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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

U.S. STEEL MINING CO., INC., CONTESTANT	CONTEST PROCEEDING
v.	Docket No. WEVA 82-390-R Citation No. 2024280; 8/18/82
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Morton Mine
UNITED MINE WORKERS OF AMERICA, RESPONDENT	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. WEVA 83-95 A.C. No. 46-01329-03519
v.	Morton Mine
U.S. STEEL MINING CO., INC., RESPONDENT	Docket No. WEVA 83-82 A.C. No. 46-05907-03502
	Shawnee Mine

DECISION

Appearances: Louise Q. Symons, Esq., Pittsburgh, Pennsylvania, for Contestant/Respondent;
Matthew J. Rieder, Esq., and David E. Street, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Respondent/Petitioner;
Joyce A. Hanula, Legal Assistant, Washington, D.C., for Respondent United Mine Workers of America.

Before: Judge Steffey

A hearing in the above-entitled consolidated proceeding was held on May 11, 1983, through May 13, 1983, in Beckley, West Virginia, pursuant to section 105(d), 30 U.S.C. 815(d), of the Federal Mine Safety and Health Act of 1977.

The contest proceeding involves a dispute as to whether U.S. Steel Mining Co., Inc. (USSM), must allow a health specialist, who works full time for the United Mine Workers of America, to be the miners' representative to accompany a Federal inspector under the provisions of section 103(f) of the Act. The petition for assessment of civil penalty filed in Docket No. WEVA 83-95 seeks assessment of a civil penalty for the violation of section 103(f) which is being challenged in the contest proceeding and also seeks assessment of a penalty for an alleged violation of 30 C.F.R. 70.101. The petition for assessment of civil penalty filed in Docket No. WEVA 83-82 seeks assessment of a penalty for an additional alleged violation of section 70.101 (Tr. 205), but with respect to USSM's Shawnee Mine instead of USSM's Morton Mine, which is the mine involved in both Docket No. WEVA 82-390-R and Docket No. WEVA 83-95.

UMWA's representative participated at the hearing in only that phase of the consolidated proceeding pertaining to the walkaround issues. Therefore, a hearing with respect to the alleged violation of section 103(f) of the Act was first held and then a hearing was held with respect to the two alleged violations of section 70.101. This decision will first dispose of the walkaround issues raised in Docket No. WEVA 82-390-R and the portion of the civil penalty case in Docket No. WEVA 83-95 pertaining to the alleged violation of section 103(f). Thereafter the decision will dispose of the issues pertaining to the alleged violations of section 70.101.

Docket No. WEVA 82-390-R

Findings of Fact

The testimony of the witnesses and the documentary evidence support the following findings of fact:

1. Leo Ingram, an MSHA inspector, went to USSM's Morton Mine on August 18, 1982, to perform a respirable-dust inspection on the longwall section (Tr. 7). He had made prior inspections at the Morton Mine and knew that the persons who normally accompanied him, as the miners' representative under the provisions of section 103(f) of the Act, were Donny Samms, James Carter, and Steve Holly (Tr. 12), but on August 18, 1982, Ingram saw William Willis at the mine along with Donny Samms. Ingram knew that Willis was a UMWA District 17 safety inspector. Shortly after Ingram had begun his work of placing respirable-dust pumps on some of the miners, he was advised by Samms and Willis that Willis would be accompanying him that day as the miners' representative and that Samms would be going underground with him, but would be traveling under the provisions of West Virginia law, while Willis would be accompanying him under the provisions of the Act (Tr. 9; 18). Ingram had no objections to having Willis accompany him as the miners' representative (Tr. 9).

2. Samms and Willis soon thereafter advised Ingram that USSM was not going to allow Willis to go with him as the miners' representative. Ingram asked Lawrence Burke, the mine superintendent, if he was refusing to allow Willis to accompany him and Burke replied "Yes". Willis expressed a belief that USSM's refusal to allow him to accompany the inspector was a violation of section 103(f). Ingram was not certain as to the course of action he should take and made a telephone call to his supervisor to obtain advice. After receiving instructions from his supervisor to the effect that a violation had occurred, Ingram wrote Citation No. 2024280 under section 104(a) of the Act at 8:45 a.m. on August 18, 1982, alleging a violation of section 103(f) of the Act, and stating as follows (Exh. 1):

> The operator refused to allow a representative of the miners, William Willis, United Mine Workers of America District 17 safety inspector, to travel with an authorized representative of the Secretary of Labor during a respirable dust technical inspection.

The citation gave USSM 30 minutes within which to abate the alleged violation. By the time a half hour had passed, the chief mine inspector of USSM's Decota District, Carl Peters, had sent word to Ingram that Willis would be allowed to accompany him. Upon receiving USSM's approval for Willis to travel with him, Ingram terminated the citation with the following explanation (Exh. 1):

> The representative of the mine operator, Mike Sinozich, has agreed to allow the representative, William Willis, to travel with the authorized representative of the Secretary of Labor during a respirable dust technical inspection.

3. Ingram was accompanied underground by Samms, Willis, and Michael Sinozich, USSM's safety inspector. All four of them went to the longwall section where coal was being produced, but Samms did not remain with the inspection party the whole period they were underground. Samms left the section sometime before noon, but Ingram does not know exactly what time it was (Tr. 13). Ingram did not ask Willis to accompany him and never has asked anyone to accompany him, but he knows that he is permitted under the Act to allow more than one miners' representative to travel with him (Tr. 14; 17). Willis advised Ingram that he wanted to look into the dust problem on the longwall section and Ingram thinks that Willis did make a suggestion about the placement or direction of water sprays on the longwall mining equipment, but he did not recall what it was (Tr. 15). Ingram was aware that he is not permitted under the Act to give advance notice of inspections and he has never done so (Tr. 16).

4. James Carter was unemployed at the time of the hearing, but on August 18, 1982, he was employed at the Morton Mine as a supply man. He was also on the union's safety committee and had called Willis on the evening of August 17, 1982, to come to the mine on the morning of August 18, 1982, because the union wanted him to accompany the inspector on that day if the inspector returned to the mine on that day (Tr. 19-20). Carter knew that Ingram had been notified that Willis would accompany him on the inspection, but Carter had to go underground to work before the issue of his being denied admittance to the mine had been resolved (Tr. 21). While Carter agreed that it was the practice of his local union to give USSM 24 hours' notice, if possible, when an employee of UMWA is asked to come to the mine to participate in an inspection which the local union wants to make at the mine, Carter stated that the 24-hour notice did not pertain to a request that a UMWA employee come to the mine to accompany an inspector under section 103(f) of the Act, but Carter could not specify a time prior to August 18, 1982, when a UMWA employee had been requested to come to the mine to be the miners' representative for accompanying an inspector (Tr. 26; 28).

5. William Willis, the UMWA safety inspector, who was called by the local union to walk around with Ingram on August 18, 1982, corroborated Ingram's and Carter's testimony as to the fact that he was called by the local union, or safety committee, on the evening of August 17, 1982, and that he took a chance that Ingram would be at the mine again on August 18, 1982, to obtain additional respirable-dust samples because production had been below normal on August 17 when Ingram had previously tried to obtain samples (Tr. 29-31). Willis has had the same training as that given to MSHA's inspectors, in addition to other training, and he is a certified mine foreman under West Virginia law (Tr. 29). Willis testified that he gave someone in the Morton Mine office notice that he was there on August 18, 1982, to go on an inspection with Ingram, but he could not recall the name of the person he notified (Tr. 31).

6. Willis' testimony does not differ significantly from Ingram's as to what occurred after he, Sinozich, and Samms went underground with Ingram, except that Willis made it clear that Samms was performing his own inspection under West Virginia law by examining the respirable-dust pumps so as to make it clear that he (Willis) was the sole representative of miners to accompany Ingram (Tr. 34; 36-37). According to Willis, Samms left the longwall face and went to the head entry where he was eating lunch by the time he, Sinozich, and Ingram arrived at the head entry to eat lunch. Willis also claimed that Sinozich and Samms got into a heated argument about what Samms' duties were on August 18 and that Samms told Sinozich at lunch time that he had called his section foreman for a ride so that he could leave the longwall section and return to his regular working place (Tr. 36).

Willis also stated that Samms was still at the head entry about 1 p.m. when he, Sinozich, and Ingram returned to the longwall face, but Willis also claimed that Carter came in a vehicle and picked up Samms so as to take Samms to his regular place of work (Tr. 36).

7. Willis claims to have made two suggestions as to the dust problem on the longwall section. One suggestion was about changing the position of the water sprays which were being welded to the longwall mining equipment (Tr. 35) and the other was about using a curtain to deflect dust away from the operator of the equipment and the jack setters (Tr. 37). At one point in his testimony, Willis denied that his visit to the longwall section had anything whatsoever to do with the fact that Ingram was there because he had come to the mine after receiving from the local union a complaint about the dust problem on the longwall section. Willis said he had received the complaint prior to June 1982 but had delayed filing it with a West Virginia State inspector because he wanted to give USSM time to make some changes which he had been advised were going to be made (Tr. 45; 52). Willis subsequently insisted that he had gone into the mine to assist Ingram with his inspection and to make suggestions to both Ingram and USSM's management as to what could be done to alleviate the respirable-dust problem on the longwall section (Tr. 50). Willis eventually justified his accompanying Ingram by saying that he wanted personally to observe the conditions on August 18, 1982, so that he would have documentation (through the results of the analyses of the inspector's samples) to assist him in determining what additional steps would need to be taken to eliminate the dust problem (Tr. 56). The three respirable-dust samples obtained by Ingram on August 18, 1982, did show that the longwall section was in compliance with the respirable-dust standards (Tr. 78).

8. Willis was not aware of the fact that UMWA's office in Washington, D.C., had filed with MSHA on April 5, 1978, a certification as to the persons who were considered to be the miners' representatives at the Morton Mine when it was owned by Carbon Fuel Company (Tr. 44; 53; UMWA Exh. 1). A copy of the certification was served on Carbon Fuel on March 24, 1978. The mine was owned by Carbon Fuel in 1978. That certification specifies certain persons who are considered to be miners' representatives at the Morton Mine and one of the persons so designated is "the UMWA Safety Division, including District Safety Inspectors". Willis was aware of the fact that he could have inspected the longwall section any time before and after August 18, 1982, under the provisions of the National Bituminous Coal Wage Agreement of 1981 (Tr. 56-57; UMWA's Exh. 2). Willis is a full-time UMWA employee and was not paid by USSM for the time he traveled with the inspector on August 18, 1982, and did not expect to be paid anything by USSM (Tr. 57). USSM did, however, pay Samms for the entire shift (Tr. 77).

9. Michael Sinozich is a mine inspector for USSM at the present time and he held that same position when the Morton Mine was owned by Carbon Fuel Company (Tr. 62-63). When Sinozich arrived at the mine on the morning of August 18, 1982, he went into the lamp room to obtain his light and saw William Willis and Donny Samms there (Tr. 63). He knew that Willis was one of UMWA's safety inspectors (Tr. 75) and advised Willis that he was not supposed to be on mine property without having given previous notification that he was coming (Tr. 64). When Willis told Sinozich that he had come to travel with the inspector that day as the miners' representative, Sinozich disagreed with that assertion and replied that Samms was the miners' representative for traveling with the inspector (Tr. 64-65). Sinozich's testimony does not differ substantially from other witnesses as to USSM's refusal to allow Willis to travel with the inspector and USSM's reversal of that refusal after Ingram issued a citation for an alleged violation of section 103(f) of the Act (Tr. 65-66).

10. Sinozich's testimony does differ from Willis' testimony in some respects. Sinozich claims that Samms was with the inspection party in the face area of the longwall section up to 11:30 a.m. and that Samms left the longwall section about 12:30 p.m. after he had eaten lunch at the head entry (Tr. 69-70). Sinozich also stated that he was surprised when Samms left the longwall section because Samms had not at any time explained to him that he (Samms) was there under a provision of West Virginia law. Additionally, Sinozich stated that his understanding of West Virginia law is that the miners have a right to participate in the taking of respirable-dust samples by USSM, but have no right to monitor or check the samples taken by MSHA. Sinozich did not think that Samms had any reason to go with the inspector to check the pumps placed on three miners in the longwall section on August 18 because USSM was not engaged in taking respirable-dust samples in the longwall section on that day (Tr. 71-72).

