

CCASE:
CYPRUS TONOPAH MINING V. SOL (MSHA)
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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April 9, 1993

CYPRUS TONOPAH MINING CORPORATION,	:	CONTEST PROCEEDINGS
	:	
Contestant	:	Docket No. WEST 90-363-RM
	:	Citation No. 3645243; 9/5/90
v.	:	
	:	Docket No. WEST 90-364-RM
	:	Citation No. 3459560; 9/5/90
SECRETARY OF LABOR, MINE SAFETY AND HEALTH REVIEW ADMINISTRATION (MSHA),	:	
	:	Cyprus Tonopah
Respondent	:	Mine I.D. 26-02069
	:	
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH REVIEW ADMINISTRATION (MSHA),	:	CIVIL PENALTY PROCEEDING
	:	
Petitioner,	:	Docket No. WEST 90-202-M
	:	AO No. 26-02069-05507
v.	:	
	:	
CYPRUS TONOPAH MINING CORP.:	:	
Respondent	:	

DECISION AFTER REMAND

Before: Judge Lasher

The Federal Mine Safety and Health Review Commission, in its Decision issued March 22, 1993, determined that the violation contained in Citation No. 3459560 did not, as I had previously held, result from Respondent's unwarrantable failure to comply with the pertinent safety standard and remanded the matter to me for recalculation of the penalty based on this change.

The penalty assessed in my original decision issued on September 23, 1991, was \$1,000.00. The basis for the Commission's determination that the violation was not the result of Respondent's unwarrantable failure is essentially set forth on page 11 of its decision.

We also find significant the fact that on the day of Inspector Ellis's inspection, Cyprus was in the process of constructing a

larger berm at the base of the west wall. The Commission has previously recognized that an operator's pre-citation efforts in mitigating a violative condition are relevant in reviewing an unwarrantable failure determination. See, e.g., Utah Power and Light Co., 11 FMSHRC 1926, 1933 (October 1989).

Because Cyprus's conduct apparently resulted from a good faith, albeit mistaken, belief that its actions were in compliance with Section 56.3200, we conclude that substantial evidence does not support the Judge's finding that Cyprus's violation of 56.3200 was caused by its unwarrantable failure. See generally Utah Power and Light Co., 12 FMSHRC 965, 972 (May 1990).

It is found that Respondent was negligent, however, in permitting work and travel in the area where hazardous ground conditions existed until completion of the "corrective work" mentioned in the safety standard, i.e., the berm mentioned by the Commission was completed. See my Decision, fn. 22, 13 FMSHRC 1547.

Nevertheless, the elimination of the "unwarrantable failure" aspect of the violation stands in considerable mitigation of the culpability to be attributed and after consideration of this change and the other penalty assessment criteria previously ascertained, a penalty of \$500 is found appropriate and is here assessed.

Michael A. Lasher, Jr.
Administrative Law Judge

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