FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

January 28, 2009

COAL RIVER MINING, LLC,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. WEVA 2006-125-R
v.	:	Citation No. 7249165; 01/30/2006
	:	
SECRETARY OF LABOR,	:	Docket No. WEVA 2006-126-R
MINE SAFETY AND HEALTH	:	Order No. 7249166; 01/30/2006
ADMINISTRATION (MSHA),	:	
Respondent	:	Docket No. WEVA 2006-127-R
	:	Order No. 7249167; 01/30/2006
	:	
	:	Docket No. WEVA 2006-128-R
	:	Order No. 7249168; 01/30/2006
	:	
	:	Tiny Creek No. 2
	:	Mine ID: 46-08835
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2007-196
Petitioner	:	A.C. No. 46-08835-103740
	:	
v.	:	
	:	
COAL RIVER MINING, LLC,	:	Tiny Creek No. 2 Mine
Respondent	:	

DECISION

Appearances: Ronald Gurka, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, on behalf of the Secretary
F. Thomas Rubenstein, Esq., Dinsmore & Shohl, LLP, Morgantown, West Virginia, on behalf of Coal River Mining, LLC

Before: Judge Barbour

These consolidated cases are before me pursuant to four notices of contest filed by Coal

River Mining, LLC (Coal River) and one petition for assessment of civil penalty filed by the Secretary of Labor against Coal River. The proceedings arise under section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Mine Act or Act). 30 U.S.C. § 815(d). In the contest proceedings, Coal River challenges the validity of one citation and three orders issued at its Tiny Creek No. 2 Mine, a bituminous underground coal mine located in Lincoln County, West Virginia. In the civil penalty proceeding, the Secretary proposed civil penalties totaling $34,400 for the violations alleged in the citation and orders. The cases were tried in Charleston, West Virginia.

THE CITATION, THE ORDERS AND THE PENALTY PETITION

Section 104(d)(1) (30 U.S.C. §814(d)(1)) Citation No. 7249165 (Docket No. WEVA 2006-125-R) asserts the company violated 30 C.F.R. § 75.340(a), a mandatory safety standard requiring in pertinent part "underground . . . battery charging stations . . . [to] be housed in noncombustible structures or areas or be equipped with a fire suppression system." Section 104(d)(1) Order No. 7249166 (Docket No. WEVA 2006-126-R) asserts the company violated 30 C.F.R. § 75.360(b)(9), a mandatory safety standard requiring the preshift examiner to "examine for hazardous conditions . . . at . . . [u]nderground electrical installations." Section 104(d)(1) Order No. 7249167 (WEVA 2006-127-R) asserts the company violated 30 C.F.R. § 75.512, a mandatory safety standard requiring all electric equipment to be "frequently examined, tested and properly maintained . . . to assure safe operating conditions." Section 104(d)(1) Order No. 7249168 (WEVA 2006-128-R) asserts the company violated 30 C.F.R. § 75.503, a mandatory safety standard requiring an operator to keep electric face equipment in "permissible condition."

The citation and orders contain findings the alleged violations were significant and substantial contributions to mine safety hazards (S&S) and were the result of the company's high negligence and unwarrantable failure to comply with the standards. The company contests all of the allegations.

The Secretary seeks penalties of $10,300 each for the violations alleged in Citation 7249165 and Orders No. 7249166 and 7249167 and a civil penalty of $3,500 for the violation alleged in Order No. 7249168 (Docket No. WEVA 2007-196).[1] In the civil penalty proceeding, as in the contest proceedings, the company denies it violated the cited standards. It also challenges the inspector's gravity and negligence findings.

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[1]Counsel for the Secretary explained the lower proposed penalty was the result of an error. When the inspector issued the order, he indicated one person was endangered by the alleged violation. According to counsel, he should have indicated eight persons were affected. Counsel's explanation was supported by the inspector's testimony, and the Secretary's motion to modify the order to indicate eight persons were affected was granted. Tr. 282, 414. According to counsel, if the alleged violation had been assessed as endangering eight miners the proposed penalty would have been $10,300, not $3,500. Tr. 24-25.

STIPULATIONS

The parties stipulated as follows:

1. Coal River . . . is an operator as defined in Section 3(d) of the . . . [Act].

2. Operations of Coal River . . . at [the mine] are . . . subject to the jurisdiction of the . . . Act.

3. [T]his proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated administrative law [judge] pursuant to Sections 105 and 113 of the . . . Act.

4. [T]he products of the . . . mine . . . affected interstate commerce within the meaning and scope of Section 4 of the . . . Act.

5. True copies of each citation and order . . . at issue . . . in this proceeding were served on . . . [Coal River] or its agent as required by the . . . Act.

6. The total proposed penalty for the citation and orders at issue in this proceeding will not affect . . . [Coal River's] ability to continue in business.

7. [F]or the purpose of assessing a penalty in this case, . . . [Coal River] has a low history of previous violations.

Tr. 38-40. After these stipulations were read into the record, counsels agreed on one additional fact – that from January 1, 2005, to January 27, 2007, no citation or order was issued at the mine alleging a violation of section 75.340(a). Tr. 41-42.

THE BACKGROUND OF THE CITATION AND ORDERS

The subject enforcement actions arose out of MSHA's investigation of an incident that occurred at the mine on January 27, 2006, when batteries allegedly overheated during the evening shift. The batteries had been taken off a scoop, placed on the ground, and connected to a battery charger at a battery charging station.[2] The batteries were located just outby the battery

[2]MSHA inspector, Bobby Moreland, described the scoop as "a rubber-tired machine that . . . has a bucket on one end, [and] batteries on the other [end]." Tr. 138. The scoop in question

charger, and the charging station was located at Spad No. 1965. Tr. 597. Air ventilating the charging station did not travel to the face, but was routed outby. *Id.,* Tr. 602. The charging and/or overheating of the batteries apparently caused them to release hydrogen gas, which in turn triggered the mine's carbon monoxide (CO) sensors. This resulted in an alarm sounding, which in turn resulted in all underground miners being evacuated and rescue teams being called.[3] There were no injuries.

Bobby Moreland has been an MSHA inspector since approximately 1991. Tr. 47-48. On January 27, Moreland was acting as an accident investigator and an electrical specialist for the agency. In addition to his MSHA duties, Moreland is a certified electrician. He also holds mine foreman's papers. Tr. 47. Since becoming an electrical specialist for MSHA, his primary area of responsibility has been accident investigations. Moreland estimated he has investigated 30 to 40 accidents for the agency, three of which involved electrical incidents. Tr. 49.

Moreland had inspected the Tiny Creek No. 2 Mine in the past, but at the time of the incident it had been "several years" since he had been underground there. Tr. 50; *see also* Tr. 92. On January 27, Moreland was at home when he received a telephone call from his supervisor, Terry Price. Price told Moreland there had been an incident at the mine.[4] Price instructed Moreland to go to the mine. Tr. 52. Price also decided to go to the mine.

Moreland and Price were not the only ones who received calls that evening. B.K. Smith, the mine superintendent, was at home when he, too, was called. Smith was advised the mine's CO monitoring system was reporting "real high" CO levels underground. Smith, who was well aware of recent mine explosions and fires involving other mines and operators, was "scared to death." Tr. 773; *see also* Tr. 772. He ordered all miners evacuated, and then he immediately left for the mine.[5] Tr. 771-772.

When Moreland arrived at the mine, he discovered no one knew exactly what had happened. Some miners still were underground. Tr. 59, 94-95. Both Price and Smith arrived shortly after Moreland. Tr. 773. Moreland first spoke with the chief electrician, Ryan

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was used "to carry supplies or to do cleaning." *Id*.

[3]Larry Blackburn, Coal River's production manager, estimated a total of 30 miners were evacuated. Tr. 629.

[4]Terry Price learned something had happened when, at about 8:30 p.m., Terry Chapman, the mine's safety director, called Price and reported the event. Tr. 56; *see* Gov't Exh. 8.

