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US STEEL V. MSHA
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K STREET, N.W., 6TH FLOOR
WASHINGTON, D.C. 20006
JUNE 26, 1984

UNITED STATES STEEL CORPORATION	Docket Nos. LAKE 81-102-RM
	LAKE 81-103-RM
v.	LAKE 81-114-RM
	LAKE 81-115-RM
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	Docket Nos. LAKE 81-152-M
	LAKE 81-167-M
v.	LAKE 81-168-M
UNITED STATES STEEL CORPORATION	

DECISION

This consolidated proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et se . (1982), presents three major issues: whether United States Steel Corporation ("U.S. Steel") violated section 103(a) of the Mine Act, 30 U.S.C. 813(a), by restricting access by the Department of Labor's Min Safety and Health Administration ("MSHA") to the scene of a truck rollover; whether U.S. Steel violated the same section of the Act by insisting on the presence of a corporate attorney during an investigative interview of one of its foremen; and whether it unwarrantably violated 30 C.F.R. 55.9-1 and 55.9-2 by failing to record a defect affecting safety in the truck involved in the accident and by continuing to operate the truck after its foreman was aware that the truck had a defective rear end. The Commission's administrative law judge determined that U.S. Steel violated section 103(a) of the Act and the mandatory safety standard as alleged, and imposed civil penalties. 4 FMSHRC 616 (April 1982)(ALJ). For the

reasons that follow, we affirm in part and reverse in part.

I.

U.S. Steel operates an open pit taconite mining operation in Iron Mountain, Minnesota, known as the Minntac Mine. During the day shift on January 21, 1981, Martin Kaivola, a field millwright, noticed that the dual rear wheels of the 2B-ton pickup truck he was driving had shifted in the wheel well. He informed his foreman, Cedric Roivanen, of the vehicle's condition. Roivanen acknowledged the report, but due to the press of other business he failed to record the defect and have it repaired. The truck was subsequently used on at least the next shift, where it was observed to be "doglegging," or steering from the rear.

On the morning of the next day, January 22, 1981, Kaivola visually inspected the truck on the ready line. Believing that the truck had been repaired, he proceeded to use it in the course of his work on a shovel repair crew. The crew used the truck on two jobs that morning. On their way back to the central shop, they drove over a rail crossing and proceeded along a straightaway. Kaivola happened to glance at the rear view mirror and noticed that the rear tires were smoking in the wheel wells. Within seconds the rear end started to steer itself around the cab. Kaivola let up on the gas pedal, the truck's drive shaft dropped loose, and the truck overturned.

Shortly thereafter, James Barmore, a U.S. Steel safety engineer, Larry Claude, a miners' representative, and James Bagley, an MSHA inspector, arrived at the mine office to take a lunch break from a regular mine inspection which MSHA was then conducting. Barmore, in the company of the other two men, was informed that a truck carrying three employees had rolled over in the pit. Barmore prepared to investigate the accident and requested that Claude accompany him. As Barmore and Claude proceeded toward the door with the inspector close behind, Barmore turned and asked the inspector where he thought he was going. Inspector Bagley said that he intended to go into the it and examine the scene of the rollover. At this point, Barmore and Bagley entered into a verbal exchange as to whether the inspector would accompany Barmore and Claude.

Bagley and Claude testified that Barmore used profanity when addressing the inspector. Barmore denied this allegation. Bagley asserted that he had a right to go into the pit to observe the site. Barmore and Claude testified that Barmore said that Bagley could not go along with them. Barmore testified that he did not want the arrival of an inspector on the scene to be misinterpreted as the initiation of an MSHA accident investigation. Barmore and Claude proceeded to the scene of the rollover together, having stated to Bagley that on their return they would show him photographs of the site and fill him in on the details.

At the time, Bagley did not have a government vehicle at his disposal. He had arrived at the mine site that morning with MSHA Inspector Thomas Wasley, who used their vehicle for his separate purposes. It was customary practice for U.S. Steel to provide transportation to MSHA personnel in the form of a company car driven by a company safety engineer. MSHA personnel relied on this practice. Signs at the mine indicated that only authorized vehicles were allowed in the pit.

By the time that Barmore and Claude reached the scene of the truck rollover, other U.S. Steel personnel had already arrived, had taken the shovel repair crew to the clinic for treatment, and were in the process of evaluating the rollover. Kaivola, the driver, and one of the passengers, Richard Boucher, a millwright apprentice, sustained back strain injuries. Another passenger, Richard Woullet, also a millwright apprentice, received a chipped elbow fracture. The truck had landed right side up on its wheels. The box of the truck had been torn off and was lying upside down. The drive shaft had separated and was lying on the ground. The rear axle had shifted the spring package had broken, and spring leaves were scattered about the

scene. Barmore took photographs of the wreckage and the surrounding area and returned with Claude to the mine office after some 20-45 minutes. They discussed the rollover with Bagley and showed him the photographs taken at the scene. Bagley was told that the employees involved in the rollover had received restricted duty injuries.

The next day, after consulting with his supervisor, Bagley returned to the mine and issued a citation to U.S. Steel under section 104(a) of the Mine Act, 30 U.S.C. 814(a). The citation alleged that U.S. Steel violated section 103(a) of the Act because Barmore had denied Bagley "the opportunity to evaluate the cause of the accident or to determine if any mandatory safety or health standard had been violated." 1/ MSHA did not proceed with its

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1/ Section 103(a) of the Act provides:

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

Secretary of Health, Education, and Welfare, shall have a right of entry to, upon, or through any coal or other mine.

30 U.S.C. 813(a).

own independent investigation of the rollover. However, on February 5, 1981, MSHA received a miner's request, pursuant to section 103(g) of the Act, 30 U.S.C. 813(g), that the rollover accident be investigated.

In response to the section 103(g) request, Inspectors Bagley and James King returned to the mine on February 9, 1981. They gave a copy of the section 103(g) request to Steve Starkovich, safety supervisor for U.S. Steel's Minnesota ore operations. Starkovich provided the inspectors with a copy of the company's accident report. The inspectors informed Starkovich that they wanted to look at the truck, speak with members of the shovel repair crew, and speak with the crew foreman. Starkovich said that there would be no difficulty in viewing the truck and in interviewing the hourly employees, but that he could not let them interview Roivanen, the foreman, unless a U.S. Steel attorney were present. Bagley informed him that it would be necessary to interview Roivanen, and that arrangements should be made to provide an attorney as soon as possible.

The inspectors examined the truck. When Kaivola, the driver, could not be located, Bagley asked Ron Rantala, a U.S. Steel safety engineer, if they could interview Roivanen. Rantala also advised them that they could not interview the foreman unless a U.S. Steel attorney were present. Kaivola was subsequently located and interviewed.

On February 11, 1981, Inspectors Bagley and Wasley returned to the mine and again informed Starkovich that they wanted to interview Roivanen. Starkovich said that they could not interview him unless a U.S. Steel attorney were present and that he had not yet received word from U.S. Steel headquarters as to when an attorney would be available.

The inspectors told Starkovich that they wished to interview Boucher and Woullet, the passengers in the truck. Starkovich testified that he informed them that Boucher and Woullet were in training at a vocational technical school and that they would return on February 17, 1981. Starkovich stated that he discussed with the inspectors the possibility of interviewing the two miners on their return to work and the possibility that a U.S. Steel attorney could be present that same day to allow MSHA to interview Roivanen. Bagley and Wasley testified that Starkovich made no mention of when Boucher and Woullet would return to work, nor when a U.S. Steel attorney would be available. Starkovich advised the inspectors that Roivanen would not talk to them about the accident.

Bagley returned to the mine the next day, February 12, 1981, and issued a section 104(a) citation to U.S. Steel alleging another violation of section 103(a) of the Mine Act. The citation alleged that Starkovich's refusal on February 9 and February 11 to allow the MSHA inspectors the opportunity to confer with Roivanen "constitutes interference with and impedance of ... an MSHA accident investigation." Upon receiving the citation Starkovich telephoned company headquarters and informed the inspectors that a U.S. Steel attorney would be present the following day. Based upon this information, Bagley set the termination date on the citation for the next day. The inspectors then went to the vocational technical school and interviewed Boucher and Woullet.

On February 13, 1981, Ronald Fischer, a U.S. Steel attorney who primarily handled worker's compensation matters, came to the mine and was present while the inspectors interviewed Roivanen. Roivanen informed them that he had been advised by his supervisor that the company preferred that he have the benefit of counsel concerning the truck rollover. Roivanen told the inspectors that the shifting condition of the rear wheels had been reported to him and that he failed to record the problem and failed to effect any repairs because he forgot.

On March 9, 1981, as a result of MSHA's truck rollover accident investigation, Bagley issued two orders of withdrawal to U.S. Steel under section 104(d)(1) of the Mine Act, 30 U.S.C. 814(d)(1). 2/ The orders alleged violations of 30 C.F.R. 55.9-1 and 55.9-2, mandatory safety standards concerning the reporting and recording of safety defects in equipment and the correction of safety defects before the equipment is used. 3/ Additionally, the orders charged that the violations were both

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2/ Section 104(d)(1) of the Act provides:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation does not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.
30 U.S.C. 814(d)(1).

3/ 30 C.F.R. 55.9-1 provides:

Mandatory. Self-propelled equipment that is to be used during a shift shall be inspected by the equipment operator before

(Footnote continued)

"significant and substantial" and caused by the operator's "unwarrantable failure" to comply with the cited mandatory safety standards. In the withdrawal order alleging a violation of 30 C.F.R. 55.9-1, the inspector found

[Roivanen] confirmed that the shifting rear end had in fact been reported to him on January 21, 1981, but that he had forgotten about it. The company could produce no records of the unsafe condition being reported, hence, did not demonstrate reasonable care in recording or maintaining a record of an equipment defect which was reported and which affected the safety of three employees.

In the withdrawal order alleging a violation of 30 C.F.R. 55.9-2, the inspector found:

The truck was not removed from service to correct the reported defect, but continued to be used for the remainder of the shift on which it was reported. The truck was also used on the following afternoon shift and again during the shift on which the accident occurred. The failure of the operator to act on information that gave him knowledge, or reason to know, that an unsafe condition existed, which affected the safety of three employees, is unwarrantable.

The Commission administrative law judge to whom these cases were originally assigned conducted two days of hearings. Post-hearing briefs were submitted by the parties. However, prior to issuing a decision, the presiding judge left the Commission. The cases were reassigned to a substitute Commission administrative law judge. After notice to the parties of the substitution and of his intention to decide the case, the judge issued an extensive 62-page decision based upon the existing record. 4/

Fn. 3/ continued

being placed in operation. Equipment defects affecting safety shall be reported to, and recorded by the mine operator. The records shall be maintained at the mine or nearest mine office for at least 6 months from the date the defects are recorded. Such records shall be made available for inspection by the Secretary of Labor or his duly authorized representative.

30 C.F.R. 55.9-2 provides:

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

4/ Prior to the issuance of the substitute judge's decision, the section 104(d)(1) withdrawal order alleging a violation of section 55.9-1 was modified by the Secretary to a section 104(d)(1) citation, and the other withdrawal order was modified to reflect that it was based on that citation.

In his decision, the judge held that U.S. Steel violated section 103(a) of the Mine Act when Barmore prevented Bagley from going to the scene of the rollover. 4 FMSHRC at 626-37. He also held that U.S. Steel violated section 103(a) of the Act when Starkovich prevented Bagley from interviewing Roivanen until a U.S. Steel attorney could be present. 4 FMSHRC at 643-59. With regard to the remaining contest, the judge held that U.S. Steel violated 30 C.F.R. 55.9-1 when Roivanen failed to record the equipment defect reporte to him by Kaivola, and that it violated 30 C.F.R. 55.9-2 when the equipment defect in the truck was not corrected before the equipment was used. 4 FMSHRC at 663-72. The judge also held that these violations were unwarrantable.

II.

As a preliminary matter, U.S. Steel argues for the first time on review that the substitute judge erred in resolving conflicts in the testimony of Barmore, Bagley, and Claude concerning what Barmore told Bagley on the day he refused to allow him access to the scene of the truck rollover. U.S. Steel asserts that the judge should not have resolved this testimonial conflict because he did not preside at the hearing and, thus, did not have the opportunity to observe the witnesses' demeanor. The Secretary of Labor contends that U.S. Steel is precluded from raising this objection to the substitute judge's decision because it failed to raise it before the judge.

