

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION  
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June 5, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 99-17
Petitioner	:	A.C. No. 42-00171-03759
	:	
v.	:	
	:	Star Point No. 2
<b>PLATEAU MINING CORP.,</b>	:	
(formerly CYPRUS PLATEAU MINING	:	
CORPORATION)	:	
Respondent	:	

**DECISION**

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

Before: Judge Cetti

This case is before me upon a petition for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the "Mine Act." The Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charged Plateau Mining Corp. (Plateau) in Citation No. 7611140 with the violation of the mandatory preshift examination safety standard 30 C.F.R. § 75.360(b)(3). At the hearing the Secretary, over the objection by Plateau, was permitted to amend the citation to allege, in the alternative, a violation of 30 C.F.R. § 75.360(f) concerning record keeping of the results of the preshift examination. No change was made in the description of the alleged violation.

**The Citation**

Citation No. 7611140 the only citation at issue in this case reads as follows:

An inadequate preshift was conducted for the afternoon shift for Unit #1 working section due to the following conditions: Loose and fine coal was allowed to accumulate in the following areas: (1) No. 6 entry which measured 5-15 inches in depth, 1-4 feet in width

and extended for approximately 40 feet in length, (2) In the No. 5 entry which measured 2-4 feet in depth, 7-8 feet wide and approximately 20 feet in length. (3) In the No. 4 entry, the accumulations measured 2-4 ½ feet in depth, 7-8 feet wide and approximately 30 feet in length. (Refer to citation No. 7611138) and the Approved Roof Control Plan was not being complied with in the following locations (1) A rib had blown out which left an area of approximately 15 feet in length and up to 6-8 feet in width between the roof bolts and the rib, (2) In the No. 3 entry the ribs had sloughed which left an area of approximately 9-10 feet in length and up to 7 feet in width between bolts and rib, (3) In the No. 4 entry the ribs had sloughed out which left an area of approximately 10 feet in length and up to 7 feet in width between the roof bolts and the rib, (4) In the No. 5 entry the ribs had sloughed out which left an area of approximately 15 feet in length and 7 feet in width between the roof bolts and the rib. (Refer to citation No. 7611139). None of the above hazardous conditions had been entered in the preshift record book.

The citation alleged that an injury or illness was "reasonably likely," that it could be expected to be "permanently disabling," and that negligence was "high." It also alleged that the condition resulted from an "unwarrantable failure" and that it was significant and substantial.

### **Stipulations**

At the hearing the parties agreed on stipulations as follows:

1. Plateau Mining Corp. is engaged in mining and selling of coal in the United States and its mining operations affect interstate commerce.
2. Plateau Mining Corp. is the owner and operator of Star Point Number 2 Mine, MSHA ID Number 42-00171.
3. Plateau Mining Corp. is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 USC Sections 801, et seq.
4. The Administrative Law Judge has jurisdiction in this matter.
5. The subject Citation 7611140 was properly served by a duly authorized representative of the Secretary upon an agent of Respondent on the date and place stated therein and may be admitted into evidence for the purpose of establishing its issuance and not for the truthfulness or relevancy of any statements asserted therein.

6. The exhibits to be offered by Respondent and the Secretary are stipulated to be authentic, but no stipulation is made as to their relevance or the truth of the matters asserted therein.

7. Payment of the proposed penalty will not affect Respondent's ability to continue in business.

8. The Respondent demonstrated good faith in abating the violation.

9. Plateau is a coal-mine operator with 1,391,173 tons of production at this mine and 70,986,776 tons of production for the company in 1997. The certified copy of the MSHA assessed violations history accurately reflects the history of this mine for the two years prior to date of the citation and order.

10. Although Citation Number 7611140 indicates that it was issued at 0915, it was actually issued at 2115.

### **Issues**

At the hearing the issues were stated as follows:

1. Whether a violation of 30 C.F.R. § 75.360(b)(3) and/or 30 C.F.R. § 360(f) occurred when a preshift examination of Unit 1 failed to note the accumulation of loose and fine coal-dust accumulation.

2. If a violation of a mandatory standard existed under one of the Secretary's theories of liability, whether it significantly and substantially contributed to the cause and effect of a mine safety or health hazard.

3. If a violation of a mandatory standard existed under one of the Secretary's theories of liability, whether it resulted from an unwarrantable failure to comply with the cited standard.

4. If a violation of a mandatory standard existed under one of the Secretary's theories of liability, what penalty is appropriate.

