FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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December 19, 2000

PLATEAU MINING CORP.,	:	CONTEST PROCEEDINGS
(formerly CYPRUS PLATEAU	:	
MINING CORPORATION)	:	Docket No. WEST 98-191-R
Contestant	:	Citation No. 7611106; 2/17/98
	:	
v.	:	Docket No. WEST 98-192-R
	:	Citation No. 76111107; 2/17/98
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Willow Creek Mine
Respondent	:	
	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 98-317
Petitioner	:	A.C. No. 42-02113-03520
	:	
v.	:	
	:	Willow Creek Mine
PLATEAU MINING CORP.,	:	
(formerly CYPRUS PLATEAU	:	
MINING CORPORATION),	:	

DECISION

Appearances: Ann M. Noble, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Respondent;
R. Henry Moore, Esq., Buchanan Ingersoll, Pittsburgh, Pennsylvania, For Respondent.

Before: Judge Cetti

These consolidated Contest and Civil Penalty Proceedings arise under the Federal Mine Act of 1977, 30 U.S.C. § 801 *et seq*. ("Mine Act"). The Secretary of Labor (Secretary) acting through her Mine Safety and Health Administration ("MSHA"), pursuant to section 105 of the Mine Act seeks the imposition of civil penalties against Plateau Mining Corp. ("Plateau"). Plateau challenges the S&S and the unwarrantable findings in the citation and order. Both documents were issued under section 104(d)(1) of the Act.

At the hearing in Salt Lake City, Utah, the parties filed comprehensive stipulations and presented testimony and documentary evidence. Both parties filed post-hearing briefs. For the

reasons set forth below, the existence of the violations alleged by MSHA in the two enforcement documents are affirmed, civil penalties are assessed, and the S&S and unwarrantable failure findings deleted.

Both the citation and the order at issue in these consolidated cases involves the number of water sprays on a 12CM12 Joy continuous miner No. 5062, after the miner was rebuilt by the Joy Manufacturing Company. These cases are concerned with the reasons why there was a discrepancy, at the time of inspection, with the number of sprays found on the continuous miner and the number of sprays called for in the parameter sheet for that 12CM12 Joy miner No. 5062. The parameter sheets for each miner is a part of the approved mine ventilation plan.

Order No. 7611107 issued by Inspector Passarella pursuant to section 104(d)(1) of the Act alleges a violation of 30 C.F.R. § 75.362(a)(2) as follows:

> Persons designated by the operator did not conduct a thorough examination to assure compliance with the respirable dust control parameters specified in the approved mine ventilation plan. These examinations shall include water spray numbers and orientations. Deficiencies in dust controls shall be corrected before production begins or resumes. The required number of water sprays for the continuous mining machine being operated in the D-1 Headgate section, MMU 006-0 did not comply with the approved respirable dust control parameter sheet, dated January 16, 1998. Two spray banks containing three sprays had never been mounted on the continuous mining machine before it was put into production. Ten additional sprays were plugged off and was not being used. The records for this examination had been certified that the parameter sheet was being complied with since January 16, 1998.

The cited safety standard at 30 C.F.R. §75.362(a)(2) reads in pertinent part as follows:

> A person designated by the operator shall conduct an examination to assure compliance with the respirable dust control parameters specified in the mine ventilation plan.... Deficiencies in dust controls shall be corrected before production begins or resumes. The examination shall include air quantities and velocities, water pressures and flow rates, excessive leakage in the water delivery system, water spray numbers and orientations ...

Citation No. 7611106 charges Plateau with a 104(d)(1) violation of 30 C.F.R. § 75.370(a)(1). The citation in pertinent part alleges:

> The approved Ventilation Plan was not being complied with. The operators [sic] dust suppression spray system approved on

> January 16, 1998, for the continuous mining machine, Serial No. 5062, MMU 006-0 which was approved on January 16, 1998, shows a total of 53 sprays. A three spray bank under the cutter head on the left side and a three spray bank on the right side had never been installed by the operator, before this miner was put into production. An additional, 14 sprays were plugged and were found inoperable.

The safety standard cited, 30 C.F.R. §75.370(a)(1), in pertinent part provides:

> The operator shall develop and follow a ventilation plan approved by the district manager. The plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine.....

