FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
SUITE 9500
WASHINGTON, DC 20001

February 2, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket Nos. WEVA 2006-125-R
ADMINISTRATION (MSHA)	:	WEVA 2006-126-R
v.	:	WEVA 2006-127-R
	:	WEVA 2006-128-R
COAL RIVER MINING, LLC	:	WEVA 2007-196

BEFORE: Jordan, Chairman; Duffy, Young, and Cohen, Commissioners

DECISION

BY THE COMMISSION:

These consolidated contest and civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act" or "Act"). Administrative Law Judge David Barbour upheld in whole or part both a citation charging Coal River Mining, LLC ("Coal River") with a violation of 30 C.F.R. § 75.340(a)[1] and three orders, issued by the Department of Labor's Mine Safety and Health Administration ("MSHA"). 31 FMSHRC 192 (Jan. 2009) (ALJ). The Commission subsequently granted the Secretary of Labor's petition for discretionary review, which challenged (1) the judge's determination that the section 75.340(a) violation was not attributable to Coal River's unwarrantable failure to comply, and (2) the penalties the judge assessed for that citation and the three orders. For the reasons that follow, we vacate and remand the judge's finding regarding the unwarrantability of the section

---

[1] Section 75.340(a) provides in pertinent part:

> (a) Underground transformer stations, battery charging stations, substations, rectifiers, and water pumps shall be housed in noncombustible structures or areas or be equipped with a fire suppression system meeting the requirements of § 75.1107-3 through §75.1107-16.

30 C.F.R. § 75.340(a).

75.340(a) violation and the penalty he assessed for that violation, and affirm the penalties he assessed for the three orders.

I.

Factual and Procedural Background

This case arose out of MSHA's investigation of an incident at Coal River's Tiny Creek No. 2 Mine, an underground coal mine in Lincoln County, West Virginia. 31 FMSHRC at 193-94. During the evening shift on January 27, 2006, batteries being charged on the ground at a battery charging station overheated. *Id*. at 194; Gov't Ex. 9, at 1 (MSHA Accident Investigation Report).

The response to the batteries' overheating was influenced by the recent multi-fatality mine explosion at Sago and fire at Aracoma, which created a sense of urgency as the situation at the Tiny Creek Mine unfolded. Tr. 591, 771-773. First, the overheating triggered the mine's alarm system.[2] That in turn prompted Coal River to act quickly to evacuate all 30 or so miners underground, cut power to the section, and contact MSHA and rescue teams. 31 FMSHRC at 195; Tr. 313, 771-72, 775; Gov't Ex. 8 (MSHA Preliminary Accident Report). There were no injuries. 31 FMSHRC at 195. As noted by MSHA's lead accident investigator, Fred Willis, removing power from the charger, as soon as the CO monitor sounded, allowed the charger to cool and "prevent[ed] a major fire." Tr. 313-14; *see also* Tr. 250.

MSHA personnel traveled to the mine that night and issued a section 103(k) order. 31 FMSHRC at 195-96.[3] While that order was in effect, MSHA interviewed miners and went

---

[2] The release of high levels of hydrogen from batteries while they are charging or when they overheat can trigger carbon monoxide ("CO") sensor systems. 31 FMSHRC at 196 n.7. The Sago and Aracoma accidents had prompted MSHA to order operators to adjust the settings on such systems to detect and alert operators to the presence of lower levels of gases. Tr. 28.

[3] Section 103(k) of the Mine Act provides:

> In the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate State representatives, when feasible,

underground, where it inspected the battery charging station at Spad No. 1965. *Id*. at 198. The investigation led to the issuance of three citations and three orders. Gov't Ex. 1-6. Coal River contested one of the citations and the three orders. All four of the contested citations and orders were designated by MSHA as significant and substantial ("S&S") and attributable to Coal River's unwarrantable failure.[4] 31 FMSHRC at 193.

A. Citation No. 7249165

At the time of the overheating incident, Coal River was using two scoops on the section, each with its own battery charging station: (1) a Fairchild 35 C model, that the operator primarily depended upon; and (2) a much older model, referred to as a 488. Tr. 690, 697, 810-11; Gov't Ex. 31, at 29. The scoops, which were used for such tasks as carrying supplies and cleaning the section, were powered by rechargeable batteries. Tr. 138, 697.

Both scoops had two sets of dedicated batteries, though the second set of batteries for the 488 was rarely used. Tr. 810-11.[5] A scoop with only one set of batteries could only be charged at the battery charging station while its batteries remained on it, in which case the scoop would be idled. Tr. 641-42. With the availability of the second set of batteries, a scoop's batteries also could be removed using the scoop's hydraulic jack and placed on the ground for charging at the station. Tr. 174. In the latter instance, the scoop could then use the alternate set of batteries – which would have been previously charged on the ground while the scoop was being used elsewhere – and go back into service. Tr. 301, 633, 637, 757, 914.