[5]On January 27, in addition to Smith, who had been the superintendent since August 1995 (Tr. 170), the mine management team included the manager of operations, Larry Blackburn; and the third shift mine foreman, Mark Blackburn. The team generally received good marks from MSHA enforcement personnel. For example, Moreland believed they did a "good job" managing the mine. Tr. 93.

Browning. Then, Moreland went to the CO monitor station to get a printout of the underground CO levels.[6] Tr. 60. A printout was not available, but Moreland could tell from the system that its alarm had sounded. Moreland thought the alarm could have been triggered by gases produced by a fire or released from a battery or batteries.[7] Tr. 61.

Smith also checked the monitor station. He was very concerned about a possible underground fire. Tr. 814. However, as he continued to check, he could see the gas levels beginning to diminish. Tr. 773-774. The gas was moving outby and out of the mine, and new gas was not being produced.[8] Tr. 780. In the meantime, MSHA took control of the situation by issuing a section 103(k) order (30 U.S.C. § 813(k)) to Coal River.[9] Tr. 776-777.

Moreland stayed at the mine until after midnight. After he confirmed all miners were safely accounted for and none were left underground, Moreland prepared to go home.[10] Before leaving, Moreland listened to the miners being "debriefed" as they came out of the mine. Tr. 63. From what he heard, he believed the high gas levels were the result of a "possible battery fire." *Id.*

In the meantime, third shift mine foreman, Mark Blackburn, had traveled underground to find out what happened. Blackburn first determined there was no active mine fire, and he then made his way to the battery charging station at Spad No. 1965. Blackburn was familiar with the

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[6]The station was located in the main mine office.

[7]Everyone agreed although the system was designed to signal a fire by detecting the resulting CO, the system also could be triggered by the release of high levels of hydrogen given off by batteries while they were charging or when they overheated. Tr. 61-62.

[8]Moreland explained that by looking at the system, "You could follow [the gas] . . . from one sensor to another" as air traveled outby to exit the mine. Tr. 96.

[9]Section 103(k) provides in part:

> In the event of an any accident occurring in a coal . . . mine . . . [an inspector], when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal . . . mine, and the operator of such mine shall obtain the approval of . . . [the inspector] . . . of any plan to recover any person in such mine . . . or [to] return affected areas of such mine to normal.

[10]Smith was so concerned about what might have happened underground, he ordered four head counts to make sure everyone was out. Tr. 778.

station because, at the direction of Smith, Blackburn had ordered the battery charger and the batteries moved to the area. Tr. 679, 683, 717. The move was motivated by less than ideal roof conditions in the area where the station was previously located.[11] Tr. 682, 693; *See also* Tr. 784. According to Blackburn, he had the equipment moved to Spad No. 1965 "probably a couple of days" before January 27. *Id.*; Tr. 708.

Blackburn explained when batteries are charged, they "emit gases . . . because that's the nature of . . . batteries." Tr. 680. Therefore, when setting up a charging station, the charger is located in neutral air, but gases given off by the batteries are ventilated out of the mine with the return air.[12] Tr. 685, 787.

Blackburn described in general how charging stations were established at the mine. He stated, either before or after a battery charger was moved into an area designated as a charging station, the ribs of the station were fireproofed by spraying them with Pyro-Chem, a fire retardant coating. Tr. 684. The company then applied rock dust to the area. Tr. 687. Blackburn's description of how a charging station was set up was echoed by Smith. Tr. 790-791.

With regard to the charging station at Spad No. 1965, Blackburn explained that the first thing moved to the area was the battery charger. Next came the batteries. After this, Blackburn instructed the crew to "run the cable [to the charger] and . . . spray the area." Tr. 689. Blackburn thought the area would be sprayed by the incoming shift. ("I moved the charger and the batter[ies] . . . I didn't spray . . . because I didn't have time. The other boss was going to take his people down there and do it. I basically got it started." Tr. 703.) Ronald Byans was the incoming section foreman, and Blackburn believed it was Byans' job to make sure the area was sprayed. Tr. 719-720. However, after the next shift ended, Blackburn learned there was a problem. Contrary to his instructions, Pyro-Chem had not been applied to the ribs. Tr. 689. At first, Blackburn thought the spray machine had malfunctioned, but later he learned the Pyro-Chem, which had been stored on the surface, was frozen and was not brought into the mine soon enough to thaw. Tr. 699-700, 707. According to Blackburn, when Smith learned the area had not been sprayed, he said, "[O]kay we'll get someone to take care of it." Tr. 707. Smith told a foreman about the situation. Smith expected the foreman to pass on the information and to rectify the problem. Tr. 832. However, the area was never sprayed.[13]

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[11]Smith confirmed the charging station was moved to Spad No. 1965 after bad roof conditions were encountered. Tr. 784.

[12]Moreland testified that the air at Spad No. 1965 was moving at least 50 feet per minute. This velocity was slow, but it did not violate any MHSA requirements. *See* Tr. 353.

[13]Smith testified, when he learned the area had not been sprayed, it was "just like a smack in the face." Tr. 801. Blackburn, could not explain why the Pyro-Chem was not applied to the ribs. He stated, "for whatever reason it didn't get taken care of, I guess we dropped the ball. Somebody, somewhere, somehow, didn't spray it." Tr. 706. He added, he was "sure it wasn't

Blackburn described spraying charging stations at the mine as a "common practice." Tr. 708. In the past four years, he could not recall any other instance when a charging station was not sprayed and, thus, when a charging station was deprived of a fire suppression system. Tr. 711. (At the mine, Pyro-Chem served as a means by which the company provided charging stations with their required fire suppression systems.)

Because everyone was accounted for and the incident did not result in any injuries, MSHA did not begin its on-site investigation of the events of January 27 until Sunday, January 29. That Sunday Moreland returned to the mine, where he was scheduled to meet MSHA's lead accident investigator, Fred Willis. Willis arrived between 9:00 a.m. and 9:30 a.m. He was briefed by James Maynard, another agency investigator. Maynard was assigned to assist Willis and Moreland. Smith also was at the mine. Tr. 782. Maynard had reviewed some of Coal River's records, and he gave Willis copies of pre-shift, on-shift and weekly examination reports, as well as gas readings. Tr. 227.

Willis asked Moreland to interview "certain individuals." Tr. 64. Willis gave Moreland a list of questions suggested to Willis by the MSHA District Manager. Tr. 64; *see* Gov't Exh. 13. *Id.*; *see* Tr. 98, Tr. 229; *see also* Gov't Exhs. 13 at 17. As a result, Moreland interviewed nine miners. From the interviews, Moreland concluded: "[s]ome of the people knew about [the battery] charger installations. Some of them didn't. . . . Not everyone knew the exact requirements of charger installations. . . ." Tr. 69. Moreland concluded the charging station had been at Spad No.1965 for two or three weeks prior to January 27. Tr. 73, 120, 136-137. However, he agreed it was possible the station had only been at Spad No. 1965 for couple of days. Tr. 121; *see also* Tr. 137.

Later that day a joint MSHA-company inspection party proceeded underground. Willis and Moreland were among those representing MSHA Larry Blackburn was one of the company's representatives. Tr. 228. According to Willis, one of the first things the team did was travel to Spad No. 1965 to look at the battery charging station. Tr. 231. The scoop batteries, which were on the ground to one side of the battery charger, were in their metal case. The lid on the case was closed.[14] Tr. 232-233; Gov't Exh. 17. As the party gathered around the case, the lid was lifted. Willis testified he noticed evidence of "extreme heat" on one the batteries. Tr. 233, 369, 372. One battery's inby end was discolored. Willis stated, "it appeared . . . the [batteries'] cells had ruptured, spilling the contents out of the batteries. Tr. 233; Gov't Exh. 18. Although the on-site investigation revealed there never was a fire at Spad No. 1965 (Tr. 369), Willis believed removing power from the charger as soon as the CO monitors gave the

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intentional." *Id*.

[14]According to Daniel Bickey, whose company, Mine Power Systems (MPS), supplied the batteries, when batteries are charged, they should not be confined so the hydrogen which is given off by the batteries during charging does not reach explosive concentrations. Tr. 453-454.

alarm – which is what Coal River personnel had done – allowed the charger to cool and "prevent[ed] a major fire" or explosion.[15] Tr. 314; *see also* Tr. 250.

