

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 18, 2010

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 ON REMAND

The Commission remands this matter for reconsideration of whether the violation of 30 C.F.R. §75.340(a), set forth in Citation No. 7249165, was the result of an unwarrantable failure on the part of Coal River Mining, LLC (“Coal River”). The Commission also orders reconsideration of Coal River’s level of negligence and of the penalty assessed for the violation. 32 FMSHRC 82 (February, 2010).

The Commission’s decision is pointed and detailed. The Commission explains the concept of unwarrantable failure and the relevant factors a judge must consider when determining the issue. 32 FMSHRC 88-89. The Commission instructs me to reconsider the

unwarrantable failure issue in light of the factors.

Following the remand, I ordered counsels to explore settlement of the matter. If they could not agree to a settlement, I ordered them to submit briefs addressing the unwarrantable issue. The settlement discussions proved futile, and the briefs were received.¹ In view of the Commission's instructions, I find that the violation was the result of Coal River's unwarrantable failure to comply with the standard.

In the underlying decision, I concluded that the violation of section 75.340(a) occurred because, as the Secretary charged, the scoop charger located at Spad No.1965 was neither provided with a fire suppression system nor housed in a proper area. It was the practice at the mine to meet the standard's requirements either by charging a scoop's batteries on the scoop or, if batteries are charged off of the scoop, by applying Pyro-Chem to the ribs of the area where the batteries were charged. In this particular instance, the scoop's batteries were charged on the floor, off of the scoop, and Pyro-Chem was not applied to the ribs. Therefore, I found that the company violated section 75.340(a). 31 FMSHRC at 206-206.

Although I concluded that the company intended to apply Pyro Chem to the ribs, the procedure was not carried out, despite the instructions of the Superintendent. 37 FMSRHC at 207. The Secretary points out that it was the practice at the mine, if batteries were charged on the ground, to apply Pyro-Chem to the ribs. Mine managers knew this. They also knew Pyro-Chem had not been applied to the ribs because the Pyro-Chem was stored on the surface and, because it was January, the Pyro-Chem was frozen. Management did not take any action to provide other Pyro-Chem or to make sure batteries were not charged on the ground. In other words, management knew of the violation but did not prevent it.

In addition, the record establishes that the violation existed long enough that it should have been reported by the pre-shift examiners, and it was not. Although the application of rock dust to the walls made the lack of Pyro-Chem difficult to detect (*see* 31 FMSHRC at 208), a proper examination would have revealed that it was missing.

Moreover, given the fact that the lack of fire proofing on the walls of the charging station could have resulted in the fire endangering eight or nine miners (31 FMSHRC 206-207), mine management was under a heightened standard of care to prevent such a hazard. Management did not meet this duty.

¹ Counsel for Coal River also filed an unsolicited Supplemental Decision. Counsel for the Secretary moved to strike the Supplemental Decision on the grounds that it was neither requested nor was permission given to file it. Counsel for the Secretary is right on both counts, and the motion **IS GRANTED**. In reaching this Decision on Remand the Supplemental Decision has not been considered.

Given these factors and given the Commission's explicit and implicit instructions, I conclude the violation of section 75.340(a) set forth in Citation No. 7249165 was the result of the company's unwarrantable failure to comply with the standard. I further find the violation was the result of the company's high negligence. Managers knew the walls were not coated with Pyro-Chem and they did not ensure the defect was correct even in view of the serious hazard posed by the violation. In view of findings I made with regard to other applicable civil penalty criteria, findings that were not disturbed on review, I conclude that a civil penalty of \$4,000.00 is appropriate and Coal River **IS ORDERED** to pay this amount for the violation.²

Upon compliance with the Order set forth at 31 FMSHRC 2117-218 as modified in n. 2, infra, these proceedings **ARE DISMISSED**.

David F. Barbour
Administrative Law Judge

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² Since the only parts of the underlying decision vacated on review were the unwarrantable failure and negligence findings made in connection with Citation No. 7249165 and the civil penalty assessed for the violation (27 FMSRHC at 99), the Order entered in the underlying decision is modified to increase the total civil penalty due for all of the violations to \$14,000.00 and to delete the instruction to the Secretary to modify the inspector's negligence finding on Citation No. 7249165 from "high" to "moderate."