

CCASE:  
SOL (MSHA) V. CYPRUS TONOPAH MINING  
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TTEXT:

March 22, 1993

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket Nos. WEST 90-202-M
	:	WEST 90-363-RM
CYPRUS TONOPAH MINING CORP.	:	WEST 90-364-RM

BEFORE: Holen, Chairman; Backley, Doyle, and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This consolidated contest and civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988)(the "Mine Act" or "Act"), involves a dispute between the Secretary of Labor and Cyprus Tonopah Mining Corp. ("Cyprus") regarding two citations issued to Cyprus alleging violations of 30 C.F.R. 56.3200 and 56.3130.(Footnote 1) The citations were later modified to allege that the violations were caused by Cyprus' unwarrantable failure to comply with the mandatory standards.

1 30 C.F.R. 56.3200, entitled "Correction of hazardous conditions," provides:

Ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area. Until corrective work is completed, the area shall be posted with a warning against entry and, when left unattended, a barrier shall be installed to impede unauthorized entry.

30 C.F.R. 56.3130, entitled "Wall, bank, and slope stability," provides:

Mining methods shall be used that will maintain wall, bank, and slope stability in places where persons work or travel in performing their assigned tasks. When benching is necessary, the width and height shall be based on the type of equipment used for cleaning of benches or for scaling of walls, banks, and slopes.

Following an evidentiary hearing, Administrative Law Judge Michael Lasher found that Cyprus had violated the standards and that the violations were caused by Cyprus' unwarrantable failure to comply with the standards, but that they were not significant and substantial ("S&S") in nature. 13 FMSHRC 1523 (September 1991)(ALJ). The judge also concluded that the citations were not duplicative, and could be modified following their termination. The Commission granted Cyprus' petition for discretionary review, which challenged all of these conclusions except the judge's determination that the violations were not S&S. For the reasons that follow, we affirm the judge's rulings, except for his determination that Cyprus' violation of section 56.3200 was caused by its unwarrantable failure, which we reverse.

I.

Factual and Procedural Background

Cyprus owns and operates an open pit molybdenum mine in Tonopah, Nevada. The lower pit of the mine, "Pushback One" ("PB1"), is the focus of this proceeding.

On February 27, 1990, Arthur Ellis, an inspector from the Department of Labor's Mine Safety and Health Administration ("MSHA"), conducted a regular inspection of the mine. Inspector Ellis, accompanied by Mike Curran, Cyprus' operations supervisor, observed that on the east wall of PB1 there was only one partial bench "about one quarter of the way from the top ... and no benches the rest of the way down," and that the bench was partly full of loose and unconsolidated material.(Footnote 2) Tr. I 16-17, 20. He noticed that the east wall was rather steep and had a "nose," or protrusion, that considerably narrowed the middle of the pit floor. He observed that most of the benches on the west wall of PB1 were covered by loose and unconsolidated material and were impassable.

Inspector Ellis also observed a dozer descending into PB1 and was informed by Mr. Curran and Robert Altamirano, Cyprus' safety manager, that miners were building a new berm along the base of the west wall because a previous berm had been filled with loose material that had sloughed from the wall. Inspector Ellis was told by Curran and Altamirano that material was continually filling up the benches, and the berm was being built in an attempt to prevent material from falling onto miners working at the pit bottom. The inspector was concerned that, if the west wall were disturbed in the process of building the berm, loosened material would collapse onto the dozer operator. He suggested that the berm be rebuilt by hauling material into PB1 by truck, rather than by using existing material from PB1. This was subsequently done.

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2 A bench is defined as "a ledge, which ... forms a single level of operation above which mineral or waste materials are excavated from a contiguous bank or bench face...." Dictionary of Mining, Mineral, and Related Terms, 96 (1968).

Later that evening, Inspector Ellis discussed his observations with his supervisor, Roger Breland, and requested ground control advice from MSHA's technical support division. The following day, on February 28, Ellis issued Citation No. 3459560, which alleged an S&S violation of section 56.3200, and stated:

There was loose material and rocks on high walls in the Push Back One pit. Benches were full and did not provide protection from falling material. The walls were about 145 ft. high. An access road ran next to the west wall and pumps were being utilized to pump water at the bottom of the pit. An employee enters the area to move and maintain pumps. The area was not posted or barricaded to prevent travel alongside the high walls.