The two battery charging stations would be set up and generally moved as mining progressed, and as frequently as was called for by conditions in the mine. Tr. 708; Gov. Ex. 31,

---

> of any plan to recover any person in such mine or to recover the coal or other mine or return affected areas of such mine to normal.

30 U.S.C. § 813(k).

[4] The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." The unwarrantable failure terminology is taken from the same section, and establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards."

[5] The Fairchild 35 C scoop would generally run on a fully charged set of batteries for six to eight hours, though the time period could be as little as four hours and as great as 12 hours, depending on how hard the scoop was being used and the condition of the batteries. Tr. 709. Fully charging the scoop's batteries at a battery charging station would generally take eight to 12 hours and then it would take another four to eight hours more for the batteries to cool before they could be safely used. Tr. 258-59, 534-35, 558, 580-81.

at 23. In January 2006, the two battery charging stations had been set up in a location where, within a few days, deteriorating roof conditions prompted Superintendent B.K. Smith to direct third shift foreman Mark Blackburn to move the stations to an area with better roof. 31 FMSHRC at 196-97; Tr. 681, 682-83, 784-86. In testifying at the hearing in this matter, Blackburn described in detail the steps that would usually be taken to complete the move to, and setup at, a new location for a battery charging station, some of which Smith echoed in his testimony. 31 FMSHRC at 197.

At the time of the events relevant to this proceeding, Coal River's battery charging stations were neither equipped with fire suppression systems nor housed in noncombustible structures. Coal River therefore would apply Pyro-Chem to the ribs and roof around a battery charging station as a fire retardant that would provide the fireproofing required by section 75.340(a) for charging batteries on the ground at such stations. *Id*. at 198; Tr. 708. Blackburn testified that the normal practice would be to spray a new battery charging station area with Pyro-Chem before transporting the charger, batteries, and ancillary items to the new location, so as to avoid getting the chemical on that equipment. Tr. 703-04, 718.

In moving the battery charging station to Spad No. 1965, however, Coal River did not spray the new area first, because the deteriorating roof made the removal of the battery charger, batteries, and other items to the new location a priority. Tr. 691, 703-04, 718-19. Blackburn moved the equipment and other items to Spad No. 1965 to start the process of setting up the new station, and assigned Section Foreman Ronnie Bias and his crew the task of completing the setup of the station. 31 FMSHRC at 197; Tr. 691, 710, 719-20.[6] Blackburn stated that he specifically instructed Bias to spray the area at Spad No. 1965 with Pyro-Chem. Tr. 691, 719-20.

Coal River stored Pyro-Chem that it was not planning on immediately using on the surface, bringing it inside a couple of days prior to use so that it could thaw in the event it was frozen. Tr. 693. In this instance the chemical had frozen, so it could not be immediately applied by Bias' crew at the time. Tr. 691-93, 797. As a result, it was left near the battery station to thaw. Tr. 638.

The next morning, at the end of the shift, both Blackburn and Smith learned from Bias that it had been impossible to apply the Pyro-Chem. Tr. 707, 797. According to Blackburn, Smith responded "[O]kay we'll get someone to take care of it." 31 FMSHRC at 197; Tr. 707. Smith testified that he told a foreman that the Pyro-Chem had not been applied and expected that the foreman would pass the information along. 31 FMSHRC at 197; Tr. 831-32. In addition, according to Blackburn, Bias informed incoming day shift Section Foreman Keith Pack that the

[6] Because of an error in the transcript, the judge misstated Bias's name as "Byans." Additionally, the judge said that Bias was the section foreman on the incoming shift, 31 FMSHRC at 197, when the record indicates that Bias was section foreman on the third shift, the same shift as the shift when Blackburn moved the batter charger. Tr. 690-91, 719.

Pyro-Chem had not been applied at the new battery charging station, and that, consequently, batteries should not be charged on the ground there, only on the scoop. Tr. 721-22.

It is undisputed that Coal River had not sprayed Pyro-Chem at Spad No. 1965 by the evening of January 27. 31 FMSHRC at 200. Batteries were being charged on the ground there that night, and they apparently released hydrogen gas which triggered the mine's CO sensors. *Id*. at 194-95. This led to the shut-off of power, mine evacuation, resulting MSHA investigation, and issuance of Citation No. 7249165. *Id*. at 195, 200; Gov't Ex. 1, 8, 9. Because of the lack of Pyro-Chem at the battery charging station at Spad No. 1965, Coal River was charged with an S&S and unwarrantable violation of section 75.340(a). 31 FMSHRC at 193, 200; Gov't Ex. 1. MSHA later proposed a civil penalty of $10,300. 31 FMSHRC at 216; Gov't Ex. 7.