STIPULATIONS

At the hearing, the parties entered into the record stipulations covering the relevant basic facts involved in these consolidated cases as follows:

1. The Willow Creek Mine is a large underground bituminous coal mine located in Helper, Utah. Currently, the mine has approximately 270 miners.

2. The Willow Creek Mine is owned and operated by Cyprus.

3. The Willow Creek Mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977 ("the Act"), 30 U.S.C. § 801 *et seq*.

4. The presiding Administrative Law Judge has jurisdiction over these proceedings, pursuant to section 105 of the Act, 30 U.S.C. § 815(c).

5. The parties stipulate to the authenticity of their exhibits, but not to the relevance or truth of the matters asserted therein.

6. Cyprus' operations affect interstate commerce.

7. Citation No. 7611106 and Order No. 7611107 were properly served by duly authorized representatives of the Department of Labor upon agents for Cyprus on the dates and at the places indicated therein.

8. Citation No. 7611106 and Order No. 7611107 were properly served by duly authorized representatives of the Department of Labor upon agents for Cyprus on the dates and at the places indicated therein.

9. Citation No. 7611106 was issued on February 17, 1999, at the Willow Creek Mine, pursuant to section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), and alleging a violation of 30 C.F.R. § 75.370(a)(1).

10. Order No. 7611107 was issued on February 18, 1999, at the Willow Creek Mine, pursuant to section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), and alleging a violation of 30 C.F.R. § 75.362(a)(2).

11. The inspection on which the Citation and Order are based was prompted by the report of an ignition on February 16, 1999, in the D-1 Headgate longwall development section of the Willow Creek mine. At approximately 9:45 p.m. on that date, mining was being conducted on the right side of the No. 1 entry of that section and an orange flame appeared on the right side rib approximately 2-3 feet from the face. The flame lasted 20-30 seconds and was extinguished by the miner operator with the washdown hose.

12. There were no injuries or property damage.

13. The methane display on the continuous miner read .4-.5 percent methane at the time of the ignition.

14. There are liquid hydrocarbons present in the coal seam at Willow Creek and such hydrocarbons may have caused the flame.

15. The methane monitor on the continuous miner was functioning properly at the time of the flame.

16. The methane monitor sensing head on the continuous miner was on the right side of the head of the continuous miner.

17. The continuous miner was in permissible condition at the time of the incident.

18. The number of water sprays required on the continuous miner at issue in the ventilation plan were 53. Under the plan, ninety percent of the required number of sprays, i.e., 48 sprays, must be operating during mining.

19. The number of water sprays operable at the time of the flame incident was 33. Six sprays depicted on the ventilation plan drawing of this miner were absent because they had not been installed by the manufacturer when the machine was rebuilt.

20. Ten of the sprays were plugged mechanically. No hoses connected these ten sprays to the water system of the miner. The continuous miner at issue here was not utilizing a scrubber.

21. One continuous miner model 11CM12 is approved with 33 sprays in this ventilation plan; the model at issue here (model 12CM12) is approved with 53, 55, and 58 sprays. In the

ventilation plan, on continuous miners with scrubbers, ten sprays are marked "only used with scrubber."

22. Four other sprays were not working on the day of the inspection because they were plugged with coal dust. The miner operator checked the sprays before beginning the cut in which the flame incident occurred and all sprays that were present and connected to the water system were working. That would include 37 sprays.

23. The water pressure for all the water sprays in the continuous miner required in the ventilation plan is 125 p.s.i. The water pressure measured during the investigation was 250 p.s.i.

24. On January 14, 1999, two MSHA inspectors, William Reitze and Harold Sherer, inspected the D-1 headgate section. The continuous miner, Serial No. 5062, which is the subject of this Citation and Order was present in that section but was not in operation and was not inspected by either inspector, according to their notes.

25. Inspector Passarella refers in the Citation and Order to two previous ignitions at the Willow Creek Mine, one on November 29, 1997, and one on December 4, 1997. Both ignitions involved a different continuous miner than the one at issue in this case. MSHA investigated both incidents and did not issue any citations in either instance.

26. On January 7, 1998, Inspector Passarella inspected the D-1 headgate section and observed the continuous miner at issue here operating but did not inspect the water sprays on the miner.

ISSUES

The issues presented in this case are as follows:

1. Whether the condition that was the basis for the issuance of Citation No. 7611106 and/or Order No. 7611107 were properly designated significant and substantial violations.

