# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
7 PARKWAY CENTER, SUITE 290
875 GREENTREE ROAD
PITTSBURGH, PA 15220
TELEPHONE: 412-920-7240 / FAX: 412-928-8689

FEB 05 2015

| | |
|---|---|
| SECRETARY OF LABOR<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>Petitioner | CIVIL PENALTY PROCEEDINGS<br><br>Docket No. WEVA 2011-1028<br>A.C. No. 46-06843-244332 |
| v. | Docket No. WEVA 2012-481<br>A.C. No. 46-06843-272825-01 |
| | Docket No. WEVA 2012-559<br>A.C. No. 46-06843-275658-01 |
| SALLY ANN COAL COMPANY, INC.,<br>Respondent | Mine: No. 2 Mine |

## DECISION

Appearances: Michele A. Horn, Esq., U.S. Department of Labor, Office of the Solicitor, Denver, Colorado, for the Secretary

James F. Bowman, Litigation Representative, Midway, West Virginia, for Respondent.

Before: Judge Harner

These cases are before me upon petitions for assessment of civil penalty filed by the Secretary of Labor ("Secretary"), acting through the Mine Safety and Health Administration ("MSHA"), against Sally Ann Coal Company, Inc. ("Sally Ann" or "Respondent") at its No. 2 Mine, pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Act"). These cases included three separate dockets containing twelve violations assessed at $38,126.00. On December 9, 2013, I issued a Decision Approving Partial Settlement resolving seven of the eight violations in Docket No. WEVA 2011-1028. The parties presented testimony and documentary evidence for the remaining five violations at a hearing held in Charleston, West Virginia on November 14 and15, 2013. Both parties filed post-hearing briefs which have been duly considered.

**STIPULATIONS**[1]

1. Sally Ann Coal Company, Inc., ("Sally Ann") at all times relevant to these proceedings, engaged in mining activities and operations at the No. 2 Mine in McDowell County, WV.

2. Sally Ann's mining operations affect interstate commerce.

3. Sally Ann is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ *et. seq.* (the "Mine Act").

4. Sally Ann is an "operator" as defined in §3(d) of the Mine Act, 30 U.S.C. §803(d), at the Mine where the contested citations in these proceedings were issued.

5. The Administrative Law Judge has jurisdiction over these proceedings pursuant to §105 of the Act.

6. The individuals whose signatures appear in Block 22 of the contested citations at issue in these proceedings were at the times the citations were issued authorized representatives of the United States of America's Secretary of Labor, assigned to MSHA, and were acting in their official capacities when issuing the citations at issue in these proceedings.

7. The citations at issue in these proceedings were properly served upon Sally Ann as required by the Mine Act.

8. The citations at issue in these proceedings may be admitted into evidence for the purpose of establishing their issuance but not for the truthfulness or relevancy of any statements asserted therein.

9. The certified copy of the MSHA Assessed Violations History reflects the history of the citation issuances at the Mine for 15 months prior to the date of the citations at issue and may be admitted into evidence without objection by Sally Ann.

10. Sally Ann demonstrated good faith in abating the violations.

11. Sally Ann may be considered a medium size mine operator for the purposes of 30 U.S.C. §820(i).

12. The assessed penalties will not affect the ability of Respondent to remain in business.

---

[1] Except for Stipulation 13, the Stipulations consist of the stipulations contained in the parties pre-hearing statements submitted prior to the hearing. Their substance is not at issue in this proceeding.

13. All of the miners in Order No. 8098519 were "experienced" miners. Tr. 96-97.[2]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

The findings of fact are based on the record as a whole and my careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, I have taken into consideration the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies, in each witness's testimony and between the testimonies of the witnesses. In evaluating the testimony of each witness, I have also relied on his or her demeanor. Any failure to provide detail as to each witness's testimony is not to be deemed a failure on my part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel,* 212 F.3d 433, 436 (8th Cir. 2000) (administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered).

### I. BASIC LEGAL PRINCIPLES

#### A. Significant and Substantial

The Orders in dispute and discussed below have been designated by the Secretary as significant and substantial and unwarrantable failures to comply with mandatory safety standards. A significant and substantial ("S&S") violation is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). 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 (Apr. 1981).

The Commission has explained that:

> [i]n order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

---

[2] Hereinafter, the Secretary's exhibits will be designated as GX followed by a number; and Respondent's exhibits will be designated as RX followed by a number. Pages of the official hearing transcript are designated "Tr." followed by the appropriate page reference(s). Respondent's Post-Hearing Brief is designated as RPHB followed by the page number.

*Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also, Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

The difficulty with finding a violation S&S normally comes with the third element of the *Mathies* formula. In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance: We have explained further that the third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984). The Secretary "need not prove a reasonable likelihood that the violation itself will cause injury." *Cumberland Coal Resources*, LP, 33 FMSHRC 2357, 2365 (Oct. 2011) (citing *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010).

This evaluation is made in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec. 2005); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

**B. Negligence and Unwarrantable Failure**

Negligence "is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm." 30 C.F.R. § 100.3(d). "A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices." *Id.* MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices. *Id.* Low negligence exists when "[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances." *Id.* Moderate negligence is when "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." Id. High negligence exists when "[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances." *Id. See also Brody Mining, LLC*, 33 FMSHRC 1329 (2011) (ALJ). Finally, the operator is guilty of reckless disregard where it "displayed conduct which exhibits the absence of the slightest degree of care." 30 C.F.R. § 100.3(d).

The Commission has defined an unwarrantable failure as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is defined by such conduct as "reckless disregard", "intentional

misconduct", "indifference", or a "serious lack of reasonable care". *Emery Mining Corp.*, 9 FMSHRC at 2003; see also *Buck Creek Coal, Inc.*, 52 F.3d 133, 136 (7th Cir. 1995).

The Commission has recognized that whether conduct is "aggravated" in the context of unwarrantable failure is determined by considering all the facts and circumstances of each case to determine if any aggravating factors exist, or if any 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). Repeated similar violations are relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard. *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992).

The Commission has made clear that it is necessary for a judge to consider all relevant factors, rather than relying on one to the exclusion of others. *Windsor Coal Co.*, 21 FMSHRC at 1001; *San Juan Coal Co.*, 29 FMSHRC 125, 129-36 (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 or her 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 Company*, 31 FMSHRC 1346, 1351(Dec. 2009).

I rely on the state of the law as discussed herein in considering each issue addressed below and whether the Orders which are alleged to be S&S and unwarrantable failure to meet the above noted criteria.

## II. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

### A. WEVA 2011-1028 – Order No. 8098519

On December 1, 2010, Inspector Bransom Williams ("Williams") wrote Order No. 8098519 (Exhibit GX-2) citing a 104(g)(1) violation of 30 C.F.R. § 48.6(b) stating:

> Eight miners[3] working in the mine have not received experienced miner training prior to beginning work duties inside the mine. The operator is hereby ordered to withdraw the eight miners from the mine until they have received the required training. The Federal Mine Safety and Health Act of 1977 declares that an untrained miner is a hazard to himself and to others.

[3] The eight miners were Carl Johnson, Rick Sizemore, Earl Click, Charles Allen Jr., James Rose, Jesse Milam, Garnie Estep and Mike Turner.

The Order was designated as S&S and highly likely to cause injuries that could reasonably be expected to be fatal for eight miners. *Id.* The inspector designated the operator's negligence as high, and a penalty of $14,743.00 was assessed. *Id.* The Order was terminated the next day and the miners were allowed to return to work when they all received the required experienced miner training. *Id.*

The order was issued pursuant to section 104(g)(1) of the Mine Act, which states that an inspector who finds "a miner who has not received the requisite safety training ... shall issue an order under this section which declares such miner to be a hazard to himself and to others, and requiring that such miner be immediately withdrawn from ... the mine, and be prohibited from entering such mine until ... such miner has received the training required by ... the Act." 30 U.S.C. § 814.

30 C.F.R. §48.6 entitled "Experienced miner training" applies, in pertinent part, to experienced miners newly employed by the operator. Section (b) states: "Experienced miners **must complete the training prescribed in this section before beginning work duties...."** (emphasis supplied). The section continues by specifying in some detail all the areas that must be covered in this training. In brief, the training must include: (1) Introduction to work environment; (2) Mandatory health and safety standards; (3) Authority and responsibility of supervisors and miners' representatives; (4) Entering and leaving the mine and communications; (5) Mine map, escapeways, emergency evacuation and barricading; (6) Roof or ground control and ventilation plans; (7) Hazard recognition; (8) Prevention of accidents; (9) Emergency medical problems; (10) Health; (11) Health and safety aspects of the tasks to which the experienced miner is assigned; (12) Self-rescue and respiratory devices, including hands-on training; and (13) Such other courses required by the District Manager based on circumstances and conditions at the mine.

At the time of the hearing, Inspector Williams has approximately sixteen years of experience in the mining industry, where he began as a mechanic in 1998. Tr. 15. He began working for MSHA as an underground inspector in 2007. Tr. 15-16. On December 1, 2010, Williams was at Respondent's No. 2 Mine for a general inspection. Tr. 16. As part of this inspection, he regularly inspects training records. Tr. 18. The day prior, Williams had issued a citation after witnessing a miner exit the mine without a multi-gas detector. Tr. 34. This further prompted Williams to check the training records at the Mine. According to Respondent's records, Mine Foreman Charley Allen ("Allen") had conducted the training for the eight newly hired, but experienced miners. Tr. 17-18; Exhibit GX-2.

When he was inspecting the training records, Williams did not know that Allen was not a certified instructor; however, when he contacted Educational Field Services, he was informed of this fact. Tr. 18, 35. Williams wrote Order No. 8098519 for a violation of 30 C.F.R. § 48.6(b) because he knew from previous contact that the miners in question were experienced rather than new to the industry. Tr. 16, 20; Exhibit GX-2. However, given that the miners were newly hired at this mine, his concern was whether the miners had received training in all the various areas required by the standard, as the amount of information is quite broad in scope. According to Williams, the training covers, *inter alia*, methane issues, the location of self-contained self-

rescuers ("SCSRs"),[4] the location of escapeways, roof condition issues and information about ventilation controls. Tr. 21-23. In addition, he was concerned that the records reflected that the training that had been provided was conducted in a single day, which he asserted would be "impossible." Tr. 19-20. Williams testified that, when Allen was questioned, he admitted that he did not follow the approved training plan; rather, he only "went over hazards...at the mine". Tr. 21. Finally, Williams testified that if the required newly hired experienced training was conducted and the MSHA form completed correctly, only Section 2 of the form would be completed and there would be no writing in Section 5 of the form. Tr. 68.

Williams designated the Order as S&S and highly likely to result in fatal injuries to eight miners. Tr. 24-25. He testified that the Act states that an untrained miner is a hazard to himself as well as other miners. Tr. 24. If a fire were caused by methane gas, miners could suffer from smoke inhalation. Tr. 24. In the past, Williams testified that untrained miners have gotten lost because they did not know where the escapeways were located. Tr. 24, 59. Further, they have been injured because they did not know where SCSR caches were located or how to operate them. Tr. 24, 60. Williams found that the operator was highly negligent because it did not follow its required training plan even though certified trainers were available. Tr. 27. In fact, one such trainer, a mine foreman, worked at the mine adjacent to the No. 2 Mine. Tr. 27. Williams further stated that Allen's belief that he was a certified instructor was not a mitigating factor because Allen should have known that he was not a certified trainer. Tr. 62.

At the time of the hearing, Charles Allen, Sr., has more than thirty-seven years in the mining industry, thirty-five years of which has been spent in underground coal mines. Tr. 88. During this time, he has held various jobs and has been a certified foreman since 1982. Tr. 88. At the time of the violation, he was the mine foreman; however, he resigned his position a few days before the hearing. Tr. 88-89. As mine foreman, his duties included examining the areas prior to the start of the shift and assisting in production. Tr. 89. Respondent operates another mine in very close proximity to the instant mine, and Mine Superintendent Ratliff oversaw both of these mines and had more authority than Allen. Tr. 90-91.

Allen testified that he realized that newly employed, experienced miner training had not been completed for the eight miners listed in the instant citation after the citation had been issued for the multi-gas detector on the previous day. Tr. 100. At that point, he made the decision to train the men "the best [he] could" by instructing the miners on rescuers, lifelines, rescue chambers, intakes, primary escapeways, secondary escapeways, returns and the general layout of the mine. Tr. 100-101. Compared to other mines in the area, he stated that the ventilation plan, roof control plan and rescue procedures were basically similar; and, they were adopted from the plans developed by the former owner of the Mine. Tr. 97-99. Allen did admit that although similar, the location of SCSR caches and escapeways would obviously vary depending upon the mine. Tr. 126-127. He also acknowledged that conditions in a mine can vary greatly depending upon the mining progression, the weather conditions, the particular miners working the shift, the materials being used and the equipment being used. Tr. 129. Although he testified that he did not know of any methane ever being found, there was a section of the mine that was sealed off and the air and gases could only be measured at the seals. Tr. 123, 136.

---

[4] SCSRs provide oxygen for miners in the event that escape is necessary. Tr. 22-23.