Willis recalled that the caps over two battery cells had been removed. Willis speculated the caps could have been "blown off"when the fluid in the battery cells overheated. Tr. 242. Further, Willis testified some of the permanent insulation around the edges of the batteries' case was missing.[16] Tr. 243-244; Gov't Exh. 18. In addition, insulation on the inside of the case lid was "gone." Tr. 243. According to Willis, the heat had melted it. *Id.*; Tr. 246.[17]

Additionally, Willis thought seven or eight of the batteries' cells looked like they had been damaged by heat. ("Heat had built up within those cells. The . . . [cap covering] the cell ha[d] sunk down inside the cell as if a piece of plastic had heated and went down into the cell." Tr. 243.) Willis remembered looking into the cells. He could see "nothing except the plates in them." Tr. 249. If water had been above the plates, the batteries would not have overheated. Tr. 250. According to Willis, eight cells had simply melted from the "extreme heat." Tr. 250.

Maynard also testified about damage that had been done to the batteries. He recalled seeing melted rubber connections between the batteries. Tr. 173.

The MSHA inspectors' belief the batteries overheated was challenged by Coal River's witnesses. A large majority of the plastic caps on top of the batteries' cells remained intact, and maintenance manager, Carl Estep, asked if the batteries had gotten as hot as MSHA's witnesses maintained, why had not most of the plastic caps melted? Tr. 973. Daniel Bickey's theory was the incident resulted from over watering the batteries' cells. He testified, when batteries are watered before they are charged, the batteries' cells overflow, battery acid spills onto the top of the batteries, and the acid flows out of the ventilation openings (cut out parts of the batteries' case). Tr. 479; *see* Gov't Exh. 19. Rather than evidence of heat, Bickey believed the corroded area at the end of the subject case was produced by acid due to too much water in the cells. Tr. 479, 577. Looking at a photograph that purportedly showed damage to the batteries, Bickey testified, "This is an over-watered battery and that's why you have that over-flow over the side."

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[15]Willis's view the batteries had been subjected to "extreme heat" was disputed by Bickey. Bickey was not a member of the investigation team. However, he had spent almost all of his working life involved in the sale and service of batteries, and he testified the danger of a fire or explosion was minimal during charging because "[t]he temperatures don't get that high. A high temperature in a battery is 115 degrees Fahrenheit . . . ." Tr. 576. Even battery temperatures as high as 160 or 180 degrees Fahrenheit were not dangerous in his view. *Id.*

[16]Steven Curry, who conducted the weekly electrical examinations for the company, disagreed. Tr. 880.

[17]However, Bickey thought the lid appeared to have been treated with ScotchCast, a black spray-on insulation. Tr. 475-477. Thus, while he agreed the black color showing on the inside of the lid could have been evidence of heat, he did not think it was. Tr. 477.

Tr. 577. According to Bickey, over-watering is not dangerous and would not have caused excessive hydrogen to be liberated and the CO monitors to trigger an alarm. Tr. 578.

In addition to trying to determine the cause of the incident, MSHA's investigators found specific conditions at Spad No. 1965 violated the previously-mentioned, mandatory health and safety standards. Willis and Maynard were sure there was no Pyro-Chem on the charging station's walls (Tr. 29, 200-201) and Willis concluded Coal River violated section 75.340(a) because with no Pyro-Chem on the walls there was no fire suppression system for the batteries when they were charged off the scoop. Tr. 385-386. Maynard acknowledged, however, the area at Spad No. 1965 was well rock dusted, that five bags of rock dust were stored at Spad 1965, and that the rock dust could act as fire suppression material. Tr. 200-201, 298. Therefore, in Maynard's opinion, the rock dust at Spad No. 1965 somewhat minimized the hazard from the lack of Pyro-Chem. Tr. 201, 211. Still, Maynard emphasized the primary purpose of the rock dust was to "prevent float coal dust from getting suspended in the air and blowing up," not to prevent the ribs from catching fire. Tr. 210.

Because of the lack of Pyro-Chem, Citation 7246621 was issued to Coal River. Gov't Exh. 1. Maynard believed the lack of Pyro-Chem at Spad 1965 was reasonably likely to contribute to an accident. According to Maynard, "it's a hazard changing . . . batteries, period . . . . That's why you have to have all the fire protection there." Tr. 180. In his opinion, the hazards inherent in charging batteries were "fires, hydrogen buildup, explosion, things of that nature." Tr. 181.

It was clear to Moreland that company personnel, including the pre-shift examiners, had missed the fact Pyro-Chem had not been applied to the ribs. He thought one reason was because the ribs were covered with rock dust. Tr. 112. This view was shared by weekly electrical examiner, Steven Curry, who stated when Pyro-Chem is first sprayed on the ribs it looks "like wet mud," but "when they come in there and rock dust . . . it dries . . . so it's just like regular rock dust." Tr. 885.

The investigators further found the condition of the scoop's battery cables and the batteries themselves indicative of a violation of section 75.503, because the scoop was not maintained in permissible condition. In addition to missing insulation on the batteries' case lid, two of the battery cables were spliced and the cables used on the batteries were not approved by MSHA. Further, some of the batteries' cells were dry, and accumulations of combustible materials were found on the batteries. These conditions were set out in Order No. 7249168.

As far as the missing insulation was concerned and, as previously noted, Willis testified insulation on the inside of the battery case lid was simply "gone" (Tr. 243) due to "extreme heat." *Id.*, Tr. 246. Willis also testified insulation was missing around the edges of the batteries' case. Tr. 243-244; Gov't Exh. 18. Moreland stated the conditions could have existed before the January 27 incident or they could have resulted from the incident, "depending on how the batteries [were] maintained." Tr. 134. Moreover, referring to a photograph of the batteries, Willis identified failed insulation where one of the battery cables connected to the battery. Tr.

268; Gov't Exh. 23. The cable had not melted, but it appeared to have been subjected to a lot of heat. *Id.*

Moreland identified a splice on a battery cable that ran across the top of one of the batteries. Tr. 145, 169; Gov't Exh. 19, Gov't Exh. 21. Moreland testified splices in battery cables were "not allowed" because a splice "weakened" the cable and created "the possibilities of arcing [and] heating."[18] Tr. 145. Moreland believed those examining the batteries for the company, for example, the certified electrician who conducted the weekly examination of electrical equipment, should have known splices were not allowed. Tr. 148.

In addition to the splice about which Moreland testified, Willis identified "a very badly damaged splice that had melted." Tr. 263; Gov't Exh. 21. The splice was open, revealing the insulated conductors. The cable containing the splice served the second of one of the two batteries being charged. *Id.*; Gov't Exh. 20. The splice was wrapped in low-voltage tape. Tr. 265, 363. Some of the tape had melted. Tr. 265. Willis believed the defective splice contributed to the cause of the accident. *See Id*. However, Coal River's maintenance manager, Carl Estep, looking at a picture of the splice (Gov't Exh. 21), pointed out that much of the splice was still in tact and "[t]he tape on both sides of the splice . . . [had] not burned." Tr. 953. To Estep, this showed the splice was not a contributory factor. If the splice had gotten hot enough to spark the incident, all of the tape used to make the splice would have melted or been distorted. Tr. 953-954.

According to Willis, the splices were dangerous because hydrogen given off when the batteries are charged is explosive when it is between 3% to 75% of the atmosphere. Tr. 331. Battery cases vibrate when the battery-operated equipment is activated. The vibration can cause a hole or holes to be worn in the insulation, exposing the conductors. The conductors can arc and cause an explosion (Tr. 257) and, in Willis's opinion, a hydrogen explosion can be "catastrophic." Tr. 256. Like Moreland, Willis maintained splices never are allowed in battery cables. Tr. 251. Willis read from MSHA's Program Policy Manual (PPM), which, in explaining MSHA's enforcement policy for section 75.503, states in part: "Splices shall not be made in external wiring of permissible equipment."[19] *Id.*; Gov't Exh. 28. Because the splice was lying

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[18]Steve Curry, the company's weekly electrical inspector, agreed to some extent. He testified splices offer resistance to electrical current and the resistance heats the spliced area of a cable. Tr. 983.