Under the Administrative Procedure Act ("APA"), agencies are authorized to have a case decided by a substitute judge when, as in this case, the pre siding judge becomes unavailable to the agency. 5 U.S.C. 554(d). Cf. Fed. R. Civ. P. 63. If the case is one in which the resolution of material conflicting testimony requires a determination of the credibility of witnesses, a de novo hearing may be procedurally necessary, unless the parties consent to dispense with, or waive, a rehearing. See, e.g., New England Coalition on Nuclear Pollution v. NRC 582 F.2d 87, 99-100 (lst Cir. 1978); Gamble-Skogmo, Inc. v. FTC, 211 F.2d 106, 113-15 (8th Cir. 1954); Van Teslaar v. Bender 365 F. Supp. 1007, 1012 (D. Md. 1973). However, under the APA, a party must object to a substitute judge's proceeding at a time appropriate under that agency's practice. Braswell Motor Freight Lines, Inc. v. United States, 271 F. Sup. 906, 910-11 (W.D. Tx. 1967). Further, the Mine Act and the Commission's Rules of Procedure provide:

... Except for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge has not been afforded an opportunity to

pass....

30 U.S.C. 823(d)(2)(A)(iii); Commission Procedural Rule 70(d), 29 C.F.R. 2700.70(d).

U.S. Steel admits in its brief that it was notified on February 4, 1982, of the substitute judge's intention to render a decision. The judge's decision was issued on April 15, 1982, thus giving U.S. Steel approximately 65 days within which to object to the substitution of this judge. Having been put on notice and having failed to raise any objection prior to the issuance of his decision, U.S. Steel can fairly be found to have consented to, or waived any objection to, this procedure. The judge was properly substituted, gave the

parties notice of his intention to render a decision on the existing record, and afforded them ample time within which to object. 5/ We discern no "good cause" to give further consideration to this procedural challenge of U.S. Steel on review. Thus, we conclude that the judge was properly substituted and properly proceeded to decide the case. Nevertheless we have specific reservations about certain findings of the judge and the civil penalty consequences which flow from those findings. We address these problems below.

III.

U.S. Steel contends that the judge erred in concluding that it violated section 103(a) of the Mine Act by preventing Inspector Bagley from inspecting or investigating the site of the truck rollover on January 22, 1981. U. S. Steel's argument centers around the Secretary's authority to investigate accidents. U.S. Steel argues that the Secretary, by his regulations at 30 C.F.R. Part 50, restricted the Act's definition of the term "accident" to a manageable administrative threshold. 6/ According to U.S. Steel's theory, because the injuries sustained by the truck's occupants did not meet the "reasonable potential to cause death" standard found at 30 C.F.R. 50.2(h)(2), it was under no obligation to take the Secretary' representative to the site of the rollover.

We find it unnecessary in reaching our decision to discuss whether or not Part 50 imposes any limits on the Secretary's accident investigation authority under section 103(a) of the Act. Under the facts of this case, sufficient grounds existed for Inspector Bagley, as the authorized representative of the Secretary, to inspect the site of the rollover pursuant to section 103(a) of the Act. Section 103(a) confers on the

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5/ A party cannot be permitted to reserve its objection develop that the [findings] of the [judge] ... were not to his liking." Braswell Motor Freight Lines, Inc. v. United States, 271 F. Supp. at 911, cited in Merchants Fast Motor Lines Inc. v. ICC 528 F.2d 1042, 1044 (5th Cir. 1976). However, the procedural concerns triggered by the substitution of the judge in this case suggest that it would be a desirable practice in future substitution situations, arising after the hearing has been conducted, for the substitute judge to include in his notice of intent to render a decision on an existing record, a specific time within which objections to the substitute judge rendering a decision may be filed. Any objection must be founded on a showing of a need for resolution of material conflicting testimony requiring demeanor-based credibility determinations. In addition, any rehearing should be limited, so far as practicable, to the testimonial

areas in dispute. See generally New England Coalition on Nuclear Pollution v. NRC 582 F.2d at 99-100.

6/ Section 3(k) of the Act, 30 U.S.C. 802(k), states that the term Occident" "includes a mine explosion, mine ignition, mine fire or mine inundation, or injury to, or death of, any person." 30 C.F.R. 50.2(h)(2) defines an "accident" as: "An injury to an individual a a mine which has a reasonable potential to cause death."

Secretary's representatives authority to make "frequent inspections and investigations" for the purpose of determining whether an imminent danger exists, or whether there is noncompliance with mandatory safety or health standards, citations, orders or decisions issued under the Act, or "other requirements" of the Act. 30 U.S.C. 813(a). Bagley was present on the mine property to conduct a regular mine inspection required by the Act and had authority to inspect the mine in its entirety. Section 103(a) places no boundary on the areas of a mine that an authorized representative may inspect or limitations on the sequence he may employ to complete his inspection. In light of the equipment rollover and, as even Barmore's testimony reflects, the attendant possibility of a fuel tank explosion, Bagley also had authority to determine whether an imminent danger existed. He likewise had authority to determine whether there was compliance with mandatory safety or health standards, or other requirements of the Act.

U.S. Steel also argues that the words and actions of Barmore, U.S. Steel's safety engineer, did not amount to a refusal to grant Bagley access to the scene of the rollover. While some of the events that transpired at the mine office prior to Barmore's departure to the rollover site are in dispute, the judge's finding that Barmore prevented Bagley from going to the scene of the accident is supported by substantial evidence. Uncontroverted evidence makes it clear that U.S. Steel had customarily provided MSHA personnel on mine property with a company vehicle driven by a company representative and that MSHA had come to rely on this practice. Barmore claimed that Bagley could have requested permission to use a company vehicle. However, Starkovich, Barmore's supervisor, testified that even if the inspector had requested a vehicle to go to the scene of the truck rollover, he would have refused pending an examination of the accident by a U.S. Steel safety engineer to determine the type of accident involved. Barmore's refusal to allow the inspector to accompany him in a company vehicle effectively left the inspector without any means of transportation to the site of the truck rollover. Barmore's denial of transportation, and Starkovich's testimony that he would have confirmed that decision, provide substantial evidence to support the judge's conclusion that U.S. Steel violated section 103(a) of the Act by preventing Bagley from inspecting the scene of the truck rollover.

