result of unwarrantable failures by USS personnel.

My review of the criteria governing issuance of unwarrantable-failure citations supports a conclusion that Order No. 293740 was properly modified to Citation No. 293740 and that Order No. 296501 was properly modified to show its issuance after the inspector had found that another violation had occurred which was the result of an unwarrantable failure. Although I have already found that the violation of section 55.9-2 alleged in Order No. 296501 meets the test of a significant and substantial violation, the court held in International Union, UMWA v. Kleppe, 532 F.2d 1403 (D.C. Cir. 1976), cert. den., 429 U.S. 585 (1976), that the violation which causes an inspector to issue his first unwarrantable-failure order following issuance of an unwarrantable-failure citation, need not be found to be significant and substantial. I have shown above that the violation of section 55.9-2, which triggered the issuance of Order No. 296501, was significant and substantial. I have considered the issue of whether the violation of section 55.9-2 was significant and substantial because the inspector made such a finding in Order No. 296501 and because USS has argued in its brief (p. 19) that the violations of sections 55.9-1 and 55.9-2 were not correctly found to be significant and substantial.

I find that the modification of Order No. 293740 to unwarrantable-failure Citation No. 293740 was properly done because the evidence shows that Citation No. 293740 meets all the criteria for issuance of an unwarrantable-failure citation under section 104(d)(1) of the Act. I also find that Order No. 296501 was properly modified to provide that Citation No. 293740 is the underlying citation which now supports the valid issuance of Order No. 296501. For the foregoing reasons, I further find that Citation No. 293740 and Order No. 296501 were properly issued under section 104(d)(1) of the Act and should be affirmed.

Assessment of Penalties

I have already found that violations of sections 55.9-1 and

55.9-2 occurred. It is necessary that civil penalties be assessed under section

110(i) of the Act. In my discussion of the six criteria with respect to the first violation of section 103(a) alleged in Citation No. 293736, I made findings as to two of the six criteria and the findings as to those two criteria continue to be applicable to the two violations here under consideration. Specifically, it has already been found that USS is a large operator and that payment of penalties will not cause USS to discontinue in business.

History of Previous Violations

I have already explained in assessing the penalty for the first violation of section 103(a) that Exhibit M-1, the exhibit pertaining to history of previous violations in this proceeding, does not show which specific sections of the Act or regulations have previously been violated by USS. Inasmuch as I cannot use my normal methods of evaluating the criterion of history of previous violations because of lack of sufficient information in the record, I shall employ the same method with respect to the violations of sections 55.9-1 and 55.9-2 which I used with respect to the first violation of section 103(a) and shall assess an amount of $10 for each violation under the assessment formula in paragraph (1) of section 100.3(c) because USS has an average of more than 50 prior violations per year. As I have already explained, the lack of evidence in the record prevents me from making any determination under paragraph (2) of section 100.3(c).

Negligence

The criterion of negligence has already been discussed above in considerable detail under the heading of "The Violations Were Unwarrantable Failures". I there noted that both violations occurred because USS's foremen had allowed the reporting of defects in equipment to deteriorate to oral reports and Roivanen expressed a belief that the men were not even making inspections of their equipment before using it. Roivanen was particularly negligent in forgetting to follow up on an oral report by the driver of the truck. Roivanen's failure to record the defect and to see that the shifted rear end was repaired was the cause of the truck's continued use on the afternoon shift after the defect was first reported, and was also the cause of the truck's further continued use on the next day up to the time that it flipped over.

While USS's brief (p. 17) tries to minimize the foreman's negligence, his own testimony shows that he was simply not assuring that defects were recorded and corrected. The mere fact that Roivanen immediately authorized Kaivola to have a tire worn down to the cords replaced is not an especially redeeming factor because anyone who has been around trucks or cars for even a few months knows that tires worn to the cords are a blowout hazard. A foreman in Roivanen's capacity should also have been interested in determining why a tire would be worn down to the cords without such extreme wear having been noted and its replacement having been done in the usual course of maintenance. Roivanen should have known, as Primozich knew, that shifted rear ends cause

excessive tire wear. Therefore, when Kaivola orally reported to Roivanen that the rear end of his vehicle had shifted,

Roivanen should have realized that the shift in the No. 856 truck was extreme and hazardous or the right front tire would not have been worn down to the cords.

