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CYPRUS MINING V. SOL (MSHA)
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

CYPRUS PLATEAU MINING CORP. :
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v. : Docket Nos. WEST 92-370-R
: WEST 92-485(A)
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :

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

DECISION

BY THE COMMISSION:

This consolidated contest and penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988) ("Mine Act" or "Act"), involves a citation issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Cyprus Plateau Mining Corporation ("Cyprus"), alleging a violation of 30 C.F.R. 75.1725 (a). Administrative Law Judge John J. Morris upheld the citation and concluded that the violation was the result of Cyprus's unwarrantable failure to comply with the standard. 15 FMSHRC 1738 (August 1993)(ALJ). Cyprus timely filed a petition for discretionary review, challenging the judge's finding of violation and his

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FOOTNOTE 1

Section 75.1725(a) states:

Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.

FOOTNOTE 2

In his decision, the judge also ruled on a citation that alleged Cyprus violated its roof control plan. Docket No. WEST 92-371-R. The Secretary petitioned for discretionary review of portions of the judge's decision relating to that violation. We are issuing a separate decision on that petition. Cyprus Plateau Mining Corporation, 16 FMSHRC _____, (August 26, 1994). We have denominated the two civil penalty proceedings (Docket No. WEST 92-785) as (A) and (B), respectively.

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conclusion as to unwarrantable failure. For the reasons that follow, we affirm.

I.

Factual and Procedural Background

Cyprus operates the Star Point No. 2 Mine, an underground coal mine, in Carbon County, Utah. On March 10, 1992, MSHA Inspector William Taylor investigated a section 103(g) complaint, which alleged that on February 12 a shuttle car had been run with inoperative service brakes. Following interviews with miners and representatives of Cyprus, Taylor issued a citation, alleging that Cyprus violated section 75.1725(a) by failing to remove unsafe equipment from service. 15 FMSHRC at 1740, 1752-53.

The shuttle car in issue was a 1977 Joy model, electrically powered and weighing over 33,000 pounds. It had a top speed of less than five miles per hour and generally carried about ten tons of coal. The car had two seats so that the operator could face the direction of travel. Tram pedals, one under each seat, powered the car. In order to stop, the operator used a foot, or service, brake. An emergency brake was generally used in order to keep the car stationary. Use of the emergency brake to stop the car resulted in a delay of several seconds and an abrupt stop. 15 FMSHRC at 1753-54, 1755.

On February 12, 1992, Seldon Barker, one of the most experienced shuttle car operators at the mine, was operating the shuttle car in the number 3 section. The car ran between the face, where it was loaded by a continuous miner, and a feeder breaker, where it dumped the coal to be loaded onto a conveyor belt. The car carried the coal 600 to 700 feet, traveling over wet, uneven surfaces and around corners. Each trip took five to seven minutes; the production goal was 100 trips for each ten hour shift. 15 FMSHRC at 1753-55, 1759.

As his shift progressed, Barker found that the shuttle car's service brakes were weakening. Two hours before the end of the shift, the service brakes ceased functioning altogether. Barker spoke to his foreman, Paul Downard, who had formerly been employed as a mechanic servicing mining equipment, including shuttle cars. Barker and Downard added hydraulic fluid to the master cylinder and then bled the brakes, but no fluid was reaching them. Downard ordered a new master cylinder. Because obtaining and installing the new master cylinder would have taken the remainder of the shift, Barker suggested that
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FOOTNOTE 3

Section 103(g), 30 U.S.C. 813 (g) provides:

Whenever a ... miner ... has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists ..., such miner ... shall have a right to obtain an immediate inspection by giving notice to the Secretary....

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he could continue operating the shuttle car if Downard notified everyone that the car was in an unsafe condition. 15 FMSHRC at 1754-55, 1756, 1759-60.

Barker resorted to "reverse tramping" or "feathering" the tram to stop the shuttle car. Reverse tramping involves the operator's placing his foot under the tram pedal and lifting it, thereby reversing the shuttle car's direction. Feathering the tram involves gradually engaging the tram pedal and then releasing it. Barker could also use the emergency brake to stop the shuttle car. 15 FMSHRC at 1755, 1757, 1759.

Later in the shift, Barker told Shift Foreman William Burton that the brakes were bad, that the crew had been notified, and that he was running the car "fine." Downard also mentioned to Burton that there was a problem with the brakes. 15 FMSHRC at 1755, 1758, 1760.

While Barker was at the feeder breaker unloading the shuttle car, his foot was off the tram pedal as he changed seats in anticipation of his return trip, and the shuttle car rolled about three or four feet. When Barker saw that Sheldon Anderson had walked in front of the car, he reverse tramped. Anderson, who had not been told about the bad brakes, jumped out of the way and yelled at Barker. 15 FMSHRC at 1755, 1761.

When the brakes were repaired during the next shift, a rock, which had blocked the flow of fluid, was found in the line from the master cylinder. Downard apologized to the crew for not informing everyone that the car had no brakes. 15 FMSHRC at 1755, 1757.

