FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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WASHINGTON, D.C. 20004-1710
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August 13, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION ("MSHA"),	:	Docket No. KENT 2010-159
Petitioner,	:	A.C. No. 15-08079-198829-01
	:	
v.	:	
	:	
EXCEL MINING, LLC,	:	Mine: No. 3
Respondent.	:	

DECISION

Appearances: LaTasha Thomas, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner

Gary D. McCollum, Esq., Alliance Coal, LLC, Lexington, Kentucky, for Respondent

Before: Susan L. Biro, Chief Administrative Law Judge, U.S. EPA[1]

On November 24, 2009, the Secretary of Labor ("Secretary"), acting through the Mine Safety and Health Administration ("MSHA"), filed a Petition for the Assessment of Civil Penalty ("Petition") against Excel Mining, LLC ("Respondent" or "Excel"), pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act"), as amended, 30 U.S.C. §§ 815, 820 (2006). Respondent subsequently filed an Answer to Petition for the Assessment of Civil Penalty ("Answer") on December 15, 2009. By Order of Robert J. Lesnick, Chief Administrative Law Judge of the Federal Mine Safety and Health Review Commission ("Commission"), dated December 1, 2010, this case was assigned to the undersigned for adjudication.

The Petition alleges two violations described in Citation Number 8236517 and Order Number 8236518, both of which were issued pursuant to Section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), and for which the Secretary seeks penalties totaling $28,133. In particular, Order Number 8236518 alleges a violation of 30 C.F.R. § 75.360(b) for failure to conduct an adequate preshift examination. Respondent disputes both liability and the penalty proposed by the Secretary for Order Number 8236518. In turn, Citation Number 8236517 alleges a violation of

[1] The Administrative Law Judges of the United States Environmental Protection Agency are authorized to hear cases pending before the Federal Mine Safety and Health Review Commission pursuant to an Inter-Agency Agreement effective for a period beginning September 2, 2010.

30 C.F.R. § 75.370(a)(1) for failure to comply with an approved ventilation plan. Respondent acknowledges liability but disputes the penalty proposed by the Secretary for Citation Number 8236517.

A hearing was held on the charged violations in Pikeville, Kentucky, on October 18, 2011. At the hearing, the Secretary introduced the testimony of one witness, Billy Ray Meddings, and proffered five exhibits that were admitted into evidence and marked as the Secretary's Exhibits ("S's Ex.") 1–5. Respondent stipulated to these exhibits at the hearing. Transcript ("Tr.") 98–99. Respondent, in turn, introduced the testimony of one witness, Jimmy Rowe, and proffered three exhibits that were admitted into evidence and marked as Respondent's Exhibits ("R's Ex.") 1, 5, and 6. The Secretary stipulated to these exhibits at the hearing. Tr. 98–99. The Secretary and Respondent subsequently filed post-hearing briefs on January 9, 2012 and February 6, 2012, respectively. With the latter filing, the record closed.

I. STIPULATIONS

Before the hearing, the parties entered into the following stipulations ("Stip."):

1. Respondent is subject to the Mine Act.

2. Respondent has an effect upon interstate commerce within the meaning of the Mine Act.

3. Respondent is subject to the jurisdiction of the Commission, and the presiding Administrative Law Judge has the authority to hear this case and issue a decision.

4. Respondent operates the No. 3 Mine, I.D. No. 15-08079.

5. The No. 3 Mine produced 1,789,927 tons of coal in 2008, and had 655,991 hours worked in 2008.

6. A reasonable penalty will not affect Respondent's ability to remain in business.

II. BURDEN OF PROOF

In a civil penalty proceeding, the Secretary bears the burden of proving the alleged violation by a preponderance of the evidence. *Consolidation Coal Co.*, 11 FMSHRC 966, 973 (June 1989) (citing 30 U.S.C. § 823(d)(2); *Kenny Richardson*, 3 FMSHRC 8, 12 n.7 (Jan. 1981)). This standard requires the Secretary to demonstrate that "the existence of a fact is more probable than its nonexistence." *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000) (citations omitted).

III. PENALTY PRINCIPLES

To determine the appropriate amount of civil monetary penalty to assess, Section 110(i) of the Mine Act requires the Commission to consider the following factors: (1) the operator's history of previous violations; (2) the appropriateness of such penalty to the size of the business of the operator charged; (3) whether the operator was negligent; (4) the effect on the operator's

ability to continue in business; (5) the gravity of the violation; and (6) 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). Set forth at 30 C.F.R. § 100.3, MSHA promulgated regulations that elaborate upon these factors in order to facilitate the calculation of a civil penalty to propose for charged violations. The undersigned is not bound by these regulations or the penalty proposed by the Secretary, however. 29 C.F.R. § 2700.30(b); *Sellersburg Stone Co.*, 5 FMSHRC 287, 291–92 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). Rather, the undersigned is required to determine the appropriate assessment independently by proper consideration of the six penalty criteria identified above. *Id.*

The concepts of gravity and negligence are applicable to all citations and orders issued pursuant to the Mine Act, and form part of the penalty assessment scheme used by MSHA and its inspectors. For certain violations found to be "significant and substantial" or to involve "unwarrantable failure," enhanced enforcement mechanisms are available under Section 104(d)(1) of the Act, which provides:

> If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under [this Act]. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) of this section to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

30 U.S.C. § 814(d)(1). As the Commission succinctly explained in a recent decision, "Section 104(d)(1) distinguishes as more serious any violation that 'could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard,' 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.'" *Wolf Run Mining Co.*, 2013 WL 1249150, at *2 n.4 (Mar. 20, 2013) (alteration in original). This mechanism for enhanced enforcement serves as a "forceful incentive for the operator to exercise special vigilance in health and safety matters." *Emery Mining Corp.*, 9 FMSHRC 1997, 2000 (Dec. 1987) (citing *Nacco Mining Co.*, 9 FMSHRC 1541, 1546 (Sept. 1987)).

A. GRAVITY

In order to determine the appropriate amount of civil monetary penalty to assess, Section 110(i) of the Mine Act requires the Commission to consider "the gravity of the violation," among other criteria. 30 U.S.C. § 820(i). Gravity is "often viewed in terms of the seriousness of the violation." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996). Pursuant to the regulations promulgated at 30 C.F.R. § 100.3(e), the Secretary analyzes the seriousness of a violation with reference to three factors: (1) the likelihood of occurrence of the event against which a standard is directed; (2) the severity of the illness or injury if the event has occurred or was to occur; and (3) the number of persons potentially affected if the event has occurred or were to occur.

B. SIGNIFICANT AND SUBSTANTIAL

As discussed in greater detail below, the Secretary alleges that the charged violations were of a significant and substantial ("S&S") nature. As defined by Section 104(d)(1) of the Mine Act, an S&S violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d)(1). The Commission first interpreted this statutory language in *Cement Division, National Gypsum Company*, 3 FMSHRC 822 (April 1981), holding that a violation is properly designated as S&S "if, based upon the particular facts surrounding [the] violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Nat'l Gypsum Co.*, 3 FMSHRC at 825. The Commission later elaborated on this standard in *Mathies Coal Company*:

> In 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. As a practical matter, the last two elements will often be combined in a single showing.

Mathies Coal Co., 6 FMSHRC 1, 3–4 (Jan. 1984) (footnote omitted).

The S&S nature of a violation is distinct from the violation's gravity. As noted by the Commission, "[t]he focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs." *Consolidation Coal Co.*, 18 FMSHRC at 1550. The Commission has also emphasized that in accordance with the language of Section 104(d)(1), 30 U.S.C. § 814(d)(1), the S&S nature of a violation stems from "a reasonable likelihood that the [cited] condition . . . could contribute, significantly and substantially, to the cause and effect of a safety hazard." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574–75 (July 1984). Thus, "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 (Aug. 1984) (emphasis added). Finally, the S&S inquiry must be made in the context of continued normal mining operations. *U.S. Steel Mining Co.*, 6 FMSHRC at 1574.

C. NEGLIGENCE

In order to determine the appropriate amount of civil monetary penalty to assess, Section 110(i) of the Mine Act requires the Commission to also consider "whether the operator was negligent." 30 U.S.C. § 820(i). Thus, "[e]ach mandatory standard . . . carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to meet the appropriate duty can lead to a finding of negligence if a violation of the standard occurs." *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983).

The Secretary defines negligence as follows:

> 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. Under the Mine Act, an operator is held to a high standard of care. 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. The failure to exercise a high standard of care constitutes negligence.

30 C.F.R. § 100.3(d). When analyzing an operator's negligence, the Secretary considers mitigating circumstances, such as actions taken by the operator to remedy hazardous conditions or practices. *Id.*

D. UNWARRANTABLE FAILURE

As discussed in greater detail below, the Secretary alleges that the charged violations resulted from Respondent's unwarrantable failure to comply with the cited standards. The Commission has described an unwarrantable failure as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "indifference," or a "serious lack of reasonable care." *Id.* at 2002–04; *see also Buck Creek Coal, Inc.*, 52 F.3d 133, 136 (7th Cir. 1995) (approving the Commission's unwarrantable failure analysis). The Commission has explained the role of Administrative Law Judges in determining whether conduct is "aggravated" in the context of the unwarrantable failure analysis:

> [W]hether 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. . . . 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., Inc., 31 FMSHRC 1346, 1350–51 (Dec. 2009). Repeated similar violations are relevant to the unwarrantable failure analysis to the extent that they serve to notify the operator that greater efforts are necessary for compliance with a standard. *Peabody Coal Co.*, 14 FMSHRC 1258, 1261–62 (Aug. 1992).

IV. SUMMARY OF THE EVIDENCE

At the hearing, in support of the facts underlying the alleged violations and proposed penalties, the Secretary offered the testimony of MSHA Inspector Billy Ray Meddings and copies of Citation Number 8236517, Order Number 8236518, the field notes of Inspector Meddings, a document entitled "Assessed Violation History Report," and the revised basic ventilation plan for Respondent's Number 3 Mine. Respondent, in turn, offered the testimony of Jimmy Rowe and copies of a written statement by Mr. Rowe regarding the alleged violations, a document entitled "Pre-shift Examiner's Report," and a document entitled "Power Move."

Inspector Meddings has been a member of the coal mining industry for over 30 years, including an unspecified period of time as a miner in Respondent's Number 3 Mine and four and a half years as an inspector for MSHA. Inspector Meddings testified that he issued Citation Number 8236517 and Order Number 8236518 during the course of an "E01 inspection"[1] which he performed at Respondent's Number 3 Mine on August 28, 2009. Tr. 100–02, 133. As part of that inspection, Inspector Meddings testified that he traveled to the Number 3 entry of the Number 4 section of the mine. Tr. 133, 136. While there, he observed "[t]he operator's date, time, and initials . . . written on the rib just right there outby the face," which indicated to Inspector Meddings that an agent of Respondent had performed a preshift examination of the area 22 minutes prior to his arrival at that location. Tr. 106–07. Admitted into evidence as Secretary's Exhibit 3 and Respondent's Exhibit 1, respectively, the field notes of Inspector Meddings and written statement of Mr. Rowe reflect that the precise time of the preshift examination of the Number 3 entry, as recorded on the rib, was 4:55 a.m. S's Ex. 3; R's Ex. 1. The copy of the Pre-Shift Examiner's Report proffered by Respondent and admitted into evidence as Respondent's Exhibit 5 confirms that a preshift examination of the Number 4 section was performed by Rick Wright between 4:48 and 5:37 a.m. R's Ex. 5. Notably, Mr. Wright recorded in the Pre-Shift Examiner's Report that he detected a concentration of methane of 0.35 percent in the Number 3 entry at the time he performed the preshift examination. *Id.*

In contrast, when Inspector Meddings proceeded to the face of the Number 3 entry and climbed on top of a "gob"[2] in order to measure the level of methane by the roof at approximately

[1] Inspector Meddings explained that an E01 inspection is performed at a given mine on a quarterly basis and requires an inspection of "every piece of equipment, all the records, everything at that mine." Tr. 102–03; *see also* Tr. 114 ("Before we start an E01 inspection, we review all the documents. Ventilation plan[,] . . . the roof control plan, training plans.").

[2] As described by Mr. Rowe, a "gob" is essentially a pile of loose waste. Tr. 170–71.

5:15 a.m., he found a concentration of at least five percent.[3] Tr. 103–05, 136–38, 151; S's Ex. 3. Inspector Meddings testified that this particular level of methane created a risk of explosion and serious injury for the 11 miners working elsewhere in the Number 4 section at that time. Tr. 103–05, 110–12, 123–24. While Inspector Meddings acknowledged that power to the Number 4 section was shut down at the time of his inspection, he identified other ignition sources for an explosion, such as battery-operated scoops and four-wheelers that were "tramming across the section." Tr. 103–04, 111, 123, 134, 156–57; S's Ex. 3. He conceded, however, that he did not observe any equipment in the Number 3 entry at the time he took his reading, that four-wheelers were not permitted to travel inby the last open crosscut, and that battery-operated scoops were not permitted to travel inby the last open crosscut unless Respondent first tested for the presence of methane. Tr. 134–36.

Upon finding the elevated level of methane in the Number 3 entry, Inspector Meddings notified Jimmy Rowe, the chief electrician on the third shift who was accompanying him at the time, of the need to gather any miners in the Number 4 section at the power center and to correct the condition.[4] Tr. 107, 140–41, 162–64; S's Ex. 3; R's Ex. 1. At the hearing, Inspector Meddings could not recall whether he showed Mr. Rowe his multi-gas detector at that time, but he testified that he normally would do so. Tr. 140. He acknowledged, however, that he failed to take a bottle sample to confirm the concentration of methane that he measured. Tr. 150–51; *see also* R's Ex. 1; Tr. 182. Mr. Rowe claimed that he did not see the reading taken by Inspector Meddings but that he heard the detector emit an audible alarm when Inspector Meddings climbed on top of the gob that had been pushed against the face. R's Ex. 1; Tr. 169–74, 185.

Inspector Meddings subsequently attempted to measure the air velocity behind the "line curtain" in the Number 3 entry,[5] using first a calibrated anemometer and then chemical smoke,[6]

[3] Inspector Meddings testified that he took the measurement using a Solaris multi-gas detector, which measures concentrations of methane up to five percent and thereafter "goes into OR, which is out of range." Tr. 103. He also testified that the detector sounds an audible alarm when it measures a concentration of one percent. Tr. 140.

[4] Inspector Meddings also notified Mr. Rowe of the need to deenergize the section, to which Mr. Rowe responded that the power was already shut down. Tr. 140, 169, 174–75; R's Ex. 1. Mr. Rowe testified that he shut down the power at least one hour prior to Inspector Meddings' arrival at the Number 3 entry because miners were performing a power and belt move in the section. Tr. 165, 182; *see also* R's Ex. 1.

[5] When questioned by counsel for Respondent, Inspector Meddings affirmed that Respondent's Number 3 Mine utilizes a ventilation system that draws air through the mine by way of two fans. Tr. 129. According to Inspector Meddings, "line curtains" aid in maintaining the movement of air, which serves to dilute any methane released at the mine face. Tr. 114, 118. Admitted into evidence as Secretary's Exhibit 6, Respondent's revised basic ventilation plan requires Respondent to maintain a minimum air velocity of 1000 cubic feet per minute ("CFM") at the "[i]nby end of line curtain[s] in idle places." S's Ex. 6; *see also* Tr. 115, 117, 142; S's Ex. 2.

[6] The field notes of Inspector Meddings do not reflect whether he performed this testing in the presence of any of Respondent's agents, and Inspector Meddings testified at the hearing that he

but he was unable to detect any movement. Tr. 115, 142; S's Ex. 2, 3. Consequently, at 5:19 a.m., Inspector Meddings issued Citation Number 8231517 to Respondent for failure to comply with the requirement set forth in Respondent's revised basic ventilation plan that Respondent maintain a minimum air velocity of 1000 CFM at the "[i]nby end of line curtain[s] in idle places." S's Ex. 2, 3, 6.

Inspector Meddings testified that the line curtain in the Number 3 entry appeared to have been hung improperly by Respondent, resulting in the lack of air flow and accumulation of methane at the mine face. Tr. 116–20, 145–46. Mr. Rowe observed the condition of the line curtain as well, testifying that the portion of the line curtain that extended into the intersection of the Number 3 entry and the last open crosscut appeared to have ripped away and fallen from the first bolt pinning it to the roof. Tr. 175–77. According to the field notes of Inspector Meddings, neither he nor Mr. Rowe observed a rock in the vicinity of the line curtain that could have dislodged it. S's Ex. 3.

Upon being notified of the level of methane found by Inspector Meddings, Mr. Rowe retrieved Mr. Wright, who informed Inspector Meddings that he had not detected any excessive concentrations of methane and that the line curtain had been properly hung when he performed his preshift examination of the Number 3 entry. Tr. 107–08, 141, 143; S's Ex. 3. According to Inspector Meddings, Mr. Wright extended the length of the line curtain "to catch more air and shove it up into the entry" and "tied the curtains up," which restored the air flow and diluted the methane. Tr. 126, 147–48; S's Ex. 3. The field notes of Inspector Meddings reflect that Mr. Wright performed this action at 5:21 a.m. and that Inspector Meddings found that the concentration of methane decreased to 1.8 percent by 5:38 a.m. and to 0.3 percent by 5:50 a.m. S's Ex. 3.

Mr. Wright also demonstrated the manner in which he measured levels of methane in the mine, but according to Inspector Meddings, he failed to take the readings at an acceptable distance from the face. Tr. 108, 143–45; S's Ex. 3. Mr. Rowe testified that he also observed Mr. Wright's demonstration and that he appeared to take a valid measurement, at least "to the extent that he . . . didn't climb up on the gob and get as close to the face as Mr. Meddings did . . . ." Tr. 178. Inspector Meddings thereafter issued Order Number 8236518 to Respondent at 5:24 a.m. for failure to perform an adequate preshift examination. S's Ex. 1, 3. Noting the absence of any cutting activity in the Number 3 entry on the date of his inspection, Inspector Meddings opined that such an excessive level of methane could not have accumulated in the Number 3 entry in the short amount of time that elapsed between Mr. Wright's preshift examination and his own testing. Tr. 122. Accordingly, Inspector Meddings testified, he believed that the high concentration was present at the time Mr. Wright performed his preshift examination and that Mr. Wright would have detected it had he performed an adequate examination. Tr. 110, 122, 124. Inspector Meddings explained his belief that Mr. Wright hurried through the preshift examination in order to complete a belt move, as evidenced by Mr. Wright ordering more employees to help with the task:

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could not recall that particular information. S's Ex. 3; Tr. 141–43. Mr. Rowe testified that he did not remember Inspector Meddings using an anemometer and that Inspector Meddings did not perform any testing with chemical smoke in his presence. Tr. 175.

> [B]ecause when he pulled more men off of an outby to come up there to try to help -- get the belt move finished, I believe he was in a hurry and came up there and put his gas test and put his date, time, and initials because he knew that each inspectors [sic], they look at each heading for date, time, and initials . . . . So he just kind of rushed across and was taking his date, time, initials, make sure they was in the face, and didn't take a proper gas test as he should have done, was trying to hurry up and get back to continue his belt move.

Tr. 125; *see also* Tr. 152–53. In order to abate the alleged violation, Inspector Meddings conferred with Mr. Wright about the proper method of measuring levels of methane at the mine and then observed Mr. Wright conducting such testing in accordance with his instructions. Tr. 113, 126–27; S's Ex. 3.

When questioned by Respondent's counsel as to whether he would find it "surprising" for the level of methane to increase over a 20-minute period given the conditions at the Number 3 entry, Inspector Meddings responded, "To me it would be." Tr. 148. He maintained that the elevated level of methane was present during the preshift examination performed by Mr. Wright and that Mr. Wright simply failed to detect it because of the improper technique that he used to conduct the preshift examination. Tr. 148–49.

Finally, Inspector Meddings explained that he designated the violations alleged in Citation 8236517 and Order 8236518 as "significant and substantial" based upon the presence of an explosive level of methane and ignition sources in the Number 3 entry, the ignorance of the miners in the section to the hazardous conditions, and the likelihood that an explosion would cause serious injury to those miners. Tr. 112, 123–24. He further explained that he found the alleged violations to have resulted from an "unwarrantable failure" to comply with the cited standards because of Number 3 Mine's history of liberating excessive amounts of methane and its history of violations for failure to comply with the approved ventilation plan, which should have put Mr. Wright on notice that he needed to exercise greater care to ensure compliance. Tr. 109–13, 120–22, 124–25.

Mr. Rowe countered that no equipment or miners were located by the face of the Number 3 entry at the time Inspector Meddings measured the concentration of methane there, and that the closest miners were those working at the power center approximately 175 feet outby the face. Tr. 167, 169. He further testified that Respondent would have no reason to move equipment to the face during the power move and that it would be required to measure methane levels prior to moving equipment to the face or reenergizing the section once the power move was concluded. Tr. 166, 183–84. He also challenged the manner in which Inspector Meddings took his reading, explaining that he observed Inspector Meddings climb to the top of the gob and hold the multi-gas detector in a "domed out area" of the roof, where a void had been created by falling rock. Tr. 170–74; R's Ex. 1. Mr. Rowe testified that Inspector Meddings "probably" took the reading less than 12 inches from the mine roof and that he had never before witnessed an inspector climb all the way to the top of a gob to measure levels of methane. Tr. 173–74.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. ORDER NUMBER 8236518: ALLEGED VIOLATION OF 30 C.F.R. § 75.360(b)

1. ALLEGED VIOLATION AND PROPOSED PENALTY

At 5:24 a.m. on August 28, 2009, Inspector Meddings issued Order Number 8236518 to Respondent pursuant to Section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), alleging in the "Condition or Practice" section as follows:

> The operator failed to conduct adequate preshift exam on the active working section 035-0/040-0 MMU[7] where 11 miners were working. An explosive range of methane of 5% or above was detected using a calibrated and approved Solaris multi-gas detector in the No. 3 entry "Face." The foreman's Date, Time, and initials are in the face area within 22 minutes of this inspection. This mine has a history of methane and liberates over 1.2 Million cubic feet in a 24 hour period. This mine has also been issued 49 violations of failing to follow the approved ventilation plan within the past 24 months. This violation is an unwarrantable failure to comply within a mandatory standard.
>
> 107(a) imminent danger order was also issued in connection with this citation.

S's Ex. 1. The Order further alleges that Respondent's failure to conduct an adequate preshift examination constitutes a violation of the mandatory safety standard governing underground coal mines set forth at 30 C.F.R. § 75.360(b), which requires the operator's agent responsible for conducting preshift examinations to perform the following actions at certain locations within the mine: 1) examine for hazardous conditions and violations of certain enumerated mandatory health or safety standards, 2) test for methane and oxygen deficiency, and 3) determine if the air is moving in its proper direction.

Inspector Meddings determined that Respondent's alleged violation of 30 C.F.R. § 75.360(b) was reasonably likely to cause injury, that such injury could reasonably be expected to be permanently disabling, and that 11 people would be affected. S's Ex. 1. He also determined that the violation was significant and substantial in nature and that Respondent's degree of negligence in committing the violation was high. *Id.*

For the alleged violation, the Secretary proposes the assessment of a civil penalty in the amount of $12,563.00.

2. REGULATORY STANDARDS

The regulations promulgated to implement the Mine Act can be found at Chapter I of Title 30 of the Code of Federal Regulations, which sets forth in Part 75 "safety standards compliance with which is mandatory in each underground coal mine subject to the Federal Mine Safety and Health Act of 1977." 30 C.F.R. § 75.1. Of particular relevance to the present proceeding, the regulations at 30 C.F.R. § 75.360 govern the performance of preshift

[7] Inspector Meddings later amended this reference to 035-0/039-0 MMU. S's Ex. 1.

examinations at underground coal mines. More specifically, the regulations at 30 C.F.R. § 75.360(a)(1) require "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 or travel underground." The regulations at 30 C.F.R. § 75.360(b) describe the particular actions this person is required to perform as part of the preshift examination, including testing for methane and oxygen deficiency.

According to the regulations at 30 C.F.R. § 75.323(a), "[t]ests for methane concentrations . . . shall be made at least 12 inches from the roof, face, ribs, and floor." When such tests detect concentrations of methane at certain threshold levels, the regulations at 30 C.F.R. § 75.323 direct operators to take precautionary measures to reduce the concentration of methane and ensure the safety of employees. For example, when testing detects concentrations of methane between 1.0 and 1.5 percent in a working place, intake air course or area where mechanized mining equipment is being installed or moved, operators are required to deenergize electrically powered equipment in the affected area, immediately adjust the ventilation system to reduce the level of methane, and prohibit any other work from being performed in the affected area until levels fall below 1.0 percent. 30 C.F.R. § 75.323(b)(1). In turn, when testing detects concentrations of methane at 1.5 percent or more in a working place, intake air course or area where mechanized mining equipment is being installed or removed, the operator is required to disconnect electrically powered equipment in the affected area at the power source and withdraw from the affected area all persons not exempt by Section 104(c) of the Act, 30 U.S.C. § 814(c). 30 C.F.R. § 75.323(b)(2).

Finally, the regulations at 30 C.F.R. § 75.360(g) require the certified person performing the preshift examination to record the results of the examination, including the results and locations of air and methane measurements, on the surface before any other persons enter any underground area of the mine. The regulations further require a mine foreman or equivalent mine official to countersign these records. 30 C.F.R. § 75.360(g).

3. LIABILITY

a. Arguments of the Parties

To support the alleged violation, the Secretary cites the testimony of Inspector Meddings that he detected an explosive level of methane in the Number 3 entry merely 22 minutes after a preshift examination had been performed in that location and that he determined, based upon his experience, that such an excessive level of methane could not have formed during that period. S's Br. 5–6 (citing Tr. 106). Accordingly, Inspector Meddings concluded, the violative condition was present at the time Mr. Wright performed the preshift examination, and Mr. Wright failed to detect it because he was not properly performing the testing for methane. *Id.* at 6 (citing 108, 122). The Secretary also points to evidence of Respondent's history of violations stemming from its failure to control levels of methane at its Number 3 Mine. *Id.* (citing Tr. 109).

In its defense, Respondent disputes the precise concentration of methane in the Number 3 entry. R's Br. 6–8. While Respondent "acknowledge[s] the presence of an amount of methane sufficient to cause Meddings' multi-gas detector to alarm," Respondent contends that that "the

amount could have been as low as 1%" based upon the testimony of Inspector Meddings "that his multi-gas detector makes an audible alarm upon encountering 1% methane." *Id.* at 6 (citing Tr. 140). Respondent notes that the reading taken by Inspector Meddings was not corroborated by any of Respondent's personnel or a bottle sample. *Id.* at 6–7 (citing Tr. 150–51, 174, 182). Moreover, Respondent claims, the testimony of Mr. Rowe demonstrates that Inspector Meddings improperly measured the concentration of methane closer than 12 inches from the mine roof. *Id.* at 7 (citing Tr. 173–74).

Finally, Respondent cites a number of legal authorities for the proposition that the Secretary is required to demonstrate not whether the violative condition existed at the time Inspector Meddings conducted his inspection but, rather, whether it existed at the time Mr. Wright performed the preshift examination. R's Br. 5 (citing *Energy Fuels Coal, Inc.*, 18 FMSHRC 171, 176 (Feb. 16, 1996) (ALJ); *Enlow Fork Mining Co.*, 1997 WL 14346, at *6 (Jan. 15, 1997); *Shelby Mining Co., LLC*, 31 FMSHRC 1501, 1510 (Dec. 31, 2009) (ALJ)). Respondent argues that even if Inspector Meddings properly measured the level of methane and found a concentration of five percent at the Number 3 entry, the record lacks sufficient evidence to demonstrate that this level of methane existed at the time Mr. Wright performed the preshift examination at that location. *Id.* at 8.

b. Discussion

Order Number 8236518 alleges that Respondent failed to perform an adequate preshift examination of the Number 3 entry of the Number 4 section of Respondent's Number 3 Mine on August 28, 2009, in violation of 30 C.F.R. § 73.360(b). S's Ex. 1. As the condition underlying this alleged violation, the Order cites the explosive range of methane detected by Inspector Meddings and notes that a preshift examination of the cited area had been performed only 22 minutes prior to Inspector Meddings' inspection. *Id.*

As a preliminary matter, the undersigned rejects Respondent's contention that Inspector Meddings improperly measured the level of methane present in the Number 3 entry and that the concentration did not exceed five percent, as determined by Inspector Meddings. Given his considerable experience in the mining industry, the undersigned accepts the assessment of Inspector Meddings as accurate and reliable. The absence of corroborating evidence in the form of a bottle sample or observations by Respondent's personnel does not cast sufficient doubt on his assessment to discredit it. Further, the countervailing evidence offered by Respondent fails to establish that Inspector Meddings improperly measured the level of methane, as claimed by Respondent. Respondent bases its argument on the observations of Mr. Rowe, who testified that Inspector Meddings "probably" took the reading less than 12 inches from the roof of the mine. Tr. 173–74. Standing alone, this equivocal testimony is not enough to establish that Inspector Meddings measured the level of methane at an improper distance from the roof. Mr. Rowe also testified that he had never observed an inspector measure the level of methane from atop a gob, as Inspector Meddings did. Tr. 172–73. This testimony also is not persuasive to establish that Inspector Meddings measured the level of methane incorrectly. Finally, when asked about a particular feature of the roof, Mr. Rowe admitted that he "didn't get close enough to see that much of it, because I didn't travel all the way to the face of the entry with him." Tr. 172. While Mr. Rowe did not specify his precise location in the entry as Inspector Meddings took readings at

the face, he noted that the entry was 95 feet deep at that time. Tr. 171. Thus, Mr. Rowe could have been a significant distance from Inspector Meddings, which casts some doubt on the reliability of his observations. Accordingly, the weight of the evidence supports a finding that Inspector Meddings properly measured the level of methane present in the Number 3 entry and that the concentration was at least five percent.

The undersigned now turns to the alleged violation of 30 C.F.R. § 73.360(b). Among the ways of establishing that an operator has failed to perform an adequate preshift examination, the Secretary can show that the violative condition cited by the inspector existed at the time of the preshift examination and that the examiner failed to document it in the examination records or otherwise report it. *See Twentymile Coal Co.*, 34 FMSHRC 2138, 2171 (Aug. 9, 2012) (ALJ). Upon consideration of the evidence presented by the parties, the undersigned finds that the Secretary has failed to satisfy this burden. Based at least in part on the absence of any cutting activity in the Number 3 entry on the date of his inspection, Inspector Meddings opined that the excessive level of methane did not form there in the short span of time between Mr. Wright's preshift examination and Inspector Meddings' inspection but, rather, that it was present during the preshift examination and Mr. Wright failed to detect it.[8] Tr. 110, 122, 124, 148–49. While the significant experience of Inspector Meddings lends credibility to this determination, it is undermined by the evidence in the record that the methane dissipated in an equally short period. Approximately 20 minutes elapsed between Mr. Wright's preshift examination, at which time he measured the concentration of methane to be 0.35 percent, and Inspector Meddings' inspection, at which time he measured the concentration to be at least five percent. S's Ex. 3; R's Ex. 5; Tr. 103–05. Once Mr. Wright remedied the improperly hung line curtain, however, the concentration of methane dropped to 1.8 percent within 17 minutes and 0.3 percent within 29 minutes. S's Ex. 3. The rate at which the concentration of methane decreased when the curtain was properly hung supports a finding that the excessive level measured by Inspector Meddings could have formed after Mr. Wright conducted a preshift examination of the entry, contrary to Inspector Meddings' determination.

Inspector Meddings recognized that an improperly hung ventilation curtain causes methane to accumulate in a mine, testifying, "I can jerk that curtain down and [methane will]

[8] Specifically, Inspector Meddings testified:

> By my experience, the buildup of methane to 5 percent, it was there when that boss went through. There's no way, you know, like I said, my experience, that that methane, if no one's cutting, there's no machine in it, you know, if the miner is not cutting, it's just an out-of-place. I can jerk that curtain down and it'll start building up, yes, immediately. But I don't believe that it would build up to explosive mixture in 22 minutes, especially with that curtain. And, you know, it was there, but like I said, I could have -- moving at the end, you know, to me I believe that it was there.

Tr. 122. The reasoning of Inspector Meddings is not entirely clear from this testimony, but he appears to have based his determination that the excessive level of methane was present during the preshift examination, at least in part, on the absence of cutting activity in the entry at the time of his inspection.

start building up . . . immediately." Tr. 122. However, he maintained that the ventilation curtain in the Number 3 entry had been hung improperly by Respondent's agents "from the get-go, from oncoming shift or the pre-shift on the second shift after production." Tr. 117. The undersigned disagrees with this conclusion as well. The field notes of Inspector Meddings reflect that Mr. Wright informed him that the curtain had been properly hung at the time Mr. Wright performed the preshift examination, and Mr. Rowe testified that a falling rock or the movement of air through the last open crosscut could have dislodged the curtain between the preshift examination and Inspector Meddings' inspection. S's Ex. 3; Tr. 177, 179. While Inspector Meddings explained that neither he or nor Mr. Rowe observed any debris in the vicinity of the curtain that could have dislodged it, he acknowledged the plausibility of such an occurrence, testifying that a piece of the curtain "probably" had been pulled from the bolt pinning it to the roof in the intersection of the entry and the last open crosscut. Tr. 117, 146–48; S's Ex. 3. He also affirmed that he has "crossed the mining section before and come back to find that a curtain has fallen off a bolt." Tr. 148. Thus, the explanation offered by Mr. Rowe for the curtain's condition appears reasonable.

Given the likelihood that the ventilation curtain was dislodged after Mr. Wright performed a preshift examination of the entry, the impact that an improperly hung ventilation curtain has on the level of methane in a mine, and the rate at which the concentration of methane in the Number 3 entry decreased once the ventilation curtain was restored to its proper position, the undersigned finds that the Secretary has failed to establish by a preponderance of the evidence that the excessive level of methane found by Inspector Meddings existed at the time of the preshift examination and that Mr. Wright, therefore, performed an inadequate examination in violation of 30 C.F.R. § 73.360(b). This finding does not end the inquiry into Respondent's liability for the charged violation, however. According to the field notes and testimony of Inspector Meddings, he issued the Order to Respondent after Mr. Wright demonstrated the technique he used to measure the level of methane in the Number 3 entry during his preshift examination, and although he scaled a few feet of the gob as part of his demonstration, he still appeared to take readings several feet from the face, which Inspector Meddings considered too great a distance. S's Ex. 3; Tr. 108, 143–45. Inspector Meddings emphasized that Mr. Wright was required to take any steps necessary, including using a probe or climbing to the top of the gob, to take a reading "next to the face." S's Ex. 3; Tr. 144. Mr. Rowe confirmed that Mr. Wright did not climb to the top of the gob as Inspector Meddings had, but he claimed that Mr. Wright appeared to take a valid measurement. Tr. 178.

Upon consideration, the undersigned finds that the foregoing evidence also fails to establish that Respondent performed an inadequate preshift examination in violation of 30 C.F.R. § 73.360(b). While the evidence that Mr. Wright measured the level of methane several feet from the face of the Number 3 entry is deemed credible, this distance seemingly complies with the regulations at 30 C.F.R. § 75.323(a), which require that"[t]ests for methane concentrations . . . be made at least 12 inches from the roof, face, ribs, and floor." The Secretary failed to move into the record any written policy, guidance document, or other evidence setting a maximum distance at which measurements could validly be taken, which would have substantiated the conclusion of Inspector Meddings that Mr. Wright performed the testing at an improper distance. Based upon the evidence of record, the undersigned is constrained to find that Mr. Wright

measured the level of methane in the entry in accordance with applicable regulations and that this consideration cannot form a basis for liability.

In accordance with the foregoing discussion, the undersigned finds that the Secretary has failed to satisfy her burden of establishing a violation of 30 C.F.R. § 73.360(b) by a preponderance of the evidence. Accordingly, Order Number 8236518 is vacated.

B. CITATION NUMBER 8236517: ALLEGED VIOLATION OF 30 C.F.R. § 75.370(a)(1)

1. ALLEGED VIOLATION AND PROPOSED PENALTY

In conjunction with Order Number 8236518, Inspector Meddings issued Citation Number 8236517 to Respondent at 5:19 a.m. on August 28, 2009, pursuant to Section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), alleging in the "Condition or Practice" section as follows:

> The approved ventilation plan is not being followed on the active 035-0/040-0 MMU[9] (#4 Section). No measurement could be obtained behind the line curtain in No. 3 heading using a calibrated anemometer. Also no positive air movement could be detected using chemical smoke. The approved ventilation plan requires 1,000 CFM be maintained in all idle/bolted faces. This entry is approximately 95 Feet deep and 8.5 to 9.5 Ft. in height and the immediate roof consist of sandstone and laminated shale. An explosive range of methane was detected using a calibrated and approved Solaris Multi-gas detector in this heading during this inspection. This mine has a history of methane and liberates over 1.2 Million Cubic feet in a 24 hour period according to the last total liberation bottle samples. This mine has also been issued 49 violations for failing to follow the approved ventilation plan within the last 24 months. The foreman's Date, Time and initials are in the face area within 24 minutes of this citation being issued. This violation is an unwarrantable failure to comply with a mandatory standard.

S's Ex. 2. The Citation further alleges that this condition constitutes a violation of the mandatory safety standard governing underground coal mines set forth at 30 C.F.R. § 75.370(a)(1). This standard provides:

> The operator shall develop and follow a ventilation plan approved by the district manager. The plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine. The ventilation plan shall consist of two parts, the plan content as prescribed in § 75.371 and the ventilation map with information as prescribed in § 75.372. Only that portion of the map which contains information required under § 75.371 will be subject to approval by the district manager.

30 C.F.R. § 75.370(a)(1).

[9] Inspector Meddings later amended this reference to 035-0/039-0 MMU. S's Ex. 2.

Inspector Meddings determined that Respondent's alleged violation of 30 C.F.R. §75.370(a)(1) was reasonably likely to cause injury, that such injury could reasonably be expected to be permanently disabling, and that 11 people would be affected. S's Ex. 2. He also determined that the violation was significant and substantial in nature and that Respondent's degree of negligence in committing the violation was high. *Id.*

For the alleged violation, the Secretary proposes the assessment of a civil penalty in the amount of $15,570.00.

2. LIABILITY

Upon consideration, the undersigned finds that the Secretary has demonstrated by a preponderance of the evidence that Respondent violated 30 C.F.R. § 75.370(a)(1) as charged in the Citation. As noted above, the revised basic ventilation plan governing Respondent's Number 3 Mine requires Respondent to maintain a minimum air velocity of 1000 CFM at the "[i]nby end of the line curtain[s] in idle places." S's Ex. 5. Inspector Meddings presented ample evidence that he was unable to detect any air velocity behind the line curtain in the Number 3 entry of the Number 4 section of the mine on August 28, 2009, in contravention of the plan. While Respondent questions the failure of Inspector Meddings to measure the air flow in the Number 3 entry in the presence of any of its agents, it ultimately does not dispute the alleged violation. As Respondent asserts in its Post-Hearing Brief:

> Excel acknowledges that, at the time of the Ventilation Plan Citation's issuance, the wing of a line curtain had torn down from the nail on which it was hung, resulting in a volume of less than 1,000 cubic feet per minute ("CFM") of air flowing toward the idle face of the No. 3 entry on the No. 4 Section. To that extent, and that extent only, the No. 3 Mine was in violation of its approved ventilation plan at the time of Meddings' inspection.

R's Br. at 4 (footnote omitted). The uncontroverted evidence presented by the Secretary is adequate to establish the fact of the violation. Accordingly, the undersigned finds that Respondent is liable for violating 30 C.F.R. § 75.370(a)(1) by failing to maintain an air velocity of 1000 CFM in the Number 3 entry of the Number 4 section on August 28, 2009, as required by its approved ventilation plan.

3. PENALTY

a. Gravity and Significant and Substantial Nature of the Violation

i) Arguments of the Parties

Citing the testimony of Inspector Meddings, the Secretary argues that Respondent's violation of 30 C.F.R. § 75.370(a)(1) was significant and substantial in nature because the explosive level of methane found by Inspector Meddings, together with the ignition sources present, created a safety hazard that was reasonably likely to result in serious or even fatal injuries for the 11 miners working in the area. S's Br. at 7–8 (citing Tr. 111–12, 122, 157). With

respect to the ignition sources, the Secretary points to "the battery-operated equipment working in the area and possible arcing." *Id.* (citing Tr. 157). According to the Secretary, "[a]nything that can create a spark, whether it is friction or electrical, can cause the methane to ignite." *Id.* at 8 (citing Tr. 157).

Respondent counters that no ignition sources were present in the Number 3 entry at the time of Inspector Meddings' inspection and that Respondent would have measured the concentration of methane prior to any ignition sources being introduced, as required by regulation, under continued normal mining operations. R's Br. at 10–11. Respondent notes that the parties do not dispute that power to the Number 4 section was deenergized and that no mobile equipment or workers were present in the face of the Number 3 entry. R's Br. at 10 (citing Tr. 134, 136, 165, 169). Respondent argues that "the Secretary's case is predicated on 'possible arcing,' a 'chance' of bolt heads popping, and anything that can theoretically create a spark such as friction." *Id.* at 11 (citing Tr. 157) (footnote omitted). Relying upon various legal authorities to support the notion that the Secretary is required to demonstrate that "a confluence of factors" existed to create a reasonable likelihood that an explosion or ignition would occur, and that the risk of ignition was not merely a theoretical possibility, Respondent contends that the Secretary fails to satisfy that burden. *Id.* at 9, 11 (citing *Zeigler Coal Co.*, 15 FMSHRC 949, 953–54 (June 1993); *Sidney Coal Co.*, Inc., 31 FMSHRC 1197, 1202 (Oct. 8, 2009) (ALJ)). Accordingly, Respondent claims, the Citation was improperly designated as S&S. *Id.* at 11.

ii) Discussion

As previously discussed, in order to establish the significant and substantial nature of a violation, the Secretary is required to demonstrate four elements under *Mathies*: 1) violation of a mandatory safety standard occurred; 2) the violation contributed to a discrete safety hazard; 3) the hazard in question is reasonably likely to result in an injury; and 4) the injury in question is reasonably likely to be of a reasonably serious nature. 6 FMSHRC 1 (Jan. 1984). The first element of *Mathies* is satisfied since the fact of the violation has been established. With respect to the second element, the Commission has long recognized the hazards associated with inadequate ventilation as "among the most serious in mining." *Monterey Coal Co., Inc.*, 7 FMSHRC 996, 1000 (July 1985). In support of this statement, the Commission referred to the findings of Congress that "[v]entilation of a mine is important not only to provide fresh air to miners, and to control dust accumulation, but also to sweep away liberated methane before it can reach the range where the gas could become explosive" and, thus, "the requirement that a mine be adequately ventilated becomes one of the more important safety standards under the . . . Act." *Id.* at 1000–01 (quoting S. Rep. No. 95-181, at 41 (1977)). While the Commission stressed the dangers associated with inadequate ventilation particularly in reference to working faces, such dangers undoubtedly exist at idle faces as well, as demonstrated by the accumulation of methane at issue in this proceeding. Inspector Meddings testified that the inadequate ventilation of the Number 3 entry contributed to the excessive level of methane that he detected, an assertion that Respondent does not dispute. Tr. 116–17. Thus, the violation clearly contributed to the discrete safety hazard of an accumulation of methane.

The undersigned now turns to the third element of *Mathies*. The critical question is whether the accumulation of methane in the Number 3 entry was reasonably likely to trigger an

injury-causing event, such as an ignition or explosion, had normal mining operations continued. In considering the likelihood of such an occurrence, the Commission has provided the following framework:

> When evaluating the reasonable likelihood of a fire, ignition, or explosion, the Commission has examined whether a "confluence of factors" was present based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1988). Some of the factors include the extent of the accumulations, possible ignition sources, the presence of methane, and the type of equipment in the area. *Utah Power & Light Co.*, 12 FMSHRC 965, 970–71 (May 1990) ("UP & L"); *Texasgulf*, 10 FMSHRC at 500–03.

Enlow Fork Mining Co., 19 FMSHRC 5, 9 (Jan. 1997) ("*Enlow*").

The presence of methane at the face of the Number 3 entry is uncontroverted. The Commission has held that methane is ignitable at concentrations of one to two percent and explosive at concentrations of 5 to 15%. *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1988). By Respondent's own admission, the concentration of methane in the Number 3 entry was at least one percent and, therefore, ignitable. The undersigned found above, however, that Inspector Meddings measured the concentration of methane to be in excess of five percent. Therefore, sufficient quantities of methane existed in the Number 3 entry to fuel an explosion.

As instructed by *Enlow*, another factor to consider is the potential source of an ignition. Indeed, the reasonable likelihood of an ignition is a "necessary precondition" to the reasonable likelihood of an injury in this context. *Zeigler Coal Co.*, 15 FMSHRC 949, 953 (June 1993) (citing *U.S. Steel Mining*, 6 FMSHRC 1834, 1836 (Aug. 1984)). The parties dispute this factor. In particular, Inspector Meddings acknowledged that power to the Number 4 section was shut down at the time of his inspection and that he did not observe any equipment in the Number 3 entry at the time he took his reading. Tr. 104, 111, 123, 134, 136; S's Ex. 3. He identified other potential ignition sources, however, including battery-operated scoops and four-wheelers that were "tramming across the section," "a bolt head popping," and "anything that can create a spark, whether it's friction, electrical, anything like that." Tr. 103–04, 111, 123, 156–57. Respondent counters that such theoretical sources are insufficient to demonstrate a reasonable likelihood of ignition. R's Br. at 9, 11(citing *Zeigler Coal Co.*, 15 FMSHRC 949, 954 (June 1993); *Sidney Coal Co., Inc.*, 31 FMSHRC 1197, 1202 (Oct. 8, 2009) (ALJ)). Respondent also disputes the likelihood that the methane in the Number 3 entry would encounter any ignition sources if normal mining operations had continued, arguing that the applicable regulations require its agents to measure the concentration of methane in the entry before relocating equipment to the face or reenergizing the section, a point that Inspector Meddings conceded. *Id.* at 10–11 (citing Tr. 134–36, 149–50, 165–66, 169, 183–84).

Upon consideration, the undersigned finds Respondent's position persuasive. While Inspector Meddings noted that battery-operated scoops and four-wheelers were "tramming across the section," the parties agree that none of these pieces of equipment were located in the Number 3 entry at the time of his inspection and that they would not be permitted to travel inby the last open crosscut until Respondent's agents had first tested for the presence of methane. Tr. 134–35,

149–50, 165–66, 169, 183–84. Thus, had normal mining operations continued, Respondent reasonably could have been expected to detect the elevated concentration of methane in the Number 3 entry prior to introducing these potential ignition sources to the area. In addition, the other potential sources of ignition identified by the Secretary appear to be only speculative, as argued by Respondent. The Secretary pointed to "a bolt head popping" as a potential source but failed to present any evidence demonstrating the reasonable likelihood that such an incident would occur and spark an ignition. Inspector Meddings testified simply, "[y]ou do have, I guess, a chance of a bolt head popping, even in sandstone, or that nature." Tr. 157. This testimony is hardly compelling. While the Secretary suggests that an ignition could also result from "anything that can create a spark, whether it's friction, electrical, anything like that," she fails to specify other equipment or materials present in the Number 3 entry that could provide the potential sources of friction or electrical charges. S's Br. at 8 (citing Tr. 157). Inspector Meddings explained, "[t]he friction part would be maybe if they had -- if there was a bearing down, or bad, on a scoop or a dry shaft, that when it was ran it would glow red, that nature." Tr. 158. As noted above, however, scoops were not present in the Number 3 entry at the time and would not have been relocated to the entry until Respondent had first tested for the presence of methane.

In relying upon such speculative sources of ignition, the Secretary demonstrates only that an ignition could occur, not that it was reasonably likely to occur. As pointed out by Respondent, the Commission has held that statements that certain events "could" occur are insufficient to support a finding that an ignition of methane was reasonably likely to occur in determining the significant and substantial nature of a violation. *Zeigler Coal Co.*, 15 FMSHRC at 953–54. Accordingly, the undersigned finds that the Secretary has failed to carry her burden of proving that an ignition of the methane present at the face of the Number 3 entry was reasonably likely to occur and, likewise, that an injury-causing event was reasonably likely to occur. Thus, the violation was not significant and substantial in nature.

Nevertheless, the violation was serious. As noted above, the Commission has advised that "[t]he focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996). The parties agree that miners were not present at the face of the Number 3 entry at the time of Inspector Meddings' inspection but, rather, were completing a belt move elsewhere in the section. Tr. 104–05, 112, 136, 169. According to Mr. Rowe, these miners were located at least 175 feet from the face of the entry. Tr. 169. Inspector Meddings also testified that a crew of repairmen was attending to a continuous miner machine "just outby" and "around the corner," an assertion that Respondent did not challenge. Tr. 104, 123. The fact that these groups of miners were not located in the immediate face of the Number 3 entry does not necessarily diminish the severity of the injuries they could sustain in the event that an ignition of methane propagates an explosion in the entry. Thus, the undersigned accepts as credible Inspector Meddings' conclusion that permanently disabling injuries were reasonably likely to result should an explosion occur. Inspector Meddings reached this conclusion by weighing "[t]he best case scenario," which would be that the methane "ignites and it burns one person," and "[t]he worst case [scenario]," which would be that it "would kill everybody on the section." Tr. 123–24. Accordingly, the undersigned finds the proper characterization of the violation to be serious.

b. Negligence and Unwarrantable Failure

i) Arguments of the Parties

Citing the testimony of Inspector Meddings, the Secretary argues that Respondent exhibited a high degree of negligence on the grounds that Mr. Wright measured the concentration of methane in the Number 3 entry only 22 minutes prior to Inspector Meddings' inspection and Mr. Wright bore the responsibility of taking "extra precautions" to ensure that the concentration fell within a safe range because of the mine's history of liberating excessive levels of methane. S's Br. at 8 (citing Tr. 113; S's Ex. 1). The Secretary also notes that Respondent has been issued 49 violations related to its failure to abide by its approved ventilation plan within the 24 months preceding the Citation. *Id.* at 8 (citing S's Ex. 2). Finally, the Secretary contends that the violation resulted from Respondent's unwarrantable failure to comply on the grounds that the cited conditions were extensive, the cited conditions existed for a period of time that would cause severe injuries to the miners, Respondent was placed on notice that greater efforts were necessary to ensure compliance because of the amount of methane liberated by the mine and the number of previous violations issued to Respondent, and agents of Respondent reasonably should have known of the cited conditions. *Id.* at 10–12 (citing Tr. 107, 109, 110, 124, 126; S's Ex. 1, 2).

Respondent challenges the Secretary's position that the violation resulted from an unwarrantable failure to comply with the cited standard, arguing that the aggravating factors that warrant such a finding were not shown in the present proceeding. R's Br. at 11–15. Specifically, Respondent contends that the Secretary failed to establish the length of time that the concentration of methane detected by Inspector Meddings was present in the Number 3 entry. *Id.* at 12–13 (citing Tr. 122, 181–82). Respondent next argues that the alleged conditions were not extensive, given that the concentration of methane measured by Inspector Meddings was never verified or encountered by Respondent and he detected it only upon climbing atop the gob. *Id.* at 13–14 (citing Tr. 138, 172–74). Thus, Respondent asserts, the excessive level of methane was located in a "limited area close to the roof." *Id.* at 13. Based upon Mr. Rowe's estimate that the cited conditions had existed for less than 20 minutes, and the fact that miners had not entered the Number 3 entry for at least that amount of time, Respondent argues that the cited conditions were not obvious. *Id.* at 14. Respondent also disputes that the cited conditions posed a high degree of danger, arguing that the lack of ignition sources in the entry weighs against such a finding. *Id.* Finally, Respondent claims that it lacked any knowledge of the cited conditions. *Id.* at 14–15. According to Respondent, "nothing in the record supports Meddings' contention that Wright did not perform his pre-shift examination correctly **at the time that it was completed**[,] and the mere fact that methane existed at the time of Meddings' inspection does not prove that Excel had knowledge of this allegation twenty-minutes earlier." *Id.* at 15. Respondent notes that Inspector Meddings verified Mr. Wright's lack of awareness of the excessive level of methane in the Number 3 entry when he testified, "[n]o, I don't believe [Mr. Wright] knew it was there." *Id.* at 14 (citing Tr. 149).

ii) Discussion

Upon consideration of the evidence presented, the undersigned finds that Respondent was only moderately negligent in violating 30 C.F.R. § 75.370(a)(1). On one hand, the undersigned is mindful that Respondent's Number 3 Mine is known to be gassy. As noted by Inspector Meddings, the mine "has a history of methane and liberates over 1.2 Million Cubic feet in a 24 hour period according to the last total liberation bottle samples," an assertion that Respondent did not challenge. S's Ex. 2. Respondent also did not dispute Inspector Meddings' observation that Respondent had been cited for 49 violations of the approved ventilation plan governing Number 3 Mine within the 24 months preceding the issuance of Citation Number 8236517, which, according to Inspector Meddings, ought to have alerted Respondent that it needed to exercise greater care in complying with the plan. S's Ex. 2; Tr. 121–22. On the other hand, as discussed above, the Secretary failed to establish by a preponderance of the evidence that Mr. Wright performed an inadequate preshift examination of the Number 3 entry or that the ventilation curtain could not have been dislodged, through no fault of Respondent, between the performance of the preshift examination and Inspector Meddings' inspection, resulting in the lack of air flow to the face of the entry. Thus, the record supports a finding that the violative condition had existed for only about 20 minutes before it was detected by Inspector Meddings and that Respondent did not possess actual knowledge of it. These considerations undoubtedly mitigate Respondent's degree of negligence in violating 30 C.F.R. § 75.370(a)(1).

Consistent with the foregoing discussion, the undersigned further finds that the violation did not result from an unwarrantable failure to comply with the cited standard. An unwarrantable failure is aggravated conduct amounting to "reckless disregard" or "intentional misconduct." The record lacks sufficient evidence that Respondent engaged in such conduct here. While Respondent may have been aware that greater efforts were needed in order to comply with its ventilation plan, this factor alone does not outweigh the other elements of an unwarrantable failure that have not been satisfied.

c. Other Penalty Factors

Having considered the gravity of the violation and the degree of negligence shown by Respondent, the undersigned now turns to the remaining factors enumerated by Section 110(i) of the Act. With respect to Respondent's history of previous violations, the proposed penalty assessment form attached to the Petition and labeled as MSHA Form 1000-179 reflects that Respondent was cited for 334 violations that became final orders in the preceding 15-month period over the course of 718 days of inspection. Of those 334 violations, 20 consisted of violations of 30 C.F.R. § 75.370(a)(1). In support of these figures, the Secretary proffered a document entitled "Assessed Violation History Report," which was admitted into evidence as Secretary's Exhibit 4. Respondent did not challenge this evidence.

Next, the parties stipulated in advance of the hearing that a reasonable penalty would not affect Respondent's ability to remain in business. Stip. 6. The parties also stipulated that Respondent's Number 3 Mine produced 1,789,927 tons of coal and had 655,991 hours worked in 2008, the year preceding that in which Citation Number 8236517 was issued.[10] Stip. 5. Finally,

[10] As described by the regulations promulgated by MSHA for the purpose of implementing its penalty assessment scheme, the appropriateness of the penalty to the size of the mine operator's business is calculated as follows:

the regulations promulgated by MSHA provide for a "10% reduction in the penalty amount of a regular assessment where the operator abates the violation within the time set by the inspector." 30 C.F.R. § 100.3(f). The Secretary found that Respondent's agents acted in good faith to achieve rapid compliance after notification of the violation, as reflected in the 10% reduction in the proposed penalty amount. The record supports this conclusion.

d. Conclusion

Taking into account the six penalty criteria set forth in the Mine Act, including a reduction in the levels of gravity and negligence, the undersigned finds that the appropriate penalty to assess for the violation charged in Citation Number 8236517 to be $3500. Further, this Citation shall be modified to a 104(a) citation, moderate negligence, injury unlikely, and non-S&S.

VI. ORDER

It is hereby **ORDERED** as follows:

1. Order Number 8236518 is **VACATED** in all respects.

2. Citation Number 8236517 is modified to a 104(a) citation, moderate negligence, injury unlikely, and non-S&S. Respondent shall pay a penalty of **$3500.**

> The appropriateness of the penalty to the size of the mine operator's business is calculated by using both the size of the mine cited and the size of the mine's controlling entity. The size of coal mines and their controlling entities is measured by coal production. The size of metal and nonmetal mines and their controlling entities is measured by hours worked. The size of independent contractors is measured by the total hours worked at all mines. Penalty points for size are assigned based on Tables I to V. As used in these tables, the terms "annual tonnage" and "annual hours worked" mean coal produced and hours worked in the previous calendar year.

30 C.F.R. § 100.3(b). In the proposed penalty assessment form attached to the Petition, the Secretary accounted for both the size of the Number 3 Mine and the size of Respondent's controlling entity. While the Assessed Violation History Report reflects that Respondent's controller is Alliance Resource Partners LP ("ARPL"), the Secretary failed to introduce any evidence into the record concerning the coal production of this entity. S's Ex. 4. Respondent contends that it is "an independent operating subsidiary of ARLP" and that "ARLP – itself – has no 'coal produced' for which 'annual tonnage' can be measured, as described by the plain language of 30 C.F.R. § 100.3(b)." R's Br. at 15–16.

3. Respondent shall pay the aforementioned penalty amount within 30 days of the date of this Order.[11] Upon receipt of payment, Citation Number 8236517 is **DISMISSED**.

/s/ Susan L. Biro
Susan L. Biro
Chief Administrative Law Judge
U.S. Environmental Protection Agency

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[11] Payment shall be sent to the following address: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket and A.C. Numbers.