B. Order Nos. 7249166, 7249167, and 7249168

Order No. 7249166 alleged that Coal River's failure to detect the missing Pyro-Chem at Spad No. 1965 during preshift examinations violated 30 C.F.R. § 75.360(b)(9). Gov't Ex. 2. That standard requires a preshift examiner to "examine for hazardous conditions . . . at . . . [u]nderground electrical installations."

In Order No. 7249167, MSHA asserted that the lack of fireproofing and the condition of the batteries at Spad No. 1965 established a violation of 30 C.F.R. § 75.512. Gov't Ex. 3. That regulation requires that all electric equipment be "frequently examined, tested, and properly maintained . . . to assure safe operating conditions."

Order No. 7249168 alleged that the condition of the batteries that were being charged at the station violated 30 C.F.R. § 75.503. Gov't Ex. 4. Under that standard, an operator is obligated to keep electric face equipment in "permissible condition."

MSHA proposed civil penalties of $10,300 each for Order Nos. 7249166 and 7249167. 31 FMSHRC at 193; Gov't Ex. 7. The agency also eventually requested an identical penalty for Order No. 7249168.[7]

---

[7] MSHA initially proposed a penalty of only $5,300 for Order No. 7249168, because the order indicated that only one miner was endangered by the violation alleged therein, in contrast to the indications in the other contested citation and orders that eight miners were endangered by those alleged violations. 31 FMSHRC at 193 & n.2; Gov't Ex. 7. At the hearing, the Secretary stated that this was a mistake, that eight miners were also endangered by the violation alleged in Order No. 7249168, and the judge granted the Secretary's motion to modify the order. 31 FMSHRC at 193 n.2; Tr. 282, 414. In her post-hearing brief, the Secretary requested that the judge also assess a penalty of $10,300 for that order. S. Post-Hearing Br. at 44.

C. Judge's Decision

Because Pyro-Chem had not been applied at Spad No. 1965, the judge affirmed the citation charging a violation of section 75.340(a). 31 FMSHRC at 206-07. He also concluded that, given the condition of the battery cables, there was a likelihood of fire and that the danger from such a fire would be even greater because of the failure to provide fire suppression measures. Thus, he concluded that the violation was S&S. *Id.* The judge further determined that because Coal River intended to apply Pyro-Chem at Spad No. 1965 but was thwarted by the chemical being frozen, the operator's failure to apply it did not rise to the level of unwarrantable failure. *Id.* at 207-08. The judge credited the testimony of the mine's superintendent as to the company's commitment to safety, found that there had been no showing that the failure to provide required fire protection was a habitual practice at the mine, and concluded that the lack of Pyro-Chem was not obvious because of the presence of rock dust on the ribs at Spad No. 1965. *Id.*

With regard to the three orders, the judge similarly affirmed Order No. 7249166, agreeing that the violation of the preshift examination requirement was S&S, but holding that it was not attributable to Coal River's unwarrantable failure. 31 FMSHRC at 208-10, 217-18. The judge also affirmed Order No. 7249167, holding that Coal River's weekly electrical examination of the batteries at Spad No. 1965 violated section 75.512 and that the violation was both S&S and unwarrantable. *Id.* at 210-13, 218.[8] As for Order No. 7249168, the permissibility violation, the judge affirmed that Coal River violated section 75.503 and agreed that the violation was S&S and unwarrantable. *Id.* at 213-15.[9] For the two violations that the judge found to be unwarrantable, he assessed penalties of $4,000 each. *Id.* at 217. For the two that he concluded were not unwarrantable, he assessed the penalties at $2,000 each. *Id.* at 216.

---

[8] The judge found the weekly examination of the electrical equipment to be in violation of the standard and S&S because he found that water levels in the battery cells were low or non-existent at the time of the last weekly examination, which caused the batteries to overheat on January 27, and because of the presence of hazardous spliced battery cables. The judge found unwarrantable failure because the weekly examiners did not have a practice of always checking the water in batteries of electrically powered equipment, and because Coal River did not know that the use of spliced cables was prohibited. 31 FMSHRC at 211-12.

[9] The judge found that electrical equipment was not kept in permissible condition because two battery cables were spliced, because the cables used on the scoop's batteries were not approved by MSHA, and because of the lack of proper clamps securing the cables. The spliced cables and lack of proper clamps caused the violation to be S&S. The judge found the violation to be an unwarrantable failure because Coal River relied on its electrical equipment vendor to supply and service the batteries without checking on the compliance-readiness of the equipment it was provided, and thus abrogated its responsibilities. 31 FMSHRC at 213-15.

II.

Disposition

A. Unwarrantable Failure

The Secretary requests that the Commission reverse the judge's determination that the violation of section 75.340(a) was not due to Coal River's unwarrantable failure to comply. PDR at 21-22. The Secretary contends that the judge erred in his unwarrantable failure analysis because he focused on the conduct of the mine superintendent, when in fact three lower level supervisors were also involved in the violation, and that the judge failed to hold the four supervisors to the higher level of care the Commission requires of supervisory personnel. PDR at 12, 14. The Secretary further argues that the non-obvious nature of the violation is irrelevant, given that the supervisors knew that Pyro-Chem had not been applied and thus were aware that Coal River was in violation of section 75.340(a). *Id*. at 12-14. The Secretary also maintains that the judge erred in his analysis by failing to take the danger of the violation into account and that the violation existed from between several days to a couple of weeks. *Id*. at 14-16.

Coal River responds that the judge's conclusion that the violation was not attributable to unwarrantable failure is supported by substantial evidence. CR Br. at 1. The operator maintains that the supervisors were not aware of the violation, because, while they knew that the Pyro-Chem had not been applied, they did not know that batteries were being charged on the ground at the station. *Id*. at 4-5, 9-10. Coal River also points to the lack of a history of this type of violation by Coal River as supporting the judge's determination that the Secretary had failed to establish reckless conduct on the part of the operator in this instance. *Id*. at 6-7.

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

The Commission has recognized that whether conduct is "aggravated" in the context of unwarrantable failure is determined by considering the facts and circumstances of each case to determine if any aggravating or mitigating circumstances exist. Aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger, and the operator's knowledge of the existence of the violation. *See*

Consolidation Coal Co., 22 FMSHRC 340, 353 (Mar. 2000) ("*Consol*"); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 43 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc*., 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc*., 10 FMSHRC 705, 709 (June 1988).

All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353. The Commission has made clear that it is necessary for a judge to consider all relevant factors. *Windsor Coal Co.*, 21 FMSHRC 997, 1001 (Sept. 1999); *San Juan Coal Co.*, 29 FMSHRC 125, 129-31 (Mar. 2007) (remanding unwarrantable determination for further analysis and findings when judge failed to analyze all factors). While an administrative law judge may determine, in his discretion, that some factors are not relevant, or may determine that some factors are much less important than other factors under the circumstances, all of the factors must be taken into consideration and at least noted by the judge. *IO Coal Co.*, 31 FMSHRC 1346, 1351 (Dec. 2009).[10]

In this case, there is record evidence to support the judge's findings on some of the unwarrantable failure factors, such as his finding that "there was no showing the failure to provide fire protection was a habitual practice at the mine." 31 FMSHRC at 207 (citing Tr. 696, 802). Other factors are irrelevant in this instance, such as the extent of the violative condition, and the operator's previous abatement efforts after having been placed on notice of the condition, as there is no evidence of such notice. However, with regard to four of the factors, the judge either failed to consider all of the evidence, so that his findings with respect to these

[10] Commission Procedural Rule 69(a) requires that a Commission judge's decision "shall include all findings of fact and conclusions of law, and the reasons or bases for them, on all the material issues of fact, law or discretion presented by the record." 29 C.F.R. § 2700.69(a). As the D.C. Circuit has emphasized, "[p]erhaps the most essential purpose served by the requirement of an articulated decision is the facilitation of judicial review." *Harborlite Corp. v. ICC*, 613 F.2d 1088, 1092 (D.C. Cir. 1979). Without findings of fact and some justification for the conclusions reached by a judge, the Commission cannot perform its review function effectively. *Anaconda Co.*, 3 FMSHRC 299, 299-300 (Feb. 1981). Thus, the Commission has held that a judge must analyze and weigh all probative record evidence, make appropriate findings, and explain the reasons for his or her decision. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218, 1222 (June 1994).

factors lack the required support in the record,[11] or he neglected to take the factor into account at all in his analysis.

1. Knowledge of the Violation

Coal River was charged with violating section 75.340(a) because batteries were charged on the ground at a battery charging station where none of the required fireproofing measures had been taken.[12] The judge in his unwarrantable failure analysis did not address the extent of Coal River's knowledge of the violation.

As the Secretary points out, it is undisputed that supervisory personnel at Coal River were aware that the area lacked the required fireproofing. PDR at 12. As was discussed, four different supervisors at Coal River were aware that Pyro-Chem had not been applied at Spad No. 1965 at the point in time at which the operator intended to apply it: Blackburn, Bias, Smith, and Pack. Because supervisors are held to a higher standard of care, the Commission, in determining unwarrantability, takes into account the extent of involvement of supervisory personnel in a violation. *See Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001) (citing *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998)). Here, the judge should have considered the

---

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

[12] Citation No. 7249165 states:

> The unattended 35 C scoop charger serial Number 0577MC2406 located at spad No. 1965 was not provided with a fire suppression system or enclosed in a noncombustible structure. *Batteries were being charged* on the bottom *off the scoop* and were not provided with fire suppression systems required by 75.1107-3 through 75.1107-16. Management is aware of this requirement in that previous station area was fire proofed. Through interviews this charger station has existed for 2 to 3 weeks. This violation is an unwarrantable failure to comply with a mandatory standard.