While the uncontroverted evidence of record supports the judge's conclusion that there was a violation, we conclude that certain findings the judge made in assessing the civil penalty for the violation are not supported by substantial evidence. Notwithstanding Barmore's denials, the judge found that Barmore employed a "sudden,

hostile and arrogant manner" in precluding Bagley from visiting the scene of the rollover; that Barmore had "a certain amount of disdain" for Bagley; that Barmore was "indifferen[t]" about the way he treated inspectors; that Barmore used "rough language" in addressing Bagley; and that U.S. Steel's violation of section 103 was "done with considerable animosity and hostility." The judge also opined that U.S. Steel's actions had an adverse impact on MSHA's inspection program in general. These findings figured prominently in the judge's assessment of a civil penalty with regard to the gravity and negligence criteria of section 110(i) of the Mine Act. 30 U.S.C. 820(i). He based 1,500 of his 1,510 assessed penalty on those two criteria.

In assessing the penalty, the judge considered each of the six statutory penalty criteria. With the exception of the gravity and negligence elements, we find that substantial evidence in the record supports the judge's findings. On the issue of gravity, we agree with the judge that the violation was serious because it thwarted an authorized representative's attempts to insure compliance with the Act. However, it is apparent that he exaggerated "the demoralizing effect which Barmore's action had on MSHA's inspection responsibilities." Whether Bagley's hesitance in asserting his authority to inspect the scene of the truck rollover was due to Barmore's statements or to his own inhibitions is difficult to determine. Moreover, we find no evidence to suggest that Barmore's actions had any negative effect on MSHA's enforcement program in general. Thus, we conclude that the judge's penalty assessment overstated the gravity of the violation.

Regarding the operator's negligence, we agree with the judge that the violation was deliberate, but note that U.S. Steel's refusal to allow MSHA access to the site of the rollover was based, at least in part, on its erroneous legal interpretation of the Secretary's authority to inspect. To support his conclusion that Barmore had "a certain amount of disdain" for Bagley, and thus demonstrated a high degree of negligence imputable to U.S. Steel, the judge relied on an extract from Barmore's own testimony. 4 FMSHRC at 641-42. In this passage, Barmore confessed to an inability to evaluate Bagley's subjective mental reaction to Barmore's refusal to allow him to proceed to the site of the rollover. However, the cold words of the transcript are susceptible to various interpretations, at least as valid as the disdain attributed to them by the judge. The judge did not have the opportunity to observe Barmore's demeanor on the stand, and we do not find that the cold record provides a sufficient basis upon which to reach this conclusion. Similarly, Barmore also denied swearing at Bagley (Tr. 182-185), and yet the judge failed to explain why he disbelieved Barmore, whose testimony was not inconsistent or contradictory. Finally, the judge concluded that Barmore's treatment of the inspector would not have provided as strong a basis for adversely evaluating the operator's negligence had Starkovich, Barmore's supervisor, evinced disagreement with the manner in which Barmore proceeded. However, the record indicates that Starkovich agreed with Barmore's actions only as a matter of company policy. Although that policy proved to be in error, there is nothing in Starkovich's testimony to indicate hostility or disdain on his part, or condonation of any such behavior by Barmore. Given a lack of substantial support in the record, the judge's conclusion that the operator exhibited a high degree of negligence cannot stand. We,

therefore, disavow his comments.

While a judge's assessment of a penalty is an exercise of discretion, assessments lacking record support, infected by plain error, or otherwise constituting an abuse of discretion are not immune from reversal by this Commission. See Sellersburg Stone Co., 5 FMSHRC 287, 292-94 (March 1983), affirmed, No. 83-1630 (7th Cir. June 11, 1984); Southern Ohio Coal Co. 4 FMSHRC 1459, 1465 (August 1982); Kpox County Stone Co., Inc., 3 FMSHRC 2478, 2480-81 (November 1981). Discounting the judge's findings analyzed above, we conclude that a penalty assessment of 400, the figure originally proposed by the Secretary for the violation, is appropriate and consistent with the statutory criteria. See Southern Ohio Coal Co., 4 FMSHRC 1459, 1465 (August 1982).

The next issue is whether the judge erred in holding that U.S. Steel violated section 103(a) of the Act by insisting on the presence of a U.S. Steel attorney when MSHA sought to interview foreman Roivanen. U.S. Steel argues on review that the APA provides for a right to counsel when a company supervisor is interviewed by a representative of the Secretary during the course of an investigation. The Secretary argues that the right to counsel is not an issue in this case because the right is a personal one and Roivanen himself never sought to be represented by counsel. Rather, the Secretary contends that U.S. Steel sought to have its counsel present when Roivanen was interviewed and impeded the investigation when it failed to notify MSHA within a reasonable time when the Secretary's representative could interview Roivanen.

The issue of whether a non-party witness involved in an MSHA investigation has a right to benefit of counsel during a non-compulsory, investigative interview is not directly before us because Roivanen did not seek to be represented by counsel and never asserted a personal right to representation during an MSHA interview. Assuming, however, for the sake of discussion, that the APA provides such a right, and that the right is incorporated by reference under the Mine Act, the right would have to be exercised in a reasonable manner. See United States ex rel. Baskerville v. Deegan, 428 F.2d 714, 716 (2nd Cir. 1970), cert denied, 400 U.S. 928 (1970). Cognizant of that principle, we address the issue of whether the actions of Starkovich constituted an unreasonable impedance of the MSHA accident investigation.

The evidence shows that on February 9, 1981, after receiving a miner's section 103(g) request for an investigation, Inspectors Bagley and King returned to the mine to investigate the rollover accident. Starkovich told them that they could not interview foreman Roivanen unless a U.S. Steel attorney were present. Bagley informed Starkovich that it would be necessary for MSHA to interview Roivanen and that arrangements should be made to provide an attorney as soon as possible. Starkovich indicated that he would let the inspectors know when an attorney would be available, but did not offer any date on which the inspectors could proceed with their investigation and interview Roivanen. These facts indicate that MSHA was willing to accommodate, at least temporarily, U.S. Steel's desire for the presence of a U.S. Steel attorney during the interview with its foreman. Two days later the inspectors returned to the mine and Starkovich informed them that he had not yet received word from U.S. Steel headquarters as to when an attorney would be available. Such an open-ended response to the inspector's instruction that an

attorney be provided as soon as possible was unreasonable. This conclusion is bolstered by the fact that after receiving the citation, Starkovich made a single telephone call and was able to inform the inspectors that a U.S. Steel attorney would be present the next day.