2. Whether the condition that was the basis for the issuance of Citation No. 7611106 and/or Order No. 7611107 resulted from an unwarrantable failure to comply with the cited standard.

3. What penalty is appropriate for the violation described in Citation No. 7611106 and in Order No. 7611107.

This docket consists of two MSHA enforcement documents, Citation No. 7611106 and Order No. 7611107. The parties stipulated that both documents could be admitted into evidence to establish the issuance, but not the truth of any statement asserted therein. (Stip. 8).

The inspection on which the citation and order are based was prompted by the report of an ignition on February 16, 1999, in the D-1 Headgate longwall development section of the Willow Creek mine. At approximately 9:45 p.m. on that date, mining was being conducted on the right side of the No. 1 entry of that section and an orange flame appeared on the right side rib approximately 2-3 feet from the face. The flame lasted only 20-30 seconds and was extinguished by the miner operator with the washdown hose. No injuries or property damage was caused by the ignition. (Stip. 12). The methane display on the continuous miner read .4 to .5 percent methane at the time of the ignition. (Stip. 13). The parties stipulated that liquid hydrocarbons exist in the coal seam at Willow Creek and such hydrocarbons may have caused the ignition. *Ibid*.

The Violations

The number of water sprays required on the parameter drawing for the continuous miner at issue, miner No. 5062, was 53. Under the plan, 90 percent of the required number of sprays, i.e., 48 sprays, must be operating during mining. The number of water sprays operable at the time of the flame incident was 33. Six sprays depicted on the parameter sheet drawing for this miner were absent because they had not been installed by the manufacturer when the machine was rebuilt at the manufacturer's facility. Ten of the sprays were plugged mechanically because the sprays were designed to be used only with a scrubber on all other continuous miners of the same model and the continuous miner at issue did not have a scrubber. This resulted in a difference of 16 sprays between the parameter drawing in the plan and the actual number of sprays on the miner after it was rebuilt at the Joy manufacturing facility.

Credible evidence was presented that, normally, Plateau compared the approved drawing with the spray configuration on the miner before a miner is put in service, but this was apparently not done for miner No. 5062. (Tr. 117). The difference was apparently overlooked when the rebuilt miner was received and taken underground. (Tr. 118). If the comparison between the approved drawing and the sprays on the miner had been made, the disparity would have been noticed and it could have been easily corrected by amending the drawing or installing the additional sprays that were left off when the continuous miner was rebuilt by the manufacturer.

The miner operator checked the sprays to see that they were working before beginning the cut in which the flame incident occurred. All sprays that were present and connected to the water system were working. That would include 37 sprays. Four other sprays were not working at the time of inspection because they were plugged with coal dust. Such plugs were to be expected in the normal mining process.

Checks were made on a regular basis to make sure the sprays on the No. 5062 miner were operating properly but, apparently, no one counted the number of sprays on the continuous miner and compared them to the number of sprays on the parameter sheet of the plan drawing. The operator of the continuous miner and his helper made the assumption that the sprays on the miner after the manufacturer rebuilt the miner were the ones that were required under the plan.

This mistaken assumption resulted in an inadvertent, unintentional but, nevertheless, a clear violation of the standard charged in the citation and order. The evidence clearly established a violation of the cited standards.

The Evidence Presented Fails to Establish by a Preponderance of the Evidence That the Violation Was S&S or Was Due to the Operator's Unwarrantable Conduct

A violation is properly designated as S&S in nature if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or an illness of a reasonably serious nature. *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co*., 6 FMSHRC 1 (January 1984), the Commission explained:

> 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; (3) a reasonable likelihood that the hazard contributed to [by the violation] will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. 6 FMSHRC at 3-4.

See also Austin Power Co. v. Secretary, 861 F.2d 99, 104-05 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

In United States Steel Mining, Inc., 7 FMSHRC 1125, 1129, (August 1985), the Commission explained the third element of the *Mathies* criteria as follows:

> We have explained further that the third element of the *Mathies* formula 'requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.' *U.S. Steel Mining Co*., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Company, Inc*., 6 FMSHRC 1866, 1868 (August 1984).

Subsequently, the Commission has repeatedly reasserted its prior determinations that to establish an "S&S" finding, the Secretary must prove the reasonable likelihood of an injury or illness occurring as a result of the hazard contributed to by the cited violative condition or practice. *Peabody Coal Company*, 17 FMSHRC 508 (April 1995); *Jim Walter Resources, Inc*., 18 FMSHRC 508 (April 1996).