11. Sinozich's testimony also differs from Willis' and Ingram's testimony to the extent that Sinozich testified that Willis made no recommendations to him about changes in the ventilation system or changes in engineering for the purpose of controlling dust on the longwall section. Sinozich stated that Samms checked the pumps placed on three miners by Ingram, but that Willis did not check the pumps (Tr. 78-79). Sinozich also testified somewhat inconsistently as to Willis' role underground by first stating that it was too noisy to discuss technical aspects of the dust problems on the longwall section (Tr. 70), while subsequently conceding that the longwall equipment was not running at times while the water sprays were being installed or repositioned and by conceding that the members of the inspection crew did talk at times (Tr. 74; 76-77). Sinozich denied that he

had a heated discussion with Samms as claimed by Ingram (Tr. 69). Sinozich also testified that at no time did he tell Samms that he was forbidden to go on the inspection or that he should not continue to be with the inspection party for the full shift (Tr. 69).

12. Carl Peters is USSM's chief mine inspector for the Decota District. He has held that position since June 12, 1982, and prior to that he was director for health and safety for Carbon Fuel Company (Tr. 80). Peters corroborated Willis' testimony to the extent of agreeing that Willis had discussed with him in June of 1982 at the West Virginia mine office the respirable-dust conditions on the longwall section and that he had advised Willis of the steps USSM was taking to alleviate the problem, but he denied that Willis had expressed an intention of coming to the mine to accompany an MSHA inspector at any time with respect to the respirable-dust problem in the longwall section (Tr. 80-81).

13. Peters stated that the miners' representatives for traveling with inspectors under section 103(f) of the Act are chosen by the union and that USSM has no right to participate in the union's choice of representatives and that USSM does not have any right to approve the union's choice of its representatives (Tr. 86). On the other hand, Peters stated that he does not recall having been served by UMWA with a statement of the persons who are considered to be miners' representatives (Tr. 82). Peters also stated unequivocally that Willis is not a miners' representative to accompany inspectors at the Morton Mine (Tr. 85). Peters stated that the miners' representatives are selected at the mines and that the mine foremen know who they are and that it is a routine understanding that when an inspector appears at the mine, one of the known representatives will automatically accompany the inspector (Tr. 86). Peters stated that the reason they initially refused to allow Willis to accompany Ingram was based on the "surprise" of being hit with "an International safety rep without proper notification. * * * It threw the whole system off" (Tr. 87).

Consideration of the Parties' Arguments

Introduction

USSM filed its brief on September 9, 1983, UMWA filed its initial brief on September 12, 1983, and the Secretary of Labor filed his brief on September 14, 1983. UMWA filed a reply brief on September 30, 1983.

When the parties first replied to a prehearing order issued October 15, 1982, they indicated that they would like to submit the issues to me for decision on the basis of a stipulation of facts. UMWA filed a notice of intervention on November 5, 1982.

After I had granted some extensions of time within which to file the proposed stipulations, I was subsequently advised in a letter filed on February 10, 1983, that the parties had been unable to reach agreement on a stipulation of facts and that the case would have to be scheduled for hearing.

The issues discussed in the parties' briefs show that they are still disputing the basic facts in this proceeding. USSM's brief (p. 2) states that the issue raised is:

> If a miner's representative is available to accompany a federal MSHA inspector, is an operator required to also permit a representative of the international union to join the inspection party absent a request by the inspector?

UMWA's brief (p. 4) expresses the issue as follows:

> The underlying issue in this case is whether USSM should be permitted to interfere in any way with the selection of the miners' representative under section 103(f) of the Act. For the reasons that will be outlined in this brief, the UMWA urges this Court to interpret 103(f) so as to prohibit any interference on the part of the operator with the selection of the miners' representative. [Emphasis added by UMWA.]

The Secretary's brief (p. 11), on the other hand, expresses the issue as follows:

> Thus, the entire case boils down to the question of whether the Union's failure to follow the technical requirements of 30 C.F.R. 40.3 would deprive the operator's miners of the right to have the Union's safety and health specialist be their walkaround representative when they need him to act in that capacity, as they did here when the local safety committeemen could not resolve a potentially serious health hazard and sought the benefit of Mr. Willis' expertise. The Secretary submits that the appropriate conclusion, already reached by one Review Commission Judge, is that the miners' health is the more important concern.

It is apparent from the parties' arguments that UMWA and the Secretary have addressed only very briefly the issue raised in USSM's brief. USSM's original notice of contest did not expressly state the issues raised by Citation No. 2024280 and in my prehearing order of October 15, 1982, I stated that I did not know what issue USSM was raising and noted that if the issue

was merely the question of whether an operator has to pay a miners' representative who is accompanying an inspector engaged in making a spot inspection, that question had already been laid to rest by the court's decision in UMWA v. FMSHRC, 671 F.2d 615 (D.C.Cir.1982), cert. den., 74 L.Ed2d 189 (1982).

USSM clarified the issues being raised in this proceeding by filing a letter on October 29, 1982. A copy of the letter was sent to both the Secretary and UMWA. In that letter USSM specified two issues it was raising in this proceeding as follows:

> (a) The facts in this case are that USSM allowed the elected representative of the miners to accompany the inspector and paid him for the time involved. The issue in this case is whether the operator must also allow a representative from the district office of the union to accompany the miners. UMWA v. FMSHRC, 671 F.2d 615 (1982), did not discuss the issue of whether the operator must permit two representatives of the miners on an inspection party, one from the local and one from the national office.
>
> (b) The facts in this case will establish that the local union never listed William Willis as a representative of the miners pursuant to 30 CFR 40, and that the local union failed to notify mine management that they requested the assistance of Mr. Willis pursuant to Article III, Section (e)(1) of the basic labor agreement.

USSM's brief (p. 5) distinguishes the Commission's holding in Consolidation Coal Co., 3 FMSHRC 617 (1981), by pointing out that in that case the inspector requested the assistance of UMWA's national safety representative and Consol objected to the request on the ground that the national representative had not been designated on the form filed pursuant to 30 C.F.R. 40.3. USSM argues that none of the parties in this proceeding based their actions on the notice of representation. Therefore, USSM argues that the Commission's holding in the Consol case is inapplicable to the facts in this proceeding.

USSM is incorrect in arguing that the Consol case is inapplicable to the issue stated in paragraph (b) above because the Commission held in the Consol case "* * * that failure of a person to file as a representative of miners under Part 40 does not per se entitle an operator to deny that person walkaround participation under section 103(f)" (3 FMSHRC at 619). As I have noted in Finding No. 8, supra, the union did file with MSHA, under the Federal Coal Mine Health and Safety Act of

1969, a certification of miners' representative for the Morton Mine. While a copy of the certification was served on Carbon Fuel Company, the union did not update the certification by serving a copy on USSM after USSM assumed ownership of the Morton Mine. The fact that the union's certification is somewhat defective in terms of service of process is immaterial in light of the Commission's holding in the Consol case to the effect that complete failure to file a certification under section 40.3 is not a sufficient reason for an operator to deny walkaround rights under section 103(f).

USSM's brief seems to have dropped the issue about UMWA's failure to file a certification pursuant to section 40.3 of the regulations because the only issue specifically articulated in the brief is the one pertaining to the safety committee's alleged appointment of two miners' representatives to accompany the inspector under section 103(f) of the Act. To the extent that USSM may still be arguing that it had a right to deny Willis the right to walkaround with the inspector on August 18, 1982, because he had not been listed in a filing made pursuant to section 40.3, I believe that that argument must be rejected under the Commission's holding in the Consol case, supra.

Rights of UMWA under the Wage Agreement

In USSM's letter filed on October 29, 1982, USSM also contends, in paragraph (b), supra, that the union violated the notice provisions of Article III, Section (e)(1) of the Wage Agreement which provides as follows (UMWA Exh. 2, pp. 12-13):

> (1) Subject to the routine check-in and check-out procedures at the mine, the officers of the International Union, the District President of the District involved, and authorized representatives of the International Union's Safety Division and Department of Occupational Health shall be afforded the opportunity to visit a mine to consult with management or the Mine Health and Safety Committee and to enter the mine at the request of either management or the Mine Health and Safety Committee.

It is obvious that the only "notice" UMWA is required to give under Section (e)(1) of the Wage Agreement is that it will follow the "routine check-in and check-out procedures" at the Morton Mine. Presumably all persons who went into the mine on August 18 followed the routine check-in and check-out procedures because no witness was asked any questions about checking in and out of the mine, but USSM's counsel did elicit from UMWA's witness Carter the fact that it is the local union's practice to give USSM 24 hours' notice of an intent to make an inspection of the mine if the inspection is going to be made under the Wage Agreement, but

Carter also insisted that the local union's practice of giving 24 hours' notice did not pertain to a request that a safety inspector from the international union be named as the miners' representative to accompany an MSHA inspector under section 103(f) of the Act (Finding No. 4, supra).

UMWA's brief (p. 5) indicates that the provision USSM should have cited in the Wage Agreement with respect to giving USSM notice is Article III, Section (d)(4) of the Wage Agreement which provides (UMWA Exh. 2, p. 11):

> (4) The Committee shall give sufficient advance notice of an intended inspection to allow a representative of the Employer to accompany the Committee. If the Employer does not choose to participate, the Committee may make its inspection alone.

UMWA's brief (p. 5) argues that USSM is confusing the miners' rights under the Wage Agreement with their rights under the Act. UMWA's brief (p. 6) contends that the Safety Committee cannot give USSM advance notice as to when a miners' representative, who doesn't work at the mine, will appear at the mine to accompany an inspector under section 103(f) because the safety committee is not given advance notice of inspections by MSHA and that it would be contrary to section 103(a) of the Act for MSHA to give the safety committee advance notice. (FOOTNOTE 1) Therefore, UMWA contends that USSM, in arguing that USSM is entitled to 24 hours' advance notice when a representative of the international union is being asked to accompany an inspector, is asking the safety committee to do something which is beyond the safety committee's ability to do. UMWA further argues that it is the union's right under section 103(f) to appoint a miners' representative who does not work for the operator if that person has more expertise to appraise a safety or health problem than one of the miners who works for the operator. UMWA contends that section 103(f) specifically provides that the miners' representative has to be paid for accompanying an inspector only if he is an employee of the operator whose mine is being inspected. UMWA notes that there is no issue in this case about whether USSM has to pay the person who accompanied the inspector because Willis is a full-time UMWA employee and did not expect to be paid by USSM for accompanying the inspector (Finding Nos. 5 and 8, supra).

While UMWA's arguments are legally correct in contending that UMWA is not given any advance notice as to when inspections are going to take place, it is a fact that the safety committee thought that Inspector Ingram would return to the mine on August 18, 1982, to obtain additional respirable-dust samples because the longwall section had not been operating at a normal production level on August 17 when the inspector had previously been at the mine to obtain respirable-dust samples.

The safety committee called Willis on the evening of August 17 and asked him to come to the mine to accompany the inspector on August 18 if the inspector returned. The record contains nothing to show why the safety committee could not also have called USSM's mine inspector, or chief mine inspector, or mine foreman, or mine superintendent so as to notify at least one of those individuals that the committee wanted to have Willis, instead of Samms, be the miners' representative on the morning of August 18 if Inspector Ingram should appear for the purpose of obtaining respirable-dust samples as anticipated by the safety committee.

Moreover, there is some doubt in the record as to whether Willis gave USSM any notice at all on August 18 that he had come to the mine to accompany the inspector. The only notice which UMWA purports to have given USSM prior to Samms' advising Inspector Ingram that Willis was going to be the miners' representative is contained in the following statement by Willis during direct examination by his counsel (Tr. 31-32):

> Q Could you tell me what happened when you arrived on the mine site on August 18th?
>
> A I went to the mine office and informed management that I was there to go on inspection with Mr. Ingram.
>
> Q Who of mine management did you inform?
>
> A I don't remember who was in the office.
>
> Q You can't remember the name of the person?
>
> A No

Since Willis was acquainted with USSM's mine superintendent, mine inspector (Tr. 30-33), and chief mine inspector (Tr. 39), it is strange that he was unable to identify the person in the mine office whom he had notified of his being present for the purpose of accompanying Inspector Ingram.

Sinozich, USSM's mine inspector, is the first person in USSM's management who became aware of Willis' presence and he did not know that Willis had been asked to be the miners' representative to accompany the inspector when he went to obtain his cap light before going underground and saw Willis and Samms in the lamp room. Sinozich immediately advised Willis that Willis was not supposed to be on mine property without having given USSM prior notice (Tr. 64). In view of Sinozich's fast adverse reaction to Willis' presence, it is somewhat doubtful that Willis actually gave any of USSM's management personnel notice on the morning of August 18 that he had come to the mine for the purpose of accompanying an inspector until the reason for his presence was challenged by Sinozich in the lamp room. The only reason which Willis could give for failure to give notification prior to the morning of August 18 was that he had been called by the safety committee the night before and did not have time to give notice. If it was possible for the safety committee to call Willis at night to ask him to come to the mine to accompany an inspector, it would have been just as possible for Willis or the safety committee to call some person in USSM's management to advise that person that Willis was planning to come to the mine on the morning of August 18 to accompany an inspector who was expected to be there to take respirable-dust samples.

Despite the safety committee's lack of concern about giving USSM any prior notice of the fact that Willis had been asked to be the miners' representative on August 18, there is nothing in section 103(f) of the Act which requires either the safety committee or anyone to give USSM advance notice as to the identity of the miners' representative until the time the inspector is ready to go underground. Therefore, despite the union's lack of ordinary courtesy and consideration, I find that Willis had a right to be the miners' representative for the purpose of accompanying the inspector on August 18, 1982, even if Willis gave no prior notification until his presence at the mine was challenged by Sinozich.

USSM's brief (p. 4) argues that if it is required to allow anyone chosen by the miners as their representative to go underground, USSM would be required to let anyone so designated to accompany the inspector even if that person were a mining engineer from a competitive company or Willis' wife and children. USSM's brief notes that a person under 18 years of age is barred from entering the mine by West Virginia law.

It is possible, of course, that the safety committee might choose a person who has no expertise at all as the miners' representative, but that is not likely to happen. Moreover, if the safety committee should make an absolutely absurd selection as the miners' representative, USSM's management would be obligated to object to the selection, just as USSM's management did

in this case. Any time that USSM objects to a given miners' representative the inspector necessarily becomes the person to approve or disapprove that appointment. In this case, the inspector was sufficiently in doubt as to Willis' legal right to be the miners' representative that he called his supervisor to clarify the position he should take. In this case, the supervisor instructed the inspector to write a citation, but it is highly unlikely that the inspector or his supervisor would conclude that a citation should be written if a miners' representative should decide that he wanted to take his wife and children with him for the purpose of accompanying an inspector. It is also highly doubtful that an inspector would cite USSM for a violation of section 103(f) if USSM should object to the appointment of a mining engineer employed by a competitive company as the miners' representative.

In short, while I think the safety committee and Willis could have been more cooperative in providing USSM's management with more advance notice than was given in this case, I do not believe that the safety committee is precluded from asking that one of its safety inspectors from the international union be allowed to accompany an inspector as the miners' representative in cases such as this one in which it has been shown that the local union's miners' representatives felt inadequate to be helpful to the inspector in taking respirable-dust samples on the longwall section which had been out of compliance with the respirable-dust standards for about 1 year.

USSM's chief mine inspector was at least aware of the union's concern about the longwall section's noncompliance with the respirable-dust standards and acknowledged that Willis had discussed the problem with him on one occasion (Finding No. 12, supra). Therefore, the choice by the safety committee of Willis as the miners' representative on August 18, 1982, was not an action which should have been of any great surprise or distress to USSM's management, despite the chief mine inspector's claims to the contrary (Tr. 87).

I agree with the arguments in UMWA's brief, discussed above, that the notice provisions in the Wage Agreement pertain only to inspections which the safety committee wishes to perform under the provisions of the Wage Agreement and that UMWA is not bound by those notice requirements when the safety committee is choosing the miners' representative to accompany an inspector pursuant to section 103(f) of the Act.

The Question of Whether There Were Two Miners' Representatives on August 18, 1982

USSM's brief (p. 3) contends that section 103(f) of the Act contemplates that each party will have one representative to

accompany the inspector unless the inspector feels that he needs additional help. USSM concludes, therefore, that since the inspector did not specifically request Willis' assistance, the safety committee improperly insisted on having both Willis and Samms accompany the inspector. USSM argues that once the miners choose their representative, that person remains their choice until they inform management that a new representative has been chosen. USSM states that once the selection has been made, no additional representative may accompany the inspector unless he requests assistance. It is a fact that Inspector Ingram did not request either Samms or Willis to accompany him and he testified that he felt perfectly competent to obtain respirable-dust samples on the longwall section without the assistance of anyone (Tr. 14).

The Secretary's brief (p. 10) argues that Samms was not the only employee at the Morton Mine who had been designated as the miners' representative to accompany the inspector and that no one on August 18 was under the impression that Samms was the miners' representative to accompany the inspector on that day. The Secretary agrees that Samms went underground with the inspector, along with Willis and USSM's mine inspector, Sinozich, but contends that Samms was going to the longwall section to check the respirable-dust pumps under West Virginia law. Therefore, the Secretary claims that USSM's contention that the inspector had to request an additional representative before Samms could go has no application in the circumstances existing in this case.

UMWA's brief (pp. 8-9) contends that only one miners' representative, Willis, accompanied the inspector on August 18. UMWA states that Samms went underground with the inspection team, consisting of the inspector, Sinozich, and Willis, but that Samms did not remain with the inspection party because he was making an independent check of the respirable-dust pumps and left the inspection party before the inspection was completed. Additionally, UMWA argues that the union never requested that two representatives accompany the inspector and that the inspector knew before going underground that only Willis was the union's representative for accompanying the inspector.

At first glance, USSM appears to have a valid argument with respect to its "two representatives" claims. It is a fact that both Samms, a previously identified miners' representative, and Willis, the special miners' representative chosen to accompany the inspector on August 18, did go underground with the inspector. It is also true that, while Samms claims to have been going underground under a provision of West Virginia law, USSM's witness, Sinozich, claimed that West Virginia law only allows a miners' representative to participate in the taking of respirable-dust samples by an operator. Sinozich stated that since MSHA

was taking the dust samples, instead of USSM, that Samms did not have a right under West Virginia law to check the respirable-dust pumps which had been placed on three miners by Inspector Ingram (Finding No. 10, supra).

None of the four briefs filed in this proceeding cites the provision of West Virginia law which is allegedly involved. Therefore, I assume that no party is entirely certain whether Samms had a legitimate right under West Virginia law to go underground on August 18 to check the respirable-dust pumps placed on three miners in the longwall section. Nevertheless, the inspector was aware of the fact that Samms claimed to be going under West Virginia law and he specifically stated that he believed Samms' announcement that he was going underground under West Virginia law took the matter out of the inspector's hands entirely. The following testimony shows beyond any doubt that the inspector thought he was being accompanied by a single miners' representative (Tr. 18):

> Q As far as you were concerned, on August 18th who was the miners' representative that went with you?
>
> A On August 18th, sir, after I issued the citation Mr. Willis was the designated miners' representative. I was instructed that we believed at the time of the conference that he had a right to travel.
>
> Q And even though Mr. Willis had been designated as the miners' representative for that day, I understood you to say that Mr. Samms also went along?
>
> A Yes, sir.
>
> Q So you had two people with you who worked for the union. Mr. Samms didn't work for the union; he worked for United States Steel. Is that right?
>
> A Yes.
>
> Q Whereas Mr. Willis is employed by UMWA as I understand it?
>
> A Yes, sir. Mr. Samms informed me that he was going to monitor my dust sampling inspection under provision of the state law which I'm not familiar with and that took it out of my hands. As far as I was concerned with him, he was going under the state law and Mr. Willis was going under the Mine Health and Safety Act.

Willis' recollection of the discussion about there being two miners' representatives is summarized in the following answer to a question asked by UMWA's legal assistant (Tr. 32-33):

> A And discussions went on, and I think Mike [Sinozich]--I'm pretty sure but I think he talked to Carl Peters, and Mike said, "He told me that he was going to object to you going with Mr. Ingram on this inspection." And I told Mike that I was the authorized representative of the miners, and he said that Mr. Samms was. Mr. Samms said, "No, Mike", said, "Bolts [Willis] is the representative of the miners." He said, "I'm going to go and look at the samples, under state law. The court decision was recently handed down by Judge Harvey." He said then he wasn't going to let me go.
>
> Q Did he give you a reason?
>
> A He said Donny Samms was the local union safety committeeman, and he usually travels with the inspector. * * *

The testimony of Sinozich as to the question of whether Samms went underground under West Virginia law consists of a short answer to a single question asked by USSM's counsel (Tr. 71):

> Q Did Mr. Samms at any time indicate to you that he was acting under state law?
>
> A No, he did not.

Sinozich also expresses on transcript page 71 his opinion that West Virginia law does not permit the miners to participate in the taking of samples by an MSHA inspector (Finding No. 10, supra).

There is some additional testimony which should be considered in determining whether the preponderance of the evidence supports a finding that two miners' representatives accompanied Inspector Ingram on August 18, 1982. Willis' testimony shows that Samms made a very significant effort to disassociate himself with the inspector's activities after they went underground. According to Willis, Samms went immediately to the face area of the longwall section and checked two respirable-dust pumps and was on his way back to check a third pump when the other three persons (Inspector Ingram, Willis, and Sinozich) in the inspection party made their way to the face area. Moreover, Willis stated that Samms remained away from the inspection party all morning and

was eating his lunch at the head entry when Ingram, Willis, and Sinozich came to the head entry to eat their lunch. Additionally, Willis stated that Sinozich and Samms became involved in a heated argument at the head entry as to what duties Samms purported to be doing at that time, whereas Sinozich denies that he ever had any sort of argument with Samms on August 18 (Finding Nos. 6 and 11, supra).

The inspector's testimony indicates that Samms did not remain with the inspection party and that Samms left the longwall section about noon (Finding No. 3, supra).

Based on the preponderance of the evidence discussed above and my observations of the witnesses' demeanor, I find that Samms did advise Sinozich that he was going underground to check the respirable-dust samples under West Virginia law and that the inspector was aware of having with him only one miners' representative, namely, Willis. Therefore, the record does not support USSM's argument that the safety committee insisted on having two miners' representatives accompany the inspector on August 18, 1982. Since Sinozich had been advised by Samms that Samms was going with the inspection party to check respirable-dust samples under West Virginia law, he had ample opportunity to assert that Samms could not go under West Virginia law and would either have to be considered as a second miners' representative to accompany the inspector under section 103(f) or be denied the right of going underground except to work on his own section.

There is every indication that if the union had been confronted with a choice of having Willis go as the miners' representative or having Willis denied the right to go because Samms was also insisting on going as the miners' representative, the union would have elected to send Willis under section 103(f) and would have dealt with USSM's claim that Samms couldn't go underground to check respirable-dust pumps under West Virginia law. Since the union was not given the chance to make that decision on August 18, 1982, I do not believe that USSM should be permitted to argue on the basis of the record in this proceeding that the safety committee insisted on sending two miners' representatives to accompany the inspector on August 18, 1982.

As noted above, Inspector Ingram was completely unaware of any claim by USSM that he was permitting two miners' representatives to accompany him on August 18. He unequivocally testified that as far as he was concerned only Willis was the miners' representative to accompany him on August 18 and that Samms took the matter of his being one of the inspection party out of the inspector's hands by announcing that he was going underground to check respirable-dust samples under West Virginia law (Tr. 18).

Finally, I do not think that section 103(f) requires that the inspector must request an additional representative before two representatives may go with him. Section 103(f) simply states that "[t]o the extent that the Secretary or authorized representative of the Secretary determines that more than one representative from each party would further aid the inspection, he can permit each party to have an equal number of such additional representatives." [Emphasis supplied.] That sentence means that the inspector may permit more than one representative for each party regardless of whether he actively requests that more than one person accompany him. In this case, however, the inspector was never asked to permit more than one representative to accompany him because, so far as he was concerned, the safety committee had elected to send only Willis as the miners' representative. Consequently, USSM simply cannot raise the "two miners' representatives" argument in this proceeding because the preponderance of the evidence fails to support such an argument.

A Violation of Section 103(f) Occurred

On the basis of the discussion above, I have found that the safety committee had a right to select a safety inspector from the international union as its miners' representative under section 103(f) of the Act on August 18, 1982. Therefore, the inspector properly cited USSM for a violation of section 103(f) when USSM refused to allow UMWA's safety inspector to accompany the inspector. The order accompanying this decision will hereinafter affirm Citation No. 2024280 issued August 18, 1982, which alleged that a violation of section 103(f) had occurred.

DOCKET NO. WEVA 83-95

The Secretary's petition for assessment of civil penalty filed in Docket No. WEVA 83-95 seeks assessment of two civil penalties, the first one being for the violation of section 103(f) of the Act alleged in Citation No. 2024280 considered above in Docket No. WEVA 82-390-R, and the second one being for a violation of 30 C.F.R. 70.101 alleged in Citation No. 9917507 dated September 1, 1982. Assessment of a penalty for the violation of section 103(f) must be done on the basis of the record developed in the contest proceeding in Docket No. WEVA 82-390-R because the civil penalty issues were consolidated for hearing in the contest proceeding. Evidence was introduced by USSM and the Secretary in Docket No. WEVA 83-95 with respect to the violation of section 70.101 alleged in Citation No. 9917507.

USSM's Argument that a Judge Is Bound by the Provisions of 30 C.F.R. 100.4

Since Inspector Ingram did not check the block on Citation No. 2024280 appearing after the words "Significant and Substantial", the Assessment Office proposed a "single penalty assessment"

of $20 under 30 C.F.R. 100.4 which provides as follows:

> An assessment of $20 may be imposed as the civil penalty where the violation is not reasonably likely to result in a reasonably serious injury or illness, and is abated within the time set by the inspector. If the violation is not abated within the time set by the inspector, the violation will not be eligible for the $20 single penalty and will be processed through either the regular assessment provision (100.3) or special assessment provision (100.5).

USSM attached to its brief, filed in Docket No. WEVA 83-95, a copy of its petition for discretionary review of a decision by Judge Broderick issued in U.S. Steel Mining Co., Inc., 5 FMSHRC 934 (1983). In that U.S. Steel decision, Judge Broderick held that the "* * * Commission is not bound by the Secretary's regulations setting out how he proposes to assess penalties" (5 FMSHRC at 936). USSM relies on the arguments made in its petition for discretionary review filed in Judge Broderick's case in Docket No. PENN 82-328 in support of its claim that I am bound by the provisions of section 100.4 and must, therefore, assess a penalty of only $20 for the violation of section 103(f) because that is the penalty which the Secretary proposed for that violation in Docket No. WEVA 83-95 when he proposed the penalty under section 100.4.

The first argument which USSM's petition (p. 2) makes is that an "* * * operator has no remedy at law" if an inspector erroneously checks the "significant and substantial" block on a citation. USSM claims that if a manager's conference held under section 100.6 of the regulations fails to result in a reversal of the inspector's error, the operator may contest the penalty under section 100.7 where lawyers will become involved, but USSM claims that if the lawyers do find that the inspector made an error in checking the "S & S" block, the operator will be unable to obtain relief because "* * * the Administrative Law Judges are not willing to approve a settlement motion for the single penalty assessment because they do not agree with the new penalty criteria" (Petition, p. 2).

There are at least two fallacies in USSM's first argument. First, section 100.7 of the regulations and section 105(d) of the Act are designed to provide the operator with a forum where he can present evidence and arguments in support of his claims that the inspector improperly checked "S & S". When USSM sought review of the inspector's citing of USSM for a violation of section 103(f), USSM's attorney checked a block on a form which states, "I wish to contest and have a formal hearing on all the violations listed in the Proposed Assessment." USSM was provided with an

extensive hearing on the inspector's having cited, USSM for a violation of section 103(f). There is nothing in the Act or in Part 100 of the regulations which provides that once a hearing has been held, the judge is precluded from using the evidence in that hearing to assess a civil penalty under section 110(i) of the Act.

The second error in USSM's first argument is that USSM incorrectly states that administrative law judges will not approve a settlement motion involving a single penalty assessment of $20 under section 100.4. I have approved several settlements involving $20 assessments proposed by the Secretary pursuant to section 100.4. See, e.g., Eureka Mining Corp., Docket No. LAKE 83-5, issued January 27, 1983; RB Coal Company, Inc., Docket No. KENT 83-24, issued July 13, 1983; and D & D Coal Company, Inc., Docket No. KENT 83-25, issued October 17, 1983. There are other errors in USSM's first argument, but they will hereinafter be noted in my discussion of USSM's other allegations.

USSM's second argument begins with the observation that the case law to date has arisen only under section 100.3 "* * * which has an elaborate scheme for considering the six penalty criteria" (Petition, p. 2). USSM concedes that the Commission and its judges are not bound by the provisions of section 100.3 "* * * because both parties may have more information after a full hearing than the assessment office had originally" (Petition, p. 2). USSM's petition (p. 3) tries to distinguish section 100.3 from section 100.4 by asserting that there is considerable discretion in applying the six criteria described in section 100.3 but little discretion in applying section 100.4's two criteria which only pertain to whether the violation was "S & S", that is, reasonably likely to result in a reasonably serious injury, and whether the violation was abated within the time given by the inspector. The aforesaid difference in the range of discretion between the two sections is said by USSM to make the present case law inapplicable to section 100.4.

USSM refers to the Commission's language in Sellersburg Stone Co., 5 FMSHRC 287 (1983), in which the Commission held that it is not bound by the Secretary's assessment formula, and USSM claims that the preamble to the regulations relied on by the Commission in that case specifically refers to section 100.3, not to section 100.4. USSM's petition (p. 3) further states that the word "may" used in the first sentence of section 100.4 implies that application of the section may be discretionary, but USSM claims that the word "may" is restricted to making the two required findings as to nonseriousness and timely abatement. USSM claims that the Secretary stated in the final rule that the term "single penalty assessment" was being used to clarify that $20 is the only penalty an operator could receive under section 100.4.

In addition to the lack of discretion permitted in applying section 100.4, as opposed to section 100.3, USSM's petition (p. 4) argues that section 100.4 enunciated a new agency policy which is binding upon the operator and the agency. USSM argues that a judge cannot ignore the new test devised by the agency whose rules he is supposedly applying and substitute his own test. USSM continues its argument by saying that a judge cannot create law because he does not agree with the existing regulation and that a judge "* * * must base his decision on the testimony he has heard" (Petition, p. 4).

If USSM is going to base its arguments on the "case law" pertaining to penalty assessments, it ought to start with the procedures used by the Secretary of the Interior to carry out the provisions of section 109(a)(c) of the Federal Coal Mine Health and Safety Act of 1969 which provided, in pertinent part, as follows:

> (3) A civil penalty shall be assessed by the Secretary only after the person charged with a violation under this Act has been given an opportunity for a public hearing and the Secretary has determined, by decision incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted, and incorporating, when appropriate, an order therein requiring that the penalty be paid. * * *

The Secretary devised a formula for applying the six criteria listed in section 109(a)(1) of the 1969 Act. Those same criteria are also listed in section 110(i) of the 1977 Act. Operators challenged the penalties proposed by the Secretary under the 1969 Act on the ground that he had not made the findings required by section 109(a)(3), supra. Several circuit courts considered the matter. The District of Columbia Circuit, in National Independent Coal Operators' Assn. v. Morton, 494 F.2d 987 (1974), affirmed the method employed by the Secretary of the Interior under which the Secretary proposed penalties without making formal findings as to the six criteria, but the regulations permitted the operator to request a hearing before an administrative law judge who would make findings as to the six criteria. The court held that the operator was afforded due process under the regulations then in effect. The Third Circuit, in Morton v. Delta Mining, Inc., 495 F.2d 38 (1974), reversed the method being used by the Secretary of the Interior because the court believed that section 109(a)(3) required the Secretary to make findings as to the six criteria when he proposed civil penalties.

The Supreme Court affirmed the D.C. Circuit's decision in National Independent Coal Operators' Assn. v. Kleppe, 423 U.S. 388 (1976), and reversed the Third Circuit's decision in Kleppe

v. Delta Mining, Inc., 423 U.S. 403 (1976). In each case the Court held that the Secretary of the Interior had proceeded under a valid regulatory scheme which permitted an operator to request a hearing and obtain a decision making the findings required by section 109(a)(c) of the 1969 Act.

The legislative history of the 1977 Act shows that Congress was displeased with the enforcement of the 1969 Act with respect to assessment and collection of civil penalties. For example, Senate Report No. 95-181, at page 41 (or page 629 of the Legislative History of the Federal Mine Safety and Health Act of 1977 prepared for the Subcommittee on Labor of the Committee on Human Resources) stated as follows:

> In overseeing the enforcement of the Coal Act the Committee has found that civil penalty assessments are generally too low, and when combined with the difficulties being encountered in collection of assessed penalties (to be discussed, infra), the effect of the current enforcement is to eliminate to a considerable extent, the inducement to comply with the Act or the standards, which was the intention of the civil penalty system.

The Report thereafter reviewed the civil penalty system as it was administered by the Secretary of the Interior and found that the procedures for assessing penalties needed revision to prevent the parties from settling cases in which hearings had been requested by agreement of the parties to reduce proposed penalties by an excessive amount. The Report also was concerned about undue delay in completing civil penalty cases because of the procedure in the 1969 Act under which an operator could obtain de novo hearings in the district courts. Report No. 95-181 outlined the amendments to the 1969 Act which were deemed necessary to eliminate the defects in the civil penalty system. On page 45 (or page 633 of the Legislative History), the Report states as follows:

> To remedy this situation, Section [110(k)] provides that a penalty once proposed and contested before the Commission may not be compromised except with the approval of the Commission. Similarly, under Section 111(k) a penalty assessment which has become the final order of the Commission may not be compromised except with the approval of the Court. By imposing these requirements, the Committee intends to assure that the abuses involved in the unwarranted lowering of penalties as a result of off-the-record negotiations are avoided. It is intended that the Commission and the Courts will assure that the public interest is adequately protected before approval of any reduction in penalties.

> The Report further states on page 45 that:
> S. 717 provides a number of means by which the method of collecting penalties is streamlined. Section [110(i)] provides that the civil penalties are to be assessed by the Mine Safety and Health Review Commission rather than by the Secretary as prevails under the Coal Act (Sec. 109(a)(3)). * * *

The discussion above of the changes which Congress made in amending the 1969 Act shows that Congress did not intend for the Commission to be bound by any formulas which the Secretary of Labor may promulgate for the purpose of proposing (FOOTNOTE 2) penalties under section 105(a) of the Act. Section 110(i) specifically provides for the Commission to assess all civil penalties under the Act and section 110(i) specifically states that in assessing civil penalties, the Commission "shall consider" the six criteria. On the other hand, section 110(i) provides that "* * * [i]n proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors."

It is clear from the provisions of the 1977 Act that the Secretary of Labor has authority under the Act only for proposing penalties. If an operator does not agree with the assessment procedures promulgated by the Secretary in either section 100.3 or section 100.4, he may ask for a hearing before the Commission. Once the Commission or one of its judges holds a hearing, the operator is bound by the results of that hearing and the Commission and its judges are required to assess civil penalties under the provisions of section 110(i) of the Act regardless of what the Secretary may have proposed in the way of penalties prior to the time the hearing is held. Moreover, the operator must take his chances, as any litigant does, as to whether he will be any better off after he seeks a hearing than he would have been if he had paid the Secretary's proposed assessments based on any provision of Part 100.

Congress specifically amended the 1969 Act to require that the parties obtain the Commission's approval of any settlement reached after an operator has requested a hearing before the Commission. Since the Act was specifically amended to prevent undue lowering of civil penalties through settlement negotiations or otherwise, it is certain that Congress did not intend for the

Commission's hands to be tied in approving or disapproving settlements, or in assessing penalties, simply because the Secretary has promulgated a provision for determining a so-called single penalty assessment of $20 in section 100.4 which only refers to two of the six criteria which the Commission is required to use in assessing civil penalties.

For the reasons given above, I reject USSM's arguments to the effect that I am bound by the provisions of 30 C.F.R. 100.4. I shall hereinafter assess a penalty for the violation of section 103(f) of the Act alleged in Citation No. 2024280 under the six criteria as required by section 110(i) of the Act.

Consideration of the Six Criteria

The parties entered into some stipulations at the hearing held in Docket No. WEVA 82-390-R. Those stipulations were that USSM is subject to the Act, that I have jurisdiction to hear and decide the issues, and that USSM is a large operator (Tr. 92). Since it has been stipulated that USSM is a large operator, I find that any penalties to be assessed in this proceeding should be in an upper range of magnitude to the extent that they are based on the criterion of the size of USSM's business.

Ability To Pay Penalties

USSM did not introduce any evidence pertaining to its financial condition. The Commission held in the Sellersburg case, supra, that if an operator fails to present evidence concerning its financial condition, a judge may presume that the operator's ability to continue in business will not be adversely affected by the payment of civil penalties. Therefore, it will be unnecessary to reduce any penalties otherwise assessable under the other criteria on the basis of a finding that payment of penalties might cause USSM to discontinue in business because the lack of any financial evidence in this proceeding permits me to conclude that payment of penalties will not cause USSM to discontinue in business.

History of Previous Violations

It has been my practice to consider under the criterion of history of previous violations the question of whether the operator in a given proceeding has previously violated the same section of the regulations or Act which is before me for assessment of a penalty. The legislative history discussed above shows that Congress agrees that such a practice is acceptable (History, p. 631). USSM's counsel stated at the hearing that USSM has not previously violated section 103(f) of the Act (Tr. 92). Therefore, the penalty to be assessed for the violation of section 103(f) should reflect consideration of USSM's lack of a history of having previously violated section 103(f) of the Act.