I believe that Roivanen's lack of care constituted at least ordinary negligence. His own testimony shows that he was so concerned about finding the locations of shovels which needed repairing that he completely forgot about Kaivola's report pertaining to the conditions of the No. 856 truck. In short, Roivanen's negligence brought about both violations. Therefore, under the criterion of negligence, USS should pay a penalty of $400 for each violation.

Gravity

The criterion of gravity has been discussed in considerable detail above under the heading of "Defect Affecting Safety". As I have already shown, shifts in vehicles' rear ends cause excessive tire wear and both Kaivola and Roivanen were aware that shifted rear ends prior to January 21, 1981, had caused the rear tires to bind in the wheel wells to the point that the vehicles could not be driven. Primozich knew that shifts in rear ends could lead to excessive tire wear, to the rubbing and smoking of tires in the wheel wells, to the stalling out of the engines, to the dropping out of drive shafts, to the rupturing of brake lines, and to the disintegration of the springs through failure of U-bolts. While the evidence does not show that Kaivola and Roivanen were aware of the hazards which are associated with shifted rear ends to the extent that Primozich was, the evidence clearly shows that Roivanen knew enough about the hazards of shifts in vehicles' rear ends to make him realize that such repairs cannot be delayed to some future point in time when the trucks are taken to the shop for routine maintenance, such as lubrication of the chassis and change of engine oil. In view of the hazards which are associated with the violations, I find that USS should be assessed $100 for each violation under the criterion of gravity.

Good-Faith Effort To Achieve Rapid Compliance

As I have previously indicated, an operator is considered to have shown a normal good-faith effort to achieve rapid compliance if he corrects an alleged violation within the time provided for abatement in the inspector's citation. It must be recalled that the inspector originally cited the violations here involved in orders of withdrawal which do not establish a time for abatement because normally the operator's personnel have been withdrawn from the area of danger, except for those employees who must remain at the place where the hazards exist for the purpose of correcting the violation. Since a withdrawal order disrupts production, it is generally assumed that an operator will correct the violation as soon as possible in order to obtain a termination of the order so that production can be resumed.

Inasmuch as the orders were written on March 9, 1981, after an investigation which was completed sometime after February 13, 1981, and

inasmuch as the investigation pertained to a truck which rolled over on January 22, 1981, the criterion of good-faith abatement is difficult to evaluate. Nevertheless, there are some factors which ought to be taken into consideration under the criterion of good-faith abatement. First, it must be recalled that USS investigated the truck's rollover on January 22, 1981, the day that it flipped over. The results of USS's investigation of the incident were recorded in a report which has been received in evidence as Exhibit M-7 in this proceeding. The report is a model of brevity and lists the following six steps to prevent recurrence of a truck's rolling over:

1. Small truck garage will check rear springs by wire brushing and visual inspection.
2. Contact operators on checking undercarriage on trucks.
3. Use vehicle inspection sheets.
4. Red tag trucks with questionable alignment.
5. Contact operators to check weight of items being carried on the shovel trucks.
6. Publicize.

Although USS's brief has sought to deny that its formen were in any way at fault in contributing to the rollover of the No. 856 truck, the list of steps which USS adopted to prevent a recurrence of the rollover reveal that USS had recognized, long before MSHA investigated the incident or wrote the citation and order here involved, that its procedures needed to be improved and greater care needed to be taken in reporting defects in equipment. If the inspections cited in the first two steps above had been taken prior to or on January 21, 1981, the shift in the rear end of No. 856 truck would have been detected and corrected before the shift became serious. If the first two steps had not resulted in detection of the shifted rear end, steps 3 and 4 would have brought about a recording of the fact that the defect existed and would have prevented the truck from being used until the defect was corrected. Steps 5 and 6 would also have had a salutary effect in making the employees aware of their responsibilities in the area of reporting defects before those defects result in accidents.