S-Exh. 2. The citation was terminated on March 2, 1990, after the "entrance to Push Back One pit was barricaded and posted to prevent entry into the pit." S-Exh. 2.

Inspector Ellis also issued Citation No. 3645243 on February 28, which alleged an S&S violation of section 56.3130, and stated:

Benches between the 5545 level and the 5400 level in the Push Back One had accumulated with materials and would not provide an adequate catch bench to protect persons working below. An access road ran next to the west wall and pumps were being utilized to pump water from the bottom of the pit. Employee's [sic] enter the area to move and maintain pumps.

S-Exh. 1. The citation also provided that "[a]ll future mining will include benches that are cleanable and maintainable." S-Exh. 1. On March 2, 1990, the citation was terminated after mining activity in PB1 was abandoned.

Inspector Ellis modified both citations on March 1, 1990, prior to their termination, by adding unwarrantable failure findings, thereby changing the two 104(a) citations to one citation and one order issued pursuant to section 104(d)(1) of the Mine Act. The citation and order were again modified on September 5, 1990, to change the number of persons affected by the violations. (Footnote 3)

Cyprus subsequently filed notices of contest and also filed a motion for partial summary judgment, alleging that the September 5 modifications were improper because they occurred after the citation and order had been terminated. The judge denied Cyprus' motion, and the matter proceeded to an evidentiary hearing.

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3 The citations were modified on various other occasions for minor or technical reasons unrelated to the issues presented.

Following the hearing, the judge affirmed his pretrial ruling on the post-termination modifications. 13 FMSHRC at 1527. The judge also rejected Cyprus' allegation that the citations(Footnote 4) were issued for the same condition in the same area and, thus, were duplicative. 13 FMSHRC at 1549. The judge reasoned that the requirements of sections 56.3200 and 56.3130, and the conditions described in the two citations, differed. 13 FMSHRC at 1549-50. The judge concluded that Cyprus had violated both sections 56.3200 and 56.3130. 13 FMSHRC at 1550-51. The judge further determined that the violations were not S&S but were caused by Cyprus' unwarrantable failure to comply with the standards. 13 FMSHRC at 1551-55.

On review, Cyprus challenges all of the judge's adverse determinations and also argues that the judge did not address its claim that the Secretary failed to plead violations with requisite particularity.

## II.

### Disposition of Issues

#### A. Violation of section 56.3200

In concluding that Cyprus violated section 56.3200, the judge found:

there existed loose rock and material on walls and slopes of Pushback 1, which together with full and partly full, inadequately maintained, failing benches created a hazard to miners working in the narrow pit below and traveling along the haul road leading into the lower pit area. These hazardous ground conditions had not been taken down or corrected, and the area was not posted with a warning against entry or otherwise barricaded to impede entry....

13 FMSHRC at 1550.

On review, Cyprus argues that the judge's conclusion is not supported by substantial evidence. Cyprus further contends that the judge erred by adopting an interpretation of the standard whereby the mere presence of loose material would constitute a per se violation. Cyprus also contends that the judge's determination of the existence of a hazard is flawed because he failed to consider that the west wall sloped to an angle of repose, and because the factors he relied upon to determine the violation was not S&S could also support a conclusion that there was no hazard.

We disagree with Cyprus's arguments. The judge did not interpret the standard to require a finding of violation whenever loose material was

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4 After finding the S&S allegations invalid, the judge modified the citation and order to section 104(a) citations. Consequently, we refer to the subject enforcement actions as "citations." See Mettiki Coal Corp., 13 FMSHRC 760, 764 (May 1991); Consolidation Coal Co., 4 FMSHRC 1791, 1794 (October 1982).

present. Rather, he expressly considered factors in addition to loose material, stating that a hazard existed due to the "loose rock and material, filled benches, failing benches, tension cracks, and narrow pit floor." 13 FMSHRC at 1536. While the judge noted the testimony of Cyprus's witnesses that the west wall had reached an angle of repose, and was stable (See, e.g., 13 FMSHRC at 1537-38, 1540-41), he credited testimony of the Secretary's witnesses asserting that material on the west wall had a potential to move and, in fact, was moving and reaching the pit bottom. 13 FMSHRC at 1535, 1551 n.27.