Good-Faith Effort To Achieve Rapid Compliance

Citation No. 2024280 was written at 8:45 a.m. on August 18, 1982, and provided a termination due date of August 18, 1982, at 9:15 a.m. The inspector terminated the citation at 9:15 a.m. and gave as the reason for the termination that USSM had agreed to allow Willis to accompany him (Exh. 1). Willis testified that Sinozich, on whom the citation had been served, waited for about 32 or 33 minutes before calling the main office to find out whether Sinozich should allow Willis to enter the mine with the inspector (Tr. 34). Sinozich testified that he called his supervisor, Carl Peters, after the citation was issued, but Sinozich did not state how long he waited after the citation was issued before calling Peters (Tr. 66). Sinozich stated, however, that Peters told him he would call Sinozich back in a few minutes to give him an answer. It is possible that the 32- or 33-minute period mentioned by Willis was running while Sinozich waited to get an answer from Peters. Since Inspector Ingram terminated the citation at 9:15 a.m., which was the time period originally given for abatement, I believe that the preponderance of the evidence supports a finding that USSM showed a good-faith effort to achieve compliance.

It has been my practice to increase a penalty otherwise assessable under the other criteria if there is evidence in a given case to show that the operator failed to make a timely effort to abate a given violation. On the other hand, if an operator demonstrates some outstanding effort to abate an alleged violation, I normally reduce the penalty otherwise assessable under the other criteria. If the operator takes no unusual action, but abates the violation within the time given by the inspector, I neither raise nor lower the penalty otherwise assessable under the other criteria. Since USSM demonstrated a normal effort to achieve compliance, the penalty will not be raised or lowered under the criterion of good-faith abatement.

Negligence

The evidence shows that the inspector was sufficiently in doubt about whether USSM's refusal to allow Willis to accompany him was a violation of section 103(f), that it was necessary for the inspector to call his supervisor for guidance (Tr. 10). Both Sinozich and Peters maintained throughout the hearing that Willis was not entitled to be a miners' representative because of his failure to give advance notice that he was coming (Tr. 64; 81; 85). I have found above in my decision in Docket No. WEVA 82-390-R that Peters was aware of Willis' interest in the elimination of the respirable-dust problem in the longwall section and that Peters should not have been greatly surprised when Willis appeared at the mine on August 18, 1982, for the purpose of accompanying the inspector.

On the other hand, the union is not entirely without fault in bringing about the state of confusion which had a great deal to do with Sinozich's and Peters' original decision to deny Willis permission to enter the mine as the miners' representative. The safety committee had called Willis on the evening of August 17 to ask Willis to come to the mine to accompany the inspector if the inspector appeared as they anticipated. Yet, neither the safety committee nor Willis bothered to provide any of USSM's management personnel with any notice of any kind until the safety committee on the morning of August 18 advised the inspector that Willis was the miners' representative to accompany the inspector. The safety committeeman, Carter, could not recall any previous time when one of UMWA's safety inspectors had been called to the mine to act as the miners' representative for purposes of accompanying an inspector (Tr. 28). Therefore, the safety committee knew that it was going to follow a procedure which was uncommon and a large part, if not all, of the confusion which resulted when Willis made his previously unannounced appearance (FOOTNOTE 3) on the morning of August 18, 1982, could have been avoided if the safety committee had at least explained on the evening of August 17 that it was going to select Willis as the miners' representative to accompany the inspector if the inspector made an appearance on August 18 as the safety committee expected. Moreover, Samms created additional confusion by announcing that he was going in with the inspection party under the provisions of West Virginia law (Tr. 18; 33). That was an unusual act on the part of the safety committee and could have affected Sinozich's ability to consider the issues in an atmosphere conducive to calm and rational decision-making.

Based on the considerations discussed above, I find that USSM's management was dealing with some new circumstances and acted in a way which can hardly be categorized as negligent, especially since both Sinozich and Peters believed that they were taking actions which were entirely in compliance with section 103(f) of the Act. Therefore, the penalty otherwise assessable under the other criteria will not be increased under the criterion of negligence.

Gravity

It has been unnecessary to consider the arguments in the parties' briefs in dealing with the five criteria discussed above because the Secretary's brief pertaining to the violation of section 103(f) does not discuss the penalty issues at all and USSM's brief simply contends that I am bound to assess a $20 penalty under section 100.4. USSM's arguments about section 100.4 have already been considered above. UMWA's brief (p. 9) does discuss the penalty issues by correctly arguing that I am not bound by section 100.4 of the regulations. UMWA's brief also argues that a penalty in an amount higher than $20 ought to be assessed because of USSM's having delayed the commencement of the inspection.

The record does not specifically show that Inspector Ingram would have gone underground any sooner than he did if he had not been confronted with USSM's refusal to allow Willis to go underground to accompany him. The record shows that the inspector went about his normal duties of placing respirable-dust pumps on three miners on the longwall section (Tr. 9). The miners on the production shift went underground at the usual time and the longwall section was producing coal at the time the inspection crew arrived in the longwall section. Since the respirable-dust samples obtained on August 18 were valid and showed that the longwall section was in compliance with the respirable-dust standards (Tr. 78), the delay, if any, which might have occurred in the time when the inspection crew went underground, does not seem to have adversely affected the inspector's work or Willis' ability to examine the conditions in the longwall section. Willis claims to have seen the engineering changes which were being made in the water sprays and claims to have made at least two suggestions pertaining to control of respirable dust (Tr. 36-37). In such circumstances, the record does not support a finding that anyone was adversely affected by the fact that the inspector may not have gone underground as soon as he would have if it had not been necessary to issue a citation and wait about half an hour for the citation to be abated.

The criterion of gravity, therefore, must be considered primarily from the standpoint of whether USSM's initial refusal to allow Willis to go underground caused the union to be frustrated prospectively in its efforts to provide a miners' representative to accompany inspectors under section 103(f).

In Consolidation Coal Co., Docket Nos. PENN 82-221-R and PENN 82-259, issued July 28, 1983, I assessed a penalty of $100 for a violation of section 103(f), but in that case, Consol deliberately refused to pay a miners' representative for accompanying an inspector during a spot inspection and did so for the

sole purpose of bringing that issue before a circuit court other than the District of Columbia Circuit which had already decided the issue adversely to Consol's position. There was some negligence in the Consol case, as compared with no negligence heretofore found in this case, because USSM was dealing with a novel situation which arose unexpectedly, whereas Consol deliberately refused to pay a miners' representative in order to create a case for purpose of perfecting an appeal to a circuit court. There was also a greater degree of gravity in the Consol case than there is in this case because USSM paid Samms for going underground at the same time USSM was contesting Willis' right to go underground with Samms and the inspector. Finally, Consol was seeking a reinterpretation of section 103(f) with respect to an issue which had already been decided by the D.C. Circuit and as to which the Supreme Court had already denied a petition for certiorari, whereas USSM is seeking an interpretation of section 103(f) with respect to an issue which has not been specifically decided by the Commission, that is, whether the safety committee has to give USSM any advance notice before selecting a UMWA safety inspector (who is a full-time UMWA employee) as the miners' representative to accompany an inspector pursuant to section 103(f).

Assessment of Penalty

The discussion above shows that a large operator is involved, that the payment of penalties will not cause the operator to discontinue in business, that the operator demonstrated a good-faith effort to achieve compliance, that the operator has no history of a previous violation of section 103(f), that the violation was associated with no negligence, and that the violation was associated with a very low degree of gravity. Therefore, a civil penalty of $25 will hereinafter be assessed for the violation of section 103(f) alleged in Citation No. 2024280 dated August 18, 1982.

Docket Nos. WEVA 83-82 and WEVA 83-95

The petition for assessment of civil penalty filed in Docket No. WEVA 83-82 seeks to have a penalty assessed for a single alleged violation of 30 C.F.R. 70.101 (Tr. 205). The petition for assessment of civil penalty filed in Docket No. WEVA 83-95 seeks to have a penalty assessed for the violation of section 103(f) of the Act which has already been considered in the preceding portion of this decision. The petition for assessment of civil penalty filed in Docket No. WEVA 83-95 also seeks assessment of a civil penalty for an alleged violation of section 70.101. The primary difference between the two alleged violations of section 70.101 is that the violation alleged in Docket No. WEVA 83-82 pertains to mechanized mining Unit No. 002 in USSM's Shawnee Mine, while the violation alleged in Docket No. WEVA 83-95 pertains to mechanized mining Unit No. 024 in USSM's Morton Mine.

Findings of Fact

The testimony of the witnesses and the documentary evidence submitted by the parties support the following findings of fact. Since this is a consolidated proceeding, the findings here will be numbered in sequence with the 13 findings of fact made in the preceding portion of this decision.

14. On October 20, 1982, an MSHA inspector issued Citation No. 9914583, pursuant to section 104(a) of the Act, alleging that USSM had violated section 70.101 in its Shawnee Mine because (Tr. 207; Exh. 20):

> [b]ased on the results of five valid dust samples collected by the operator, the average concentration of respirable dust in the working environment of the designated occupation in mechanized mining unit 002-0 was 1.7 milligrams which exceeded the applicable limit of 1.4 milligrams. Management shall take corrective actions to lower the respirable dust and then sample each production shift until five valid samples are taken and submitted.

15. On November 22, 1982, an MSHA inspector issued a subsequent action sheet which stated (Tr. 209; Exh. 23):

> [b]ased on five valid samples, the respirable dust concentration on the [d] esignated occupation in mechanized mining unit 002-0 is within the applicable limit of 1.4 milligrams.

16. The respirable-dust standard for the 002 Unit had been reduced to 1.4 from the normal standard of 2.0 milligrams per cubic meter of air under the provisions of section 70.101 which provides as follows:

> 70.101 Respirable dust standard when quartz is present.
>
> When the respirable dust in the mine atmosphere of the active workings contains more than 5 percent quartz, the operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings is exposed at or below a concentration of respirable dust, expressed in milligrams per cubic meter of air as measured with an approved sampling device and in terms of an equivalent concentration determined in accordance with 70.206 (Approved sampling devices; equivalent concentrations), computed by dividing the percent of quartz into the number 10.

> Example: The respirable dust associated with a mechanized mining unit or a designated area in a mine contains quartz in the amount of 20%. Therefore, the average concentration of respirable dust in the mine atmosphere associated with that mechanized mining unit or designated area shall be continuously maintained at or below 0.5 milligrams of respirable dust per cubic meter of air (10/20 = 0.5 mg/m3).

USSM had been notified on April 27, 1982, pursuant to section 70.101, that the respirable-dust standard for the 002 Unit in the Shawnee Mine had been reduced to 1.4 milligrams per cubic meter of air on the basis of a quartz analysis showing that the mine atmosphere contained 7 percent quartz (10/17 = 1.4 mg/m 3) (Tr. 223; Exh. 36).

17. On September 1, 1982, an MSHA inspector issued Citation No. 9917507, pursuant to section 104(a) of the Act, alleging that USSM had violated section 70.101 in its Morton Mine because (Tr. 108; Exh. 4):

> [b]ased on the results of five valid dust samples collected by the operator, the average concentration of respirable dust in the working environment of the designated occupation in mechanized mining unit 024-0 was 1.9 milligrams which exceeded the applicable limit of 1.6 milligrams. Management shall take corrective actions to lower the respirable dust and then sample each production shift until five valid samples are taken and submitted.

18. On November 29, 1982, an MSHA inspector issued a subsequent action sheet which stated (Tr. 114; Exh. 8):

> [b]ased on five valid samples, the respirable dust concentration on the designated occupation in mechanized mining unit 024-0 is within the applicable limit of 1.6 milligrams.

19. On October 26, 1981, USSM had been notified that the respirable-dust standard for the 024 Unit in the Morton Mine had been reduced to 1.6 milligrams per cubic meter of air on the basis of a quartz analysis showing that the mine atmosphere contained 6 percent quartz (10/6 = 1.6 mg/m3) (Tr. 108; 136; Exh. 11).

20. MSHA normally places respirable-dust-sampling devices on persons in each mechanized mining unit at least once each year (Tr. 103). The samples are weighed in MSHA's field offices (Tr. 104) and if there is a weight gain of .5 milligrams for

samples obtained with an MSA sampler or .8 milligrams for samples obtained with a Bendix sampler, the samples are sent to the Pittsburgh Technical Support Center for quartz analysis (Tr. 106; 244; 249).

21. USSM is critical of MSHA's quartz-sampling program because it argues that mining conditions change on a daily basis (Tr. 522) and that the amount of quartz in the mine atmosphere changes constantly (Tr. 181). Therefore, USSM declares that it is unrealistic for MSHA to fix a respirable-dust standard for an entire year based on a quartz analysis of a single respirable-dust sample. MSHA defends its once-a-year sampling procedure by stating that MSHA has examined data collected over a 6-to-8-year period and has found that in 80 to 81 percent of the cases, where repeat samples were analyzed for quartz content, the repeat samples showed a quartz content equal to or greater than the quartz content revealed by the original sample (Tr. 246).