The Commission has firmly established that the question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation.

Texasgulf, Inc., 10 FMSHRC 498 (April 1988); *Youghiogheny & Ohio Coal Co*., 9 FMSHRC 2007 (December 1987).

The facts surrounding the violation as shown in the stipulations and the undisputed evidence in this case do not show that serious injury or illness was reasonably likely. For example, the water pressure for all the water sprays in the continuous miner in question required in the ventilation plan is 125 p.s.i. The water pressure measured during the investigation for the sprays on the Joy continuous miner in question was 250 p.s.i. (Stip. 23). Thus, the water pressure for the sprays on the miner, in question, was twice the pressure required in the ventilation plan. The ten sprays that were mechanically plugged were plugged because those sprays were designed for use only on all other continuous miners of the same model with a scrubber and the miner, in question, did not have a scrubber. All other continuous miners of the same model, 12CM12 used at the Willow Creek Mine, the corresponding ten sprays at issue were specifically restricted "Only use with scrubber." There was undisputed evidence that if those ten sprays were unplugged, they would have conflicted with other sprays on the miner and would not have assisted in the control of dust.

Upon careful review of all the evidence presented in this case, I find no evidence of overexposure to an excess of harmful respirable dust. The evidence presented in this case fails to establish by a preponderance of the evidence the reasonable likelihood that the hazard contributed to by this violation, assuming continued normal operation, will result in an injury or illness of a reasonable serious nature.

There was some speculative testimony by the inspector indicating that perhaps miners on the crew may have been over exposed to an excess of harmful respirable dust but there was no persuasive evidence to that effect. There was only a bald-naked statement which I find to be based on speculation and not on any evidence presented in this case. Petitioner has failed to prove the reasonable likelihood of an injury or illness occurring as a result of the hazard contributed by the cited violations. There is no persuasive evidence in this case that establishes that the violations are significant and substantial.

Unwarrantable Failure

The unwarrantable failure terminology is taken from section 104(d) of the Act and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp*., 8 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id*. At 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal Inc*. v. FMSHRC, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). The Commission has discussed various factors in determining whether a violation is unwarrantable, including the extent of a violative condition, whether the violation is obvious, or poses a high degree of obvious danger, whether the operator has been placed on notice that greater efforts are

necessary for compliance, and the operator's efforts or lack thereof in abating the violative condition once he is aware of the violative condition. *Mullins & Sons Coal Co*., 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co*., 14 FMSHRC 1258, 1261 (Aug. 1992); *Quinland Coals, Inc*., 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp*., 6 FMSHRC 1596, 1603 (July 1984); *BethEnergy Mines, Inc*., 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Warren Steen Constr., Inc*., 14 FMSHRC 1125, 1129 (July 1992). The Commission has examined the operator's knowledge of the existence of the dangerous condition. *E.g., Cyprus Plateau Mining Corp*., 16 FMSHRC 1604, 1608 (Aug. 1994) (affirming unwarrantable failure determination where operator aware of brake malfunction failed to remedy problem); *Warren Steen*, 14 FMSHRC at 1126-27 (knowledge of hazard and failure to take adequate precautionary measures support unwarrantable determination).

Even more germain to the facts of this case is the Commission holding that the culpability determination for finding of unwarrantable failure is more than a "knew or should have known" test. *Virginia Crews Coal Co*., 15 FMSHRC 2103, 2107 (October 1993).

I am satisfied from the evidence presented in this case that the operator was not aware of the disparity and did not know, before Inspector Lana Passarella's inspection, of the disparity between the number of water sprays on the rebuilt miner and the number specified in the approved ventilation plan. A somewhat similar case involving a similar disparity of water sprays on a continuous miner is *Basin Resources, Inc*., 19 FMSHRC 1565, 1567. In that case MSHA Inspector Fleshman indicated that the difference between the number of sprays on the mine plan and the number of sprays on the continuous miner was a "typical oversight" that is generally corrected by amending the plan. In that case, the violation was held to be of a "technical nature only" rather than serious. Likewise, in this case MSHA admitted that the violation could be abated by amending the parameter drawing in the plan or installing the additional sprays shown in the drawing.