Even assuming that U.S. Steel was within its rights in insisting on the presence of a company attorney, Starkovich's failure to specify a date certain when an attorney would be present, combined with the failure to produce an attorney, had the effect of unreasonably delaying the accident investigation. We therefore conclude that substantial evidence supports the judge's conclusion that U.S. Steel impeded the MSHA investigation in violation of section 103(a) of the Act.

U.S. Steel also argues that in assessing a penalty of 80 for this violation, the judge erred in considering arguments contained in its posthearing brief. The judge determined that U.S. Steel's complaints about having to send an attorney somewhat less experienced in the field of mine safety law in order to abate the violation largely offset any conclusion that the speed it had exhibited in abating the citation demonstrated "good faith" that should be used as a reason for reducing the penalty otherwise assessable.

We agree with U.S. Steel that under the Mine Act "good faith" should be judged in terms of objective attempts to achieve rapid compliance after notification of a violation. We also note that the parties stipulated that U.S. Steel demonstrated good faith in abating the citation at issue within the time provided. Therefore, we reverse the judge on this point and reduce the assessed penalty from 80 to 70

V.

With respect to the judge's findings that U..S Steel violated 30 C.F.R. 55.9-1 and 55.9-2 (n. 3, supra) in connection with the truck rollover, U.S. Steel argues that the judge misconstrued the phrase "defect affecting safety" contained in those standards by defining it in terms of injury or loss to the vehicle. The operator also contends that the alleged violations could not have been "significant and substantial" within the meaning of our Cement Division, National Gypsum Co. decision, 3 FMSHRC 822 (April 1981), because the judge characterized the probability of injury as remote. Finally U.S. Steel maintains that substantial evidence does not support the judge's conclusion that the alleged violations were the result of its unwarrantable failure to comply with the cited standards.

Relying on ordinary usage, the judge applied the dictionary definition of the term "defect" to the dictionary definition of the term "safety." He found that failed brakes and disconnected drive shafts were "shortcomings" or "imperfections" in a truck with a shifted rear end, and that these defects constituted conditions which would prevent persons riding in a vehicle from feeling "safe from undergoing" an "injury or loss." The judge intimated that because an accident occurred, it was certain that the truck's shifted rear end was a defect affecting safety. He nonetheless went on to state that inasmuch as a shifted rear end was a defect and because the potential consequences of its presence affected safety, the record supported a finding that the shifted rear end of the truck constituted a defect affecting safety.

We find the judge's legal reasoning to be generally in accord with our decision in Ideal Basic Industries, Cement Division 3 FMSHRC 843 (April 1981), in which we construed 30 C.F.R. 56.9-2, a regulation identical to section 55.9-2 and applicable to sand, gravel, and crushed stone mining operations. There we held "that use of a piece of equipment containing a defective component that could be used and which, if used, could affect safety, constitutes a violation of 30 C.F.R. 56.9-2." 3 FMSHRC at 844. Substantial evidence also supports the judge's conclusion that the shifted rear end of this truck was a defect affecting safety within the meaning of the two standards involved in this case. There is evidence in the record that a shifted rear end is a sign of mechanical defect, with a potential to cause an accident. Also, at some point, a shift in a vehicle's rear end will affect safety. John Primozich,

the foreman of the auto repair shop at the Minntac Mine, testified that he would not operate a truck in which the rear end had shifted two and one half inches because he would not feel safe. In this particular instance, the shifted rear end caused the spring package to break, a punctured rear tire, the broken drive shaft to separate from the vehicle, and the truck to roll over. The truck rollover caused several back strain injuries and a chipped elbow fracture. There is no question that the rollover had the potential for more serious injury. All of these facts point to a defect affecting safety.

It is also clear that, as the judge found, U.S. Steel violated the two standards by not recording information regarding the shift in the truck's rear end and by failing to correct the defects before the truck was used. Kaivola, the driver, orally reported the condition to his foreman, Roivanen. Roivanen acknowledged the report, but made no attempt to report or record the complaint because he was preoccupied with other affairs and simply forgot. Kaivola testified that the shovel repair shop had always had an oral system of reporting complaints to the supervisor. Roivanen testified that normally he would have informed the afternoon shift foreman of the complaint and he, in turn, would have sent the truck to the auto repair shop in order to have it repaired and back in service by the next day shift.

In his decision, the judge referred to these and other facts. Thus, substantial evidence supports the judge's conclusion that U.S. Steel failed to record the defect affecting safety as required by 30 C.F.R. 55.9-1. It is undisputed that U.S. Steel did not correct the shift in the rear end before the truck was used and, therefore, violated 30 C.F.R 55.9-2 as well.

U.S. Steel contends that the alleged violations of these standards could not have been "significant and substantial" within the meaning of National Gypsum because the judge characterized the probability of injury as remote. The judge found that a significant and substantial violation required "at least a remote possibility of injury and, additionally, that there should exist a reasonable likelihood of occurrence of an injury or illness of a reasonably serious nature." He concluded that the violations were significant and substantial because shifting rear ends "were associated with a remote possibility of an injury which would have a reasonable likelihood of occurrence and be of a reasonably serious nature."

In National Gypsum, the Commission defined a significant and substantial violation as requiring the existence of "a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." 3 FMSHRC at 825. As we

stated recently:

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; [7/] (3) a reasonable likelihood that the hazard contributed to will result in injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Consolidation Coal Co., 6 FMSHRC 189, 193 (February 1984).

It is obvious that the judge's definition of what constitutes a significant and substantial violation differs from that employed by the Commission in National Gypsum. The judge obscured the necessary probability element by addressing it in terms of both a "remote possibility" and a "reasonable likelihood." Nevertheless, substantial evidence supports the judge's ultimate conclusion that the violations were significant and substantial within the meaning of National Gypsum. There is evidence that a shifted rear end is a sign of mechanical defect, with a potential to cause an accident. There are statements that at some point, a shift in a vehicle's rear end will affect safety. There is also the testimony of Primozich the auto repair shop foreman, that he would not operate a truck in which the rear end had shifted two and one half inches because he would not feel safe. Further, the presence of this kind of defect affecting safety in equipment that is subsequently used presents at least a reasonable likelihood that an injury will result. We, therefore, conclude that substantial evidence supports the judge's ultimate conclusion that the violations were significant and substantial within the meaning of National Gypsum.