Gov't Ex. 1 (emphases added). Below, the Secretary suggested that Coal River could have avoided a violation by removing the batteries from the charging station area until the area had been fireproofed as required by section 75.340(a), or indicated with a sign that batteries were not to be charged on the ground at that location. S. Post-Hearing Br. at 16-18.

involvement of all four supervisors in the section 75.340(a) violation when determining whether the violation was unwarrantable.

In addition, the evidence is that the frozen bags of Pyro-Chem were left nearby the charging station to thaw. Tr. 638. Those bags were a visible reminder to those who knew that the Pyro-Chem had not been applied that the battery charging station had been set up without the required fireproofing.

While conceding that the supervisors were aware that Pyro-Chem had not been applied as intended at the battery charging station, Coal River argues that there is no evidence that those supervisors were informed or otherwise knew that batteries were being charged on the ground at the charging station. CR Br. at 4-6. Coal River is correct as far as the evidence goes. There is no evidence that witnesses observed batteries being charged on the ground there following the move of the charging station. Tr. 346-47, 741, 744. Blackburn testified that it was company practice not to charge batteries on the ground at a station until the station had been sprayed with Pyro-Chem. Tr. 701.[13]

Even if it is true that supervisors did not have direct knowledge of batteries being charged on the ground, and regardless of Coal River's overall commitment to safety, in this instance it is clear that miners used the station at Spad No. 1965 to charge batteries on the ground, at least on January 27. Moreover, there is much in the record to establish that Coal River relied on the Fairchild 35 C scoop to such an extent that it would have been difficult for the operator *not* to charge scoop batteries on the ground for any extended length of time.

At the hearing, Blackburn testified that there always should be a set of Fairchild 35 C scoop batteries on charge, which would tend to indicate continual or near-continual use of the station. Tr. 709. This is consistent with the earlier deposition testimony of Pack, who stated that it was not unusual for a scoop operator to tell him that he needed to switch out dying batteries for charged ones, and in such instances the dying batteries would be left at the station to recharge while the operator returned with the scoop to continue working. Gov't Ex. 30, at 29-31. In addition, evening shift section foreman Mickey Webb testified at his deposition that, while the only batteries he saw being charged at Spad No. 1965 were on a scoop, it would have been

---

[13] However, fireboss Jerry Vance, Jr., who performed two pre-shift examinations each day in the area of the violation in January, 2006, did not specifically recall seeing batteries being charged either on the scoop or on the ground, or whether there were batteries there which were not actually connected to the charger. Tr. 743-44. Vance also said that at the time of the violation, he was not aware that the law required a fire suppressant such as Pyro-Chem in addition to rock dust. Tr. 754. In other words, the evidence of record does not directly establish either instances of charging batteries on the ground at Spad No. 1965 between the time of the battery charger move and the January 27 incident, or its absence.

unusual for Coal River, in light of its extensive use of the Fairchild 35 C scoop, to operate for even a couple of days without charging scoop batteries on the ground. Gov't Ex. 32, at 21-23.[14]

In determining whether the section 75.340(a) violation was unwarrantable, the judge should have taken the foregoing into account, particularly since the Secretary pointed out below that the operator's practice was to charge batteries on the ground to keep the Fairchild 35 C scoop in service.[15] S. Post-Hearing Br. at 16. The factor of an operator's knowledge may be established, and a finding of unwarrantable failure supported, where an operator reasonably should have known of a violative condition. *See Emery,* 9 FMSHRC at 2002-04; *Drummond Co., Inc.,* 13 FMSHRC 1362, 1367-68 (Sept. 1991) (quoting *Eastern Assoc. Coal Corp.*, 13 FMSHRC 178, 187 (Feb. 1991) ("*Emery* makes clear that unwarrantable failure may stem from what an operator 'had reason to know' or 'should have known'")). On remand, the judge must consider whether, under the circumstances, the Coal River supervisors reasonably should have known that batteries would be charged on the ground at Spad No. 1965 once the battery charging station was set up there.

2. Duration

The Commission has emphasized that duration of the violative condition is a necessary element of the unwarrantable failure analysis. *See Windsor Coal*, 21 FMSHRC at 1001-04 (remanding for consideration of duration evidence of cited conditions). Here, the issue of duration of the violation is a particularly critical one, because the longer the battery station lacked the required fireproofing, the more likely it would be that miners would charge batteries on the ground there, given that the second set of batteries was there and there were no signs warning miners not to charge batteries on the ground.

In deciding the section 75.340(a) issues, the judge did not directly address the amount of time that elapsed between the setup of the battery charging station at Spad No. 1965 and when the batteries overheated. *See* 31 FMSHRC at 207-08. He did, however, address the duration issue elsewhere in his decision, in the context of affirming in part the order charging that Coal River violated the pre-shift examination requirements of section 75.360(b)(9). *See id.* at 208-09. Similar to the citation for the section 75.340(a) violation, this order stated that, according to interviews with miners and Coal River management, the battery charging station had been at

---

[14] Four deposition transcripts, including those of Pack and Webb, were made part of the hearing record. Tr. 407-12.

[15] It is not unreasonable to expect that if Coal River was refraining from charging batteries on the ground, there would be evidence of the operator having to idle the Fairchild 35 C scoop, which would eventually lead to a halt in production. There is no record evidence of such a stoppage. On remand, the judge may consider the inference that the lack of evidence of the idling of the scoop indicates that its batteries were being charged on the ground in violation of section 75.340(a), prior to the incident on January 27.

Spad No. 1965 for two to three weeks. Gov't Ex. 2, at 1. The judge concluded that it was impossible to establish with certainty when the station was moved to Spad No. 1965. 31 FMSHRC at 209. He did rule, however, that the Secretary had failed to establish that the move had occurred as early as two to three weeks prior to the overheating incident. *Id*. at 208.

On review, the Secretary argues that there is undisputed evidence that the lack of fire suppression existed for at least several days, that such a duration supports a finding of unwarrantable failure, and that the judge erred in not considering the duration of the violation in his analysis. *Id*. at 15-16.[16] Coal River responds that the judge simply found that the Secretary did not carry her burden on the issue of the duration of the violation. CR Br. at 10.

We appreciate that the state of the record in this case does not permit the judge to make a conclusive finding regarding exactly how much time elapsed between the setup of the battery charging station and the overhearing incident. Nevertheless, the duration of the violation remains a relevant consideration for purposes of determining whether the violation was unwarrantable. Even imperfect evidence of duration in the record should be taken into account by the judge.

The judge rejected MSHA's position that two or more weeks had elapsed, and the Secretary on review does not challenge that rejection, but there is other evidence in the record regarding a shorter duration that nevertheless may still be considered significant under the circumstances. For instance, Blackburn testified that the overheating incident occurred a couple of days after the setup of the battery charging station. Tr. 708. Smith was less certain, stating it could have been from a few days to a week. Tr. 794. Vance said the charging station could have been at Spad No. 1965 for a week to two weeks. Tr. 738-39. On remand, the judge, after weighing the varying accounts regarding the length of time Spad No. 1965 remained without fireproofing, should consider the duration factor in determining whether Coal River's failure to fireproof the area was unwarrantable under the circumstances. Depending on the judge's findings on the other factors, the violation of section 75.340(a) can be found to have been unwarrantable even if a relatively short period of time passed between the setup of the battery station and the overheating incident. *Cf. Midwest Material Co.*, 19 FMSHRC at 34-36 (finding violation to be attributable to operator's unwarrantable failure where the duration was only a period of a few minutes, because it posed a high degree of danger, involved a foreman, and the violative condition may have continued but for occurrence of accident); *Lafarge Constr. Materials*, 20 FMSHRC 1140, 1145-48 (Oct. 1998) (same).

---

[16] Below, MSHA Inspector Willis testified that the agency would have designated the violation as high negligence even if the condition had existed for only two to three days. Tr. 315-16.

3. Obviousness

There is little dispute that the lack of fireproofing at Spad No. 1965 was not obvious. Given that Coal River routinely sprayed rock dust on top of Pyro-Chem, and the relative difficulty of distinguishing color between the two substances in the underground environment, it would have been difficult for anyone to detect that Pyro-Chem had not been applied at Spad No. 1965. *See* 31 FMSHRC at 209-10. The record is replete with evidence to support the judge's finding to that effect. Tr. 603-04, 633-34, 695, 742, 802.

It appears from his analysis that the judge viewed this lack of obviousness to be a mitigating factor in this instance. However, because the operator knew that the absence of Pyro-Chem would be obscured by the presence of rock dust, we do not necessarily agree that the operator's degree of fault is mitigated in this instance by the lack of obviousness of that absence. The likelihood of batteries being eventually charged on the ground at the station was actually *increased* because of the coating of rock dust. The evidence is that if any miner who did not know that Pyro-Chem had not been applied there looked at the Spad No. 1965 battery station, he could not tell that the required fireproofing was lacking because of the rock dust on the roof and ribs. Tr. 817. Consequently, a scoop operator would have had no way of knowing from the appearance of the area that batteries should not have been charged on the ground there.

On remand, the judge should consider in his unwarrantable failure analysis that the lack of obviousness could have tended to *increase* the likelihood of a violation in this instance, i.e., batteries being charged on the ground in an area that lacked required fireproofing. *See San Juan*, 29 FMSHRC at 129 (facts and circumstances of case determine whether an unwarrantable failure factor aggravates or mitigates an operator's negligence).

4. The Degree of Danger

The Commission has relied upon the high degree of danger posed by a violation to support an unwarrantable failure finding. *See BethEnergy*, 14 FMSHRC at 1243-44 (finding unwarrantable failure where unsaddled beams "presented a danger" to miners entering the area); *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992) (finding violation to be aggravated and unwarrantable based upon "common knowledge that power lines are hazardous, and . . . that precautions are required when working near power lines with heavy equipment"); *Quinland Coals*, 10 FMSHRC at 709 (finding unwarrantable failure where roof conditions were "highly dangerous").

In concluding that the violation was not attributable to Coal River's unwarrantable failure, the judge did not consider the factor of the danger posed in this instance. 31 FMSHRC at 207-08. The judge failed to do so even though he concluded that the violation of section 75.340(a) was S&S. *Id.* at 206-07. In reaching that conclusion (which Coal River did not appeal), the judge found Inspector Maynard's testimony on how the process of charging batteries can result in fires, hydrogen buildup, and explosions to be "persuasive." *Id.* at 206 (citing Tr. 181). The judge also acknowledged that the requirements of section 75.340(a) are designed

to greatly minimize such hazards, and that the lack of fireproofing at Spad No. 1965 increased the hazard of the ribs catching fire and the fire spreading, which would be extremely dangerous in the underground mine environment. *Id*. at 206-07.

While these findings are not necessarily dispositive of the unwarrantability of the violation of section 75.340(a), they are highly relevant to the degree of danger posed by the violation in this instance. On remand, in determining unwarrantability, the judge must consider the dangers posed by Coal River's failure to fireproof the battery station at Spad No. 1965.

In summary, we remand this case to the judge for a determination of whether, considering all of the facts and circumstances, the violation of section 75.340(a) that occurred when batteries were charged on the ground at Spad No. 1965 was attributable to Coal River's conduct that rose to the level of unwarrantable failure, i.e. conduct that constituted "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." This means that the judge must consider Coal River's conduct throughout the period at issue, beginning with the failure to apply the Pyro-Chem and ending with the charging of batteries on the ground at Spad No. 1965 that resulted in the overheating incident. In addition, should the judge on remand reach a different conclusion as to whether the violation was unwarrantable, he should reassess the associated penalty in light of his revised findings.[17]

B. The Judge's Penalty Assessments as to the Orders

The Secretary requests that the Commission vacate the penalties that the judge assessed for the orders and remand the case to the judge with instructions for assessing appropriate penalties for the violations. PDR at 21-22. The Secretary contends that the judge did not adequately explain in assessing the penalties why he diverged to the extent that he did from the Secretary's proposed penalties. *Id*. at 19-20. The Secretary also argues that the judge's finding that Coal River demonstrated "more than good faith" in abating the violations is neither supported by substantial evidence nor permissible under the six statutory factors he was limited to considering in assessing the penalties. *Id*. at 20-21. Coal River responds that it was well within the judge's discretion to assess the penalty amounts he did, given that his findings on the operator's good faith and low history of violations are supported by record evidence. CR Br. at 10-14.

Commission judges are accorded broad discretion in assessing civil penalties under the Mine Act. *Cantera Green*, 22 FMSHRC 616, 620 (May 2000). In determining the amount of the penalty, neither the judge nor the Commission shall be bound by a penalty recommended by the Secretary. *Sellersburg Stone Co.*, 5 FMSHRC 287, 291 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). However, such discretion is not unbounded and must reflect proper consideration of the penalty criteria set forth in section 110(i) and the deterrent purposes of the

---

[17] For the reasons below, we otherwise reject the Secretary's challenge to the penalty that the judge assessed with respect to the section 75.340(a) citation.

Act.[18] *Cantera Green*, 22 FMSHRC at 620. In reviewing a judge's penalty assessment, the Commission must determine whether the judge's findings with regard to the penalty criteria are supported by substantial evidence. Assessments "lacking record support, infected by plain error, or otherwise constituting an abuse of discretion are not immune from reversal." *U.S. Steel Corp.*, 6 FMSHRC 1423, 1432 (June 1984). Additionally, the Commission in *Sellersburg*, 5 FMSHRC at 293, explained that "when . . . it is determined that penalties are appropriate which substantially diverge from those originally proposed, it behooves the Commission and its judges to provide a sufficient explanation of the bases underlying the penalties assessed by the Commission." In *Cantera Green*, the Commission clarified that "[w]hile the findings and explanations relating to a penalty assessment do not have to be exhaustive, they must at least provide the Commission with a basis for determining whether the judge complied with the requirement to consider and make findings concerning the section 110(i) penalty criteria." 22 FMSHRC at 621.

Here, the judge, in assessing the penalties, provided an adequate explanation for why he diverged to the extent that he did from the Secretary's proposed penalties. First of all, it is clear that the judge reduced two of the penalties by $2,000 each because he did not affirm the findings of high negligence sought by the Secretary, but instead found moderate negligence with respect to the two orders associated with those penalties. This was, roughly, a 20 percent reduction from the Secretary's proposed penalty amounts for those two violations.[19] Ascribing such weight to the degree of negligence factor is well within a judge's broad discretion in assessing penalties de novo under the Mine Act. *See, e.g., Spartan Mining Co.*, 30 FMSHRC 699, 725 (Aug. 2008) (upholding 800 percent increase of proposed penalty based on gravity and negligence factors).

---

[18] Section 110(i) provides in part:

> In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

[19] For the two orders that the judge affirmed and agreed with the Secretary on the degree of negligence, he reduced the penalties from the requested $10,300 to $4,000. For the citation and order that the judge affirmed but reduced the degree of negligence, he reduced the Secretary's proposed penalties even further, from $10,300 to $2,000. 31 FMSHRC at 216-17.

As for the judge's additional $6,300 reduction to each of the penalties from the Secretary's proposal, the Secretary argues that such reductions were based solely on the judge's findings regarding Coal River's abatement efforts. PDR at 20-21. That is not accurate, however, because for each of the penalties, the judge directly justified his large reduction from the Secretary's proposed penalties based on *two* of the section 110(i) factors. In addition to taking into account Coal River's actions in responding to the violations, the judge relied upon the operator's "low history of prior violations." 31 FMSHRC at 216-17.

Substantial evidence supports the judge with regard to this factor. Coal River states in its brief that the total amount of penalties it was assessed and paid in 2006 was only $5,662. CR Br. at 11. Even more importantly, the Secretary in her brief below recited statistics establishing the operator's ratio of violations per inspection day, and concluded that "[t]his low history of previous violations reflects Coal River's 'excellent' reputation for mine safety." S. Post-Hearing Br. at 44 (citing Tr. 206 (testimony of MSHA Inspector James Maynard)).

As for the Secretary's argument that the judge's focus on the operator's abatement efforts went beyond the terms of section 110(i), here we do not agree that the judge strayed beyond the confines of the Mine Act when he put as much emphasis as he did on the operator's abatement efforts. Section 110(i) states that the judge must consider "the *demonstrated* good faith of the person charged in attempting to achieve rapid compliance after notification of a violation." 30 U.S.C. § 820(i) (emphasis added). The term "demonstrated" makes the question of the operator's "good faith" one that can be answered in degree, just as other section 110(i) factors, such as negligence, can be answered.

In this instance, the judge found that the degree of good faith demonstrated by the operator was "much more than ordinary good faith." 31 FMSHRC at 215. In so doing, the judge was not using an additional factor in his assessment; rather, he was indicating the weight he was giving that factor. In fact, the judge stated as much. *See* 31 FMSHRC at 216 ("I will give much more weight than normal to the good faith criteria when I assess penalties in this case."). In assessing penalties de novo, it is within the discretion of the Commission, and thus of its judges acting in the first instance, to accord different weights to the six penalty factors. *See Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997) ("there is no requirement that equal weight must be assigned to each of the penalty assessment criteria").

The Secretary maintains that because Coal River did no more than what the law requires, the judge's finding that "much more than ordinary good faith" was demonstrated by Coal River is not supported by substantial evidence. PDR at 20-21. While we might agree that the judge, in characterizing the operator's response to be "much" more than good faith, was perhaps overly effusive in his praise, the record supports the conclusion that Coal River did act quickly to do more than necessary to abate the violations in question. In addition to purchasing new and more

reliable fire suppression systems that would be used at battery charging stations,[20] the company changed its practices throughout its mines in response to the incident on January 27.
31 FMSHRC at 216. Although we might not have come to the same conclusion as the judge, we believe that substantial evidence supports the judge's finding that Coal River demonstrated "much more than ordinary good faith." Thus, we affirm the penalties that the judge assessed as to the three orders.

[20] After being charged with violating section 75.340(a), Coal River stopped using Pyro-Chem to fireproof battery charging station areas. It purchased and began using a dry chemical solution fire suppression system that would attach to the station itself. 31 FMSHRC at 215-16; Tr. 659-660, 710, 762-63.

III.

Conclusion

For the foregoing reasons, we vacate and remand the judge's finding as to whether the section 75.340(a) violation was attributable to Coal River's unwarrantable failure, the operator's degree of negligence in connection with the violation, and the penalty the judge assessed for that violation. As to the three orders, we affirm the penalties that the judge assessed.

____
Mary Lu Jordan, Chairman

____
Michael F. Duffy, Commissioner

____
Michael G. Young, Commissioner

____
Robert F. Cohen, Jr., Commissioner

Distribution:

Cheryl C. Blair-Kijewski, Esq.
Office of the Solicitor
U.S. Dept. Of Labor
1100 Wilson Blvd., 22nd Floor
Arlington, VA 22209-2296

F. Thomas Rubenstein, Esq.
Dinsmore & Shohl, LLP
215 Don Knotts Blvd., Suite 310
Morgantown, WV 26501

Administrative Law Judge David F. Barbour
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
601 New Jersey Avenue, N. W., Suite 9500
Washington, D.C. 20001-2021