Allen also testified that because he had not yet been certified, he was confused as to the procedure for filling out the training forms. Tr. 101-102, 107. (Allen subsequently became certified in March 2011. Tr. 92.) Although Allen had only given task training, he also checked the box for experienced miner training because the miners were experienced. Tr. 101. Allen maintained throughout his testimony that he believed that he was doing the right thing. Tr. 102. At the time, he testified that he did not know that the instructor had to be certified to conduct the eight hour refresher training. Tr. 103. James Rose ("Rose") was the miner who was cited for not carrying a multi-gas detector. Tr. 79-80. He opined that Allen's training was probably the best that he had ever received because of Allen's strict adherence to safety standards. Tr. 87.

Although there were eight newly employed, experienced miners at the Mine, Allen testified that on November 30, he trained the four day shift miners and that the night shift mine foreman, Woodrow Williamson ("Williamson"), who was a certified instructor, trained the other four night shift miners. Tr. 38-39, 104-105. However, Allen confirmed that there were roughly ten miners working on each shift. Tr. 125-126. Allen stated that he had completed the 5000-23 form[5] before, but it had only been for task and equipment training. Tr. 109.

Respondent submitted various training records for the eight employees into evidence. However, none of these records demonstrate that Respondent fulfilled its obligation to train newly hired experienced miners. It is evident from looking at most of these exhibits, namely Exhibit RX-1 (James Rose), Exhibit RX-3 (Charles Allen, Jr.) Exhibit RX-5 (Jesse Milam), Exhibit RX-6 (Earl Click), Exhibit RX-7 (Ricky Sizemore), Exhibit RX-9 (Carl Johnson) and Exhibit RX-10 (Garnie Estep), that the training all occurred on November 30, 2010, and that the training given on that date only concerned mine gases and the use of multi-gas detectors.[6] This training was given as a result of the citation written on that date when miner Rose was observed exiting the mine without a multi-gas detector. Respondent also introduced into evidence three additional training forms for Rose (Exhibit RX-2), Allen Jr. (Exhibit RX-4) and Turner (Exhibit RX-8) to show that these miners received training. However these forms show that the miners received training in specific tasks on June 15, 2010 (Rose and Allen Jr) and on February 24, 2010 (Turner). And for two of the three miners this training was given by Allen Sr. who was not a certified instructor at the time and the record for Turner is training at another mine. Tr. 44. The record does not reflect any further training received by the eight named miners nor does it reflect when the eight miners were hired. Needless to say, Respondent has not demonstrated, either by documentation or by testimony, that the eight named miners ever received the newly employed, experienced miner training required by 30 C.F.R. §48.6(b).

I find that there has very clearly been a violation of 30 C.F.R. §48.6(b). To be in compliance, Respondent must be able to provide training forms showing that each of the newly employed, experienced miners received the required training. Not only could these not be provided, but the documentation provided totally fails to demonstrate the type of training required by30 C.F.R. §48.6(b). The training that was given was either in response to a citation issued for a miner not having a multi-gas detector on November 30, 2010, or for specific tasks.

---

[5] This is the MSHA form filled out when training is complete.

[6] Allen Sr. signed the MSHA training forms for Rose, Allen Jr., Milam and Click while Williamson signed the forms for Sizemore, Johnson and Estep.

Further, most training was undertaken by an individual who was not an MSHA certified trainer. Allen stated at hearing that while he knew that he was not certified, he believed that he was doing the right thing and since the incident has become certified.

I also find that this violation was S&S in nature. A violation of a mandatory standard has clearly been established. Having untrained miners in a particular mine, regardless of their experience in other mines, is a safety hazard to the untrained miners as well as those miners working with them. This significantly contributes to numerous hazardous situations that could be created by the untrained miners. None of these men had ever been previously employed at the Respondent's Mine. As no two mines are exactly alike, each must have its own emergency plans, roof and rib control plans and ventilation plans, among a variety of other things which each miner working within the mine must have knowledge of. Over the course of time, the absence of training could lead to injury or death to each of the miners working with the one or few who remains untrained. In light of this, I find that Order No. 8098519 is S&S. See e.g. *Boart Longyear Company*, 35 FMSHRC 3680, 3699-3700 (Oct. 2013) (ALJ Barbour); *Lehigh Southwest Cement,* 33 FMSHRC 3229, 3243 (Dec. 2011) (ALJ Paez); *Cannelton Industries, Incorporated,* 24 FMSHRC 840, 853(Aug. 2002) (ALJ Barbour). Section 2(a) of the Mine Act states that "the first priority and concern of all in the coal…industry must be the health and safety of its most precious resource – the miner." To not properly train miners, whether new or experienced, clearly runs afoul of this basic principle.

Respondent contends that the gravity should be reduced to a non S & S violation. By requiring an untrained miner to be immediately withdrawn on grounds that the miner constitutes "a hazard to himself and to others," section 104(g) of the Act essentially defines the failure to properly train a miner as a significant and substantial violation; the untrained miner constitutes a hazard sufficiently likely to contribute to a serious injury to himself or others as to require his immediate removal. *Boart Longyear*, 35 FMSHRC at 3699-3700. I find that Respondent's argument that the involved miners were experienced in mining hazards from working at other similar mines in the same area to be ungrounded and fallacious since every mine has its own specific conditions of which miners must be aware. The best way to ensure that accidents resulting from insufficient training do not occur is to ensure that all new hires receive the MSHA-required training. Accordingly, the S&S designation for the Order is affirmed.

I further agree with the Secretary that this violation was the result of Respondent's high negligence. Allen admitted at hearing that he was not certified at the time of the violation, and in fact, was confused as to what was required. Instead of finding out what was required or calling in Williamson to ensure that the training was properly conducted, Allen had the men sign their forms and continue working. Further, there is absolutely no evidence that the eight affected miners ever received the required newly employed, experienced miner training contemplated by 30 C.F.R. §48.6(b). As such, I find that no mitigating circumstances exist and affirm the Secretary's high negligence designation. In light of the foregoing, Order No. 8098519 and the assessed penalty of $14,743.00 are **AFFIRMED**.

## B. WEVA 2012-481

### 1. Order No. 8136396

On October 12, 2011, Inspector Matilda Collins ("Collins") wrote Order No. 8136396 (Exhibit GX-4) citing a Section 104(d)(2) violation of 30 C.F.R. §75.220(a) stating:

> The operator is failing to follow the approved roof control plan. As specified on page 7 paragraph 4 the lengthwise spacing shall not exceed 4 feet. The following entries have not been support [*sic*] adequately: entry #4 – 1 cut; entry #5 – 2 cuts; entry #6 – 2 cuts; entry #7 – 2 cuts and entry #8 – 2 cuts, all exceeds the lengthwise bolt spacing of 4 feet in distance.
>
> This is an unwarrantable failure to comply with a mandatory standard. The operator or his agent engaged in aggravating conduct constituting more than ordinary negligence by not recognizing the hazard of the roof supports not being installed according to the approved roof control plan.

This Order was designated as S&S and reasonably likely to result in fatal injuries to eight miners. *Id.* The inspector designated the operator's negligence as high, and a penalty of $7,774.00 was assessed. *Id.* The Order was terminated on October 14, 2011 when affected area was spot bolted. *Id.*

30 C.F.R. §75.220(a) entitled "Roof control plan" states, in pertinent part, "Each mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine." 30 C.F.R. §75.220(a)(1).

Collins graduated from Virginia Polytechnic Institute and State University in 1980 with a degree in Mining Engineering. Tr. 143. She worked at a mine owned by her father where she roof bolted and assisted with plan submissions. Tr. 144-145. After twenty years out of the industry, she began working for MSHA in 2008 as a coal mine inspector. Tr. 146. She is currently the supervisor of Roof Control and Impalements. Tr. 147.

On October 12, 2011, Collins was at the Mine for an E01 regular inspection. Tr. 147. While conducting a danger run, she noticed that the roof bolts were irregularly spaced without a pattern. Tr. 149. According to Respondent's roof control plan, roof bolts were to be inserted in a pattern of five feet wide and four feet deep. Tr. 149,151; Exhibit GX-12. While she and Section Boss Josh Collis did not measure every single bolt in the entries, they found several bolts that were not only inserted without a pattern but also exceeded the maximum spacing in the roof control plan. Tr. 189-191. Her notes taken at the time of the inspection, at Exhibit GX-5, indicate that the bolt spacing was five feet by five feet (instead of the plan required four feet by five feet) in entries 4 and 5. Her notes also reflect problems in entries 6, 7 and 8, where instead of the required four foot spacing, the spacing was 52-60 inches. This irregular pattern existed in Entries 4-8. Tr. 152-153. The pattern was so irregular that Collins could not determine the number of rows that existed. Tr. 205.

Inspector Collins explained that the purpose of roof bolting in a sandstone top[7] was to form a beam that distributes the weight of the roof onto the pillars, preventing collapse. Tr. 157-158. Stress and water could cause the roof to collapse, and the irregular pattern could contribute to this by creating an insufficient beam. Tr. 158. If the roof collapsed on the miners working below, Collins testified that it would be fatal considering that a cubic foot of sandstone weighs approximately 165 pounds. Tr. 163. She believed that all eight miners working at the face would be affected because the crews often congregate to receive instructions. Tr. 159. She designated Order No. 8136396 as high negligence because she believed it was extensive and had lasted for about nine cuts, which constituted more than one shift. Tr. 159, 222. Collins testified that the obvious lack of pattern should have been noticed during a preshift or onshift examination. Tr. 159-160. The Order was terminated by spot bolting to bring the spacing into compliance. Tr. 164.

Respondent presented two witnesses to testify about this Order: Jeff Bennett and Charles Allen Sr. It did not call Josh Collis, the evening shift section foreman who accompanied the inspector, or offer any reason why he was not presented.

Jeff Bennett ("Bennett") has been a miner for more than six years and testified for Respondent at the hearing. Tr. 265. After the issuance of the Order on the evening shift, Bennett was assigned on the following day shift to measure the bolts indicated. Tr. 272. He admitted that there were a few bolts beyond the required measurements, but not many according to the method he used for measuring. Tr. 273. He assumed a grid and measured distances according to this artificial line, rather than measuring on an angle. Tr. 273, 285. This is how he was trained to measure by Respondent. Tr. 286. He testified that the bolts along the rib line were "pretty straight" but "the ones that were wide – longwise was mainly in the middle." Tr. 274. He further admitted that the first row of bolts in front of the face should be straight, and a pattern should be discernable even if misaligned. Tr. 291-292.

Allen testified that he conducted the preshift and onshift examinations after the bolting was complete. Tr. 304. While he did not measure every single bolt, the bolts that were measured were within the range of compliance. Tr. 306. He further explained that fully grouted resin bolts are used in the Mine. Tr. 307. The bolts bond layers of the strata together. Tr. 211. If cracks exist, the resin seeps in, fills them, and keeps everything bonded. Tr. 211, 307-308. If glue does not seep out of the bolt hole, it indicates that the resin has seeped into a crack. Tr. 309. In those situations, Allen testified that a test hole will be drilled adjacent to the original hole to investigate the top. Tr. 309.

As noted above Respondent did not call Josh Collis, the foreman who accompanied the inspector and helped her measure the distances between the irregularly spaced bolts. It is well established that if a witness has knowledge of a material issue and is within a party's control, an inference may be drawn that the witness' testimony would have been adverse to the party failing to call him. 75B Am Jur 2d § 1315; *Wilson v. Merrell Dow Pharmaceuticals, Inc.*, 893 F.2d 1149, 1150 (10th Cir. 1990). The Commission has long approved of its judges utilizing this rule. *Eagle Energy, Inc.*, 23 FMSHRC 1107, 1120 (2001). In the instant case, the Respondent failed

[7] When compared to other forms of top, sandstone is considered to be good top. Tr. 211.

to call the witness who made the measurements with the inspector and who therefore was in the best position to support or contradict the inspector's testimony, despite that witness being in the Respondent's control. Consequently I draw the inference that if Collis had testified, his testimony would have been unfavorable to Respondent and would have supported inspector Collins' testimony that the roof bolts were not in the pattern or spacing required by the roof control plan.

I find that Respondent violated 30 C.F.R. § 75.220(a) when it failed to bolt within four feet of the last bolt as contemplated and approved in its roof control plan. Collins credibly testified that most of the bolts that she and Collis measured were beyond the requirement, some by as much as 12 inches. Respondent essentially argues that a violation did not exist according to its own measurements. The inherent flaw in its method, however, is that it measured to where the bolt should be, not to where it was. If this were an accepted method of measurement, it would create the absurd result of operators essentially bolting anywhere and measuring to where the bolt should be to maintain compliance. It is also significant that no witness testified that the bolting met the pattern established by the roof control plan.

I further conclude that the violation is S&S. Although Collins and Bennett did not see any adverse roof or rib conditions at that time, such conditions could reasonably occur over the course of continued mining as weight was insufficiently distributed over long distances. This is especially the case where the deficient spacing of the bolts -- leaving longer bolt spacing than required by the roof control plan -- is in the middle of the entry and not along the ribs, as testified to by Respondent witness Bennett. Tr. 274. At hearing, the testimony established that some areas of the mine do have roof problems. Tr. 260. The irregular bolting contributes to the hazard of a roof collapse. Given that this is a working section of the mine, it is reasonably likely that miners would be in the area. Collins testified that the miners also congregate in the entries to receive directions for the day. If a portion of the roof were to collapse, miners could suffer fatal injuries from being crushed or struck by falling rock. Based on the evidence and testimony at hearing, I affirm the Secretary's S&S designation.

I further find that the violation was the result of Respondent's high negligence. Based on Collins' testimony that she immediately noticed it, the violation was obvious. Further, it existed in five entries. Although Respondent offers evidence that a single-headed roof bolter makes it difficult to produce straight lines, its roof control plan was specifically created with the use of a single headed bolter in mind. Tr. 258. Moreover, the entries cited in the Order were the only entries affected by the unusual bolt pattern. Clearly, Respondent did not have trouble following the roof control plan in other areas of the mine. In light of the foregoing, Order No. 8136396 and its assessed penalty of $7,774.00 are **AFFIRMED**.

### 2. Order No. 8136397

Also on October 12, 2011, Collins wrote Order No. 8136397 (Exhibit GX-6) citing a Section 104(d)(2) violation of 30 C.F.R. §75.211(c) stating:

> The operator has created a hazardous condition when the boom hole was put in for the belt drive. The operator failed to recognize the hazardous roof condition and correct the condition before persons were assigned to work in this area. The boom hole which is located in the adjacent intersection from spad #637 in #6 entry has a transition of up to 36 inches, consisting of fractured sandstone with open spaces of up to 2 inches between the layers. The operator used 42 inch resin bolts to hold the top. This left only 6 inches to be installed in the solid roof.
>
> This is an unwarrantable failure to comply with a mandatory standard. The operator or this agent engaged in aggravating conduct constituting more than ordinary negligence by not recognizing the hazards of transition areas where persons work or travel.

The Order was designated as S&S and reasonably likely to result in fatal injuries to six miners. *Id.* The inspector designated the operator's negligence as high, and a penalty of $5,645.00 was assessed. *Id.* The Order was terminated on October 14, 2012, when the area was rebolted with 72 inch super bolts. *Id.*

30 C.F.R. §75.211(c) entitled "Roof testing and scaling" provides:

> When a hazardous roof, face, or rib condition is detected, the condition shall be corrected before there is any other work or travel in the affected area. If the affected area is left unattended, each entrance to the area shall be posted with a readily visible warning, or a physical barrier shall be installed to impede travel into the area.

A boom hole in a mine is a hole shot out with explosives to create a hole in the roof, which provides more room for an operator to install a new belt line. Tr. 166. It is dome shaped at the top where it has been blasted out and is square at the bottom where it intersects the roof. Tr. 172. When Collins arrived at the location of the boom hole in question, she testified that a crew of five men[8] was working under it, and that one side of the hole had multiple fractures in the brow[9], the largest of which was approximately two inches wide and at least two inches deep. Tr. 167-168, 178. She further testified that the brow was separating from the permanent roof in one approach. Tr. 167-168, 238. It was supported by 42 inch roof bolts, but Collins was concerned that the existence of the rock only allowed for about six inches of the bolt to be inserted into the permanent roof. Tr. 171; Exhibit GX-6. Although Respondent had scoped[10] the

[8] Collins admitted that although she listed six miners as being affected, all six of them could not fit in the boom hole at the same time. Tr. 257.

[9] There is some dispute as to whether this was actually a brow. Allen testified that it was not; rather, it was simply a rock that could not be scaled down. Tr. 318. Therefore, the miners bolted it. Tr. 317-318. For the purpose of this decision, the distinction is not important.

[10] A scope is entered into a hole so that any cracks or abnormalities in the layers of the roof can be viewed on a TV monitor. Tr. 247. The scope showed that there were two hairline cracks. Tr. 247-248.

area around the crack, it could not view the specific location and that was what concerned Collins. Tr. 246. In the end, Collins was not convinced that the roof was adequately supported. Tr. 248-249. In her opinion, she believed that the only effective way to secure the area was to install six to eight foot super bolts through the cracks or fractures in the rock so that the rock would be better attached to the roof. Tr. 176.

Collins' concern was that if the rock fell, miners could be crushed. Tr. 174, 255. Further, she feared that the loose rock would make equipment operators nervous, resulting in other accidents. Tr. 174, 257. In her opinion, any of these scenarios could result in a fatality. Tr. 174. The danger did not end with the belt installation either. Tr. 180. Belt men would have to maintain it, and miners would have to clean around it directly under the brow. Tr. 180, 238-239. Collins felt sure that the brow would eventually fall, and the water that existed in the mine would exacerbate the separation. Tr. 181. She believed that Respondent knew about the condition because additional roof bolts has been inserted and, in her opinion, loose top would be the only reason to do this. Tr. 173-174, 237.

Bennett testified for Respondent and stated that he helped bolt the boom hole about two weeks before the citation was written and at that time of the citation was being trained by Respondent as an underground mine foreman. Tr. 265, 267, 282. Bennett testified that timbers are set prior to blasting. Tr. 267-268. After blasting, the timbers are removed and the roof is bolted prior to cleaning. Tr. 267-268. After cleaning, extra bolts are set. Tr. 267. According to Bennett, a few sixty inch bolts were used, and he did notice at least one crack in the roof, but he could not judge how big the crack was.[11] Tr. 268-269, 281. Further, because some rock was hanging that could not be scaled, he inserted extra bolts in the area of the crack. Tr. 283. All of the bolts used in all four entrances around the boom hole were fully grouted, resin glue bolts. Tr. 269. The glue could be seen in the gaps of the brow. Tr. 270. Bennett testified that he believed the boom hole was in good condition when work was finished on it and at the time of the citation two weeks later. He stressed that eight foot super bolts were only inserted to abate the Order. Tr. 282, 287-288, 290, 325. He was assisted by scoop operator James Rose, who largely confirmed all of Bennett's observations. Tr. 297-299.

I find that the condition violated 30 C.F.R. § 75.211(c). After blasting the boom hole, a large rock was left hanging from the roof. Instead of finding a way to scale it, Respondent instead put up extra roof bolts. According to the regulation, Respondent either should have corrected the condition prior to allowing miners to work in the area or barricaded the area and posted warning signs to prevent access to the area. Because Respondent's attempt at putting up roof bolts did not fully correct the condition and allowed miners to work under the roof, I find that a violation existed.

Moreover, I find that the violation was S&S. As noted, Respondent did not fully comply with the cited regulation. Inspector Collins credibly testified that on one approach to the boom hole she observed that the brow was separating from the roof and she also observed multiple

---

[11] Bennett testified that when a crack is hit, the roof bolt will "jump" when being pushed. Tr. 269. If, by contrast, the top is only soft, the roof bolt will move more quickly than it does in regular top. Tr. 269.

fractures in the brow, the largest of which was two inches wide and at least two inches deep. Respondent witness Bennett was uncertain as to large the crack was. These cracks or separations from the roof contributed to the hazard of a rock fall, which would be reasonably like to cause a serious if not fatal injury to any employees working under the boom hole. This is an area where miners work for extended periods of time performing cleaning and maintenance tasks. There is also water in the mine which could exacerbate the possibility of a roof collapse. The boom hole area should have been bolted with the longer super bolts to assure that the brow or area around the boom hole was stable and did not show visible cracks or separations.