Cyprus' further contention that the judge should have considered the same factors that he utilized in considering whether the violation was S&S to determine whether there was a hazard is without merit. In establishing that a violation is S&S, the Secretary must prove that there is a reasonable likelihood that the hazard contributed to by the violation will result in an injury. Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984). Section 56.3200 requires that operators restrict miners' access to areas where hazardous conditions exist, whether or not it is likely that the hazard will result in an injury.

We also conclude that substantial evidence supports the judge's finding that ground conditions on the east and west walls and pit floor created a hazard within the meaning of section 56.3200. (Footnote 5) See *Donovan v. Phelps Dodge Corporation*, 709 F.2d 86, 92 (D.C. Cir. 1983). The judge credited Inspector Ellis' testimony that the benches on the west wall were full, that there was loose material on the faces, that the loose material "could come down and get somebody," and that the berm along portions of the west wall was "filled up." 13 FMSHRC at 1529 n.8 & 1530. In addition, the judge credited the testimony of David Ropchan, a mining engineer from MSHA's technical support division who had observed the conditions in PB1 on March 6, 1990, that the west wall was in a "state of distress" in that there was a partial failure of the wall, resulting in partly or fully covered, inaccessible and ineffective catch benches. 13 FMSHRC at 1531, 1533. Mr. Ropchan testified that pieces of loose material, up to several feet in diameter, existed near the top of the west wall. 13 FMSHRC at 1532-33. He stated that such conditions were hazardous because they could feed rock onto the slopes below and allow material to roll into the pit. 13 FMSHRC at 1532. Ropchan observed that the rough surface of the west wall would allow falling rock to bounce, become airborne, and assume a "considerable horizontal velocity." 13 FMSHRC at 1533-34. He explained that such loose material was a threat to miners and equipment in the pit because the west wall benches would be unable to contain some falling material, and the west wall stood over a very narrow travelway. *Id.* Ropchan testified that large material and "material coming down with enough energy" could roll over the berm or "blow" through it. Tr. II 38-39.

The judge also credited Ropchan's written report, in which he stated that a berm placed along the west half of the haul road was too close to the

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5 Evidence is undisputed that PB1 was not posted or barricaded against entry and that miners were working in the area. Tr. I 63; Tr. III 15; 13 FMSHRC at 1536.

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wall and too small to "provide sufficient rock fall protection considering the overall condition" of the west wall. 13 FMSHRC at 1535. Ropchan also stated in his report that tension cracks existed along the crest of the west wall. (Footnote 6) 13 FMSHRC at 1534.

With respect to the east wall, the judge credited Inspector Ellis' testimony regarding the scarcity of benches and the narrowness of the bottom of the pit, allowing only limited room for a miner to escape falling rock. 13 FMSHRC at 1529-30; Tr. I 16-17, 20. Ropchan also testified that the east wall would tend toward greater instability because of its protrusion. Tr. II 85-86. The judge also credited Ropchan's testimony that the condition of the wall posed some hazard to miners working in the narrow bottom of the pit. Tr. II 30, 37; 13 FMSHRC at 1531 n.10.

Cyprus challenges the judge's credibility determinations, arguing that MSHA's witnesses failed to investigate the conditions sufficiently, and that Cyprus' expert witnesses were better qualified than MSHA's. The Commission has recognized that:

[e]xpert witnesses testify to offer their scientific opinions on technical matters to the trier of fact. If the opinions of expert witnesses conflict in a proceeding, the judge must determine which opinion to credit, based on such factors as the credentials of the expert and the scientific bases for the expert's opinion.

Asarco, Inc., 14 FMSHRC 941, 949 (June 1992).

The judge recognized Ropchan as well as two of Cyprus' witnesses, James Savely, a senior geological engineer in Cyprus' technical service assistance group, and Richard Call, the president of a geotechnical consulting firm, as experts. Tr. II 14; Tr. III 77, 116. The judge noted that, in weighing their testimony, he would consider such factors as experience, qualifications, familiarity with the precise conditions, and how convincingly the testimony was stated. Tr. II 15. The judge credited the testimony of Ropchan and other MSHA witnesses over that of Cyprus' witnesses because he found it to be more convincing, reliable, and objective. 13 FMSHRC at 1534, 1546. The judge also found Ropchan's conclusions regarding the conditions in PB1 to be "consistent with the general sense of the evidentiary record (including the various photographic exhibits therein)." 13 FMSHRC at 1534. In addition, Ropchan testified that he had examined the mine conditions sufficiently to reach his conclusions (Tr. II 91), and the judge credited this testimony. Furthermore, the judge noted that the mining conditions observed by Ropchan had remained materially unchanged from the time of citation. 13 FMSHRC at 1532 n.11. However, the judge noted that the conditions observed by Dr. Call were

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6 Ropchan testified that such cracks are a precursor to slope failure. Tr. II 28-29.

different from those in existence of the time of citation. 13 FMSHRC at 1541.(Footnote 7) We find no circumstances in this case warranting the unusual measure of rejecting the judge's determination that the testimony of MSHA's expert witnesses should be credited over the testimony of Cyprus' expert witnesses. See generally Ranger Fuel Corp., 12 FMSHRC 363, 374 (March 1990).