By contrast, the issue of whether the violations were the result of the operator's unwarrantable failure is more straight forward. U.S. Steel argues that the Secretary failed to prove that Roivanen knew or should have known that the shift in the truck's rear end could affect safety. It maintains that this mechanical problem was not normally considered to be a defect affecting safety, but rather a maintenance item to be corrected in the normal course of operations. The judge repeatedly rejected that argument and found that Roivanen was aware of the fact that wheels could rub in the wheel wells, smoke, and even stall a vehicle's engine. He concluded that the evidence controverted U.S. Steel's claim that prior experience with shifted rear ends would not have enabled Roivanen to foresee the possibility that the vehicle's mechanical condition was more than a maintenance item and could affect safety. The judge also found that Roivanen, under the pressure of other duties, forgot about Kaivola's having reported the shifted rear end to him, and that he failed to report and record the defect and failed to remove the affected equipment from service.

We note that the Interior Board of Mine Operations Appeals interpreted an identical reference to "unwarrantable failure" in the 1969 Coal Act, 30 U.S.C. 801 et se .(1976)(amended 1977). Zeigler Coal Co., 7 IBMA 280 (March 1977). There the Board stated:

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7/ We note that this case involves the violation of mandatory safety standards. We have pending before us a case raising a challenge to the application of National Gypsum to a violation of a mandatory health standard. Consolidation Coal Co., FMSHRC Docket No. WEVA 82-209-R, etc. We intimate no views at this time as to the merits of that case.

> [A]n inspector should find that a violation of any mandatory standard was caused by an unwarrantable failure to comply with such standard if he determines that the operator involved has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of a lack of due diligence, or because of indifference or lack of reasonable care.

7 IBMA at 295-96. 8/ The Senate Committee largely responsible for drafting the bill that became the Mine Act specifically approved the Zeigler interpretation of the term unwarrantable failure. S. Rep. No. 11, 95th Cong., lst Sess. 31-32 (1977) reprinted in Subcommittee on Labor, Senate Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 619-20 (1978). This case does not require us to examine every aspect of the Zeigler construction, but we concur with the Board to the extent that an unwarrantable failure to comply may be proved by a showing that the violative condition or practice was not corrected or remedied, prior to issuance of a citation or order, because of indifference, willful intent, or a serious lack of reasonable care.

Roivanen's testimony indicates that he was aware that a shifted rear end could cause a truck's wheels to rub in the wheel wells, smoke, and even stall a vehicle's engine. These facts, as previously discussed, are consistent with the judge's finding of a defect affecting safety, rather than a maintenance item. Roivanen also admitted that normally he would have taken the truck to the repair shop at the end of the shift or left instructions with the afternoon shift foreman to see to the repairs, but that he simply "forgot." Roivanen's lapse in memory can be regarded as demonstrative of a serious lack of reasonable care. His failure to take corrective action to remedy the violations ultimately contributed to the occurrence of the rollover. In sum, all these facts provide substantial support for the judge's conclusion that the violations were the result of the operator's unwarrantable failure to comply with the cited standards. Contrary to U.S. Steel's position, we agree with the judge and find substantial support for his conclusion that the shifted rear end of this truck was a defect affecting safety within the meaning of 30 C.F.R. 55.9-1 and 55.9-2, and not an item of maintenance. Therefore, we affirm the judge's conclusion as to the violations of the standards, as well as his assessment of 255 for each of the violations.

8/ The Board's use of the term "abate" refers to correction of the

violative condition or practice prior to issuance of a citation or order.

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VI.

Based on the foregoing reasons, the decision of the administrative law judge is affirmed in part and reversed in part. His penalty assessment is consequently reduced from $2100 to $980.

Commissioner Jestrab, concurring in part:

I concur in this decision, except that I would not reduce the civil penalties assessed by the administrative law judge.

Commissioner Lawson dissenting:

The majority properly affirms the conclusion of the judge below that U. S. Steel violated section 103(a) of the Act and the cited mandatory safety standards, as indeed it must given the facts of this case. 1/ However, no credible rationale has been advanced for either the penalty reductions for this operator's deliberate flouting of the Act, or for the majority's disregard of the substantial evidence found by the judge below to support imposition of the penalties he assessed. Henceforth, an operator's deliberate defiance obviously generates reduced penalties. This error is compounded by uncritical acceptance of the Secretary's "proposed" penalty assessment of 400, without discussion or explanation of how that figure is "appropriate and consistent with the statutory criteria." Slip op. at 10. 2/

Section 110(i) of the Act provides:

> The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. In 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 statutory language that, although the Secretary is not required to make findings of fact concerning the statutorily enumerated penalty factors, the Commission is. In a penalty proceeding before the Commission, the Secretary's proposed penalties are merely suggestive, and the amount of the penalty to be assessed is a de novo determination based on the six statutory criteria. United States Steel Mining Co., Inc., Docket No. PENN 82-328 (May 31, 1984); Sellersburg Stone Co, 5 FMSHRC 287, affirmed, No. 83-1630 (7th Cir. June 11, 1984); see also Rushton Mining Company, Inc., 1 FMSHRC 794 (1979); Shamrock Coal Co, 1 FMSHRC 799 (1979); Pittsburgh Coal Co., 1 FMSHRC 1468 (1979); Co-op Mining Company, 2 FMSHRC (1980).

1/ On the basis of the criteria set forth in my separate opinion

in Cement Division, National Gypsum Co., 3 FMSHRC 822 (April 1981), the violations of the mandatory safety standards are, as found, significant and substantial.

2/ The Act nowhere mandates nor even recommends acceptance of the Secretary's proposed penalties. To the contrary, the Act unambiguously provides that the sole authority to assess all civil penalties provided in the Act resides with the Commission. Section 110(i).

The majority has determined, for reasons unknown or at least unexplained, that a $1,510 penalty, assessed because U. S. Steel violated the Act by preventing Inspector Bagley from inspecting the accident site, is too high, but $400 is "appropriate." It reaches this result by concluding--without record support-- that the judge improperly based $1500 of his penalty assessment on inappropriate negligence and gravity criteria findings.