Although the Secretary asserts that the Respondent's negligence is high, I find that its negligence is low. Thus, the record reveals that Respondent inserted additional bolts immediately after blasting to ensure that the rock separating from the roof did occur. Bennett testified that a few sixty inch bolts were used, but most of the bolts were forty-two inches. He also testified that extra bolts were used because to insure that the area was safe. Respondent also "scoped" the area to see if it could determine the extent of the crack or separation. Collins also testified that Respondent would only have inserted extra bolts if loose top existed. Respondent realized that the rock could not be scaled down by the measures it took, so it took some additional steps in an effort to prevent injury. Therefore, I find that there are mitigating circumstances and reduce the negligence to low. I also find that the violation was not an unwarrantable failure under Section 104(d) of the Act as Respondent's conduct was not "aggravated" or reckless. Respondent did recognize the hazard and took steps to remedy the danger. Although the inspector believed that further steps (longer super bolts) were necessary to abate the violation, the record shows that Respondent did act.

Based on the above, Order No. 8136397 is **MODIFIED** from a 104(d) order to a 104(a) S&S, low negligence citation. I assess a penalty of $1,500.00 for this violation.

### 3. WEVA 2012-559

### 1. Order No. 8143332

On September 26, 2012, Inspector John Stone ("Stone") wrote Order No. 8143332 (Exhibit GX-8) citing a Section 104(d)(2) violation of 30 C.F.R. §75.360(a)(1) stating:

> A preshift exam was not performed in the intake airway were [*sic*] miners were working at the mine. Miners were found rock dusting and operating equipment from the section (life chamber location four breaks outby the LOCC) to the surface in this airway. These miners were not certified and the certified foreman at the mine had not traveled this area. The [sic] is an unwarrantable failure to comply with a mandatory standard.
>
> Standard 75.36(a)(1) was cited 1 time in two years at mine 4606843 (1 to the operator, 0 to a contractor).

The Order was designated as S&S and reasonably likely to result in permanently disabling injuries to three miners. *Id.* The inspector designated the operator's negligence as high, and a penalty of $4,000.00 was assessed. *Id.* The Order was terminated the next day when all members of management were instructed on the importance of conducting examinations where miners would be working. *Id.*

30 C.F.R. §75.360(a)(1) entitled "Preshift examination at fixed intervals" provides:

> Except as provided in paragraph (a)(2) of this section, a certified person designated by the operator must make a preshift examination within 3 hours preceding the beginning of any 8-hour interval during which any person is scheduled to work underground. No person other than certified examiners may enter or remain in any underground area unless a preshift examination has been completed for the established 8-hour interval. The operator must establish 8-hour intervals of time subject to the required preshift examinations.

Inspector Stone has worked in the mining industry for more than thirty years and has done various jobs in underground mines and cleaning plants throughout that time. Tr. 333. He began with MSHA in March 2007, and his current position is a CMI, or electrical specialist, as well as a collateral Conference Litigation Representative. Tr. 334. He was at the Mine on September 26, 2011, for a regular E01 inspection. Tr. 334-335. While entering the Mine with Foreman Mike Turner, Stone noticed a scoop operator exiting the intake. Tr. 335, 337. Stone did not recall seeing anything in the preshift examination book concerning the intake, so he asked foreman Allen about the situation and Allen admitted that a preshift examination had not been conducted in the intake. Tr. 335-336, 390, 492, Exhibit 9. Stone observed other miners rock dusting in the intake. Tr. 337. One of the miners from the intake explained to Stone that they were directed to continue doing what had been started either that day or a few days prior, and there was rock dust located in the intake, not at the belt line. Tr. 338, 379. Therefore, Stone concluded that management knew that the men would be in that location. Tr. 338.

Stone testified that the purpose of a preshift examination is to check an area of a mine for hazards, proper air quality and quantity, and proper air flow anywhere that miners travel or are scheduled to work. Tr. 339, 367, 371. If miners need to work outside of the initial area, a supplemental exam can be conducted. Tr. 369. In the absence of the examinations, miners could be exposed "to all sorts of different hazards." Tr. 340. Therefore, Stone presumed that the three miners in the intake at the time of issuance would be exposed to permanently disabling injuries. Tr. 340, 342. He further designated the Order as a violation of Section 104(d) of the Act and high negligence because there were no mitigating circumstances. Tr. 343. Stone believed that management, specifically Allen, knew what work was being done in the intake and knew that the miners would continue rock dusting once they finished their work at the belt. Tr. 390-391.

Allen testified that one miner usually works on the belt, but three had been assigned on this particular day because Allen was concerned that Respondent would be cited for accumulations if one miner got behind on the work. Tr. 484-485. If the miners had been needed on a different section, Allen stated that he would have conducted a supplemental examination. Tr. 487. However, he testified that the miners proceeded to the intake without management's

knowledge, and he was not aware that there was rock dust in the intake. Tr. 489, 494, 515-516. Further, the scoop should have come out of the mine through the secondary escapeway rather than the intake. Tr. 489. Because a violation was issued, Allen talked to the men "harshly" concerning their behavior. Tr. 494-495.

I find that Respondent violated 30 C.F.R. § 75.360(a)(1) by allowing miners to work in an area of the mine where no preshift examination had been conducted. Stone found three miners working and the scoop operator exiting the intake, which Respondent admits had not been examined prior to the start of the shift. It argues that the men were not scheduled to work in the area and took it upon themselves to enter the intake to rock dust. However, Stone credibly testified that the miners' instructions were to continue the work that they had been doing in the prior days. This would have included rock dusting the intake. Further, it is telling that no rock dust was located at the belt. When the men were finished cleaning the belt, they would have logically progressed to an area of the Mine where they were previously working and contained the materials that were needed. If Respondent wanted the men to clean the belt and wait for further instruction, it should have made this clear. In light of this, I find that Respondent violated 30 C.F.R. § 75.360(a)(1) when it did not conduct a preshift examination in the intake.

I further find that the violation was S&S. The requirement of a preshift examination "is of fundamental importance in assuring a safe working environment underground." *Buck Creek Coal*, 17 FMSHRC 8, 15 (Jan. 1995). Preshift examinations are intended to "prevent hazardous conditions from developing." *Enlow Fork Mining Company*, 19 FMSHRC 5, 15 (Jan. 1997). Failing to conduct the preshift examination contributes to an assortment of hazards ranging from the reasonable likelihood of minor injuries to death. In its brief, Respondent argues that the intake is not a normal working area and, therefore, is not required to be examined daily if work is not scheduled; rather, it is subject to a weekly examination. RPHB, page 14. This exacerbates the violation in that it increases the likelihood that the intake had not been examined for several shifts. The miners working on that day could have walked into any number of hazards. This could have reasonably led to the serious injury or death of any of the three miners working there.