[19]Larry Cook, an MSHA supervisory electrical engineer, explained if an operator had reason to believe equipment would be used in the face area or in return areas, the equipment had to be maintained in permissible condition. Among other things, this meant that battery cables could not be spliced. Tr. 667-668. It was clear from the testimony that prior to the incident neither company personnel nor Daniel Bickey understood this. They consistently testified that they were not familiar with the referenced part of the PPM and with the "no-splice" requirement. *See, e.g.*, Tr. 948.

on top of part of the metal frame of the battery case, the only thing between the case and the conductors was the tape that was wrapped around the splice. Tr. 276. The tape was low-voltage tape, the kind used for general electrical repairs. *Id.* In Willis's opinion, the splice was a poorly made repair of a cable that should not have been spliced in the first place. Tr. 277.

Daniel Bickey testified the splices probably were made by one of his employees. *Id.* Until the splices were cited for violating section 75.503, Bickey believed battery cables could be spliced. Tr. 450. Larry Blackburn, the company's production manager; Carl Estep, its maintenance manager; and Steven Curry, the weekly electrical inspector, held similar beliefs. Tr. 611-612, 866, 903, 935, 943. Bickey testified, from a pragmatic standpoint, splicing sometimes was preferable to replacing a damaged cable because splicing "took less time" and, thus, production was less disrupted. He was certain a properly prepared splice would not compromise safety. Tr. 452.

MSHA's inspectors found something else wrong with the cables used on the batteries. The cables were not approved by the agency. Tr. 146; Gov't Exh. 20. An MSHA-approved cable bears an approval notice or stamp, and Moreland knew the cables were not approved, because they lacked the agency's official imprimatur. Tr. 146. In Moreland's opinion, miners examining the batteries should have known approved cables were required. *Id.*

Like Moreland, Willis, too, testified there were no MSHA markings on the cables. Tr. 257. The type of cable used on the batteries was 600-volt welding cable. Tr. 259, 260, 356. Willis did not believe insulation around the welding cable's conductors was designed to be effective for the long time period a scoop battery was typically used. Tr. 260. Moreover, unlike an MSHA-approved cable, the 600-volt welding cable was not tested for flame resistence. Willis feared insulation used on the non-approved cables would break down. Tr. 261. He recognized MPS supplied the batteries and cables to Coal River, but he did not think this in any way lessened the company's negligence for failing to use approved cables.

Bickey testified 600-volt welding cable (also referred to as "2/0 cable") was used at mines prior to 1989. After 1989, MSHA required used of cable that had a thicker "skin." Tr 430-431; *see* C.R. Exh. 9. However, according to Bickey, cable used after 1989 actually withstood less heat (210º Fahrenheit, as opposed to 240º Fahrenheit) than cable used prior to 1989. Tr. 431. The older cable was "better" because of this. Tr. 432; *see also* Tr. 527, 528. Nonetheless, Bickey described 2/0 cable and MSHA-approved cable as "functionally equivalent." Tr. 435. In Bickey's view, using non-approved cable did not jeopardize safety (Tr. 443), whereas using approved cable created a "cost issue" for suppliers. Tr. 529. He stated, "We . . . [paid] double because MSHA was printed on it." *Id.*

Like Bickey, the company's maintenance manager, Carl Estep, also thought 2/0 cable and MSHA-approved cable were functionally equivalent. He could "not see any difference in either cable." Tr. 937. He knew of no problems at any of Coal River's three mines from using 2/0 cable. Tr. 938.

Bickey testified it was not until after the January 27 incident that MPS learned the cable it used was not compliant. "[N]ot until this incident had we ever had any complaints about the 2/0 cable, the . . . [MSHA] people have come through our shop, they've seen this [2/0] cable, [they have] never said a word to us and to my knowledge, we have never been contacted by . . . [MSHA] . . . to put this . . . [MSHA-approved] cable on the batteries." Tr. 433; *see also* Tr. 524. Bickey added, "We're not about looking up laws." Tr. 522.

Larry Blackburn, Coal River's operations manager, also did not know until the incident that the cable supplied with the batteries should not have been used. Tr. 610. He had "never heard anybody say there was [such a thing as] MSHA approved cable." *Id.* He just "did not know that." *Id.* Rather, he "took it for granted" cables supplied by MPS were acceptable. Tr. 614. He testified the company never experienced safety or operational difficulty using the non-approved cable.[20] Tr. 610-611.

Each of the two batteries was composed of numerous batttery cells. The cells were distinct compartments containing lead plates. For the batteries to function properly, the cells had to be "watered" so each cell had enough water to reach and interact with the cell's lead plate. (The resulting chemical reaction produced the batteries' electrical charges.) According to the inspectors, the investigation revealed some of the batteries' cells contained either no water or insufficient water. Moreland agreed with Willis that the water in several of the cells was low or the cells were dry, but he could not say for sure which of the cells were dry. Tr. 149. Maintenance manager Carl Estep looked at the batteries after they were taken out of the mine. He could not see any water in the cells. However, he believed some must have contained water because they "[had] to have water in [them] . . . to charge." Tr. 952. Nonetheless, he acknowledged the water in some of the cells was "low." *Id*.

Willis believed low water in the cells could have caused the batteries to overheat. He also testified once the cells overheated the loss of water would have accelerated, which, in turn would .cause more heat. Tr. 287. Because of the danger of overheating if water was too low, Moreland stated he "definitely [would] add water [to the cells] prior to charging [the batteries]." Tr. 152. Willis agreed (Tr. 324-325) and stated proper maintenance of the batteries required monitoring their water level. Tr. 284-286.

The government's assertions regarding when to water the batteries was challenged by Daniel Bickey. Bickey identified a sticker MPS attached to the batteries it sent to mines. The stickers stated in part: "Water me after charging only." C.R. Exh. 10. Bickey thought adding water prior to charging the batteries was "almost criminal." Tr. 458. He stated, "All batteries that are on charge are going to have low water because they've been discharged. So our rule is

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[20] Like Blackburn, Steven Curry did not know cable provided by MPS was not acceptable. Tr. 865. Nor did the company's maintenance manager or its superintendent. *See* Tr. 807, 935, 944.

you water after [a] charge." Tr. 460. He explained, "[I]f you water before a charge . . . you bring acid and water to the surface of . . . [the] battery, and that's where it's dangerous because when acid is on the top of . . . [the] battery it will go to ground and short to the steel from the connector and create a very hazardous situation."[21] Tr. 461. According to Bickey, low water prior to charging was not the sign of a battery maintenance problem.

Willis understood the last weekly examination of the scoop was on January 24, 3 days before the incident. Tr. 291. At that time the examiner indicated the scoop was "OK." Gov't Exh. 15 at 4. The lack of adequate water levels indicated to Willis that despite the "okay" given by the examiner, the water levels were low on the 24th and the examiner or another company employee had not corrected the defect. Tr. 292. Willis believed the failure to properly maintain the scoop's batteries was the result of "high negligence" because of the obviousness of the conditions.