The obvious difficulty with this rationale is that the majority has failed to make any findings under the statutory criteria of negligence or gravity. From all that can be discerned from the majority opinion, $1 or nothing would be equally "appropriate" under the "negligence" rubric, or $400 or nothing under that of "gravity." Indeed any arbitrarily selected figure between these extremes would be equally valid, or invalid. This hardly meets either the section 110(i) mandate or any other criteria founded upon a rational relationship between the statute and the penalty amounts required to be assessed thereunder.

In contrast, the judge below made specific findings which are in conformity with the stipulation of the parties and substantial evidence of record. With respect to four of the six statutory criteria for penalty assessment; viz, U. S. Steel's ability to continue in business, the good faith demonstrated, the operator's history of previous violations, and the size of this operator, the findings are unchallenged by my colleagues. However, the majority asserts that certain other "findings" the judge made in these penalty assessments that "figured prominently" in the judge's penalty assessment were not supported by substantial evidence. Slip op. at 9.

Finding support in Commission precedent that permits reversal of a judge's penalty assessment for lack of record support, 3/ my colleagues conclude that the judge overstated the gravity of the violation and lacked substantial record support for his findings of a high degree of negligence. With respect to gravity, the judge found:

The violation of section 103(a) was moderately serious because Barmore's refusal to permit Inspector Bagley to accompany him and Claude to the scene of the truck's rollover prevented an MSHA inspector from being able to carry out his functions as an inspector, those functions being, as hereinbefore explained, the checking of accident sites to determine whether an imminent danger exists and whether violations of the mandatory health and safety standards have occurred.

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3/ My consistent, and statutorily supported, position has been that the Commission may not substitute its view of the statutory penalty factors for that of the judge below. See Southern Ohio Coal Co., 4 FMSHRC 1459 August 3, 1982)(dissenting opinion).

The citation was not terminated until February 9, 1981, when the inspector was permitted to examine the truck after it had been towed or hauled to USS's auto repair shop. The delay which resulted in the inspector's being able to examine the truck and interview witnesses not only prevented the inspector from being able to get first-hand information at the scene of the accident, but brought about a considerable duplication of effort which could have been avoided if the inspector had been permitted to accompany Barmore to the scene of the accident in the first instance.

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

4 FMSHRC 616, 640-41. The judge's characterization of Barmore's conduct to which the majority refers, relates not to gravity, but to his rejection of U. S. Steel's contention that the inspector was not precluded from making the inspection because he had the power to go anywhere on mine property to inspect without U. S. Steel's consent. The judge concluded that the inspector was precluded from inspecting the rollover site because of Barmore's "sudden, hostile, and arrogant manner of forbidding the inspector to accompany him," the lack of transportation, the lack of a U. S. Steel safety engineer as an escort, and the lack of an accompanying miners' representative. 4/ 4 FMSHRC at 641.

The facts and clear record testimony make it evident that the dispute between mine inspector Bagley and U. S. Steel were not legalistic quibbles over statutory application. Despite the lessons of Donovan v. Dewey, 452 U.S. 594 (1981), this operator deliberately decided to challenge the core of the statute, the mine inspector's indisputable right to inspect this mine for not only potential safety violations, but, as in this case, those which have actually caused injury. It is contended--although not explained--that the "cold words of the transcript" are "susceptible to various interpretations" (slip op. at 10). To the contrary, one need hardly strain to find copious and substantial evidence in support of the judge's interpretation. Observation of demeanor (slip op. at 10) is unnecessary given the record before us. Indeed, one need look no further than the transcribed testimony of the operator's own witnesses. The admissions of its chief witness, Barmore, are sufficient in themselves to support the judge's conclusions. 5/

4/ The majority's suggestion that Bagley's hesitance in asserting his

inspection authority may have been due to his own inhibitions is more properly addressed to the merits, as was the judge's contrary view. My colleagues would reward Barmore's defiance and penalize "Bagley's hesitance in asserting his authority." Slip op. at 10. Apparently, if Barmore had commandeered a vehicle to travel to the accident scene, that would be less disturbing to the majority than the manner in which he actually proceeded.

5/ Although the testimony is obviously too voluminous for reproduction here in its entirety (transcript pages 179 to 232), the samples quoted accurately reflect, and support at least the "indifference about the way [this operator] treated inspectors," and, indeed, the "disdain" found by the judge below. 4 FMSHRC at 642.

Barmore determined, without investigation, "that it didn't appear that anyone was injured at the time, you know, as far as real bad" (Tr. 182) and concluded that he would deny Bagley access to the accident scene (Tr. 182-84). The majority asserts that there was no "condonation" of Barmore's actions by this operator. More compelling, however, is the fact that nothing in this record reveals even a word of criticism of this "safety engineer's behavior. Indeed, Starkovich, Barmore's supervisor, specifically agreed with Barmore's barring of access to this mine accident site, testifying that he, too, would object to the MSHA inspector going to the accident site, even in a government vehicle, and that MSHA had no right to go to the scene of the accident (Tr. 274, 279).

Barmore also contends--astonishingly--that he "assumed" Inspector Bagley was "satisfied, a little bit reluctantly," with Barmore's explanation of why Bagley was being denied the access he had requested to the mine accident (Tr. 186); that Bagley could have secured other transportation; "...[a]ll he had to do was use a little initiative" (Tr. 197). Later testimony, however, reveals the obvious futility of any attempt to secure transportation since both Barmore and Starkovich believed Bagley had "no right to investigate this accident" (Tr. 200-01, 279).

Compounding the denial of access to the mine accident site, was U.S. Steel's refusal to permit its employee to give statements concerning the accident, without the presence of an attorney (another new policy, Tr. 80) ordered and employed by U. S. Steel (Tr. 261, 264-66, 307). Whether this too rises to the level of disdain may be open to differing assessments; clearly it does not evidence an attitude of cooperation or willingness to permit unhampered access to the facts of the accident. (Tr. 245).

My colleagues have given unsubstantiated credence to Barmore's denial of the evidence which the judge credited. This no more than substitutes their opinion for that of the judge, who properly evaluated this operator's response to the undisputed evidence that MSHA Inspector Bagley at all times acted with scrupulous professional courtesy in seeking to carry out his duties under the Act.