The evidence established to my satisfaction that had Plateau been aware of the disparity, they would have promptly corrected the problem by simply adding the additional water sprays called for or would have amended the parameter drawing for continuous miner No. 5062 to conform to the number of sprays that existed on the miner when it was received at the mine after it was rebuilt by the manufacturer. Plateau was not trying to hide or mislead anyone. Plateau, in this instance, just failed to use the ordinary care required to make sure the number of sprays on the miner and the parameter drawing were identical. They were properly cited for their negligence and violations are affirmed.

Although the citation and the order refer to two previous ignitions, both previous ignitions involved different continuous miners, not the one involved here, No. 5062. Those ignitions were investigated by MSHA and no violations were found and no citations were issued. (Stip. 25).

About a month before the incident which prompted the inspection and resulted in the issuance of this citation and order, Inspector Lana Passarella observed continuous miner No.

5062 operating, but she did not inspect the water sprays on the miner, although she always pays attention to the dust parameters and control measures. (Tr. 10, Stip. 26, Tr. 72). She did not observe any unusual amounts of dust or other conditions which would have prompted her to inspect the miner more closely. (Tr. 71-3). In addition, the operator of miner No. 5062 observed nothing unusual in the dust conditions when operating that miner. The violation was not obvious. It would require counting the number of water sprays on the miner and comparing that number to the number of sprays on the parameter drawing for miner No. 5062. This was overlooked. It was a mistake and a violation of the standard as previously stated. The operator failed to use the ordinary care required by the facts and circumstances. I, therefore, find the operator was negligent and that the level of the operator's negligence was moderate rather than aggravated conduct.

I, therefore, conclude upon consideration of all the evidence and factors that the violations of the cited standards was not a result of the operator's aggravated conduct. The unwarrantable failure designation in the citation and order should be deleted and the findings as to negligence should be amended to moderate negligence.

Appropriate Civil Penalties

The Judge is required by Commission Rule 30, 29 C.F.R. § 2700.30 as well as by the Mine Act itself, to consider the statutory criteria set forth in § 110(i) of the Mine Act in determining the appropriate civil penalty to each violation.

> Section 110(i) provides in relevant part:
> 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.

Size

The parties stipulated that the Willow Creek Mine is a large underground bituminous coal mine and employs approximately 270 miners.

History of Previous Violations

Plateau's Ex. 1 sets forth Plateau's history of violations before February 17, 1996. Petitioner's Ex. 2 sets forth Plateau's history during the period beginning February 17, 1996, and ending February 16, 1998, which is the two-year period before the February 17, 1998, inspection which resulted in issuance of the citation and order. During this two-year period, Plateau received 186 citations and/or orders of which 16 had been designated significant and substantial.

Negligence

Respondent failed to exhibit the ordinary care that was required by the facts and circumstances and this resulted in the two violations previously discussed. I evaluated the operator's negligence to be moderate rather than unwarrantable conduct.

Operator's Ability to Continue in Business

No evidence was offered on this criteria. Consequently, in the absence of evidence, I rely on the presumption that the penalty assessed will not affect Plateau's ability to continue in busines.

Gravity

I have previously discussed the gravity and found that the preponderance of the evidence presented in this case fails to establish a S&S violation of the cited standard.

Good Faith in Rapid Compliance

The evidence demonstrated Plateau's good faith in achieving rapid compliance after notification of the violations. All violations were timely abated.

Upon consideration of the stipulations and my evaluation of the evidence in this case, I find the appropriate penalty for each of the violations is $200.00

In view of the findings, decision and assessment of penalties in the Penalty Proceeding Docket No. WEST 98-317, the issues in the Contest Proceeding, Docket Nos. WEST 98-191-R and WEST 98-192-R, have been resolved, and are now moot. Consequently, those Contest Proceedings are dismissed along with Docket No. WEST 98-317 upon receipt of payment of the civil penalties I have assessed in the Penalty Proceeding.

ORDER

Accordingly, it is **ORDERED THAT PLATEAU MINING CORP. PAY** a civil penalty of $400.00 to the Secretary of Labor within 30 days of the date of this decision. Within the same 30 days, the Secretary shall modify Citation No. 7611106 and Order No. 7611107 to delete the S&S and the unwarrantable failure findings and change the level of negligence to "moderate." Upon receipt of payment of the penalties, these consolidated Contest and Penalty Proceedings are **DISMISSED**.

August F. Cetti
Administrative Law Judge

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