When the inspector terminated Order No. 293740 (now Citation No. 293740) and Order No. 296501, he indicated that USS had procedures for carrying out the provisions of sections 55.9-1 and 55.9-2. The inspector did not recommend any corrective action which USS should take which it had not already taken. Moreover, it must be recognized that USS had completed its investigation and had adopted the six remedial steps described above before the inspector had even begun his investigation in response to the complaint which MSHA had received under section 103(g)(1) requesting that the accident be investigated.

The purpose of assessing penalties under the Act is to deter companies from future violations of the mandatory safety and health standards. When a company has written proof of the fact that it had already recognized the shortcomings of its

supervisory personnel in allowing the truck to get into a condition which could cause it to roll over and has taken steps to correct

those shortcomings before MSHA ever cites it for the violations, it is obvious that assessing large penalties would be unwarranted and would not accomplish the purpose for which they were placed in the Act. Therefore, I believe the facts in this proceeding warrant a finding under the criterion of good-faith abatement that any penalties assessed under the other five criteria should be reduced by 50 percent under the criterion of good-faith abatement.

By way of summary, I have found above that for each violation, USS should be assessed a penalty of $10 under the criterion of history of previous violations, $400 under the criterion of negligence, and $100 under the criterion of gravity, or a total penalty of $510 for each violation. Reduction of the penalty by 50 percent under the criterion of good-faith abatement means that USS should be assessed a penalty of $255 for the violation of section 55.9-1 and $255 for the violation of section 55.9-2.

It should be noted that the parties' stipulation with respect to the criterion of good-faith abatement stated: "U. S. Steel demonstrated good faith in abating the citations at issue within the time given for abatement" (Tr. 12). As I have explained above, the stipulation is inapplicable as to the violations of sections 55.9-1 and 55.9-2 because both violations were originally cited by the inspector in orders of withdrawal which do not specify a time within which the violations are required to be abated. While it is true that Order No. 293740 has been modified to Citation No. 293740, the modification did not include an abatement period (Exh. M-8).

It can be argued, of course, that the criterion of good-faith abatement is inapplicable to violations cited in orders of withdrawal, but there is nothing in section 110(i) which provides that the criterion of good-faith abatement should be ignored in assessing any civil penalty. Moreover, the criterion of good-faith abatement can hardly be ignored in this instance when it is considered that USS abated both violations before they were cited by adopting procedures which should assure that the violations do not again occur. Since USS had abated the violations before they were cited, it cannot be shown that USS was under any coercion to act swiftly because its plant was under any kind of closure order.

I am aware that MSHA's brief (p. 13) recommends that USS be assessed a civil penalty of $1,000 for the violation of section 55.9-1 and a penalty of $1,500 for the violation of section 55.9-2, but MSHA's brief does not discuss any of the six criteria other than negligence and gravity and does not discuss any of the ameliorating aspects of the violations which warrant the assessment of the moderate penalties which I have determined should be imposed.

WHEREFORE, for the reasons hereinbefore given, it is ordered:

(A) The notice of contest filed on February 23, 1981, in Docket No. LAKE 81-102-RM is denied and Citation No. 293736 issued January 22, 1981, is affirmed.

(B) The notice of contest filed on February 23, 1981, in Docket No. LAKE 81-103-RM is denied and Citation No. 293739 issued February 9, 1981, is affirmed.

(C) The notice of contest filed on March 27, 1981, in Docket No. LAKE 81-114-RM is denied and Citation No. 293740 issued March 9, 1981, as modified, is affirmed.

(D) The notice of contest filed on March 27, 1981, in Docket No. LAKE 81-115-RM is denied and Order No. 296501 issued March 9, 1981, is affirmed.