Finally, I find that the violation was the result of Respondent's high negligence. Respondent argues that no miners were scheduled to work in the intake and, therefore, management had no knowledge that they would take matters into their own hands and work in an unexamined area of the mine. However, I find that Respondent did schedule miners to work in the intake. The miners' instructions were to "continue what work they had started either the day or couple shifts before in the intake airway." Tr. 338. The miners continued to tell Stone that they were to rock dust and clean the belt and finish rock dusting the intake. Tr. 338. Regardless of whether Respondent specifically meant for the workers to work in the intake, it gave them directions in such a way as to suggest that this was part of their tasks. Moreover, Respondent supplied the necessary materials in the intake, not on the belt. That rock dust was not to arrive until later in the day. Tr. 515-516. While Allen testified that he was unaware that there was rock dust in the intake, I find this unlikely because work was being conducted in the intake, at the very least, a few days prior. Given the evidence and testimony at hearing, I find that Respondent knew the miners would eventually progress to the intake and, nonetheless failed to conduct a preshift examination. I affirm the Secretary's high negligence designation. In light of all of the foregoing, Order No. 8143332 and its assessed penalty of $4,000.00 are **AFFIRMED**.

**2. Order No. 8143333[12]**

Also on September 26, 2012, Inspector Stone wrote Order No. 8143333 (Exhibit GX-10) citing a Section 104(d)(2) violation of 30 C.F.R. §75.364(a) stating:

> There was no weekly exam performed at the #1 and #2 seals located in the return airway at the mine. When these two seals were checked there were no dates, times or initials on the date board at these locations to indicate that an exam had been performed in the last 7 days. These two seals (out of nine in this set) were examined with the weekly examiner. Upon arriving at the seal locations the examiner was instructed by the authorized representative not to remove DTI's[13] before inspection. The examiner removed DTI's on the date board placed at these two seals before it could be determined that a weekly examination had been performed. No other DTI's were found and evidence indicated than [*sic*] no weekly exam was performed. This is an unwarrantable failure to comply with a mandatory standard.

This Order was designated S&S and reasonably likely to result in permanently disabling injuries to one miner. *Id.* The inspector designated the operator's negligence as high, and a penalty of $4,000.00 was assessed. *Id.* The Order was terminated the same day when an examination was performed and DTIs were placed on the date boards. *Id.* Management was further placed on notice that increased enforcement would result for future violations. *Id.*

30 C.F.R. §75.364(a) entitled "Weekly examination," and subtitled "Worked-out areas," states:

> At least every 7 days, a certified person shall examine unsealed worked-out areas where no pillars have been recovered by traveling to the area of deepest penetration; measuring methane and oxygen concentrations and air quantities and making tests to determine if the area is moving in the proper direction in the area. The locations of measurement points where tests and measurements will be performed shall be in included in the mine ventilation plan and shall be adequate in number and location to assure ventilation and air quality in the area. Air quantity measurements shall also be made where the air enters and leaves the worked-out area. An alternative method of evaluating the ventilation in the area may be approved in the ventilation plan.

---

[12] On November 12, 2013, I granted the Secretary's Motion to amend this Order and to plead in the alternative on the basis that the facts also support a violation of mandatory standard 30 C.F.R. §75.364(g), which provides that "The person making the weekly examination shall certify by initials , date, and the time that the examination was made."

[13] DTI's refers to dates, time and initials. This information provides inspectors with a history of operator examinations.

During the same regular inspection, Stone and foreman Mike Turner traveled to two seals, which were remotely located from the others and were the most outby seals at the Mine.[14] Tr. 343. The purpose of these two seals was to seal the newer section of the Mine from an older, worked-out section. Tr. 345. These two seals were accessed by crawling several hundred feet in muddy wet conditions to the seals; crawling was necessary as the top of the Mine at that point is only 26-28 inches with bad roof making access difficult. Tr. 347, Exhibit GX-11. As they approached the first seal, Turner, who was ahead of Stone, used his glove and hand to wipe the DTIs off the chalk board located near the seal before Stone could read it. Tr. 344, 355. At that point, Stone told Turner that the DTIs needed to be confirmed and when they got to the second seal, Turner should not remove the dates.[15] Tr. 344, 358, Exhibit GX-11. However, when they arrived at the second seal, Turner again erased the DTIs. Tr. 344. In Stone's opinion, Turner's erasures were done to conceal evidence that the seals had not been examined in the last seven days as required by the regulation. Tr. 344, Exhibit GX-11.

Stone designated the Order as reasonably likely because the seals were constructed from Omega blocks, similar to foam insulation.[16] Tr. 353. Although operators will often add strength to the seals using plaster, they can be penetrated by a pen or screwdriver. Tr. 353-354. Because dangerous gases accumulate behind the seals, Stone was concerned that these gases would migrate into the working section if the seal was damaged. Tr. 360. This could lead to an ignition or explosion, or it could expose miners to low oxygen levels. Tr. 360-361. Because the area is only subject to a weekly examination, the only miner affected would be the examiner. Tr. 361.

Stone designated Respondent's negligence as high because Turner erased the second DTI board after being instructed not to erase the DTIs as the dates needed to be confirmed. Tr. 344, 358. Turner never asked Stone to repeat or clarify what had been said. Tr. 359. He further testified that Turner was behaving in a nervous manner, and the area itself did not appear to be well traveled. Tr. 344, 350. Although the path was well worn, there was nothing to suggest that the requirement was actually being met, such as fresh boot or knee pad marks in the return. Tr. 350-351. Although the examinations were recorded in the books, Stone discounted them based on Turner's conduct and because there was no other evidence that the examination had, in fact, been conducted. Tr. 451-452, 456; Exhibits. RX-13-15.

To defend this Order, Respondent presented the testimony of foreman Allen and miner Bennett. Mr. Turner did not testify. Bennett testified that on September 14 and 21 he accompanied foreman Allen to examine the #1 and #2 seals as part of his training as a foreman.

---

[14] Stone testified that the other seals were inspected without issue. Tr. 346.

[15] Stone testified that he believes he told Turner twice not to remove the DTIs. Tr. 344, 358.

[16] The State of West Virginia considers these seals to be high risk and requires operators to inspect them daily. Tr. 350. Although Stone was unclear of the exact circumstances, he testified that this is required due to an explosion in a worked-out area in which the Omega seals did not hold. Tr. 354, 497, 501.

Tr. 477, 479, 481. Bennett stated that he observed Allen putting the date, time and his initials on the date board and that Allen instructed him on how to examine seals. Tr. 478. He said further that Allen told him it was a felony to sign the examination forms if the examination had not been performed. Tr. 479, 482. Finally, he testified that he did not pay any attention to the DTIs that were on the date board. Tr. 480-481.