Therefore, we conclude that substantial evidence supports the judge's finding that ground conditions existing in PB1 created a hazard within the meaning of section 56.3200. We affirm the judge's finding that Cyprus violated section 56.3200.

B. Violation of section 56.3130

In concluding that Cyprus violated section 56.3130, the judge determined that the use of adequately maintained benches was a necessary part of the mining method employed in PB1, and that the benches had accumulated rock and other material and did not serve as adequate catch benches. 13 FMSHRC at 1536, 1550. The judge also found that Cyprus had not otherwise maintained wall, bank, and slope stability. 13 FMSHRC at 1551 n.27.

Cyprus argues that the judge's determination is erroneous because the judge misinterpreted the standard by holding that the "potential requirement of benches was the paramount requirement" of the standard. C. Br. at 25. Cyprus maintains that an operator is required to accomplish the purpose of the standard, that is, provide stable walls, benches and slopes where miners work or travel, by whatever mining method is appropriate. Cyprus also argues that the standard requires cleaning and scaling of benches only when the mining process is initiated. Cyprus further contends that the judge's finding of a violation of section 56.3130 is not supported by substantial evidence and that the standard is impermissibly vague.

Section 56.3130 expressly requires the use of mining methods that maintain wall, bank and slope stability where persons work or travel. The standard also requires that "[w]hen benching is necessary, the width and the height shall be based on the type of equipment used for cleaning of benches or for scaling...." 30 C.F.R. 56.3130. The standard does not expressly require benching, nor does it set forth specific parameters for cleaning or maintaining benches if they are used.

The preamble to section 56.3130 further explains its application:

When benches are included in the "mining method," there must also be a maintenance system selected to prevent the deterioration of the ground from creating a fall of ground hazard. When required,

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7 The judge explained, however, that the testimony of Mr. Savely and Dr. Call had more probative value as to whether the violation was S&S, rather than as to whether Cyprus had violated the standard, because they seemed to concede the hazard of rock fall, and only gauged its probability of occurrence. 13 FMSHRC at 1542 n.18.



the benches must be able to serve as catch benches. MSHA agrees with the commenter who stated that many factors contribute to the determination of bench width and height. The standard provides a performance-oriented approach without restrictions on width and height of benches, other than those necessitated by the equipment selected for the maintenance function.

51 Fed. Reg. 36192, 36193 (October 8, 1986). The purpose of the standard is to require mining methods that will maintain ground stability. The standard contemplates that benches, when included as part of an operator's mining method, must function as catch surfaces and must be maintained in order to prevent fall of ground hazards. Benches, therefore, must be accessible to maintenance equipment. (Footnote 8)

Evidence regarding the state of the benches in PB1 and Cyprus' failure to clean them is probative of the stability of the walls, banks, and slopes in PB1. The judge concluded that the east and west walls were not competent, relying upon the failure of the benches, as well as other evidence that the walls were not stable. As noted above, the judge credited Inspector Ellis' testimony regarding the lack of space on the east wall benches to catch material. The judge also credited statements in Ropchan's written report that the east wall did "not have adequate catch benches to protect against falling rock in the work and travel areas below." 13 FMSHRC at 1535. Cyprus acknowledges that it employed benching on its east wall as a method of ground control and that no consideration was given, when designing the benches, to making them accessible for maintenance. Tr. II 143; C. Br. at 35.

With respect to the west wall, the judge determined that benching was a necessary part of the mining method employed, in part because Cyprus had originally constructed benches on that wall and had adjusted its double-benching method to a single-benching method. Cyprus contends that, because it encountered unexpected problems in the west wall, it had to alter its mining methods and, on the day of the inspection, benches were no longer necessary because the wall sloped to an angle of repose and a berm existed along portions of its base. The record, however, reveals that, although Cyprus relied upon other methods, it did not abandon benching. As Cyprus acknowledged, when it adjusted its mining method due to conditions encountered on the west wall, it inserted a bench at the 5475 foot level and inserted "a wider than planned bench" on other portions of the west wall. C. Br. at 4, 33.