Willis also maintained there were accumulations of combustible materials on the batteries. On the second of the two batteries, Willis thought he saw evidence of smouldering, fine coal and/or coal dust in the form of white ash. Tr. 266; Gov't Exh. 20, Gov't Exh. 22. Bickey challenged Willis's belief the ash was residue from combustible material. Bickey thought the "ash" identified by Willis could have been baking soda that "wasn't washed off really good." Tr. 465. Maintenance manager Carl Estep essentially agreed. Tr. 940. He added, "We clean the batteries with baking soda. It dilutes the acid when it builds up on top of the batteries." *Id.*

Finally, and as previously noted, during the course of the investigation Moreland asked for and was given copies of various company reports, including the pre-shift reports from the morning shift of January 19 to the hoot owl shift of January 27 (Tr. 73; Gov't Exh. 14) and the weekly electrical equipment examination reports covering various days between January 4 and January 24. Tr. 73; Gov't Exh. 15. According to Moreland, Jerry Vance was one of the pre-shift examiners who inspected the area at Spad No. 1965 for the company. Tr. 126-127. Vance recalled conducting the pre-shift examinations prior to the incident. Vance agreed he did not notice fire retardant material was missing from the ribs at the battery charging station.[22] Rather, he remembered the area at Spad No. 1965 as being well rock dusted, and as containing fire

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[21]Weekly electrical examiner Steve Curry, who "watered" batteries, agreed with Bickey. Curry testified it was his practice to add water to the batteries'cells if the water level was low, but he did not do so if the batteries were going to be charged. Tr. 862

[22]After the incident, when he was informed the retardant in fact was missing, he viewed the condition as an aberration because, as he put it, Coal River "always Pyro-Chem'd [its] charging stations." Tr. 753; *see also* Tr. 755. Production manager Larry Blackburn agreed. He could not recall the company ever receiving a prior citation for failing to provide a fire suppression system at a battery charging station. Tr. 606.

extinguishers and extra bags of rock dust. Tr. 754. To Vance, these conditions alone meant batteries could be charged in the area because, as Vance then understood the requirements of section 75.340(a), fire retardant material on the ribs was not necessary to comply with the standard's requirements. He believed the application of Pyro-Chem as an additional precaution the company voluntarily undertook to "further fireproof [the] area." Tr. 754-755. Therefore, at the time of the inspections he thought the area was in compliance. Tr. 754. MSHA's investigators disagreed, and charged the company with a violation of section 75.360(b)(9), for failing to perform an adequate pre-shift examination (Order No. 7249166). They further charged the failure of the weekly electrical examiner to note, among other things, that the batteries were not properly maintained meant the weekly examination was inadequate (Order No. 7249167).

RESOLUTION OF THE ISSUES

WEVA 2006-125-R
WEVA 2007-196

Section 104(d)(1) Citation No. 7249165 states:

> The unattended 35 C scoop charger . . . located at [S]pad No. 1965 was not provided with a fire suppression system or enclosed in a noncombustible structure. Batteries were being charged on the bottom of the scoop and were not provided with fire suppression systems required by [§] 75.1107-3 through [§] 75.1107-16. . . . Through interviews this charger station has existed for 2 to 3 weeks.

Gov't Exh. 1.

THE VIOLATION

Among other things, the standard requires battery charging stations to be "housed in noncombustible structures or areas or to be equipped with a fire suppression systems meeting . . . [specified] requirements." I find the requirements of the standard were not met. There really is no question about this. The battery charger was not "housed in noncombustible structure;" nor was the area in which it was located rendered noncombustible by the application of Pyro-Chem to the walls. Since the batteries were charged on the floor at Spad No. 1965 rather than on the scoop itself, the charging station was not equipped with a "fire suppression system" within the meaning of the standard, and for these reasons I find the violation occurred as alleged.

S&S GRAVITY

An S&S violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d). A

violation is properly designated S&S, "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). To establish the S&S nature of a violation, the Secretary must prove: (1) the underlying violation; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood the hazard contributed to will result in an injury; and (4) a reasonable likelihood the injury will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 3-4 (January 1984); *accord Buck Creek Coal Co., Inc.* 52 F. 3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc. v. Sec'y of Labor*, 81 F. 2d 99,103 (5th Cir. 1988) (approving *Mathies* criteria).

It is the third element of the S&S criteria that is the source of most controversies regarding S&S findings. The element is established only if the Secretary proves "a reasonable likelihood the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.,* 7 FMSHRC 1125, 1129 (August 1985). Further, an S&S determination must be based on the particular facts surrounding the violation and must be made in the context of continued normal mining operations. *Texasgulf, Inc.,* 10 FMSHRC 1125 (August 1985); *U.S. Steel*, 7 FMSHRC at 1130.

Finally, the S&S nature of a violation and the gravity of a violation are not synonymous. The Commission has pointed out that the "focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (September 1996).

The Secretary established a violation of section 75.304(a). She also established a safety hazard contributed to by the violation. In this regard, I find Maynard's testimony concerning the hazards associated with charging batteries logical and pertinent. He persuasively explained how charging batteries can result in "fires, hydrogen buildup, [and] explosion[s]." Tr. 181. The requirements of section 75.304(a) are designed to greatly minimize these hazards. If an explosion and/or a fire had occurred at Spad No. 1965 while the batteries were being charged, little was in place to minimize the chance the ribs would catch fire and the fire would spread.

Without the protections required by the standard, it is reasonably likely the hazard would have contributed to an injury. The splices in the battery cables provided a potential ignition source for hydrogen liberated while the batteries were charging. If an explosion and/or a fire occurred, smoke and/or fume inhalation or burns were reasonably likely to result. Miners likely to be injured would either have worked in the vicinity of the accident or would have been sent to fight the accident's results. In this regard, I note the mine superintendent's candid admission that eight or nine miners could have been affected in the event of an explosion. Tr. 834; *see also* Tr. 823-824. B.K. Smith maintained no miners would have been affected in the event of a fire because, if the stoppings remained intact, smoke would have traveled away from the miners. *Id.* However, his contention is highly speculative and too problematic. The fact is, underground mine fires can disrupt ventilation and send smoke and fumes over the miners working in fresh

air. Inhalation and/or burn injuries were reasonably likely to be serious, even fatal, and for these reasons I conclude the violation was S&S. Moreover, in view of the kind of injuries that were likely to happen to miners if the hazard occurred, I find the violation also was serious.

UNWARRANTABLE FAILURE AND NEGLIGENCE

Unwarrantable failure is "aggravated conduct, constituting more than ordinary negligence . . . in relation to a violation of the Act." *Emery Mining Corp.* 9 FMSHRC 1997, 2004 (December 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or "a serious lack of reasonable care." *Id.* 2003-2004; *Rochester & Pittsburg Coal Co.*, 13 FMSHRC 189, 193-l94 (February 1991); *see also Rock of Ages Corp. v. Sec'y of Labor*, 170 F.3d 157 (2d Cir. 1999); *Buck Creek Coal, Inc. v. MSHA*, 53 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). Moreover, the Commission has examined the conduct of supervisory personnel in determining unwarrantable failure, and recognized that a heightened standard of care is required of such individuals. *See Youghiogheny & Ohio Coal Co.,* 9 FMSHRC 2007, 2011 (December 1987) (section foreman held to demanding standard of care in safety matters); *S&H Mining, Inc.*, 17 FMSHRC 1918, 1923 (November 1995) (heightened standard of care required of section foreman and mine superintendent). Negligence, of course, is the failure to meet the standard of care required by the circumstances.

I conclude the violation was not caused by Coal River's unwarrantable failure to comply with the standard. I do not entirely agree with Willis that the charging station was "set up . . . without . . . regard to fire suppression." Tr. 284. I accept Mark Blackburn's essentially unchallenged testimony that the Pyro-Chem the company intended to apply to the walls of the charging station was frozen, and I find, as Blackburn testified, that when he learned of the situation, B.K. Smith ordered the area to be sprayed. Tr. 699-700, 707. The record reveals nothing "aggravated," "reckless," or "intentional" in the company's failure. Indeed, Superintendent Smith throughout the course of the hearing impressed me as a caring, careful, and conscientious supervisor, one any company would be lucky to employ and any miner would be lucky to work for. I fully believe he was as surprised as anyone when he learned his instructions had not been followed and the area had not been sprayed. As he stated, it was "just like a smack in the face." Tr. 801.

The record also does not support a finding of heightened neglect. There was no showing the failure to provide fire protection was a habitual practice at the mine (*see, e.g.,* Tr. 696, 802). Further, the rock dust that covered the ribs clearly made the absence of Pyro-Chem difficult, although not impossible, to detect. In this regard, Larry Blackburn's testimony regarding the similarities in the color of rock dust and Pyro-Chem was persuasive. Tr. 603-604. I agree with Blackburn that the lack of Pyro-Chem would not have "jumped out" at anyone.[23] Tr. 634

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[23]The testimony of Mark Blackburn and Jerry Vance, both of whom were familiar with the chemical and with rock dust, corroborated that of Larry Blackburn in this regard. Tr. 694,

In sum, I conclude the failure to apply Pyro-Chem to the ribs at Spad No. 1965 reflected a lack of care, but not one so heightened as to constitute unwarrantable failure. Rather, the violation occurred due to Coal River's moderate negligence, and I will order the citation to be modified to reflect this fact.

WEVA 2006-126-R
WEVA 2007-196

Section 104(d)(1) Order No. 7249166 states in part:

> [An in]adequate pre-shift examination was conducted for the 35 C Scoop charger . . . located at [S]pad [No.] 1965. The pre-shift examiners did not record obvious hazards that existed at this location. [The] charger station was not provided with a fire suppression system or enclosed in a noncombustible structure. Through interviews with management and miners [the] charger has been at this location for two to three weeks. No hazardous conditions [have] been recorded in the pre-shift records concerning the [charger] during this period of time.

Gov't Exh. 2.

THE VIOLATION

Section 75.360(b)(9) requires the pre-shift examiner to "examine for hazardous conditions" at "[u]nderground electrical installations," and section 75.360(d)(f) requires the keeping of a record of "hazardous conditions and their locations found by the examiner during each examination."

The order states that the charging station was located at Spad No. 1965 "for two to three weeks,", but this is not certain from the record. Moreland acknowledged the two- to three-week period was based on what he remembered hearing others say, and Moreland later agreed it was possible the station had been at the spad for only a few days before the accident. Tr. 121; *see also* Tr. 136-137. In fact, no one testified exactly when the station was moved to the area. Mark Blackburn believed it was moved "probably a couple of days" before January 27. Tr. 708. Jerry Vance, who conducted the pre-shift examinations immediately prior to the incident, stated it was "a week, a couple of weeks, maybe" (Tr. 738-739) and "[i]t could have been less." Tr. 739.

695, 713, 756.

Although it is impossible to establish with certainty when the station was moved, it is reasonable to assume the station was located at Spad No. 1965 when Vance conducted his pre-shift examination immediately before the incident. Vance testified he did not notice fire retardant material was missing from the ribs. Tr. 754. This oversight was confirmed by his pre-shift reports, none of which reference the missing Pyro-Chem. *See* Gov't Exh. 19. The lack of the fire retardant material on the ribs at the charging station was a "hazardous condition." It should have been reported. In failing to do so, Vance, and through Vance, the company, violated section 75.360(b)(9).

S&S GRAVITY

I have found the Secretary established a violation of section 75.360(b)(9). She also established a safety hazard contributed to by the violation. The failure to conduct an adequate pre-shift examination in this instance meant a hazardous condition was not reported. Reporting is an essential step in the elimination of hazards, because pre-shift reports are reviewed by management personnel (usually the incoming shift foremen) and reported conditions are corrected. When the incident occurred on January 27, the explosion and/or fire hazard was augmented by the lack of Pyro-Chem on the ribs, a condition that presumably would not have existed had Coal River fully complied with section 75.360(b)(1). Moreover, I find it reasonably likely as mining continued the failure to report the lack of fire retardant material on the ribs would have contributed to an injury. The ongoing charging of batteries whose cables were spliced and improperly clamped (*see* discussion of Order No. 7249168, *infra*) meant it was reasonably likely an explosion and/or fire would occur. The failure to identify the lack of fire retardant material on the ribs also meant it was reasonably likely serious injuries would result. This is especially true in the context of continued mining operations. The area had been rock dusted, and Jerry Vance did not look under the rock dust for Pyro-Chem. Tr. 741. Therefore, as mining continued there was little likelihood the lack of material ever would have been reported as a hazard and corrected. For these reasons, I conclude the violation was both S&S and serious. In finding the violation was serious, I reject the suggestion offered by Vance that rock dust alone could afford sufficient fire protection for the charging station. *See* Tr. 749. As Maynard pointed out, the purpose of the rock dust was to inert potentially explosive coal dust, not to retard a fire. Tr. 210.

UNWARRANTABLE FAILURE AND NEGLIGENCE

I conclude the violation was not the result of Coal River's unwarrantable failure. Certainly, Vance was not guilty of reckless disregard, intentional misconduct, or indifference to his obligations. He relied on the fact that it was the practice at Coal River to spray Pyro-Chem on the ribs and then to rock dust over the Pyro-Chem. While his reliance was misplaced and did not meet the standard of care required, it was not the kind of serious lack of reasonable care that justifies an unwarrantable failure finding. The record established the practice on which Vance relied was a fact. It was repeatedly testified to by other of the company's witnesses, and the Secretary did not offer evidence of frequent, previous failures to apply fire retardant material where it was required. (For example, she did not introduce previous citations alleging the same

violation of section 75.360(b)(9).) The similarity in color between Pyro-Chem and rock dust once both were applied meant its absence was not readily apparent. Had the company's pre-shift examiner exercised the care required, he would have observed and recorded the fact the material was missing. However, because the lack of Pyro-Chem was not the kind of condition that would have "jumped out" at him and because it was reasonable to assume Pyro-Chem had been applied as usual, I conclude the lack of care in failing to note its absence was ordinary and was not unwarrantable.

WEVA 2006-127-R
WEVA 2007-196

Section 104(d)(1) Order No. 7249167 states in part:

> [An in]adequate weekly examination was conducted at the 35 C Scoop charger . . . located at [S]pad [No.] 1965. Numerous and obvious hazards existed at this location including no fire suppression provided, damaged charger cables, and batteries not being maintained. Records of weekly examination[s do] not reveal any hazardous conditions existing. Through interviews of management and the miners this charger station has existed at this location for two to three weeks. This violation is an unwarrantable failure to comply with a mandatory standard.

Gov't Exh. 3.

THE VIOLATION

Section 75.512 requires "[a]ll electric equipment " to be "frequently examined," and when a "potentially dangerous condition is found on electrical equipment," for the equipment to be "removed from service until such condition is corrected." Moreover, "[a] record of [the] examination" is required to be kept. 30 C.F.R. § 75.512. Under section 75.512-2 the frequency of the required examination is defined as "at least weekly."

I conclude the Secretary established a violation of section 75.512, although not as extensive a violation as she alleged. It is clear from the order and from the testimony of Inspector Willis that MSHA regarded the failure of the weekly electrical examiner to note the absence of Pyro-Chem on the ribs at Spad No. 1965 as violative of the standard. Gov't Exh. 3; Tr. 294, 299. The problem is the allegation focuses on a condition extraneous to the cited electrical equipment. It would be a stretch indeed to regard the ribs at the charging station as part of the charger and batteries, and I find the weekly examiner's failure to note the condition did not violate the standard.

The order also charges the examiner should have noted the batteries were not "being maintained." Gov't Exh. 3. To Willis, this meant low water levels of the battery cells should have been reported by the examiner, as should the accumulations of combustible materials on the batteries. Tr. 296, 336.

Willis understood the last pertinent weekly electrical examination was on January 24, three days before the incident. With regard to the water levels in the battery cells, Willis clearly stated his opinion the water levels were low or nonexistent at the time of the last inspection. Tr. 291-292; Gov't Exh. 15 at 4. Willis's belief was reasonable in the light of what happened on January 27. Although there was a great deal of testimony about the right time to add water to the batteries' cells – before or after charging – I find the most probable deduction to draw from the incident is when the batteries were being charged that the water in several of the cells was too low – in fact, a few of the cells might have had no water at all – and this caused the batteries to overheat and release gas, which in turn activated the CO sensors. The electrical examiner, Steven Curry, should have checked the batteries on January 24 to make sure the water in the cells was at an appropriate level for the batteries to be charged.[24] At no point in Curry's testimony did he indicate he conducted such a test as part of his examination. I find that his failure to do so violated the standard.

As for the alleged accumulations, as I have previously found, in my view, the Secretary did not carry her burden of proving they existed. The testimony offered by the Secretary was almost entirely restricted to the existence of white "ash," and, as discussed above, whether the substance was ash from combustible material or was residue from baking soda, cannot be determined from the record. For this reason, I find any failure of the weekly examiner to report the presence of the alleged combustible material on the batteries did not violate the standard.

Finally, the order asserts the examiner should have reported the presence of "damaged charger cables," and I agree The testimony established the spliced battery cables were present when Curry conducted the examination on January 24. I have found the spliced cables posed a hazard. The hazard should have been reported by the examiner. The spliced cables represented a "potentially dangerous condition" (section 75.512), a condition that could have posed an ignition source and/or a shock hazard as mining continued.

S&S GRAVITY

The Secretary established a violation of section 75.512. She also established a safety hazard contributed to by the violation. The failure to conduct an adequate weekly electrical

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[24]Carl Estep's assertion, watering battery cells before they are charged causes the water and acid to overflow the cells (Tr. 950) may be true if, after watering, the level of water is too high in the cells. But, water has to be in the cells for the batteries to take a charge, and it logically follows there has to be a proper level for the water, one that will not cause them to overflow.

examination in this instance meant that two potentially dangerous conditions were not brought to the attention of mine management: insufficient water in the battery cells prior to charging and spliced cables in use on the batteries. As previously stated, the reporting of a hazardous condition is an essential step in eliminating a hazard. Weekly electrical examination reports are reviewed by management personnel and reported conditions are corrected. Here, Curry's failure to report low water in the battery cells before they were charged meant the batteries overheated during charging, a condition that triggered the January 27 incident. Fortunately, no injuries occurred as a result of the incident, but a very real potential for injuries either through an explosion and/or fire existed, and, in my opinion the hazard was reasonably likely to occur as mining continued.

Moreover, the failure to report the spliced battery cables meant that as mining continued, the spliced areas would have been exposed to more vibration and strains. The insulation at the spliced areas could have ruptured, and the conduits could have been exposed and presented a potential ignition source for the gas given off during charging. The spliced cables also presented a continuing shock hazard to miners working with the batteries. Serious injuries were reasonably likely. The company's unquestioned acceptance of whatever MPS provided and the lack of knowledge of the electrical examiner that splicing was prohibited meant the spliced cables would in all likelihood have remained indefinitely on the batteries. (In this regard, I again note Curry's testimony he was unaware battery cables could not be spliced. Tr. 866.) The injuries most likely to result from an explosion and/or a fire or from being shocked would have been serious, even fatal. For these reasons, I find the violation was both S&S and serious.

UNWARRANTABLE FAILURE AND NEGLIGENCE

The failure of the weekly examiner to make sure sufficient water was in the battery cells was an unwarrantable failure. Because of the potential dangers involved in charging the batteries when the cells contained insufficient water, it should have been a practice at the mine to have the weekly examiners always check the water in batteries of electrically powered equipment. It is clear no such practice existed. In all likelihood the lack of such a practice directly contributed to the January 27 incident.

Moreover, Curry's and the company's failure to detect and report the use of spliced cables on the batteries went beyond a lack of observation. The testimony established the company officials and Curry did not even know the use of spliced cables was prohibited. As previously discussed, the record fully supports finding the company totally relied on MPS to provide it with compliance ready batteries and did nothing beyond that to ensure compliance. This serious lack of reasonabey care resulted in the violation here at issue and it reflected both Coal River's unwarrantable failure and its high negligence.

WEVA 2006-128-R
WEVA 2007-196

Section 104(d)(1) Order No. 7249168 states:

> The 35 C scoop batteries located at [S]pad [No.] 1965 were not being maintained as approved. Insulation on the battery lids and areas near cells [was] damaged and missing . . . cables within the battery box . . . [were] found damaged and two were found spliced, cables also were not approved . . . in that . . . [they] must be accepted by MSHA as flame resistant under [P]art 18[.] [A]lso[,] battery cables must be protected from abrasion by effective means. Scoop batteries were also not being maintained in that cells were dry of water and accumulations of combustible materials were found present on the batteries. These are obvious and extensive hazards that should have been addressed by management . . . . this violation is an un-warrantable failure to comply with a mandatory standard.

Gov't Exh. 4.

THE VIOLATION

I conclude the Secretary properly charged the company with a violation of section 75.503. Coal River does not dispute the subject scoop was taken into and used inby the last open crosscut. As such, the scoop was "electric face equipment" required to be maintained in "permissible condition." The permissibility requirement extends to the components of the scoop, including its batteries, and the evidence clearly establishes the batteries were not permissible in several ways.

First, at least two battery cables were spliced. The splices were testified to by Moreland and Willis and were shown in the Secretary's exhibits. Tr. 145, 169,263; Gov't Exhs. 19, 20, 21. Moreover, the Secretary established that under section 75.503, no splices are allowed in battery cables. This ban on splices is, as Willis testified, MSHA's policy and the policy reflects the requirements of the regulation. Tr. 251; *see* Gov't Exh. 28. Second, the cables used on the scoop's batteries were not approved by MSHA. Moreland and Willis testified to this fact, and their testimony was not disputed by Coal River's witnesses. Tr. 146, 257; *see* Gov't Exh. 20. Third, and as the order alleges, the lack of proper clamps securing the cables also violated section 75.503. The testimony supports the charge. Willis's contention a non-approved Buncy clamp was used to hold the conductors at one of the splices was not refuted, and even Bickey agreed tape, not a clamp, was used at another of the splices. Tr. 267; 568; *see* Gov't Exh. 21.

Finally, the order asserts the batteries were "not being maintained" (presumably in permissible condition), in that the battery cells were "dry of water" and "accumulations of combustible materials" were found on the batteries. There are problems with these charges. The record reveals the Secretary's witnesses actually did not know if the cells were totally without water, that is, if the cells were "dry." (Moreland admitted he could not say which of the cells in

each battery was without water. Tr. 149.) The inspectors could not see to the bottom of the cells because of the cells' lead plates. Furthermore, Carl Estep's contention the battery cells had to have at least some water in them for the cells to make a circuit for the charger to function was not refuted (Tr. 949), and Moreland and Willis essentially agreed some of the cells contained water, although the level was insufficient. *See, e.g.,* Tr. 149, 287. Thus, the record does not support finding the cells were "dry of water", as the order charges. Gov't Exh. 4.

Further, the evidence falls short of establishing the presence of accumulations of combustible materials on the batteries. True, Willis's testimony confirmed the presence of white residual "ash" on the batteries, but, as I have noted, whether the "ash" was the result of incinerated combustible accumulations, as he maintained (Tr. 266), or was the residue of baking soda used to clean the batteries, as Bickey and Estep testified (*see* Tr. 266, 465, 940), cannot be determined.

For these reasons, I conclude the Secretary established the scoop's batteries were not maintained in permissible condition as alleged, but only insofar as the cables were spliced, were not approved by MSHA, and were not permissibly clamped.