22. MSHA also claims that it sent all operators a notice dated March 10, 1981 (Exh. 39), which advised them that the new quartz standard had been put into effect and that notice advised the operators that they could request a repeat survey if they believed that there was less quartz in the environment than existed at the time the reduced standard was put into effect. MSHA also defends the fairness of its sampling program by noting that if the reduction in the respirable-dust standard applies to quartz analysis for a single work position, the reduced standard will be applied only to that work position (Tr. 249).

23. USSM also objects to MSHA's quartz-sampling program because the quartz analyses are based entirely on samples taken by MSHA inspectors and complains that MSHA will not perform a quartz analysis on any of the samples taken by the operator (Tr. 194-195; 225-228). USSM also objects that it is not specifically advised when MSHA plans to take samples for quartz analysis and that the inspectors themselves cannot tell USSM for certain which of the samples they are taking on a given day will be analyzed for quartz (Tr. 314). Moreover, USSM claims that the inspectors do not know what the exact mining parameters are at the time the samples are being taken and that when USSM receives a notice that a quartz analysis of a given sample has required the respirable-dust standard to be reduced because of the percentage of quartz in the mine atmosphere, USSM cannot find out what specific sample was analyzed for that particular reduction of the respirable-dust standard (Tr. 315).

24. MSHA defends its refusal to use the operator's samples for quartz analysis primarily by arguing that the operator submits samples on a bimonthly basis and that if the respirable-dust standard is adjusted upward or downward with bimonthly

frequency, MSHA would not have control over the long-term variation in respirable dust or quartz levels. MSHA contends that frequent changes in the standard would work to the detriment of miners because the particular respirable-dust control plan would never be adjusted to the levels that would insure that the miners were protected from quartz exposures (Tr. 253; 282). One MSHA inspector testified that on one occasion when he was obtaining respirable-dust samples, USSM's section foreman controlled the mining sequence so as to avoid extracting from 18 to 24 inches of rock normally taken in an entry where extra height was needed for the purpose of placing longwall mining equipment in that entry (Tr. 351).

25. One of USSM's witnesses testified that USSM requested that repeat samples for quartz analysis be taken at its No. 9 Mine. When the inspector came to the No. 9 Mine to obtain the samples, USSM was considerably perturbed because the inspector asked the persons wearing the samplers to get into as much dust as possible so that the inspector would be able to acquire enough weight for a quartz analysis without his having to make additional trips to the No. 9 Mine for that purpose. USSM's witness stated, however, that the portion of the No. 9 Mine, where the repeat sampling was performed, was closed for economic reasons and that the results of the request for resampling were never reported to USSM (Tr. 535; 538; 544). USSM does not claim to have made any requests for repeat sampling for quartz with respect to the 002 Unit in the Shawnee Mine or the 024 Unit in the Morton Mine which are involved in this proceeding (Tr. 529; 538).

26. Quartz analyses of samples taken in the Shawnee Mine on April 12 and April 13, 1982, showed that the mine atmosphere contained 15-percent quartz on one day and 7-percent quartz on the next day (Tr. 229-230). Therefore, the quartz concentration may vary as much as 8 percent within a 2-day period. As a result of the two aforesaid quartz analyses, USSM received notification on April 27, 1982, that the respirable-dust standard had been reduced to .6 milligrams per cubic meter because of the 15-percent quartz analysis and to 1.4 milligrams per cubic meter because of the 7-percent quartz analysis (Exhs. 35 and 36). The 7-percent quartz analysis was performed on April 22, 1982, while the 15-percent quartz analysis was performed on April 20, 1982. Therefore, USSM was allowed to utilize the 1.4 milligram standard because that standard was based on the last information available to MSHA (Tr. 511).

27. At least one of USSM's witnesses conceded during cross-examination that USSM has enough knowledge about the conditions in its mines to be able to determine the mining parameters which are in existence on any given day when MSHA inspectors are

obtaining respirable-dust samples (Tr. 526-527). The section foremen have eyes in their heads and cannot possibly be unaware of the fact that an MSHA inspector has placed respirable-dust pumps on the members of their crew on a given day (Tr. 345).

28. Although USSM's cross-examination of MSHA's inspectors raised the generalized objections to MSHA's respirable-dust program which have been covered above, the primary contention raised by USSM in the respirable-dust aspect of this proceeding is that exposure for 2 months to 1.7 milligrams of respirable dust per cubic meter of air on a standard of 1.4 milligrams in Docket No. WEVA 83-82, or exposure for 2 months to 1.9 milligrams of respirable dust per cubic meter of air on a standard of 1.6 milligrams in Docket No. WEVA 83-95, is not a significant and substantial violation as the term "significant and substantial" has been defined by the Commission in National Gypsum Co., 3 FMSHRC 822 (1981) (Tr. 416; 496-498). MSHA presented as witnesses the inspectors who classified the respirable-dust violations described in the preceding sentence as being significant and substantial and another witness who considered the violations to be significant and substantial because excessive dust causes an injury which is permanently disabling, because each exposure is additive, and because the dust ingested remains in the lungs, but that testimony was largely based on what the witnesses had read or heard (Tr. 155; 207; 329-331; Exhs. 4, 15, and 20).

29. The most persuasive testimony with respect to whether the respirable-dust violations alleged in Citation Nos. 9917507 and 9914583 are significant and substantial was given by Dr. Thomas Richards who is an MD employed by the National Institute of Occupational Safety and Health (NIOSH) (Tr. 411). He works in NIOSH's Division of Respiratory Diseases and his experience has been in examining workers who have been exposed to various types of conditions which produce pulmonary problems (Tr. 412-413). He said that the U.S. Public Health Service has identified silicosis as one of the major diseases which needs to be prevented and has set a goal of 1985 as the year after which there should be no new cases of silicosis developing in the United States because it is a preventable disease (Tr. 414).

30. Richards testified that quartz and silica are terms which may be used interchangably. When silica gets into the lungs, it causes scarring or fibrosis. Over a period of time, exposure to silica can be predicted to cause a person to develop silicosis. When that condition becomes severe, it is called progressive massive fibrosis and can cause premature death. Damage caused by the fibrosis, once it occurs, is irreversible and there is no treatment for it. There is a dose-and-response relationship. The frequency of the exposure and the concentration of the dust increases the risk of developing silicosis (Tr. 424-425). As an extreme example of what can

happen when a person is exposed to almost pure silica dust, Richards referred to a man who had a job requiring him to take 24 bags of silica-bearing material and pour them into a drum. He did that for 1 hour on 60 occasions per year. After 2 years, he developed symptoms of silicosis and in another 2 years he died (Tr. 425).

31. Richards testified that coal workers' pneumoconiosis from pure carbonaceous dust can cause progressive massive fibrosis and result in early death. He said that coal workers are also exposed to silica coming from layers of rock above and below a coal seam or between coal seams which are mined simultaneously. Shale, for example, is from 40 to 60 percent silica and sandstone can be even higher in silica content than shale. He stated that autopsy surveys show that up to 18 percent of persons who have developed coal workers' pneumoconiosis show nodules in their lungs which are typical of silica exposure (Tr. 426-427).

32. Richards frankly admitted that he does not know for certain that there is a significant and substantial risk to a miner for a single brief exposure to respirable dust in excess of the standard given in section 70.101, but he said that the available medical evidence and logic supports a conclusion that a single exposure has a significant and substantial adverse effect on a miner's health. He said that silica in the air is breathed in and out to some extent and some of it may be coughed up, but some of it will go down to the distal portions of the lungs, the alveoli, where the scarring process is initiated. He explained that there is a dose response and that he did not know the low end of the response, but there is a definite additive effect in each daily dose so that, at some point, a miner has to pay the price of the added effect. Richards said there was no medical proof to show that a single exposure caused no problem any more than there is medical proof to show that a single exposure produces a definite measurable, adverse effect (Tr. 435-436). Richards said that "[s]ilicosis is a man-made disease, and if men didn't go down in the mines to work, they wouldn't have it. So, I think they ought to be very strict on the rules on it" (Tr. 500).

Consideration of Arguments

USSM's brief (pp. 2-3) states that the issues raised in Docket Nos. WEVA 83-82 and WEVA 83-95 are whether the violations of section 70.101 alleged by MSHA were significant and substantial and what penalties are appropriate for the conditions described in Citation Nos. 9914583 and 9917507 (Finding Nos. 14 and 17, supra).

It should be noted that Judge Kennedy's decision in U.S. Steel Mining Co., Inc., 5 FMSHRC 46 (1983), held that a

respirable-dust violation involving a quartz content of 11 percent was a significant and substantial violation. USSM did not file a petition for discretionary review of Judge Kennedy's excellent decision although he decided most of the same issues raised in this proceeding. For example, he held, contrary to USSM's contentions, that MSHA's use of a single annual sample for determining the quartz content in the mine atmosphere is in accordance with the procedure established by the Act. Judge Kennedy's U.S. Steel decision also contains a superb explanation of MSHA's respirable-dust program along with a discussion of the statutory requirements under which MSHA's program is administered.

Judge Broderick's decision in U.S. Steel Mining Co., Inc., 5 FMSHRC 1334 (1983) (petition for discretionary review granted July 27, 1983), held that a respirable-dust violation involving a quartz content of 7 percent was a significant and substantial violation. Judge Broderick's decision also appropriately observed (5 FMSHRC at 1336):

> * * * I should note that the precise issue raised by Respondent in this case was raised by it in the case of Secretary v. U.S. Steel Mining Co., Inc., supra, before Judge Kennedy. A decision by a tribunal of competent jurisdiction is res judicata in a subsequent proceeding between the same parties involving the same issue. 46 Am.Jur. Judgments 397 (1969); 1B Moore's Federal Practice 0.405 (1982). Factual differences not essential to the prior judgment do not render the doctrine inapplicable. Montana v. United States, 440 U.S. 147 (1979); Hicks v. Quaker Oats Co., 662 F.2d 1158 (5th Cir.1981). Respondent had a full and fair opportunity to litigate this issue before Judge Kennedy and to petition the Commission for review. Based on the doctrine of res judicata, it should be precluded from relitigating it here. The government, however, did not raise this issue, and the case was heard on the merits. My conclusion here is based on a consideration of the evidence in the case before me. Respondent should not be permitted to endlessly raise this issue, however. I accept and adopt the analysis and conclusions of Judge Kennedy that exposure to respirable dust with quartz content that exceeds 100 micrograms per cubic meter of air constitutes a significant risk of a serious health hazard. See also Consolidation Coal Co. v. Secretary, 5 FMSHRC 378 (1983) (ALJ).

All of the averments made by Judge Broderick are also true in this proceeding. The Secretary's counsel did not object in this proceeding to a third litigation by USSM of the issue of whether

a respirable-dust violation based upon a quartz content of more than 5 percent constitutes a significant and substantial violation under the definition of that term set forth by the Commission in its National Gypsum decision (Finding No. 28, supra). Like Judge Broderick, I hereinafter find, on the basis of the evidence presented in this proceeding, that the violations of section 70.101 alleged in Citation Nos. 9914583 and 9917507 were significant and substantial as that term has been defined by the Commission in its National Gypsum decision.

USSM's Claims of Bias or Unfairness

Although USSM's brief (p. 3) begins its arguments with a contention that the Secretary failed to meet his burden of proof in this proceeding by establishing that respirable-dust violations are reasonably likely to result in a reasonably serious injury, pursuant to the Commission's National Gypsum test of significant and substantial violations, USSM continually makes allegations about the unfairness of MSHA's respirable-dust sampling program. The record, as a whole, shows that USSM's claims of unfairness have no merit.

USSM claims, for example, that MSHA takes samples of respirable dust for quartz analysis under conditions which it will not disclose to USSM (Br., p. 3). USSM cites transcript page 315 in support of that allegation. On that page MSHA's witness Nesbit conceded that USSM had no way to know which sample an inspector is taking will be analyzed for quartz, but the truth of the matter is that the inspector does not know, when he is taking a sample, whether it will be analyzed for quartz either, because the sample has to be weighed in the field office's laboratory to determine if the weight gain is as much as .5 or .8 milligrams. If the required weight gain is shown to be present, the sample is sent to Pittsburgh for quartz analysis. If the analysis shows that the mine atmosphere contained more than 5 percent quartz, the respirable-dust standard is reduced accordingly (Finding Nos. 16, 19, and 20, supra).