The judge credited MSHA witnesses' testimony that the west wall was in a state of distress in that benches had failed or were partially full of fallen material rendering some of them quite ineffective, and that a sufficient

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8 We disagree with Cyprus' assertion that an operator is required under the standard to clean benches only upon their initial construction. The standard contemplates that benches must be cleaned whenever such activity would aid their ability to catch material, or to prevent ground from deteriorating and creating a hazard.

threat existed that the benches would be unable to catch material moving down the wall. 13 FMSHRC at 1529 n.8, 1532-33. The judge also credited testimony that material was moving down the wall and had partially filled an existing berm. 13 FMSHRC at 1535. Cyprus' operations supervisor conceded that some material from the wall had raveled to the bottom. Tr. III 33-34. In addition, the judge credited testimony from Ropchan regarding the inadequacy of the augmentation to the existing berm along portions of the west wall. 13 FMSHRC at 1535. In sum, substantial evidence supports the judge's finding that the east and west wall were not stable and that the benches were not maintained to fulfill their function as required by the standard.

We further agree with the judge that section 56.3130 is not impermissibly vague. The Commission has previously recognized that, in order to afford adequate notice, a mandatory safety standard cannot be "so incomplete, vague, indefinite or uncertain that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application." *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (November 1990) (citations omitted). Section 56.3130 incorporates a "performance-oriented" approach so that it is "broad enough to apply to the wide variety of conditions encountered." 51 Fed. Reg. at 36193. The appropriate test in interpreting and applying such broadly worded standards:

is not whether the operator had explicit prior notice of a specific prohibition or requirement, but whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard.

*Ideal*, 12 FMSHRC at 2416. The judge properly found that a reasonably prudent person would have recognized that section 56.3130 requires operators to adopt mining methods that maintain wall, bank, and slope stability, and that benches, when used, must be maintained so as to aid wall stability. Accordingly, we affirm the judge's determination that Cyprus violated section 56.3130.

C. Whether the violations were caused by Cyprus' unwarrantable failure

In concluding that the violations were unwarrantable, the judge rejected Cyprus' argument that the condition of the benches justified its failure to clean them. 13 FMSHRC at 1552. He found that Cyprus never planned to maintain its benches, and that the failure to clean them created the hazard of falling rock. *Id.* In addition, the judge determined that Cyprus' conduct in these instances was inconsistent with its abatement actions with regard to previous violations of sections 56.3200 and 56.3130. *Id.* The judge concluded that Cyprus':

failure to maintain and clean its benches was not merely due to inadvertence or inattention since it is beyond dispute that its management personnel were quite aware of the continuity of conditions, [but]

proceeded intentionally to expose miners on the haul road and in the very narrow pit despite ineffective failing catch benches, and the presence of loose rock and material.

Id.

In Emery Mining Corp., 9 FMSHRC 1997, 2004 (December 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. This determination was derived, in part, from the plain meaning of "unwarrantable" ("not justifiable" or "inexcusable"), "failure" ("neglect of an assigned, expected or appropriate action"), and "negligence" ("the failure to use such care as a reasonably prudent and careful person would use, characterized by 'inadvertence,' 'thoughtlessness,' and 'inattention'"). Id. The Commission's determination also was based on the purpose of unwarrantable failure sanctions in the Mine Act, the Act's legislative history, and judicial precedent. Id.

Prior to this proceeding, MSHA inspectors had been concerned about the stability of the high walls in PB1 and had previously issued citations, which were uncontested, for those conditions. In May 1989, nine months before Inspector Ellis' inspection, MSHA Inspector Ron Barri had visited the mine, in response to a miner's complaint about various matters including the condition of the west wall. On May 31, and June 1, 1989, Inspector Barri issued two citations that alleged S&S violations of sections 56.3200 and 56.3130. The section 56.3200 citation stated that there "were large piece[s] of loose material hanging on the west high wall ... above the ramp" and that the "area was not posted or barricaded to prevent travel alongside the high wall." S-Exh. 18. The section 56.3130 citation stated that benches on the south end of the east wall "had been allowed to accumulate materials and would not provide an adequate catch bench to protect haul truck traffic below," and that a "maintenance program for maintaining benches had not been established...." S-Exh. 19. Mr. Breland (supervisor of Ellis and Barri) had inspected the mine in June 1989, and held a post-inspection conference regarding the two citations issued by Inspector Barri. At the meeting, Breland, Cyprus' General Manager Bill Gibson, Curran, Altamirano, and a miners' representative discussed the pit walls, overall mining plan, and signs of failure in the west wall. Breland testified that they discussed the requirements of section 56.3130 and 56.3200 "fairly extensively." Tr. I 111.