Cyprus contested the citation. Following an evidentiary hearing, the judge determined that Cyprus had violated section 75.1725(a). The judge further concluded that the violation was significant and substantial and resulted from Cyprus's unwarrantable failure. 15 FMSHRC at 1760-62. The Commission granted Cyprus's petition for review of the judge's decision and heard oral argument.

II.

Disposition of Issues

A. Basis for Violation

Cyprus argues that the citation was improperly based on a standard that does not specifically address shuttle car brakes. Cyprus asserts that, because there is a safeguard criterion (30 C.F.R. 75.1403-10(1)) applicable to brakes on haulage equipment, the

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FOOTNOTE 4

Section 75.1403-10(1) provides: "All self-propelled rubber-tired haulage equipment should be equipped with well maintained brakes, lights, and a warning device."

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Secretary can properly cite Cyprus for the defective brakes only after first issuing a safeguard notice. Cyprus further argues that the judge committed reversible error when he failed to address this issue. C. Br. at 16-17.

In response, the Secretary argues that his issuance of a safeguard is discretionary and that Commission precedent requires the use of a mandatory standard in this situation. The Secretary asserts that the judge's failure to address this issue was harmless error. Sec. Br. at 8-12.

We agree with the Secretary. The Commission has held that, in general, it is within the Secretary's discretion "to issue mandatory standards or to issue safeguards for commonly encountered transportation hazards." Southern Ohio Coal Co., 14 FMSHRC 1, 9 (January 1992). The Commission has noted, however, that an inspector's decision to issue a safeguard "must be based on his consideration of the specific conditions at the particular mine." Id. at 7. The United States Court of Appeals for the District of Columbia Circuit has stated, "[T]he Secretary should utilize mandatory standards for requirements of universal application." UMWA v. Dole, 870 F.2d 662, 672 (1989).

In light of the foregoing principles, the Secretary's citation of Cyprus, based on a standard that requires an operator to remove unsafe equipment from operation, was proper. The hazard posed by the use of unsafe equipment does not arise from conditions specific to particular mines and thus is not properly addressed by issuance of a safeguard. Compare Green River Coal Co., 14 FMSHRC 43, 44-45, 48 (January 1992). The mine hazard at issue is amenable to a mandatory standard of universal application. We affirm the judge's holding that the use of a shuttle car without service brakes is unsafe within the meaning of section 75.1725(a), and that such equipment must be removed from service immediately. 15 FMSHRC at 1760.

We conclude that the judge, by considering the merits of the alleged violation, implicitly rejected the argument that the Secretary should have proceeded by first issuing a safeguard. See Asarco Mining Co., 15 FMSHRC 1303, 1305-06 (July 1993). We reject Cyprus's argument that, because the Commission and its judges have decided few cases involving defective brakes under section 75.1725(a), the standard has been improperly applied here.

B. Unwarrantable Failure

Cyprus argues that the judge's determination of unwarrantable failure is not

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FOOTNOTE 5

The unwarrantable failure terminology is taken from section 104(d)(1), which establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with ... mandatory health or safety standards...."

supported by substantial evidence. It asserts that Foreman Downard conducted a reasonable investigation into the condition of the brakes and relied on Barker's opinion that the shuttle car could be operated, and that an unwarrantable failure determination cannot be based on the brief conversation between Barker and Shift Foreman Burton. C. Br. at 4-15. The Secretary responds that the judge's decision is supported by substantial evidence and notes that the Cyprus foremen knew of the condition of the shuttle car brakes or had sufficient information to warrant investigation of their condition. Sec. Br. 14-22.

In Emery Mining Corp., 9 FMSHRC 1997, 2001 (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'"). 9 FMSHRC at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." 9 FMSHRC at 2003-04; Rochester & Pittsburgh Coal Corp., 13 FMSHRC 189, 193-94 (February 1991). The Commission's determination was also based on the purpose of unwarrantable failure sanctions in the Mine Act, the Act's legislative history, and judicial precedent. Emery, 9 FMSHRC at 2002-03.

The judge concluded that the operator was highly negligent because both Downard and Burton were aware of the shuttle car's serious brake problem and failed to follow up appropriately by remedying it. 15 FMSHRC at 1762. There is substantial evidence in the record to support the judge's findings. Tr. 589-90, 737, 739-40. Shift Foreman Burton testified that Barker told him that the brakes were "bad or they were screwed up." Tr. 721-22. Further, both Downard and Burton were aware that Barker had insisted that the crew be put on notice of the shuttle car's unsafe condition. Tr. 593. See Tr. 721. Additionally, Downard thought the problem was significant enough to require a new master cylinder. Tr. 590-91.

The shuttle car should have been removed from service by either Downard or Burton because both knew that the brakes were not operable. The judge correctly found that the violation was due to the operator's unwarrantable failure. See Quinland Coals, Inc., 10 FMSHRC 705, 708-09 (June 1988).

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FOOTNOTE 6

The Commission is bound by the substantial evidence test when reviewing an administrative law judge's factual determinations. 30 U.S.C. 823(d)(2) (A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159, 2163 (November 1989), quoting Consolidation Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

III.

Conclusion

For the foregoing reasons, we affirm the judge's decision.

Mary Lu Jordan, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner