FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9933
FAX: 202-434-9949

May 18, 2023

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. MARYLAND ENERGY RESOURCES, LLC, Respondent	CIVIL PENALTY PROCEEDING Docket No. YORK 2023-0024 A.C. No. 18-00780-567820 Mine: Casselman Mine

DECISION APPROVING SETTLEMENT

Before: Judge Moran

This case is before the Court upon a petition for assessment of a civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977. The Secretary's Conference Litigation Representative ("CLR"), who is not an attorney, has filed a Motion to Approve Settlement. The Respondent has agreed to the modifications for the two violations in this matter and to the enormous reductions in the civil penalty amounts. The originally assessed amount for the now-admitted violations was $5,296.00 and the proposed settlement total amount is $698.00, (six hundred ninety-eight dollars). Individually, the two violations were each assessed at $2,648.00, with the reductions for each reduced to $349.00 (three hundred forty-nine dollars). These represent penalty reductions of 87% for each violation. Both violations, originally a (d)(1) citation and a (d)(1) order, have been modified to 104(a) citations. The modifications and the settlement amounts are summarized in the following table:

Citation No.	Originally Proposed Assessment	Settlement Amount	Modification
YORK 2023-0024			
9250036	$2,648.00	$349.00	Modify Injury or Illness to Unlikely, Modify S&S Designation to No, Modify Type of Action to 104(a), Modify Type of Issuance to Citation **87% reduction in penalty**
9250037	$2,648.00	$349.00	Modify Injury or Illness to Unlikely, Modify S&S Designation to No, Modify Type of Action to 104(a) **87% reduction in penalty**

Total	**$5,296.00**	**$698.00**	**87% overall reduction in penalty**

Citation No. 9250036, issued as a (d)(1) order, alleged a now-admitted violation of 30 C.F.R. § 77.503. Titled "Electric conductors; capacity and insulation," it provides "[e]lectric conductors shall be sufficient in size and have adequate current carrying capacity and be of such construction that a rise in temperature resulting from normal operation will not damage the insulating materials."

The MSHA Inspector who issued this (d)(1) order, Louis Bernatowicz, stated in the Condition or Practice section of the citation:

> The #12 AWG Electric Conductors for the 14 - 120 Volt A.C. Outlets in the Cart Charging Building are *not sufficient in size and do not have adequate current carrying capacity and are not of such construction that a rise in temperature resulting from normal operation will not damage the insulating materials*. **4 of the 14 outlets show evidence of overheating with damaged and melted plastic in the receptacles. 5 of the last 10 monthly electrical exams of the Cart Charging Building show receptacles were replaced.**
> This violation is an unwarrantable failure to comply with a mandatory standard.

Petition for civil penalty at 9 (emphasis added).

To terminate the (d)(1) order:

> The 12 - 120 Volt AC outlets in the Cart Charging Building were rewired with #10 AWG copper wire. 30 Amp Ground Fault Circuit Interrupter Breakers labeled 1 through 12 were also installed for each individual 3 or 4 prong 30 amp receptacle numbered 1 through 12. The 10 Battery Chargers in the Cart Charging Building are individually identified with numbers 11 through 14, and either 3 or 4 prong 30 amp twist lock plugs were installed on all chargers except #11 which is out of service for output plug repair. A contractor was brought in to help rewire the building. The 2 240 Volt AC outlets labeled A and B that had extension cords running to 2 chargers will not be used due to the different plug types on the chargers. The 2 - 240 Volt AC extension cords running to the 2 - 120 volt AC battery chargers were removed. The Cart Charging Building was examined by an electrician and the exam recorded in the record book on the surface stating the charger circuits were upgraded to 30 amp from 20 amp.

Id. at 10.

In the Motion, "Respondent contends that injury from the cited condition would not be reasonably likely to occur, asserting that the circuits were properly grounded and therefore did not pose a shock hazard. The inspector noted that gravity evaluations were based on fire hazards resulting from the overheating of the inadequately sized conductors. However, the affected circuits were in an open, metal shed on the surface where little potential for fire propagation or entrapment existed." Motion at 4.

Citation No. 9250037, is related to the just described violation identified in Citation No. 9250036. Issued as a (d)(1) citation, Citation No. 9250037 alleged a now-admitted violation of 30 C.F.R §77.502. Titled "Electric equipment; examination, testing, and maintenance," it provides that "Electric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions. When a potentially dangerous condition is found on electric equipment, such equipment shall be removed from service until such condition is corrected. **A record of such examinations shall be kept**."

For this now-admitted violation, issued 9 minutes before Order No. 9250036, Inspector Bernatowicz, stated in the Condition or Practice section of the citation:

> The Battery Chargers in the Cart Charging Building and the Shop are not frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions. ***No*** **record of the examinations for the 14 battery chargers in the Cart Charging Building and the Shop are being kept. The chargers have been in use at the mine for at least 8 months.**
> Standard 77.502 was cited 1 time in two years at mine 1800780 (1 to the operator, 0 to a contractor). This violation is an unwarrantable failure to comply with a mandatory standard.

Petition for civil penalty at 5 (emphasis added).

To terminate the (d)(1) citation the following occurred:

> The Battery Chargers in the Cart Charging Building and the Shop have been individually identified with numbers 1 through 14. The Battery Chargers have been properly examined by a electrician with the results recorded in the book maintained on the surface. Battery Chargers 1 through 4 in the shop and charger number 11 in the Cart Charging Building have been removed from service with the plugs cut off and removed. Chargers 1 through 4 are in the shop and are 60 amp output chargers with the nameplate tag identifying 2 of the chargers as 15 amp max input and the other 2 chargers as 30 amp max input. The 3 other 60 amp output battery chargers at the mine in the Cart Charging Building have name plate tags identifying the max input as 30 amps. All of the nameplate tags on the 14 battery chargers at the mine state input voltage as 110 Volt AC. The 2 battery chargers in the Cart Charging Building that were plugged into 220/240 Volt AC Receptacles were removed from service, plugs changed and plugged into 110/120 Volt AC. The operator stated the 2 battery chargers in the Shop that were plugged into 220/240 Volt AC will be only be used on 110/120 Volt AC when they are placed back in service. All chargers now in service have new 30 amp rated plugs, and are plugged into 30 amp 110/120 Volt AC receptacles.

Id. at 7.

In the Motion "Respondent contends that injury from the underlying condition would not be reasonably likely to occur, asserting that the chargers were being examined weekly in

conjunction with the corresponding vehicles, and that the circuits were properly grounded and therefore did not pose a shock hazard. The inspector noted that gravity evaluations were based on fire hazards (associated with the underlying conditions referenced in Order No. 9250036 …) resulting from the overheating of the inadequately sized conductors. However, the affected circuits were in an open, metal shed on the surface where little potential for rapid fire propagation or entrapment existed." Motion at 3.

Analysis

Both of these, now-admitted, violations involve serious hazards and required significant remedial actions to cure the hazards found by the diligent MSHA Inspector, Louis Bernatowicz.

Battery chargers can present serious safety and health risks. These hazards which are associated with the use, handling, storage, or when the battery is charging. They include: overheating, fire or explosion, electrical shock from battery chargers, thermal burns and exposure to corrosive battery electrolytes. https://weeklysafety.com/blog/batteries

The charging of lead-acid batteries "can be hazardous. The two primary risks are from hydrogen gas formed when the battery is being charged and the sulfuric acid in the battery fluid, also known as the electrolyte. Hydrogen gas can lead to fires and explosions, and worker exposure to sulfuric acid can lead to chemical burns and other adverse health effects. Improper handling of batteries can also lead to shocks and electrocution, and battery charging can also result in the release of other harmful contaminants." https://www.ccohs.ca/oshanswers/safety_haz/battery-charging.html#:~:text=The%20two%20primary%20risks%20are,and%20other%20adverse%20health%20effects.

The two conceded violations in this docket arose from the same circumstance, as they were discovered in the mine's Cart Charging Building.

The 104 (d)(1) Order, No. 9250036, Insufficient outlet size and inadequate current capacity

As noted, this now-admitted violation was issued for the failure to have electric conductors of sufficient in size and adequate current carrying capacity and for their failing to be of such construction so that a rise in temperature resulting from normal operation will not damage the insulating materials. The inspector's condition or practice section of the Order details egregious violations. The inspector found that **29%** (twenty-nine percent) of the outlets showed evidence of overheating with damaged and melted plastic receptacles. And the operator cannot claim ignorance of this problem, not with 5 of the last 10 monthly electrical exams resulting in receptacles being replaced. This speaks loudly to the issue of unwarrantable failure, supporting the inspector's finding in that regard.

These uncontested findings are in accord with *Peabody Midwest,* 44 FMSHRC 515 (Aug. 2022), wherein the Commission reiterated its long-standing law "that unwarrantable failure means aggravated conduct constituting more than ordinary negligence. Emery Mining Corp., 9 FMSHRC 1997, 2001 (Dec. 1987). Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at the facts and circumstances of each case to see if any aggravating factors exist, such as the operator's knowledge of the existence of the violation, whether the violation was obvious, whether the violation posed a high degree of danger, the extent of the violative condition, the length of time that the violative condition has

existed, the operator's efforts in abating the violative condition, and whether the operator has been placed on notice that greater efforts are necessary for compliance. *See Manalapan Mining* Co., 35 FMSHRC 289, 293 (Feb. 2013); *IO Coal Co*., 31 FMSHRC 1346, 1350-57 (Dec. 2009)." *Id.* at 522

And though the foregoing is more than sufficient to support Inspector Bernatowicz's evaluation in all respects, the remedial actions to bring the Cart Charging Building into compliance make this abundantly clear:

> The 12 - 120 Volt AC outlets in the Cart Charging Building were rewired with #10 AWG copper wire. 30 Amp Ground Fault Circuit Interrupter Breakers labeled 1 through 12 were also installed for each individual 3 or 4 prong 30 amp receptacle numbered 1 through 12. The 10 Battery Chargers in the Cart Charging Building are individually identified with numbers 11 through 14, and either 3 or 4 prong 30 amp twist lock plugs were installed on all chargers except #11 which is out of service for output plug repair. A contractor was brought in to help rewire the building. The [two] 240 Volt AC outlets labeled A and B that had extension cords running to 2 chargers will not be used due to the different plug types on the chargers. The [two] - 240 Volt AC extension cords running to the 2 - 120 volt AC battery chargers were removed. The Cart Charging Building was examined by an electrician and the exam [was thereafter] recorded in the record book on the surface stating the charger circuits were upgraded to 30 amp from 20 amp.

Id. at 10.

In the Court's opinion, the Respondent's contention that injury from the cited condition would not be reasonably likely to occur, asserting that the circuits were properly grounded and therefore did not pose a shock hazard, is misguided and insufficient. The Court considers the excuse as an effort of misdirection from the many hazardous conditions found by the inspector. As described above, the hazards are not limited to fire. For that reason, the "metal shed" excuse does not address all the associated hazards. The Court finds the inspector's determination of negligence as 'high' to be well-supported – the Order, the facts reported in it, which were not challenged, establishes this.

The 104 (d)(1) Citation, No. 9250037, Failure to frequently examine, test, and properly maintain electric equipment *and to keep a record of such examinations*

For this other, now-admitted violation, connected with the Cart Charging Building, Inspector Bernatowicz found an equally egregious violation, having determined that there was ***no record*** **being kept of the examinations for the 14 battery chargers in the Cart Charging Building and the Shop. This was a long-standing violation, as the chargers had been in use at the mine for at least 8 months.** The operator challenges *none of these facts.* Instead, it advances largely the same arguments it made for the first violation – that shock hazards and fire and entrapment were not reasonably likely. The operator adds the claim that the chargers were being examined weekly. However, one would have to respond that those exams, if they actually were being conducted, were, to be polite, grossly inadequate.

Behind the excuse presented by the operator, is the suggestion that this was only a recordkeeping violation. The Court does not adopt this perspective – recordkeeping is no second-class requirement, impervious to significant and substantial and unwarrantable findings.

If viewed as lesser safety and health requirements, their importance is seriously diminished. Recordkeeping requirements keep mine operators on the up and up. And here, the operator did not keep such required records for eight (8) months. It is no excuse to claim, as the operator does here, that the chargers were being examined weekly. Anyone could *claim* that. It is for that reason that the standard requires *records* of exams. Further, where recordkeeping is involved, the Court believes that the measure of what constitutes a "significant and substantial" violation should be flexible, much as exposure to dust is not measured by a one-time exposure. Similarly, where a mine operator habitually fails to comply with a recordkeeping requirement, under the continued normal mining operations principle, sooner or later such failures will produce a reasonable likelihood of a reasonably serious injury. If that is not true, then it would seem that all recordkeeping violations would not be S&S, a result which would eviscerate their importance.

Based on the information available to the Court and given that it is precluded from reasonable inquiry, it is clear that the (d)(1) citation and order were well supported. Further, penalty reductions of this order run counter to Congress' express direction that penalties are to be of sufficient magnitude to make compliance the less expensive option over non-compliance. The $349.00 penalties in the motion do not meet with Congress' instruction.

Despite the foregoing, the Court is not permitted to make reasonable inquiry about settlement motions. With that restriction, the Court has considered the Secretary's Motion and approves it *solely* on the basis of the Commission's decisions in *The American Coal Co*., 40 FMSHRC 983 (Aug. 2018) and *Rockwell Mining, LLC*, 40 FMSHRC 994 (Aug. 2018) for the standard to be applied by Commission administrative law judges when reviewing such settlement motions under the Commission's interpretation of section 110(k) of the Mine Act. Per the Commission's decisions on the scope of a judge's review authority of settlements, the "information" presented in this settlement motion is sufficient for approval.

Should the Commission agree that the motion is inadequate for the reasons articulated by the Court, it has the authority to review, per 29 C.F.R. 2700.71.

The motion to approve settlement is **GRANTED**, and Respondent is hereby **ORDERED** to pay the Secretary of Labor the sum of $698.00 within 30 days of the date of this decision.[1] The violations are modified, as reflected in the table above, to Section 104(a) citations, with the gravity reduced to unlikely. As a consequence, the modifications erase the significant and substantial determinations.

William B. Moran

William B. Moran
Administrative Law Judge

[1] Penalties may be paid electronically at Pay.Gov, a service of the U.S. Department of the Treasury, at https://www.pay.gov/public/form/start/67564508. Alternatively, send payment (check or money order) to: U.S. Department of Treasury, Mine Safety and Health Administration, P.O. Box 790390, St. Louis, MO 63179-0390.
It is vital to include Docket and A.C. Numbers when remitting payments.
.

Distribution:

Chris A. Weaver, CLR, U.S. Dept. of Labor, MSHA, 604 Cheat Road, Morgantown, WV 26508 (weaver.chris@dol.gov)

R. Henry Moore, Esq., Fisher & Phillips, LLP, Six PPG Place, Suite 830, Pittsburgh, PA 15222 (hmoore@fisherphillips.com)