The testimony in the instant proceeding reveals that Cyprus apparently believed that maintenance of a berm along portions of the west wall put it in compliance with section 56.3200. In May 1989, when cited for violating section 56.3200 because of conditions existing on the west wall, Cyprus had abated the citation by building a berm along the base of the west wall. S-Exh. 18. Although Supervisory Inspector Breland testified that Cyprus had been permitted to abate the earlier citation in such a fashion because MSHA understood that Cyprus was going to lessen the angle of the west wall, Curran testified that he did not understand that building the berm and lessening the angle of the west wall were linked. Tr. I 172; Tr. III 30-32. Curran understood that construction of the berm alone was sufficient to abate the citation. Tr. III 31-32. The description of the abatement action for the

May 1989 citation does not indicate that the angle of the west wall had to be reduced, but states only that "the west high wall in the pit ... has been barricaded with a large berm along its full length...." S-Exh. 18. Mr. Gibson also testified that, from the discussions of the closeout conference in June 1989, he understood that building a berm was sufficient for safe operation. Tr. II 211-12.

We also find significant the fact that on the day of Inspector Ellis' 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 & Light Co., 11 FMSHRC 1926, 1933 (October 1989).

Because Cyprus' 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' violation of 56.3200 was caused by its unwarrantable failure. See generally Utah Power & Light Co., 12 FMSHRC 965, 972 (May 1990).

The record, however, supports the judge's conclusion that Cyprus' actions in violation of section 56.3130 were a result of its unwarrantable failure. The citation issued to Cyprus in June 1989, alleging a violation of section 56.3130, specifically provided that catch benches in PB1 "had been allowed to accumulate[] materials and would not provide an adequate catch bench to protect haul truck traffic below." S-Exh. 19. The citation also provided that a "maintenance program for maintaining benches had not been established." S-Exh. 19. In order to abate the citation, Cyprus was required to clean a bench above a working area on the south wall. With respect to the close-out conference regarding the citation, Breland testified:

Also the 3130 I specifically had gone out on several of those benches with Mike Curran and my superintendent. I talked to him about what was going on there. They were or could have been accessed to do the bench maintenance that's required as part of the standard. However, they were not doing that and had not been doing that, and I explained the requirement there to keep those benches clear as long as there was staff beneath them.

Tr. I 111. Thus, Cyprus had been advised in June 1989, that it was required to adopt a maintenance program so that benches above where miners worked could be cleaned when necessary to maintain ground stability. Even after receiving such notice from MSHA, Cyprus constructed benches that it never intended to enter for maintenance purposes. Tr. II 111, 146.

Cyprus' experience with ground stability in PB1 should have put it on notice that bench maintenance would, most likely, be necessary, and, as explained above, section 56.3130 requires an operator to maintain ground stability. The standard contemplates that benches, when used, be accessible to maintenance equipment. Cyprus continued to use benches in its mining, but

did not construct them so that they could be maintained. As the judge found, the benches did not serve their function as catch benches, and the unmaintained benches contributed to ground instability. 13 FMSHRC at 1550-51. We conclude that substantial evidence supports the judge's conclusion that Cyprus' failure to maintain the benches or take other adequate measures to maintain stability was aggravated conduct. Accordingly, we affirm his finding that Cyprus' violation of section 56.3130 was caused by its unwarrantable failure to comply with the standard.

D. Whether the citations are duplicative

Cyprus argues that the citations are duplicative because they address the same conditions in the same area of the mine. However, the requirements of sections 56.3200 and 56.3130 are different. Section 56.3130 requires that an operator use mining methods that maintain wall stability and sets forth additional requirements if benching is necessary. In contrast, section 56.3200 requires that, if a hazardous ground condition occurs, it be corrected and entry into the area be restricted until corrective work is completed. The standards are related in that an operator's failure to mine in a way that maintains stability may also result in a hazardous condition requiring an operator to restrict access until the hazardous condition is corrected. As the Commission has recognized:

[t]he 1977 Mine Act imposes a duty upon operators to comply with all mandatory safety and health standards. It does not permit an operator to shield itself from liability for a violation of a mandatory safety standard simply because the operator violated a different, but related, mandatory standard.