(E) Within 30 days from the date of this decision, United States Steel Corporation shall pay civil penalties totaling $2,100.00 which are allocated to the respective violations as follows:

	Docket No. LAKE 81-152-M	
Citation No. 293740 3/9/81	55.9-1	$ 255.00
Order No. 296501 3/9/81	55.9-2	255.00
Total Penalties Assessed in Docket No. LAKE 81-152-M		$ 510.00
	Docket No. LAKE 81-167-M	
Citation No. 293736 1/22/81	103(a) of Act	$1,510.00
	Docket No. LAKE 81-168-M	
Citation No. 293739 2/9/81	103(a) of the Act	$ 80.00
Total Penalties Assessed in This Proceeding		$2,100.00

Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

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~FOOTNOTE_ONE

1 These cases were originally assigned to Administrative Law Judge John F. Cook and were reassigned to me after Judge Cook ceased to work for the Commission because of a reduction in force. Therefore, the decision has been written by me in its entirety, but the hearing was held before Judge Cook on August 26 and 27, 1981, in Duluth, Minnesota, pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(d).

~FOOTNOTE_TWO

2 Section 103(a) of the Act reads as follows:

Sec. 103. (a) Authorized representatives of the Secretary or the Secretary of Health, Education, and Welfare shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining,

utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirements of this Act. In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person, except that in carrying out the requirements of clauses (1) and (2) of this subsection, the Secretary of Health, Education, and Welfare may give advance notice of inspections. In carrying out the requirements of clauses (3) and (4) of this subsection, the Secretary shall make inspections of each underground coal or other mine in its entirety at least four times a year, and of each surface coal or other mine in its entirety at least two times a year. The Secretary shall develop guidelines for additional inspections of mines based on criteria including, but not limited to the hazards found in mines subject to this Act, and his experience under this Act and other health and safety laws. For the purpose of making any inspection or investigation under this Act, the Secretary, or the Secretary of Health, Education, and Welfare, with respect to fulfilling his responsibilities under this Act, or any authorized representative of the Secretary or the Secretary of Health, Education, and Welfare, shall have a right of entry to, upon, or through any coal or other mine.

18 As the majority notes, two of the four sets of purposes enumerated in 103(a) fall under the investigatory domain of the Secretary of Health and Human Services. Maj. op. at 9 n.10. Specifically, the information-gathering purposes set forth under numbers (1) and (2) of 103(a) are within the aegis of the Health and Human Services Secretary. By contrast, the Secretary of Labor is directed by 103(a) to conduct inspections to determine "whether an imminent danger exists" and "whether there is compliance with the mandatory health or safety standards" or with other administrative orders promulgated under relevant legislation. 30 U.S.C. 813(a) (Supp. II 1978).

~FOOTNOTE_THREE

3 Citation No. 293739 (Exh. M-4), as originally issued, alleged a violation of section 103(a)(1), but the inspector issued a subsequent action sheet on February 27, 1981, in which he stated that the citation was being modified to allege a violation of section 103(a) instead of a violation of section 103(a)(1). Although the modification of Citation No. 293739 in this proceeding (Exh. M-4, p. 3) does not contain words modifying the violation from section 103(a)(1) to section 103(a), the proposal for a civil penalty filed in Docket No. LAKE 81-168-M seeks a penalty for the violation of section 103(a) alleged in Citation No. 293739 and the proposal is accompanied by a modification dated February 27, 1981, showing that the inspector modified Citation No. 293739 long before the hearing was held in this proceeding. Therefore, respondent was not prejudiced by the fact that the exhibits introduced at the hearing in this

proceeding failed to include the inspector's modification showing that the inspector had modified Citation No. 293739 to allege a violation of section 103(a) instead of a violation of section 103(a)(1).

~FOOTNOTE_FOUR

4 Section 104(d)(1) of the Act reads as follows:

(d)(1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.