S&S GRAVITY

The Secretary established a violation of section 75.503. She also established a safety hazard contributed to by the violation. I find Moreland's testimony that splices in battery cables "weakened" the cables and created "the possibilities of arcing and heating" to be compelling. Tr. 145. The danger was heightened in this instance because one of the splices had been damaged to the extent it was open and revealed the spliced cable's inner conductors. Tr. 263; Gov't Exh. 21. However, I do not find the Government offered sufficient evidence to find any of the splices was causally linked to the incident of January 27. In this regard, I note Estep's observation that most of the tape used in making the ruptured splice showed no evidence of being affected by heat, in that it was not burned or distorted. Tr. 953-954. Nonetheless, I agree with Willis that the splices were very dangerous because of their potential to ignite a hydrogen explosion. Tr. 256-257; *see also* Tr. 331. He persuasively described the result of any such explosion as "catastrophic." Tr. 256. It also is obvious to me the splices could have contributed to a dangerous fire. Given the fact the spliced cables were subject to vibration and abrasion as mining continued, were not clamped properly, and one of the splices already had ruptured, revealing its conductors, I find in the context of continued, normal mining operations, an explosion and/or fire was reasonably likely to occur, and serious, even fatal, injuries to miners caused by gas, smoke and/or fume inhalation or fire were reasonably likely to result. For these reasons, I conclude the violation was both S&S and serious.[25]

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[25]I do not find use of the non-approved cables contributed significantly to the hazard. While Willis expressed fear about the insulation of the non-approved cables breaking down due to long use (Tr. 261), Bickey testified without dispute that the 2/0 cable used on the batteries was more heat tolerant than MSHA-approved cable. Tr. 431-432. Moreover, I accept Estep's

UNWARRANTABLE FAILURE AND NEGLIGENCE

I conclude the company unwarrantably failed to prevent use of the spliced, improperly clamped and non-approved battery cables. Coal River unquestionably relied on MPS to provide it with batteries meeting all of the applicable MSHA requirements. As Estep stated, company officials believed MPS to be a "quality vendor." Tr. 933. The attitude of mine operations manager Larry Blackburn was typical. He stated he just "took it for granted" the batteries supplied and serviced by MPS were acceptable to MSHA. Tr. 614; *see also* Tr. 807, 865, 935, 944 (testimony of other company officials regarding unquestioned reliance on MPS). I also accept as credible the testimony of Larry Blackburn, Estep, and Curry that they were unaware battery cables could not be spliced (Tr. 611-612, 866, 903, 935, 943), and the testimony they did not know the battery cables supplied by MPS were not approved by MSHA. Tr. 807, 865, 935, 944. However, I fully agree with Inspector Willis that the company's reliance on MPS did not lessen the company's culpability. *See* Tr. 356. Coal River's responsibility for compliance was not subject to contract. In failing to ensure MPS provided it with batteries that complied with the law, the company exhibited a serious lack of reasonable care. There was no evidence of a system established by the company to check on the compliance-readiness of the equipment it was provided. Coal River simply abrogated its responsibilities in this regard. As such, I conclude the violation of section 75.503 was the result of its unwarrantable failure and high negligence.

OTHER CIVIL PENALTY CRITERIA

The parties stipulated the proposed penalties for the alleged violations would not affect Coal River's ability to continue in business (Stip. 6) and that Coal River had a "low" applicable history of previous violations. Stip. 7. The parties also stipulated Coal River abated in good faith the violations alleged in the citation and orders. Tr. 397-398. Exhibit A of the Secretary's civil penalty assessment petition indicates Coal River is of a moderately large size, an assertion not disputed by the company. Finally, the record reveals Coal River exhibited much more than ordinary good faith in abating the violations. For example, Larry Blackburn described how Coal River complied with the requirement to use MSHA-approved cable on its batteries. He stated, as soon as management became aware of the requirement, the company "had . . . [MPS] come in and change all batteries at all three [of its] mines with the MSHA approved cables." Tr. 613. The company also discontinued spraying the ribs and chose instead to have dry chemical fire suppression systems at each of its battery charging stations. Tr. 617-618. The heat activated systems were hung from the roof over the chargers. Tr. 710. As Blackburn stated, the company did "everything . . . [it] could to avoid having . . . [an] incident [similar to that of January 27] happen in the future." Tr. 659. He added, "We tried to make a positive out of this and learn

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testimony non-approved cable had long been used at the mine without problems. Tr. 938. Thus, while use of the cable supplied by MPS violated the standard, it did not add to the S&S nature of the violation or to its gravity.

from it." Tr. 660. Mark Blackburn described the new fire suppression system as "a better system." Tr. 714; *see also* Tr. 808, 810. In addition, pre-shift examiner Jerry Vance noted after the January 27 incident, additional training was given at the mine regarding pre-shift examinations and how they should be conducted. Vance stated he "learned a lot." Tr. 762. With regard to battery cables and splices, weekly electrical examiner Steven Curry noted after the subject citation and orders were issued, things were done differently at the mine.

> We [charged] every cable on every battery. We put certification tags on every battery. [The] batteries are always ventilated and we make sure the water's maintained, the epoxy's maintained, and we never splice the cables.

Tr. 887; *see also* Tr. 959-960 (testimony of maintenance manage, Carl Estep). Curry stated if he found a splice on a scoop battery cable, he would "shut the scoop down" until the cable was replaced, even if the splice had been made by MPS personnel. Tr. 923. Maynard agreed, under the management team of B.K. Smith and Larry Blackburn, there had been improvements at the mine. He described Smith and Blackburn as "good," even "excellent," when it came to safety. Tr. 205. From all of this, I conclude the company's attitude toward compliance and safety warrants recognition and encouragement, and I will give much more weight than normal to the good faith criteria when I assess penalties in this case.

WEVA 2007-196
CIVIL PENALTY ASSESSMENTS

CITATION NO.	DATE	30 CFR §	PROPOSED ASSESSMENT
7249165	1/30/06	75.340(a)	$10,300

I have found the violation occurred, that it was serious, and that it was due to Coal River's moderate negligence. Given the other civil penalty criteria, especially the company's low history of prior violations and its greater than ordinary good faith, I conclude a civil penalty of $2,000 is appropriate.

ORDER NO.	DATE	30 CFR §	PROPOSED ASSESSMENT
7249166	1/30/06	75.360(b)(9)	$10,300

I have found the violation occurred, that it was serious and that it was due to Coal River's moderate negligence. Given the other civil penalty criteria, especially the company's low history of prior violations and its greater than ordinary good faith, I conclude a civil penalty of $2,000 is
appropriate.

ORDER NO.	DATE	30 CFR §	PROPOSED ASSESSMENT

7249167	1/30/06	75.512	$10,300

I have found the violation occurred, that it was serious, and that it was due to Coal River's high negligence. Given the other civil penalty criteria, especially the company's low history of prior violations and its greater than ordinary good faith, I conclude a civil penalty of $4,000 is appropriate.

ORDER NO.	**DATE**	**30 CFR §**	**PROPOSED ASSESSMENT**
7249168	1/30/06	75.503	$5,300

I have found the violation occurred, that it was serious, and that it was due to Coal River's high negligence. Given the other civil penalty criteria, especially the company's low history of prior violations and its greater than ordinary good faith, I conclude a civil penalty of $4,000 is appropriate.

ORDER

Within 40 days of the date of this decision Coal River **IS ORDERED** to pay civil penalties totaling $12,000 for the violations found above. Within the same 40 days the Secretary **IS ORDERED** to modify Citation No. 7249165 from a citation issued pursuant to section 104(d)(1) of the Act to a citation issued pursuant to section 104(a) of the Act and to modify the inspector's negligence from finding from "high" to "moderate." She also **IS ORDERED** to modify Order No. 7249166 from an order issued pursuant to section 104(d)(1) of the Act to a citation issued pursuant to section 104(a) of the Act and to modify the inspector's negligence

finding from "high" to "moderate." Finally, she **IS ORDERED** to modify Order No. 7249167 from an order issued pursuant to section 104(d)(1) of the Act to a citation issued pursuant to section 104(d)(1). Upon payment of the penalties and modification of the citation and orders, these proceedings **ARE DISMISSED**.[26]

David F. Barbour
Administrative Law Judge

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[26]These cases were tried despite my strong belief they should have been settled. Following the trial, I orally advised the parties I still believed a settlement was the best way to resolve the issues, and I outlined my view of a reasonable compromise. The parties considered my suggestions, but were unable to reach an agreement. I have heard many disputes under the Mine Act, but rarely have I been as impressed with the commitment to safety and to the well-being of miners as I was with that displayed by B.K. Smith and the Blackburns. I doubt if the trial enhanced their commitments, and I doubt if Coal River's miners, the company, the industry, the government, or the taxpayers gained much, if anything, from the extended proceedings. With more flexibility on the part of all involved and with more appropriate and timely intervention on my part, the matters should have been resolved prior to the day we convened or, at the latest, immediately after the hearing. Since these cases were initiated, the Commission has established an office of Settlement Counsel. I am convinced the counsel's mediation would have been helpful here, and, in the future, I will aggressively recommend parties seek the counsel's assistance in cases such as this.