USSM's unequivocal statement (Br., p. 3) that MSHA "* * * will not disclose to the operator" the conditions under which a sample is taken is not supported by the record. The inspectors fill out a Form 2000-86 when they are taking respirable-dust samples. Those forms show the mining conditions when samples are being taken (Exhs. 12 and 33). USSM's cross-examination of MSHA's witness Nesbit tried to get him to concede that MSHA would not make those forms available, but he repeatedly stated that it was not MSHA's policy to deny operators' requests for those forms (Tr. 311; 313-314). Moreover, the inspector who took the respirable-dust sample which caused the respirable-dust standard to be reduced in the 024 Unit of

the Morton Mine because of the presence of 6 percent quartz, explained exactly what conditions existed on the section at the time he was taking that respirable-dust sample. He even recalled that the section foreman declined to cut coal in the entry where from 18 to 24 inches of rock are taken for purposes of obtaining increased height for the use of highwall mining equipment (Finding No. 24, supra). His statements, together with those of witness Nesbit, show that USSM's section foremen know when respirable-dust samples are being taken by an MSHA inspector (Tr. 345).

USSM complains that MSHA takes only one sample a year and requires USSM to maintain a reduced respirable-dust standard on the basis of that single sample for an entire year (USSM's Br., p. 3). If MSHA takes only a single sample once a year to obtain a quartz analysis, the taking of that sample would have to be such an infrequent occurrence that USSM could easily have its section foremen write down all of the mining parameters which exist when sampling is occurring. Thereafter, if USSM is advised that its respirable-dust standard is being reduced because of the presence of more than 5 percent quartz, it could obtain from the inspector the date on which the sample analyzed for quartz was obtained and could determine from its own records exactly what conditions existed on the day the sample was taken.

USSM's brief (p. 5) also contends that MSHA will not honor its requests for the taking of additional samples for quartz analysis, but the only testimony in the record which supports that allegation is contained in a question asked by USSM's counsel of MSHA's witness Nesbit (Tr. 310):

> Q Isn't it true that you heard testimony in a previous case in which U.S. Steel Mines had requested MSHA to come out and re-do quartz sampling on a number of occasions and were turned down?
>
> A Yes, I did.

Despite witness Nesbit's affirmative answer to the question quoted above, he stated that it was MSHA's policy to take repeat samples for quartz analysis when the operator requests that repeat sampling be done (Tr. 310). While USSM did present some testimony in this proceeding about MSHA's performing repeat sampling at USSM's request, that testimony pertained to a section in USSM's No. 9 Mine. Moreover, the request for resampling was granted, but USSM was shocked because the inspector who took the samples requested that the miners wearing samplers get into as much dust as possible so that the inspector would be able to get a weight gain of at least .5 milligrams and thereby avoid having to come back for additional samples on successive days (Finding Nos. 20 and 25, supra).

USSM's witness who made that statement did not know the outcome of his complaint to his own supervisory personnel with respect to the inspector's instructions about getting into as much dust as possible. I doubt seriously that MSHA would condone the inspector's request that miners get into as much dust as possible, but if USSM wants me to make a finding that MSHA refused to sample on the basis of the aforementioned testimony, I need something more certain than the equivocal testimony presented by USSM in support of its claim that MSHA has refused to take repeat samples for quartz analysis, especially since USSM did not claim that it asked for repeat sampling to be done in the 024 and 002 Units which are involved in this proceeding (Finding No. 25, supra).

Judge Broderick's decision in U.S. Steel Mining Co., Inc., 5 FMSHRC 1334, 1335 (1983), contains a finding which shows that MSHA took a sample for determining quartz content at USSM's Maple Creek No. 1 Mine on October 26, 1981, and took another sample for quartz analysis on February 10, 1982, and then, in response to USSM's request, conducted resampling for quartz analysis from February 22 to March 1, 1982. MSHA's witness Nesbit did not agree during cross-examination by USSM that MSHA had refused to provide USSM with information as to the conditions which existed when respirable-dust samples are obtained and he also refused to agree with USSM that MSHA has a practice of denying requests for information or resampling (Tr. 313-314).

My review of the record shows, therefore, that MSHA has granted some of USSM's requests for resampling for quartz analysis and the finding in Judge Broderick's decision shows that MSHA responded to USSM's request for resampling. As opposed to the information showing that MSHA does grant requests for resampling, the record contains a single question, answered in the affirmative, to the effect that in some other unidentified proceeding someone seems to have testified that MSHA denied one or more of USSM's requests for resampling for quartz. In such circumstances, the preponderance of the evidence fails to support USSM's claim that its requests for resampling have been denied in a manner to justify a finding on the basis of the record in this case that MSHA's quartz-sampling program is so unfair that it should be found to be invalid.

USSM's brief (p. 5) also asserts that MSHA's respirable-dust sampling program is erratic and inaccurate because respirable-dust samples taken on successive days showed that the mine atmosphere contained 15 percent quartz when sampled on one day and 7 percent quartz when sampled on the next day. As was pointed out in Finding No. 24, supra, it is necessary for USSM to cut from 18 to 24 inches of rock in one entry in order to obtain sufficient height for use of longwall mining equipment.

On a day when large quantities of rock are being cut, the quartz content can be expected to increase. That is the reason that on the day the inspector was obtaining a respirable-dust sample in the 024 Unit of the Morton Mine, USSM's section foreman declined to allow the continuous-mining machine to be operated in the entry where 18 to 24 inches of rock are taken (Tr. 351).

USSM also contends (Br., p. 5) that it was expensive for USSM to maintain a reduced standard based on a 15-percent quartz content, but the testimony of USSM's own witness shows unequivocally that USSM was required to comply with a reduced respirable-dust standard based on a quartz content of 7 percent. USSM was not required, even for a single day, to maintain a reduced respirable-dust standard based on a 15-percent quartz content in the mine atmosphere (Tr. 511).

At one time in her arguments made at the hearing, counsel for USSM referred to what "[w]e have found in our research" (Tr. 190). That reference serves to remind me of the fact that USSM knows exactly what conditions prevail in its mines when it is producing coal. If USSM is ever certain that the quartz content in a given mine has actually been incorrectly analyzed by MSHA, it is quite obvious that USSM has the facilities to prove to MSHA that a mistake has been made. In view of the evidence showing that MSHA has responded to USSM's requests for resampling on past occasions, I am confident that USSM would be able to get repeat sampling done when a really meritorious situation shows that a mistake has been made.

USSM's Argument that MSHA Looks Only at Peaks and Ignores Valleys

USSM's brief (p. 4) notes that during the period from January 1981 to August 1982, the 002 Unit in its Shawnee Mine had an average concentration of 1.3 milligrams per cubic meter of air and USSM concludes from that observation that over the year, the miners in that section were working in an atmosphere which was within the respirable-dust standard set by MSHA. USSM then observes that during that same period, however, on any particular set of five samples, one sample may have been above 2 milligrams per cubic meter of air, so that, on that day, the miners were exposed to more than the allowable standard. USSM then argues that the exposure to more than the allowable standard for 1 day is not considered a violation by MSHA. USSM concludes from the foregoing observations that MSHA's use of a 2-month period to determine exposure levels causes one to look only at the peaks and ignore the valleys. USSM says that it cannot understand how the Secretary can honestly argue that exposure to more than the allowable limit on a single day is a significant and substantial violation because MSHA is totally disregarding periods of time when the average concentration is well below the allowable standard.

There are a number of fallacies in the above-mentioned arguments. First, the transcript references given by USSM show that MSHA's witness Nesbit was being asked questions about his Exhibits 40 and 41 which are graphs showing how many of USSM's own samples were above and below the allowable standard of 1.4 milligrams for Unit 002 in the Shawnee Mine which had a respirable-dust standard of 1.4 milligrams when the mine atmosphere had a 7-percent quartz content. The graph in Exhibit 40 does show that USSM's samples indicate the mine had a mean of 1.36 milligrams, but the samples depicted in Exhibit 40 were not taken at a time when USSM's 002 Unit had a reduced standard based on a quartz content greater than 5 percent. Nesbit said that before the 002 Unit was placed on a reduced standard, USSM's samples were above the 2 milligram standard 36 percent of the time. Exhibit 41 is a graph showing the results of USSM's samples taken after the 002 Unit was required to maintain a reduced standard of 1.4 milligrams because the 002 Unit had a 7-percent quartz content in the mine atmosphere. Nesbit stated that after USSM was placed on the reduced standard, USSM's samples were above the 1.4 milligram standard 46 percent of the time (Tr. 247; 302-303).

USSM incorrectly claims that MSHA looks only at the peaks and ignores the valleys because the graphs in Exhibits 40 and 41 very carefully indicate both the peaks and valleys and one of the purposes of the graphs is to show that USSM's miners were exposed to an excessive amount of respirable dust when from 36 to 46 percent of the samples were taken. USSM is correct in stating that statistics may be used to make all sorts of arguments, depending on which side of a given issue the person is who wishes to make the arguments. The important point in this proceeding, however, is that the lungs of the miners working in the 002 Unit do not know that, on an average day, they have been breathing an atmosphere which contains no more respirable dust than the standard which is in effect for a given period of time. USSM did not succeed in showing that there are any errors in Dr. Richards' claims that studies indicate that a miner's chances of having progressive massive fibrosis increase when he is exposed to high concentrations of respirable dust. Three samples shown in Exhibit 40 had a respirable-dust content which was between 2.5 and 3 milligrams and three other samples had a respirable-dust content of 6 or more milligrams. On those 6 days, the miners in the 002 Unit were especially likely to breathe into the alveoli of their lungs enough silica or quartz to initiate the scarring process or fibrosis which may lead to progressive massive fibrosis which cannot be arrested (Finding Nos. 30-32, supra).

There is considerable inconsistency in USSM's arguments about MSHA's ignoring the valleys because MSHA's respirable-dust program uses the respirable dust in five samples submitted

by the operator for determining whether the operator is in compliance with the respirable-dust standard. Since the samples are taken by the operator, the operator has absolute control over the conditions in its mine at the time the samples are taken. MSHA does not cite the operator for a violation if one of the five samples is greatly out of line with the respirable-dust standard so long as the remaining four samples do not raise the average milligrams of respirable dust above the allowable standard at any given time (Exhs. 16; 22; 29; 32; 37; 38). Therefore, it is simply incorrect for USSM to argue that MSHA considers only the peaks and ignores the valleys. MSHA's averaging process gives equal weight to both valleys and peaks in determining whether the miners have been exposed to more milligrams, on the average, than is permitted by the applicable respirable-dust standard.

Finally, USSM's argument that its samples showed that the 002 Unit, on the average, was within compliance with the applicable standard for more than a year is based on its own samples and those samples were taken for only 5 days during each 2-month period. The fact that some of USSM's samples had a respirable-dust content of more than 6 milligrams at a time when USSM's section foremen knew that they were obtaining samples to prove compliance with the allowable standard is a strong indication that the miners may be exposed to much greater concentrations than 6 milligrams on days when USSM is not trying to obtain samples to prove compliance with the respirable-dust standard applicable to its mines on those days.

The Violations Were Properly Designated as Significant and Substantial

The discussion above has shown that MSHA's dust-sampling program is being administered in a fair and valid manner and that USSM has ample opportunity to take its samples under favorable conditions for bringing its mine into compliance with the respirable-dust standard applicable to the various sections in its mines. I find that MSHA proved that the two violations of section 70.101 alleged in Citation Nos. 9914583 and 9917507 occurred (Finding Nos. 14 and 17, supra).

The remaining question to be decided is whether MSHA proved that the violations, in the words of section 104(d)(1) of the Act, "* * * could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard". The Commission applied its National Gypsum definition of the term "significant and substantial" in its recent decisions in Mathies Coal Company, 6 FMSHRC 1 (1984), and in Consolidation Coal Company, 6 FMSHRC 189 (1984). The Commission stated in footnote 4 of its Mathies decision and in footnote 8 of its Consolidation decision that it has pending before it a

challenge to the application of National Gypsum to a health standard, as opposed to a safety standard, and it stated that it intimates "* * * no views at this time as to the merits of that question" (Footnote 4 in Mathies).

The Commission held in the Consolidation case, supra, that an inspector may properly designate in a citation issued pursuant to section 104(a) of the Act that the alleged violation is significant and substantial as that term is used in section 104(d)(1) of the Act. While the Commission has not determined whether a health standard may be designated as "significant and substantial" within the meaning of that definition given by the Commission in the National Gypsum case, the quotation below from section 104(d)(1) of the Act shows that Congress made no distinction in providing that an inspector may designate either a health or a safety standard as being significant and substantial:

> (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 * * * 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, * * * he shall include such finding in any citation given to the operator under this Act. [Emphasis supplied.]