In his testimony, Allen confirmed that he and foreman trainee Bennett had gone to the #1 and #2 seals on September 14 and 21 to examine the seals and that he recorded the DTIs on those dates. Tr.499-504. Allen testified that after the Order was written, he asked Mike Turner why he erased the DTIs. Turner's only reply was "he couldn't hear good." Tr. 510-511. On cross-examination, Allen stated that during his deposition about the Order, when he questioned Turner, Turner admitted erasing the DTIs and that Stone had told him not to erase the date board. Allen also admitted that during the deposition he did not say anything about Turner's poor hearing. Tr. 523.

I find that Respondent violated 30 C.F.R. § 75.364(a) as set forth in the Order inasmuch as Respondent could not establish it examined Seals #1 and #2. This was because foreman Turner erased the DTIs on the date board before the inspector could verify their presence, despite being admonished by the inspector in a timely manner to not erase the DTIs at the second seal. I do not credit Allen's assertion that Turner told him he did not hear well or was hard of hearing.[17] Further, Allen testified that Turner admitted to erasing the boards and had no further explanation for doing so. Tr. 511, 523. It is also significant that Respondent failed to call Turner as a witness since he was the person charged with erasing the DTIs. As with Josh Collis, noted about, I draw an adverse inference that had Turner been called to testify his testimony would have been unfavorable to Respondent. Since Turner was a certified examiner and foreman, he should have known that failing to keep records at the seals was a violation. Further, I agree with Stone's credible testimony that there would have been no reason to erase the boards unless Respondent was attempting to hide the fact that the examinations had not been conducted. Turner's unexplained conduct certainly supports this conclusion. Likewise, Turner's nervous behavior and failure to ask for clarification are telling and support Stone's testimony. Respondent argues that regardless of the erasure of the DTI boards, the examination books clearly show that the seals were examined daily and, therefore, weekly. Allen and Bennett testified that they had, in fact, examined the seals on September 14 and 21, 2011 and put the DTIs on the date board. Tr. 477-478, 480-481.[18] If this were the case, it begs the question of why Turner would erase the boards. Further, the examination book records (Respondent Exhibits 13, 14 and 15) are only a record of the examination, and do not establish by themselves that the examination was in fact conducted. In light of all the facts and evidence, I find that Respondent violated 30 C.F.R. § 75.364(a).

---

[17] In this regard I note that the hard of hearing "defense" was not raised during the Secretary's deposition of Allen.

[18] Respondent apparently argues that there was no violation here since foreman Allen had correctly examined the two seals on September 21, so that the next weekly examination was not due until September 28. This argument fails as the violation here is the concealment by erasure of all DTIs on the date of inspection (September 26).

I also find that this violation is S&S. Respondent's conduct here, through its agent Turner, prevented the inspector from determining if the required examinations of Seals #1 and #2 had been completed. If there was not compliance with the regulation, this would have contributed to the likelihood of a serious injury. Because the seals are constructed of Omega blocks, they are more easily damaged or penetrated over time. Although MSHA does not so require, the State of West Virginia has labeled them high risk and requires them to be examined daily. This is particularly important because the worked-out areas behind the seals can contain dangerous gases, as well as low quality air. Any damage to the seals contributes to the hazard of noxious or flammable gases entering the working section. If this were to occur, at the very least, the examiner risks serious injury or death resulting from an ignition, an explosion or breathing poor quality air. As such, I conclude that the violation is S&S.

I further find that the violation was the result of Respondent's high negligence. Stone testified that the area was quiet, Turner was crawling in close proximity to him and Stone speaks loudly due to some loss of hearing. Tr. 357-358. Therefore, I conclude that Turner heard Stone and deleted the DTIs in direct defiance of the instructions that he had been given. In this regard, Stone's testimony that he instructed Turner not to erase the second date board is uncontradicted, and therefore fully supported by the record. Moreover, Turner was a certified foreman who should have known the examination requirements. Because Respondent cannot present any mitigating evidence, I affirm the Secretary's high negligence designation. Based on the foregoing, Order No. 8143333 is **AFFIRMED** and a $4,000.00 penalty is assessed.[19]

## III. THE APPROPRIATE CIVIL PENALTIES

It is well established that Section 110(i) of the Act grants to the Commission and its judges the authority to assess all civil penalties provided under the Act. 30 U.S.C. § 820(i). It further directs that:

> [i]n 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).

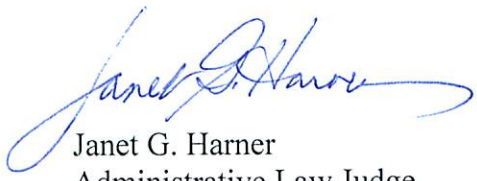
[19] As noted, the Secretary alleged an additional and/or alternative violation of 30 C.F.R. § 73.364(g) with respect to Turner's actions in erasing the DTIs on the date board. Although the argument is made in the Secretary's post-hearing brief that this was an additional violation, the Secretary does not urge any additional remedial relief. It would appear from the evidence adduced at the hearing would support a violation of § 73.364(g) apart from the violation of §73.364(a) found herein. However, inasmuch as no additional remedy is sought and the violation is essentially encompassed within the violation in the original Order, I decline to make a specific finding in this regard.

The Secretary submitted the operator's history of past violations with no objection from Respondent. Exhibit GX-1. There is no dispute concerning the appropriateness of the penalty to the size of the business. Further, the parties have stipulated to the fact that the penalties as assessed will not affect Respondent's ability to continue in business and Respondent's good faith in abating the violations. As stated above, the gravity for each violation except Order No. 8136397 was affirmed as issued. Therefore, a reduction in penalty was warranted for the reduction in gravity as to that Order. The same logic applies to the reduction in Respondent's negligence in Order No. 8136397. Based on the six civil penalty factors, I find that a total penalty of $32,017.00 is warranted as follows:

Order No. 8098519 -- $14,743.00
Order No. 8136396 -- $7,774.00
Citation No. 8136397 -- $1,500.00
Order No. 8143332 -- $4,000.00
Order No. 8143333 --- $4,000.00

## IV. ORDER

It is **ORDERED** that Order Nos.8098519, 8136396, 8143332 and 8143333 are **AFFIRMED**. It is further **ORDERED** that Order No. 8136397 is **MODIFIED** from a 104(d) order to a 104(a) citation, and that the operator's negligence be reduced from high to low. Respondent is **ORDERED** to pay the Secretary of Labor the sum of $32.017.00 within 30 days of the date of this Decision.[20] Upon receipt of payment, this case is hereby **DISMISSED**.



Janet G. Harner
Administrative Law Judge

Distribution:

Michele A. Horn, Esq., Office of the Solicitor, U.S. Department of Labor, Cesar E. Chavez Memorial Building, 1244 Speer Blvd., Denver, CO 80204

James F. Bowman, Litigation Representative, Sally Ann Coal Company, Inc., P.O. Box 99, Midway, WV 25878

[20] Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390