Thus, although one need not endorse every step of the penalty assessment process taken by the judge below, my colleagues have failed to provide a more reasoned analysis supporting their reducing by more than 70% the penalty assessed by the judge for this violation. The violation was deliberate, not inadvertent. As the majority notes, uncontroverted evidence makes it clear that U. S. Steel had never

denied MSHA personnel on mine property transportation by a company vehicle on previous mine inspections, but did so in this instance. One can only speculate as to the reason for this refusal, but the unknown, and later determined to be serious nature of this accident, suggests ample reason for concern. Slip op. at 9.

There is no dispute that U. S. Steel violated section 103(a of the by preventing Bagley from inspecting the accident scene. It is thus established that the MSHA inspector was precluded from carrying out his enforcement functions, even though there existed an acknowledged possibility of a fuel tank explosion. Slip op. at 9. Accordingly, the record contains substantial evidence to support the judge's finding of moderately serious gravity and his corresponding allocation of 500 for this penalty criteria. 6/

With respect to the negligence criteria, the judge stated that Barmore's action was deliberate and thus constituted a high degree of negligence. He also indicated that Barmore's "indifference" may not have been used to evaluate U. S. Steel's negligence, had Barmore's supervisor not supported his denial of Bagley's right to inspect. Whether the judge properly or improperly characterized Barmore's attitude, 7/ substantial evidence clearly supports a finding of a high degree of negligence when an operator deliberately prevents an inspector from carrying out his enforcement functions, as a matter of company policy.

The majority has again embarked upon the uncharted waters of independent penalty assessment. See Southern Ohio Coal Co., 4 FMSHRC 1459 (August 3, 1982)(dissenting opinion). Their opinion fails to cure what they view as judicial deficiencies below by an independent assignment of numerical or other objective indicia to the Act's "negligence" or "gravity" criteria. No guidance is furnished for either mine operators or the Secretary by their conclusorily glossing over the penalty reduction for this violation. This is no doubt attractive, particularly to U. S.

6/ The majority errs when it asserts that it is "apparent" that the judge exaggerated the demoralizing effect which Barmore's action had on MSHA inspection responsibilities. Slip op. at 10. The judge's statement that Barmore's "action" had a demoralizing effect on MSHA's enforcement responsibilities is certainly true as it relates to this case. Moreover, it is hard to conceive of a more "demoralizing" course of conduct than that initiated by this operator, in denying Inspector Bagley his absolute right to investigate this accident. Contrary to the assertion that Barmore's actions had no negative on MSHA's enforcement program, given the size of this operator, the effect of this recalcitrance by U. S. Steel could indeed have a demoralizing effect on inspection responsibilities at a wide range of mining operations, not only the mines of this large and diverse mine operator. 4 FMSHRC at 642.

7/ Before the Commission, U. S. Steel takes exception to certain

credibility resolutions regarding Barmore's conduct made by a substitute judge who did not preside at the hearing. U. S. Steel maintains it was error for the judge to base his negligence assessment (his gravity determination is not challenged) on these attitude findings rather than on the operator's action alone. Inasmuch as the Commission rejects U. S. Steel's challenge to these findings, I cannot conclude that the judge erred in relying on these same findings in the only manner to which U. S. Steel objects.

Steel, but falls far short of being either judicially permissible or in accord with the Act. The majority, as in Southern Ohio Coal Co., supra, asserts that its assessed penalties are "appropriate and consistent with the statutory criteria," slip op. at 10. However, it completely fails to evaluate the gravity of the violations, merely parses the negligence for an admittedly deliberate violation,.Id, and fails to explicate its reasons, contrary to the careful conformity to the statute exercised by the judge.

The majority's further reduction of the judge's penalty assessment for U. S. Steel's second violation of section 103(a) is similarly deficient. The judge assessed a penalty of 80, which my colleagues have reduced to 70, because they find error in the judge's analysis of U. S. Steel's good faith. The parties stipulated that U. S. Steel demonstrated good faith abatement after being cited. The judge found "normal good-faith abatement," 4 FMSHRC at 663, that warranted neither an increase nor decrease in the penalty otherwise assessable. Whatever disagreement my colleagues may have with the judge's discussion of U. S. Steel's abatement efforts, his view apparently did not adversely affect his acceptance of the parties' stipulation regarding good faith. The 80 penalty assessed by the judge was properly based on the statutory criteria, with due consideration to the stipulations of the parties. As he stated, his finding of "normal good faith abatement ... is consistent with the parties' stipulation to the effect that U. S. Steel showed good faith abatement as to all violations after the citations were written." Id. Accordingly, the majority's almost frivolous 10 reduction of the assessed penalty for this violation, for reasons irrelevant to the judge's assessment, is unwarranted, and would appear, given the amount involved, to serve no purpose other than to reward this operator for another deliberate violation.

The judge's assessments were based on the premise that "the purpose of assessing penalties under the Act is to deter companies from future violations of the mandatory safety and health standards." 4 FMSHRC at 675. I agree. The penalties imposed by the judge for each violation accurately reflect that rationale and are in accord with Congressional intent expressed in the Act's legislative history. Legis. Hist. at 603, 628-30.

As the Senate Committee Report notes:

In short, the purpose of a civil penalty is to induce those officials responsible for the operation of a mine to comply with the Act and its standards.

* * *

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.

S. Rep. No. 95-181, Legis. Hist. at 629 (emphasis added).

The Commission has stated that,

> The determination of the amount of the penalty that should be assessed for a particular violation is an exercise of discretion by the trier of fact. Cf. Long Manufacturing Co. v. OSHRC supra, 554 F.2d [903] at 908 [8th Cir. 1977]. This discretion is bounded by proper consideration of the statutory criteria and the deterrent purpose underlying the Act's penalty assessment scheme.

Sellersburg Stone Co., supra. 5 FMSHRC at 294. As in Sellersburg,

> Although the penalties assessed by the judge far exceed those proposed by the Secretary before hearing, based on the facts developed in the adjudicative record [I] cannot say that the penalties assessed are inconsistent with the statutory criteria and the deterrent purpose behind the Act's provision for penalties. Hence, [I] find that the judge's penalty assessments do not constitute an abuse of discretion.

Id at 295, quoted in part. No. 83-1630, slip op. at 11 (7th Cir. June 11, 1984).

I therefore dissent to the reduction of the penalties imposed.

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