The language quoted from section 104(d)(1) above shows that MSHA had the authority to include in Citation Nos. 9914583 and 9917507 findings that the violations of section 70.101 were significant and substantial. Although the Commission's definition of significant and substantial as given in the National Gypsum case has been held by the Commission as being applicable, up to now, only to a safety standard, it is my belief that the definition is equally applicable to a violation of a health standard and that the Commission's National Gypsum definition of significant and substantial can be applied to a violation of a health standard. The Commission, in both its Mathies and Consolidation decisions, supra, considered the National Gypsum definition in four steps.

The first step is a consideration of whether MSHA proved that violations occurred. USSM's counsel conceded at the hearing that USSM had violated section 70.101 if the language given in that section is applied to the samples which USSM submitted from the 002 Unit in its Shawnee Mine and the 024 Unit of its Morton Mine (Tr. 144). I have already considered in the foregoing portions of this decision USSM's claims about the lack of fairness in MSHA's respirable-dust program and I have found

them to be without merit. Since the preponderance of the evidence shows that MSHA is fairly administering the program and that USSM has been given ample opportunity to obtain all the information MSHA has in connection with the citations issued, I find that the violations of section 70.101 alleged in Citation Nos. 9914583 and 9917507 occurred.

The second step to be considered in determining whether a health violation is significant and substantial is whether the violation contributed a measure of danger to a discrete health hazard. There can be no doubt but that breathing excessive quantities of respirable dust exposes the miners to developing silicosis or pneumoconiosis which are serious and which can cause premature death (Finding Nos. 30-32, supra).

The third step to be considered in determining whether a health violation is significant and substantial is whether there is a reasonable likelihood that the hazard contributed to will result in injury. Dr. Richards' testimony was based, in part, on studies which supported his statements that breathing respirable dust exposes miners' lungs to a scarring process known as fibrosis. Richards could not state that an exposure for a 2-month period to 1.9 milligrams when the standard is 1.7 milligrams or to 1.7 milligrams when the standard is 1.4 milligrams would produce a measurable response in a given miner's lungs, but the studies show that continual exposure may produce silicosis or pneumoconiosis. When the respirable dust lodges in the alveoli of the lungs, it remains there forever and each exposure adds to the scarring process so as to produce the lesions associated with progressive massive fibrosis. USSM's cross-examination of Richards failed to disprove any of his claims as to the hazards associated with breathing excessive quantities of respirable dust. Therefore, I find that the preponderance of the evidence supports a finding that there is a reasonable likelihood that the hazard contributed to will result in injury.

The fourth step to be considered in determining whether a violation is significant and substantial is whether there is a reasonable likelihood that the injury in question will be of a reasonably serious nature. USSM's brief (pp. 6-7) claims that there is simply no definite proof that an exposure to a few tenths of a milligram of respirable dust in excess of the applicable standard for a 2-month period is reasonably likely to result in an injury of a reasonably serious nature. It is asserted that MSHA's quartz-compliance program is a house of cards built upon assumptions that cannot withstand scrutiny. The evidence in this case contradicts USSM's arguments because MSHA's witnesses successfully defended the validity of the respirable-dust program (Finding Nos. 21-22; 24; 26, supra).

The very nature of silicosis and pneumoconiosis defies specific proof as to the exact extent of injury which will result from a single 2-month exposure to respirable dust in excess of the applicable standard. It is the average person's lack of familiarity with health hazards that causes him to accept more readily a contention that a safety hazard is likely to produce a serious injury than an assertion that a health hazard will result in a reasonably serious injury.

For example, a miner may work under unsupported roof for years and never be injured because he was fortunate in not happening to be under any rocks which were loose enough to fall on him. Despite that particular miner's good fortune, there are overwhelming statistics which show that many miners are killed by roof falls each year. Therefore, an inspector's claim that working under unsupported roof is reasonably likely to result in a reasonably serious injury is not doubted because there are many instances every year which demonstrate beyond any doubt that noncompliance with a roof-control plan may be designated as a significant and substantial violation without there being much chance that anyone will challenge such a designation.

The evidence in this case is just as persuasive as any which could be offered in support of a designation of working under unsupported roof as a significant and substantial violation. Dr. Richards did not equivocate about believing that each exposure to more than 5 percent of quartz in the mine atmosphere is a serious health hazard. No roof-control specialist could have been any more positive as to the likelihood of an injury of a reasonably serious nature from a single minute of standing under unsupported roof than Dr. Richards was as to the possibility of injury of a reasonably serious nature from a 2-month exposure to excessive respirable dust. A single minute under unsupported roof is reasonably likely to result in a fatality, but there is no certainty that it will. It is just as true that a 2-month exposure to more than 1.4 milligrams of respirable dust when 7 percent quartz is present may start fibrosis, but there is no absolute certainty that it will. Yet, exposure to excessive dust does cause miners to develop fibrosis. Once that process is started, each exposure thereafter contributes to the cumulative effects until progressive massive fibrosis results. Then, even if the miner stops working in a coal mine, the disease will continue to cause increasing inability for the lungs to perform their function of purifying the blood and the miner will die prematurely (Finding Nos. 30-32, supra).

I find that Dr. Richards' testimony was sufficiently positive and sufficiently based on valid scientific studies to support a finding that the violations alleged in Citation Nos. 9914583 and 9917507 were properly designated as significant and

substantial under the Commission's definition set forth in the National Gypsum case, as amplified in the Mathies and Consolidation cases, supra.

Assessment of Penalties

USSM's brief (p. 7) makes only one contention as to the assessment of penalties in the event I should find that violations occurred. That contention is that since the violations were not proven to be significant and substantial, I am required to reduce the penalty for each violation to the single penalty assessment of $20 as provided for in 30 C.F.R. 100.4. I have already considered that argument at some length in connection with the violation of section 103(f) alleged in Citation No. 2024280. Of course, since I have found that the violations of section 70.101 were significant and substantial, the provisions of section 100.4 are not applicable in assessing penalties, even if I had not already found that there is no merit to USSM's contentions that judges are bound in evidentiary proceedings to assess penalties of only $20 for nonserious violations.

The Secretary's brief makes only one comment about assessment of penalties for the violations of section 70.101. That comment is that "[i]n view of the criteria contained in 110(i) of the Act, a penalty of $100 would be appropriate for each Citation" (Br., p. 26). In his U.S. Steel decision, 5 FMSHRC at 1336, supra, Judge Broderick assessed a penalty of $200 for a violation of section 70.101 in circumstances showing that the average concentration was 1.8 milligrams when the standard was 1.4 milligrams with a 7-percent quartz content in the mine atmosphere. The violation in Judge Broderick's case is almost exactly the same as the one in this case for the 002 Unit in the Shawnee Mine where the concentration of respirable dust was 1.7 milligrams when the standard was 1.4 milligrams with a 7-percent quartz content in the mine atmosphere. In his U.S. Steel decision, supra, 5 FMSHRC at 77, Judge Kennedy assessed two civil penalties of $99 each for two violations of section 70.101 at a time when the quartz content in USSM's Maple Creek No. 2 Mine had been found to be 11 percent.

I have already shown in previously considering the six criteria in this decision, at page 25, supra, that USSM is a large operator and that payment of penalties will not cause USSM to discontinue in business. The remaining four criteria will be examined for purpose of assessing the penalties for violations of section 70.101.

History of Previous Violations

The evidence introduced by MSHA shows that USSM had only one previous violation of the respirable-dust standards for the

024 Unit in the Morton Mine (Exh. 13) and only one previous violation of the respirable-dust standard for the 002 Unit in its Shawnee Mine (Exh. 28). A single previous violation for each unit at a time when the respirable-dust standards were being reduced on the basis of MSHA's finding of a quartz content of more than 5 percent shows that USSM was making an effort to keep its miners from being exposed to excessive respirable dust. Therefore, the penalty will not be increased for either violation under the criterion of history of previous violations.

Good-Faith Effort To Achieve Compliance

USSM was given 21 days to abate the violation cited for the 024 Unit in the Morton Mine (Exh. 4) and 30 days to abate the violation cited for the 002 Unit in the Shawnee Mine (Exh. 20). USSM succeeded in abating each violation when it submitted five samples for purposes of abatement. The samples were not collected within the abatement period in the Morton Mine but since USSM had acquired the Morton Mine from Carbon Fuel Company only a short time before the citation was written, I do not believe that the penalty should be increased for USSM's failure to abate the violation within the 21-day period given in the citation, especially when it is considered that USSM's samples, when submitted, did show that it had succeeded in meeting the reduced standard.

USSM took five samples for abatement of the violation in the 002 Unit in its Shawnee Mine about 20 days before expiration of the abatement period. An advisory was sent to USSM before expiration of the abatement period showing that USSM had succeeded in meeting the reduced standard for the 002 Unit. Therefore, USSM demonstrated a good-faith effort to achieve compliance with respect to the violation alleged in Citation No. 9914583 and the penalty should not be increased under the criterion of good-faith effort to achieve compliance.

Negligence

The inspector who cited the violation in the 024 Unit of the Morton Mine classified USSM's negligence as "low" (Exh. 4) and the inspector who cited the violation in the Shawnee Mine classified USSM's negligence as "none" (Exh. 20). MSHA's witness Nesbit expressed no disagreement with the inspector who had classified USSM's violation in the Shawnee Mine as nonnegligent (Tr. 329). As I have previously indicated, USSM did make an effort to bring both the 002 Unit and the 024 Unit into compliance with reduced standards within a short period of time and the evidence in this proceeding shows only one previous violation for each unit. I find that the preponderance of the evidence supports a finding that USSM was nonnegligent in exceeding the reduced standard applicable for both units. Therefore, the penalty will not be increased under the criterion of negligence with respect to either violation.

Gravity

In each instance, the inspector who cited the respective violations of section 70.101 indicated that he considered the violation to be serious because he checked blocks on the citation showing that he believed the violations to be permanently disabling and to affect from 2 to 4 persons (Exhs. 4 and 20). Witness Nesbit stated several times during his direct testimony and cross-examination that he considered the violations to be serious because, once respirable dust has entered a miner's lungs, it will remain there for the remainder of his life so as to disable the miner or cause premature death (Tr. 271; 329; 331; 342). All of Dr. Richards' testimony was devoted to explaining why exposures to respirable dust when a quartz content of more than 5 percent is present is a serious violation (Tr. 411-506).

All of the discussion above under the heading of the term "significant and substantial" shows why exposures to excessive respirable dust is a serious violation. Therefore, I find that the preponderance of the evidence supports a finding that both violations of section 70.101 were serious. Although I have found above that no portion of the civil penalty should be assessed under the criteria of history of previous violations, good-faith effort to achieve rapid compliance, or negligence, it is appropriate that a penalty of $125 be assessed for each violation in view of the fact that a large operator is involved and the fact that both violations were serious.

WHEREFORE, it is ordered:

(A) The notice of contest filed by U.S. Steel Mining Co., Inc., in Docket No. WEVA 82-390-R is denied and Citation No. 2024280 dated August 18, 1982, is affirmed.

(B) Within 30 days from the date of this decision, U.S. Steel Mining Co., Inc., shall pay civil penalties totaling $275.00 which are allocated to the respective violations as follows:

Docket No.	WEVA 83-82		
Citation No. 9914583 (Tr. 205)	10/20/82	70.101	$125.00
Total Penalties Assessed in Docket No. WEVA 83-82			$125.00

Docket No. WEVA 83-95

Citation No. 2024280	8/18/82	103(f)	$ 25.00
Citation No. 9917507	9/1/82	70.101 .....125.00	

Total Penalties Assessed in Docket No. WEVA 83-95 ..... $150.00

Total Penalties Assessed in This Proceeding $275.00

(C) The motion filed on May 5, 1983, by the Secretary of Labor to amend the petition for assessment of civil penalty in Docket No. WEVA 83-82, so as to substitute correct attachments for the erroneous attachments which were originally filed with the petition for assessment of civil penalty, is granted.

Richard C. Steffey
Administrative Law Judge

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~FOOTNOTE_ONE

1 Section 103(a) of the Act, in pertinent part, provides: "* * * In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person, * * *".

~FOOTNOTE_TWO

2 See the Commission's discussion of the Secretary's role of proposing penalties versus the Commission's role of assessing penalties in MSHA on behalf of Milton Bailey, 5 FMSHRC 2042 (1983).

~FOOTNOTE_THREE

3 I am not holding that section 103(f) of the Act requires the safety committee to give USSM advance notice as to the identity of the miners' representative. I am simply pointing out that USSM's management might have acted differently in this case if it had had some advance time within which to consider the fact that the safety committee intended to select a miners' representative other than the ones who were normally chosen for the purpose of accompanying the inspectors. Since USSM claims no right whatsoever to participate in UMWA's selection of miners' representatives (Tr. 86), I cannot see any advantage in the safety committee's failure to give USSM as much notice as possible of the fact that it is planning to choose a miners' representative other than the one who is normally selected.