### **Finding of Facts**

On April 28, 1998, the day-shift section face boss Miles David Frandsen was supervising a crew of miners in the Unit No. 1 production section of the Star Point No. 2 mine. A continuous miner was used in the section to mine the coal.

At 12:16 p.m. Mr. Frandsen performed an "onshift" examination of the section pursuant to 30 C.F.R. § 75.362. During his examination of the section, he observed no hazards in the eight faces that were being mined in any part of the section. He completed the examination at

12:46 p.m. He called out the results of his preshift examination of the section at 2:26 p.m. Later on that same shift, after completion of his preshift examination of the section, a bounce occurred approximately 240 feet, outby the working faces. Frandsen immediately had his crew stop mining and move needed equipment to the area of the bounce. He had his crew take the necessary action to start correcting the conditions created by the bounce. He stayed late at the end of his shift in order to report the bounce and conditions it caused to the oncoming foreman, Carl Martinez. He showed Martinez what had been done and what still needed to be done to complete the correction of the condition caused by the bounce. This included the accumulations and other hazardous conditions that later that evening were observed by Inspector Passarella and described by her in the citation at issue and as well in Citation Nos. 7611138 and 7611139 which were received into evidence as Petitioner's Exhibits 7 and 8. The latter two citations are not at issue but describe the hazardous conditions caused by the coal burst or bounce that occurred after completion of the preshift examination. The accumulations were approximately two crosscuts outby the working face and thus were not in locations which would indicate that they resulted from the mining process. They were in locations which indicate they had been caused by coal coming off the ribs as a result of the bounce.

It was later that same day, April 28<sup>th</sup>, at approximately 8 p.m. that Inspector Lana Passarella accompanied by Clifford Snow first entered the area of the mine where the bounce occurred. Upon observing the accumulations and other conditions caused by the bounce which she believed at the time constituted the hazardous conditions that should have been observed and noted in the preshift examination, she issued Citation No. 7611140 at 2115. (Stipulation No. 10).

### **Discussion**

The citation alleges a violation of 30 C.F.R. § 75.360(b)(3) which provides in relevant part as follows:

- (b) The person conducting the preshift examination shall examine for hazardous conditions, test for methane and oxygen deficiency, and determine if the air is moving in its proper direction at the flowing locations.

\* \* \*

- (3) Working sections and areas where mechanized mining equipment is being installed or removed, if anyone is scheduled to work in the section or in the area during the oncoming shift. The scope of the examination shall include the working places, approaches to worked-out areas and ventilation controls in these sections and in these areas, and the examination shall include tests of the roof, face and rib conditions

on those sections and in these areas.

The only time requirement for preshift examination is set forth in 30 C.F.R. § 75.360(a) which specifies that the preshift examination is to be performed during some part of the three hour period before the beginning of the next shift. The next shift in this case started at 3 p.m. The preshift examination was performed between 12:16 and 12:46 p.m. Thus the preshift examination was clearly performed within the three hour period before the next shift began.

Since the hazardous conditions described in the citation in question did not exist at the time the preshift examination was performed and were caused by the later bounce some 240 feet from the face, there was no violation of the cited standard 30 C.F.R. § 75.360(b)(3), *New Warwick Mining Co.*, 18 FMSHRC 1568; 1575 (Rev. Comm. Sept. 1996); *Enlow Fork Mining Co.*, 19 FMSHRC 5; (Rev. Comm. January 1997).

The Secretary under the alternative theory of liability charges Plateau with the violation of 30 C.F.R. § 75.360(f) which in relevant part provides:

A record of the results of each preshift examination, including a record of hazardous conditions and their locations found by the examiner during each examination and of the results and locations of an end methane measurements, shall be made on the surface before any persons, other than certified persons conducting examinations required by this subpart, enter any underground area of the mine. A record shall also be made by a certified person of the action taken to correct hazardous condition found during the preshift examination. (Emphasis added).

Clearly, the only record of the preshift examination is of the conditions found or corrected during the preshift examination. No record of conditions found at other times is required under 30 C.F.R. § 75.360(f). Since the hazardous conditions observed by the inspector did not exist at the time of the preshift inspection, no violation of the recording requirement occurred. The citation should be vacated.

**Conclusion**

Plateau Mining Corporation did not violate 30 C.F.R. § 75.360(b)(3) nor 30 C.F.R. § 75.360(f). Citation No. 7611140 and its corresponding proposed penalty are **VACATED**.

August F. Cetti  
Administrative Law Judge

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