El Paso Rock Quarries, Inc., 3 FMSHRC 35, 40 (January 1981). Thus, although Cyprus' violations may have emanated from the same events, the citations are not duplicative because the two standards impose separate and distinct duties upon an operator. Accordingly, we affirm the judge's conclusion that the citations are not duplicative.

E. Modification of the citations following termination

Cyprus argues that the September 5, 1990, modifications to the citations changing the number of persons affected by the violations, were improper because the citations had been terminated. We agree in result with the judge's conclusion that the subject citations were not improperly modified.

In Wyoming Fuel Corp., 14 FMSHRC 1282 (August 1992)("WFC"), the Commission held that, absent legal prejudice to the operator, the Secretary's modification of a section 104 citation, terminated pursuant to section 104(h) of the Mine Act, 30 U.S.C. 814(h), was permissible. 14 FMSHRC at 1287-92. The Commission reasoned that termination of a section 104 citation is an administrative action of the Secretary that is meant to convey that a violative condition has been abated and to inform the operator that it will no longer be subject to a withdrawal order pursuant to section 104(b), 30 U.S.C. 814(b), for failure to abate. 14 FMSHRC at 1289. The Commission drew a

analogy between the Secretary's modification of a terminated citation or order and the amendment of a pleading pursuant to Fed. R. Civ. P. 15(a), concluding that a modification should be permitted unless the operator would be legally prejudiced by the modification. 14 FMSHRC at 1290.

Here, Cyprus has offered no evidence that it was prejudiced by the modifications but only argues that the modifications were improper as a matter of law. We conclude that Cyprus' challenge to the modifications is without merit.

#### F. Particularity of citations

Cyprus argues that the citations failed to plead violations with sufficient particularity because they do not clearly set forth the time or location that the allegedly violative conditions existed and, furthermore, that it was confused as to the proper method of abatement. Cyprus contends that the judge failed to address this argument. In fact, the judge noted that Cyprus maintains that "both enforcement documents (the Citation and the Order) ... are impermissibly vague." 13 FMSHRC at 1525 (emphasis added). The judge, by considering specifically the merits of each alleged violation, implicitly rejected Cyprus' particularity argument.

Section 104(a) requires that each "citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated." The Commission has generally recognized that this requirement for specificity serves the purpose of allowing the operator to discern what conditions require abatement, and to adequately prepare for a hearing on the matter. See, e.g., *Mid-Continent Resources, Inc.*, 11 FMSHRC 505, 510 (April 1989)(citations omitted); *Jim Walter Resources, Inc.*, 1 FMSHRC 1827, 1829 (November 1979); *Old Ben Coal Co.*, 2 FMSHRC 1187, 1190 (June 1980); *Ralph Foster and Sons*, 3 FMSHRC 1181 (May 1981).

We conclude that the citations were sufficiently specific to provide notice to Cyprus that conditions existed that were alleged to be in violation of the cited standards and that corrective action was necessary. Moreover, Cyprus conducted extensive pretrial discovery that provided it with an opportunity to gain the information necessary to prepare adequately for trial. See, e.g., *Annotation, Construction and Application of Provision of 29 U.S.C.*

658(a) that OSHA Citation "shall describe with Particularity the Nature of the Violation," 48 ALR Fed 466, 6(b)(1980). In addition, the cited conditions were, in fact, adequately abated. Accordingly, we affirm the judge's implicit conclusion that the citations met the Act's specificity requirements.

III.

Conclusion

For the foregoing reasons, we affirm the judge's findings that Cyprus violated sections 56.3200 and 56.3130, that Cyprus' violation of section 56.3130 was caused by its unwarrantable failure to comply with the standard, and that the citations were not duplicative, could properly be modified following their terminations, and charged violations with sufficient particularity. We reverse the judge's finding that Cyprus' violation of section 56.3200 was caused by its unwarrantable failure. Accordingly, we remand to the judge for recalculation the penalty for Cyprus' violation of section 56.3200.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner