

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 4, 2014

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner,

v.

EXCEL MINING, LLC,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. KENT 2011-1618
A.C. No. 15-18839-265121

Mine: Van Lear Mine

DECISION

Appearances: Anthony M. Berry, Esq., U.S. Department of Labor, Office of the Solicitor,
Nashville, Tennessee, for Petitioner;
Tyler H. Fields, Esq., Excel Mining, LLC, Lexington, Kentucky, for Respondent.

Before: Judge Paez

This case is before me upon the Petition for the Assessment of Civil Penalty filed by the Secretary of Labor (“Secretary”) pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). In dispute are two section 104(a) citations issued to Excel Mining, LLC (“Excel” or “Respondent”). To prevail, the Secretary must prove his charges “by a preponderance of the credible evidence.” *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)), *aff’d sub nom., Sec’y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1106–07 (D.C. Cir. 1998). This burden of proof 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 and internal quotations omitted), *aff’d*, 272 F.3d 590 (D.C. Cir. 2001).

I. STATEMENT OF THE CASE

Both of the alleged violations in this docket charge Excel with a violation of its ventilation plan under 30 C.F.R. § 75.370(a)(1).¹ The MSHA inspectors designated each

¹ Section 75.370(a)(1) provides:

The operator shall develop and follow a ventilation plan approved by the district manager. The plan shall be designed to control

violation as significant and substantial (“S&S”)² and characterized Excel’s level of negligence as moderate. The Secretary proposed specially-assessed penalties under his 30 C.F.R. § 100.5 regulations based on Respondent’s history of violations at this mine. Specifically, the Secretary proposed penalties of \$13,600.00 and \$11,500.00, respectively, for Citation Nos. 8258130 and 8252975.

Chief Administrative Law Judge Robert J. Lesnick assigned Docket No. KENT 2011-1618 to me, and I held a hearing in Pikeville, Kentucky.³ The Secretary presented testimony from Inspectors Jamie Hamilton and Billy Stiltner. Excel presented testimony from Mine Engineer David Arrington. The parties each filed closing briefs and reply briefs.

II. ISSUES

The parties have stipulated to the Commission’s jurisdiction in this case. (Ex. J–1 at 1–2.) The Secretary argues that the allegations underlying both citations are valid and that his proposed penalties are appropriate.⁴ (Sec’y Br. at 6, 9–10, 14, 16–19.) Although Excel admits that the cited conditions constituted violations, Respondent disputes the Secretary’s allegations regarding gravity and negligence. (Resp’t Br. at 6–7; Resp’t Reply at 7.) Specifically, Respondent argues that the Secretary has failed to demonstrate either violation was S&S and claims its negligence in each case was low. (Resp’t Br. at 6–7.) Further, Excel suggests that I modify Citation No. 8252975 to reduce the number of miners affected from five to two. (*Id.* at 7.) Finally, Excel contends that the penalties should be lowered in this case. (*Id.*)

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 [section] 75.371 and the ventilation map with information as prescribed in [section] 75.372. Only that portion of the map which contains information required under [section] 75.371 will be subject to approval by the district manager.

² The S&S terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that “could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.”

³ In this decision, the hearing transcript, the Secretary’s exhibits, and Excel’s exhibits are abbreviated as “Tr.,” “Ex. G–#,” and “Ex. R–#,” respectively. The parties also admitted a list of stipulations in a joint exhibit, which is abbreviated as “Ex. J–1.”

⁴ Although MSHA Inspector Hamilton characterized Excel’s negligence as “moderate” for Citation No. 8258130 (Ex. G–1), the Secretary in his posthearing brief asks that I modify the level of negligence to “high.” (Sec’y Br. at 10, 19.) The Federal Rules of Civil Procedure allow the amendment of pleadings to conform to the evidence if an issue is tried by the parties’ express or implied consent. *See* Fed. R. Civ. P. 15(b)(2). Given the facts of this case and my conclusions of law, *see* discussion *infra* Part V.A.2, I need not reach this issue.

Accordingly, the following issues are before me: (1) whether the record supports the Secretary's assertions regarding the gravity of the alleged violations, including whether each is S&S and whether Citation No. 8252975 affected five miners; (2) whether the record supports the Secretary's assertions regarding Excel's negligence in committing the alleged violations; and (3) whether the Secretary's proposed penalties are appropriate.

For the reasons set forth below, Citation Nos. 8258130 and 8252975 are **AFFIRMED** as to the Secretary's gravity determinations and **MODIFIED** to reduce the levels of negligence from "moderate" to "low."

III. FINDINGS OF FACT

A. Basic Mining Phases at Van Lear Mine

The Van Lear Mine is an underground coal mine located in Martin County, Kentucky. (Ex. G-4 at 1.) Room-and-pillar mines like the Van Lear Mine produce coal in two phases. (See Tr. 21:13-15, 32:21-23, 50:14-51:4, 55:20-57:13.) In the first phase—known as advance mining—an operator uses a continuous mining machine to bore deeper into different sections of the mine. (See Tr. 55:20-57:13, 153:12-15, 165:3-10.) The continuous mining machine cuts through the coal seam in long corridor-like entries and perpendicular crosscuts. (See Ex. G-3; Ex. G-3A; Ex. G-8; Ex. G-8A; Ex. R-1; Tr. 153:25-154:4.) However, the resulting square or rectangular "pillars" of coal within the seam are *not* simultaneously mined; instead, those pillars remain in place to provide support for the overlying rock and dirt as the operator advances deeper into the mine. (Tr. 165:3-10.) Thus, when viewed from above, working sections at Van Lear Mine—also known as panels—in the advance mining phase resemble checkerboards, with entries and crosscuts surrounding pillars of coal. (Ex. G-3; Ex. G-3A; Ex. G-8; Ex. G-8A; Ex. R-1.)

When the mine operator reaches the end of a coal panel, the process enters the second phase, which is known as retreat mining. (Tr. 151:19-152:5, 165:11-15; Ex. G-3; Ex. G-3A; Ex. G-8; Ex. G-8A; Ex. R-1.) In this phase, the operator removes portions of certain coal pillars on the panel sequentially as it "retreats" towards the entrance to the panel. (Tr. 50:14-51:4, 112:14-113:3, 151:19-152:5, 165:11-18.) As the operator retreats, the mine roof may collapse because the weight of the rocks and dirt above is no longer being supported—creating a refuse area called "gob." (Tr. 146:19-24, 148:1-10.) Because methane and other dangerous gases collect in the gob, mine operators must continue to ventilate it even though no additional mining activity will occur in these areas. (Tr. 48:9-49:14, 50:14-51:7, 55:20-56:10, 57:5-7, 113:12-114:5, 146:25-147:10.) Proper ventilation of gob areas includes the retention of a series of pillars—also known as bleeder blocks—around the outside of the gob, which provides a pathway to ventilate fresh air into and through the gob, thus forcing those dangerous gases out of the mine. (See Tr. 48:9-49:14, 56:4-10, 57:5-7, 113:23-114:5, 121:16-20, 178:8-20; Ex. G-4 at 31.) This air pressure on the gob also helps ensure that those gases do not seep back into the active mining section.⁵ (Tr. 113:12-114:5, 114:24-115:8, 121:7-20, 126:4-13, 132:17-21,

⁵ Once a week, Excel was required to monitor the amount of air that reached the back end of the panel beyond the gob and the bleeder blocks. (Tr. 128:14-21.)

133:17–134:16.) Accordingly, panels at the Van Lear Mine in the retreat mining phase continue to resemble checkerboards around their borders, but they contain large gob areas in the center of the ring created by the bleeder blocks. (Ex. G–3; Ex. G–3A; Ex. G–8; Ex. G–8A; Ex. R–1.)

B. Ventilation Controls at the Van Lear Mine

Methane gas and respirable dust are two dangerous by-products of the coal mining process. (See Tr. 22:2–20, 38:24–39:10.) In certain concentrations, methane is an explosive gas. (Tr. 60:10–14.) The Van Lear Mine is a gassy mine, which liberates more than 500,000 cubic feet of methane within a twenty-four hour period. (Tr. 22:2–20.) Based on the volume of methane the Van Lear Mine liberates, MSHA placed the mine on a ten-day spot exam schedule requiring MSHA inspectors to take bottle samples every ten days to test for methane accumulations. (Tr. 22:7–12, 131:18–21, 164:6–14.) In addition, exposure to silica in respirable dust form contributes to serious lung diseases. (Tr. 39:24–40:22, 45:21–46:11, 67:14–68:10.)

In accordance with 30 C.F.R. § 75.370(a)(1), Excel also submitted a ventilation plan to MSHA on April 27, 2010, and MSHA approved the plan on May 10, 2010 (“May 10 Plan”). (Ex. G–4; Ex. G–4A.) To control methane and dust produced in the mining process, the plan required Excel to provide fresh air with a velocity of at least 4,800 cubic feet per minute (c.f.m.) at any face where coal is being mined. (Ex. G–4 at 9, 11, 31; Ex. G–4A at 9, 11, 31; Tr. 36:4–14, 36:23–37:4, 125:5–15.) In addition, the May 10 Plan required Respondent to provide at least 13,000 c.f.m. of air on the intake side of the pillar line. (Ex. G–4 at 9, 11, 31; Ex. G–4A at 9, 11, 31; Tr. 108:18–109:22.) During retreat mining, Excel was required to ensure at least 7,000 c.f.m. reached the deepest part of the panel, after the air passed through the gob and the bleeder blocks. (Ex. G–8; Ex. G–8A; Ex. R–1; Tr. 127:13–128:13, 174:4–7, 174:23–175:3.)

C. Inspections – January 24, 2011

Inspectors Hamilton and Stiltner visited the Van Lear Mine to conduct a complete inspection of the mine on January 24, 2011. (Tr. 22:21–23:8, 90:20–21, 91:23–24, 92:21–93:3; Ex. G–2 at 1; Ex. G–7 at 1.) At the time, Excel had begun the retreat mining phase and was removing pillars from the Van Lear Mine’s Panel 6 using two separate continuous mining machines.⁶ (See Tr. 100:2–13, 102:5–105:9.) On January 24, day shift miners began cutting coal in Panel 6 at approximately 7:30 a.m. (Tr. 32:11–13.)

The roof of Panel 6 was made of sandstone, which contains quartz.⁷ (Tr. 32:24–33:4; Ex. G–5.) In addition, the continuous miner frequently created sparks when its carbide tip bits struck

⁶ These machines and their respective crews were known as the 007 MMU and 008 MMU. (Tr. 31:16–18, 100:8–9, 101:23–24.) “MMU” stands for mechanized mining unit. (See Tr. 31:18.) Each unit includes a continuous mining machine operator, two shuttle car drives, and two miners setting timbers for roof control purposes. (Tr. 112:2–7.)

⁷ The Secretary’s regulations lower the concentration of respirable dust that may be found in the mine’s atmosphere when the respirable dust contains more than five percent quartz. See 30 C.F.R. §§ 70.100–.101. Although Excel was not subject to this heightened quartz standard at

the mine roof. (Tr. 116:17–20.) These sparks provided potential ignition sources. (Tr. 116:17–20.)

Panel 6 included six entries. When looking towards the working face, the No. 1 Entry was located on the far left and the No. 6 Entry was located on the far right. (Ex. G–3A; Ex. G–8A; Tr. 27:8–31:16, 37:6–8, 100:8–103:23.) Because Excel employed two separate continuous miners on the Panel, Respondent provided separate air courses of fresh air for each mining unit. (See Tr. 102:5–12, 104:11–15, 120:12–121:20.) Thus, the intake air traveled up the No. 3 Entry, then split into separate air courses when it reached the last open crosscut. (Tr. 101:17–24, 102:10–12; Ex. G–3A; Ex. G–8A.)

Hamilton and Stiltner arrived at the mine at approximately 8:00 a.m., met with Excel personnel at the surface, and examined preshift and on-shift reports. (Ex. G–2 at 1; Ex. G–7 at 1, Tr. 25:8–11, 54:12–21, 94:24–95:2, 129:6–12.) Along with Excel’s Curtis Webb and Mike Hurley, the inspectors then traveled to Panel 6 and completed an imminent danger run of the retreat mining section. (Ex. G–2 at 1–4; Ex. G–7 at 1–3; Tr. 25:15–24, 93:12–20, 130:9–12.) At this point, Hamilton inspected the right side of the panel while Stiltner inspected the left. (Ex. G–3A; Ex. G–8A; Tr. 100:12–103:23, 104:11–23, 109:17–25.)

1. Hamilton’s Inspection and Citation No. 8258130

As Inspector Hamilton approached the No. 6 entry, he noticed the 008 MMU cutting into the pillar bounded by the entry and the last open crosscut. (Tr. 27:25–31:18, 32:14–20.) The machine operator had just begun his cut a few minutes earlier, cutting the bottom of the pillar near the floor. (Tr. 39:11–15, 57:14–59:7, 82:2–12.) As the mining machine operator made his cut, Hamilton also observed a cloud of dust surrounding the operator. (Tr. 38:16–23, 41:5–10, 67:9–13, 73:23–74:2; Ex. G–2 at 6.) Although Hamilton did not collect bottle samples of this dust, he witnessed the machine operator standing in the dust and inhaling without any respirator or dust mask. (Tr. 40:19–41:2, 41:11–15, 62:11–18, 74:3–5.) He also learned that neither the section foreman nor the machine operator had taken an air reading prior to beginning the cut. (Tr. 46:19–47:8, 50:2–7, 53:12–23; Ex. G–2 at 8.) Hamilton did not detect any methane present in the working section. (Tr. 60:18–21, 78:15–18, 82:24–83:1.)

At that point, Hamilton measured the air flow at the continuous mining machine using an anemometer. (Tr. 37:10–19.) He recorded an air velocity of 3,456 c.f.m., which was below the 4,800 c.f.m. required under the May 10 Plan. (Tr. 37:20–25, 49:15–23; see Ex. G–4 at 9, 11, 31; Ex. G–4A at 9, 11, 31.)

Based on his inspection, Hamilton issued Citation No. 8258130 at 10:30 a.m., providing:

The compan[y’s] Ventilation plan is not being followed for the 008 MMU. While cutting in the [No.] 6 [E]ntry[,] 3456 cfm was measured going over [the] miner when checked with calibrated anemometer while cutting in [the] 1st sump of pillar block. The

the time of the inspection (Tr. 42:6–43:5; Ex. G–5), it is uncontroverted that Respondent’s mine roof contained quartz.

compan[y's] plan requires 4800 cfm as stated on page 31 of the ventilation plan. The miner had visible float dust suspended in the air around [the] miner and miner man. The continuous miner was cutting in sandstone roof. This condition exposes miners to the dangers associated with lung disease. This mine also on a 10 day spot liberating 500,000 cubic ft of methane in a 24 hour period. This condition exposes miners to the dangers associated with an ignition. Standard 75.370(a)(1) was cited 50 times in two years at [this mine] (50 to the operator, 0 to a contractor).

(Ex. G-1 at 1-2.) Hamilton marked the citation as S&S and indicated the condition affected one person. (*Id.* at 1.) Hamilton also characterized Excel's negligence as moderate. (*Id.*) To abate the violative condition, Respondent spent approximately 10 minutes tightening ventilation curtains on Panel 6. (*Id.*; Tr. 47:9-18, 51:18-53:7; Ex. G-2 at 7.) At the hearing, Hamilton admitted that he had no basis for determining the length of time this cited condition existed. (Tr. 63:24-64:14, 74:13-19.)

2. Stiltner's Inspection and Citation No. 8252975

When Inspector Stiltner began to inspect the left side of the working section, he noted that the 007 MMU was completing its pillar removal work in the No. 3 Entry and moving into the No. 2 Entry. (Tr. 105:11-16, 112:14-113:3, 114:11-23, 147:11-23; Ex. G-7 at 4-5.) At the time, two miners were setting timbers in the No. 2 Entry and three miners had moved into the No. 3 Entry. (Tr. 112:14-113:3; Ex. G-7 at 4.) Stiltner took an air reading while positioned in the last open crosscut between the No. 2 and No. 3 entries. (Tr. 122:16-21; Ex. G-8A.) He recorded an air velocity of 10,703 c.f.m., which is below the 13,000 c.f.m. required under the May 10 Plan. (Tr. 111:11-18, 120:25-121:2; Ex. G-7 at 5, 9.) Stiltner did not detect any methane on the section. (Tr. 115:9-14, 130:9-131:14; Ex. G-7 at 4, 9.)

In light of his observations, Stiltner issued Citation No. 8252975 at 11:15 a.m., providing:

The approved ventilation plan is not being followed on the 007-0 [sic] MMU. When measured with a calibrated anemometer only 10,703 cfm of air is present at the intake side of the pillar line. Page 9 of the approved plan, dated [May 10, 2010], states that a minimum of 13,000 cfm of air will be maintained at the intake side of the pillar line. This mine is on a 103(i) 10 day spot with a history of liberating in excess of 500,000 cubic feet of methane in a 24 hour period. This inadequate ventilation exposes the miners who work on this section, three shifts per day five to six days per week, to the hazards associated with the buildup of methane. [Section] 75.370(a)(1) was cited 50 times in two years at [the Van Lear Mine] (50 to the operator, 0 to a contractor).

(Ex. G-6.) Stiltner designated the citation as S&S and indicated that five miners were likely to be affected. (*Id.*) He also characterized Respondent's negligence as "moderate" in this case.

(*Id.*) Stiltner suggested that the foreman might have been able to feel the difference between 13,000 c.f.m. and 10,703 c.f.m. (Tr. 119:9–16, 143:7–144:14.) However, Stiltner did not know how long this condition existed. (Tr. 117:21–118:3.) Excel again tightened ventilation curtains and the citation was abated thirty minutes after being issued. (Tr. 118:2–4, 119:17–120:6, 134:17–137:21, 144:22–146:18; Ex. G–6.)

IV. PRINCIPLES OF LAW

A. Significant and Substantial

A violation is S&S “if, based on 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). To establish an S&S violation, the Secretary 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.” *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984) (footnote omitted); *see also Buck Creek Coal, Inc. v. Fed. Mine Safety & Health Admin.*, 52 F.3d 133, 135–36 (7th Cir. 1995) (affirming ALJ’s application of the *Mathies* criteria); *Austin Power, Inc. v. Sec’y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving the *Mathies* criteria).

The Commission has also provided guidance to Administrative Law Judges in applying the *Mathies* test. The Commission indicated that “an inspector’s judgment is an important element” in an S&S determination. *Mathies*, 6 FMSHRC at 5 (citing *Nat’l Gypsum*, 3 FMSHRC at 825–26); *see also Buck Creek Coal*, 52 F.3d at 135 (stating that ALJ did not abuse discretion in crediting opinion of experienced inspector). The Commission has also observed that “the reference to ‘hazard’ in the second element is simply a recognition that the violation must be more than a mere technical violation—i.e., that the violation present *a measure of danger*.” *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (Aug. 1984) (emphasis added) (citing *Nat’l Gypsum*, 3 FMSHRC at 827). Moreover, the Commission clarified “the correct inquiry under the third element of *Mathies* is whether the hazard identified under element two is reasonably likely to cause injury.” *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1742 n.13 (Aug. 2012). Finally, the Commission has specified that evaluation of the reasonable likelihood of injury should be made assuming continued mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985) (quoting *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984)).

B. Negligence

Although the Secretary’s part 100 regulations are not binding on the Commission, the Secretary’s definitions of negligence in those provisions are illustrative. According to the Secretary, 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). These standards indicate that high negligence is found where “[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances.” *Id.* at Table X. Moreover, the standards prescribe moderate negligence where “[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances.” *Id.* Finally, low negligence is found where “[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances.” *Id.*

C. Penalties

Although the Secretary proposes penalties, the Commission assesses penalties for violations of the Mine Act *de novo*. *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 600 (May 2000). When assessing a civil penalty, section 110(i) of the Mine Act requires that I consider six criteria, including: the operator’s history of previous violations, the appropriateness of the penalty relative to the size of the operator’s business, the operator’s negligence, the penalty’s effect on the operator’s ability to continue business, the gravity of the violation, and the demonstrated good faith of the operator in attempting to achieve rapid compliance. 30 U.S.C. § 820(i). The criteria are not required to be given equal weight. *Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1979 (Aug. 2014).

V. FURTHER FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

A. Citation No. 8258130

As explained above, Inspector Hamilton issued Citation No. 8258130 as the result of conditions he identified during his January 24, 2011, inspection of the Van Lear Mine. *See* discussion *supra* Part III.C.1. Although Excel admitted that the cited conditions were a violation of 30 C.F.R. § 75.370(a)(1), Respondent contends that the Secretary has not satisfied his burden of proving his allegations regarding gravity and negligence. *See* discussion *supra* Part II.

1. Gravity and S&S

The Secretary contends that he has satisfied all four elements of the *Mathies*’ test for S&S.⁸ (Sec’y Br. at 8–9.) Respondent does not dispute the fact of violation or seriousness of the injury that is likely to result from prolonged exposure to respirable dust. (Resp’t Br. at 8.) Accordingly, Excel admits that *Mathies*’ first and fourth elements have been satisfied. (*Id.*)

⁸ Although Inspector Hamilton included methane ignition as a hazard in the “Condition or Practice” narrative of Citation No. 8258130 (Ex. G–1), his testimony made only passing reference to methane ignition. (Tr. 22:13–20, 82:17–83:1.) Instead, he focused on dust exposure as the hazard with which he was most concerned. (*See* Tr. 40:14–16, 78:23–79:2.) Similarly, the Secretary in his posthearing brief claims this violation “contributes to the discrete safety hazard of allowing the accumulation of respirable dust and harmful gases, such as methane” but focuses solely on dust exposure in discussing the reasonable likelihood of reasonably serious injury. (Sec’y Br. at 8–9.) Accordingly, my analysis will focus on the dust exposure hazard.

However, Respondent claims that the Secretary has not met his burden of proving that the violation contributed to a discrete safety hazard. (*Id.* at 9–11.) In the alternative, Excel also argues that the Secretary has not demonstrated that the discrete safety hazard is reasonably likely to result in an injury. (*Id.* at 11–15.) Given the evidence before me, I determine that the Secretary has satisfied his burden of proof on both the second and third *Mathies*' elements.

First, the record in this case demonstrates that Excel's violation of its ventilation plan contributed to a discrete safety hazard. Inspector Hamilton specifically identified dust exposure as the hazard to which Excel's violation would contribute. (Tr. 40:14–16, 78:23–79:2) When Hamilton arrived on Panel 6, he observed the operator of the continuous mining machine surrounded by visible dust. Further, the machine operator was not wearing a respirator or dust mask, which meant that he was breathing in the dust surrounding him. Although Hamilton did not take bottle samples of the dust he observed, he credibly testified that the sandstone roof would provide a source of quartz, which is a source of hazardous respirable dust.⁹ As the operator cut into the top of the coal pillar, Excel's violative and insufficient air flow would allow dust to continue to collect around the miner. Indeed, Hamilton credibly testified that the low air velocity increased the amount of dust flowing over the machine operator. (Tr. 77:14–19.)

Hamilton is also an experienced inspector and miner. (Tr. 16:17–18:15.) As mine foreman and section boss, Hamilton had been responsible for ventilation and the safety of miners underground. (Tr. 17:7–18:1.) Thus, his opinion is entitled to significant weight. *See Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278–79 (Dec. 1998) (relying on the opinion of an experienced inspector to conclude that substantial evidence supported an ALJ's S&S determination). Accordingly, I determine that Excel's violation of its ventilation plan contributed to the hazard of respirable dust inhalation.

Second, the record before me also demonstrates that this dust hazard was reasonably likely to result in an injury. Hamilton credibly testified that brief exposure to respirable dust contributes to black lung disease and silicosis. He also indicated that the low air velocity and presence of dust surrounding the machine operator made this hazard reasonably likely to result in injury. In contrast, Excel argues that “[t]he nature of the retreat mining process makes it impossible to sustain this exposure to the degree that it is reasonably likely illness will occur.”¹⁰

⁹ In Excel's posthearing brief, the operator notes that the dust Inspector Hamilton observed “came from cutting in the mine floor, not the mine roof where quartz can be found.” (Resp't Br. at 11.) Thus, Respondent claims that “the continuous miner was not cutting an area that generally exposes quartz, and any testimony that they would eventually cut into quartz is purely speculative.” (*Id.*) Nevertheless, it is uncontroverted that the sandstone roof at the Van Lear Mine contained quartz, and Hamilton credibly testified that Respondent would eventually cut into the roof as it continued to mine the pillars in Panel 6. Indeed, Excel did not dispute that it intended to mine the top portion of the coal pillar that abutted the sandstone roof. Thus, Excel would have cut into the mine's sandstone roof in the course of continued mining operations.

¹⁰ Excel also claims that the ventilation controls would have been removed after Respondent completed retreat mining in Panel 6. (Resp't Br. at 14.) Thus, Respondent argues, “[t]here is no reason to assume that, upon completing advance mining in a new panel, similarly faulty controls would be established in the next retreat mining process.” (*Id.*; *see also* Resp't

(Resp't Br. at 12.) Yet in the context of respirable dust hazards, the Commission has not cast the reasonable likelihood of injury analysis in durational terms. *Consolidation Coal Co.*, 8 FMSHRC 890, 894–99 (June 1986) [hereinafter “Consol I”], *aff'd*, 824 F.2d 1071 (D.C. Cir. 1987); *see also Oxbow Mining LLC*, 35 FMSHRC 932, 947 & n.3 (Apr. 2013) (ALJ) (citing Air Quality Standards for Abrasive Blasting and Drill Dust Control, 59 Fed. Reg. 8318, 8319 (Feb. 18, 1994) (indicating in preamble that inhalation of relatively small amounts of freshly fractured silica particles may contribute to the development of acute silicosis)); *Pine Ridge Coal Co.*, 34 FMSHRC 291,304 (Jan. 2012) (ALJ) (discussing “the nebulous, progressive nature of black lung disease . . .”). In fact, in the context of dust sampling standard violations, the Commission has adopted a presumption that respirable dust hazards are reasonably likely to result in injury, regardless of the duration of exposure. *Consol I*, 8 FMSHRC at 894–99; *Consolidation Coal Co.*, 17 FMSHRC 250, 254 (Mar. 1995) [hereinafter “Consol II”] (“To the extent the judge suggested that short periods of exposure to respirable dust are exempt from the presumption . . . we agree . . . that he erred.”).

Although the Commission has not extended a comparable presumption in the context of respirable dust hazards arising out of ventilation plan violations, the direct and indirect evidence before me demonstrates that the respirable dust hazard was reasonably likely to result in injury in this case. The machine operator was engulfed in a cloud of dust, yet he did not wear a respirator or mask. The sandstone roof contained quartz. Brief exposure to dust containing quartz and silica contributes to silicosis. In the course of continued mining operations, these conditions were reasonably likely to continue. Accordingly, I determine that *Mathies*' fourth element has been satisfied.

Based on the forgoing, Excel's admissions and the record before me have satisfied each of the four elements of *Mathies*. Thus, I conclude that Citation No. 8258130 was appropriately designated as S&S.

2. Negligence

Here, Respondent has admitted that it violated the May 10 Plan because it did not provide the required air velocity at the continuous miner, and I have concluded that Citation No. 8258130 was properly designated as S&S. Moreover, the Mine Act is a strict liability statute. Regardless of whether a miscommunication occurred, Excel had a duty to comply with its ventilation plan under section 75.370(a)(1). Thus, Respondent reasonably should have known of the violative condition. That condition also presented a danger to Excel's miners. Accordingly, I determine that Respondent's failure to fulfill its duties, thus exposing its miners to dust inhalation dangers, constitutes negligent conduct. Nevertheless, the Secretary has the burden of proving Respondent's *level* of negligence. *See* 30 C.F.R. § 100(d) at Table X (indicating that an

Reply Br. at 6–7 (suggesting “[a]n analysis of continued normal mining operations should not unequivocally assume the condition would exist in perpetuity.”) However, the Commission has declined to assume or infer that the violative condition would be abated in continued mining operations. *See, e.g., McCoy Elkhorn Coal Corp.*, 36 FMSHRC 1987, 1991 (Aug. 2014); *Knox Creek Coal Corp.*, 36 FMSHRC 1128, 1140–41 (May 2014); *Gatliff Coal Co., Inc.*, 14 FMSHRC 1982, 1986 (Dec. 1992); *U.S. Steel Mining Co.*, 6 FMSHRC at 1574.

operator's level of negligence turns not only its reason to know of the violative condition, but also any mitigating factors).

In this unusual case, I am presented with arguments for three different levels of negligence: low (Excel); moderate (Inspector Hamilton); and high (the Secretary). Here, Inspector Hamilton initially marked this citation as resulting from Excel's moderate negligence. However, the Secretary has asked that I increase the level of negligence from moderate to high. *See* discussion *supra* note 4. In support of his allegations, the Secretary claims the section foreman should have taken an air reading before allowing the mining machine operator to begin his pillar cut and notes that the foreman admitted he had not done so. (Sec'y Br. at 9–10.) Thus, the Secretary suggests the foreman's "awareness of his own inaction and willingness to subject the miner to the, at the time, unknown danger of deficient ventilation demonstrated an absence of mitigating circumstances." (*Id.* at 9–10.) In other words, the Secretary appears to imply indifference on the part of the section foreman. *Cf. San Juan Coal Co.*, 29 FMSHRC 125, 136 (Mar. 2007) (suggesting that high negligence often correlates with unwarrantable failure); *see also Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991) (noting that unwarrantable failure includes indifference, serious lack or reasonable care, reckless disregard, and intentional misconduct.)

Conversely, Excel contends its conduct in this case constituted a low level of negligence. Excel disputes that it had reason to know the air velocity at the continuous mining machine was insufficient. (Resp't Br. at 15.) Instead, Excel claims this failure resulted from a "miscommunication between the section foreman and the miner operator." (Resp't Reply Br. at 2.) Further, Respondent notes that Inspector Hamilton provided no indication regarding the duration of the violative condition. (Resp't Br. at 15–16.) Excel therefore characterizes the foreman's failure to take an air reading prior to the beginning of the pillar cut as inadvertent. (Resp't Br. at 15; Resp't Reply Br. at 2–3.)

Based on the record before me, three factors convince me that Excel's conduct is consistent with a low level of negligence. First, the Secretary's evidence falls well short of demonstrating the indifference the Secretary suggests in his posthearing brief. Inspector Hamilton testified that the machine operator told him that he did not take an air reading because he believed the mine foreman had taken one. In addition, Hamilton indicated that when he himself worked as a section foreman, he had been trained to take readings prior to every cut of coal to ensure that he had sufficient air velocity. Thus, the Secretary infers indifference from the section foreman's failure to take an air reading before the cut began. Although such a policy might be *one* effective method to ensure compliance with a ventilation plan, Hamilton admitted that section 75.370(a) did not require the section foreman to take an air reading at the beginning of every cut. (Tr. 54:22–55:19.) Moreover, Inspector Hamilton admitted that he did not know Excel's practices and policies. (Tr. 80:21–81:11.) Without those details, the Secretary falls short of his suggested inference. Perhaps the machine operator—rather than the section foreman—ordinarily measures the air velocity, but failed to do so in this case because he misunderstood his foreman. Perhaps the section foreman expected the machine operator to take an air reading. Hamilton is an experienced miner, but here he simply did not provide a basis to infer indifference on the part of the section foreman.

Second, Excel's history of 30 C.F.R. § 75.370(a)(1) violations in the previous two years (Tr. 46:15–18, 73:12–15) does not support an inference that the section foreman was indifferent. Inspector Hamilton could not provide any details regarding any of those prior citations or explain any similarities to Citation No. 8258130. (Tr. 71:2–73:11.) The Secretary need not provide voluminous details regarding these previous ventilation plan violations, but merely highlighting past violations of this far-reaching standard does not suggest to me a lack of concern for the machine operator's safety in this case. I also note that Citation No. 8252975, which is the other citation involved in this docket, occurred the same day on the same section. That violation of the ventilation plan also required Excel to tighten its ventilation curtains. *See* discussion *supra* Part III.C.2. Although I understand the Secretary's concern that two separate violations of the May 10 Plan occurred on Panel 6 at the roughly the same time, neither inspector linked the violations in their testimony. Without more, it is unclear why this temporal link alone should demonstrate the section foreman's disinterest in the safety to Excel's miners. Under the circumstances, I cannot determine that the section foreman's action or inaction constituted indifference to the endangerment of the machine operator. Thus, the Secretary has not shown that Excel's level of negligence was high.

Third, the Secretary's inability to demonstrate either the duration or extent of the ventilation problems on Panel 6 significantly mitigates Excel's reason to know of this violation. *Cf.* 30 C.F.R. § 100.3(d) at Table X (suggesting "low" negligence is appropriate where the mitigating circumstances are "considerable.") Indeed, Hamilton found no indication in Excel's preshift reports that Panel 6 had previously experienced any ventilation problems. (Tr. 54:12–21.) Further, he could not identify which ventilation curtains were adjusted to abate the violation. (Tr. 52:6–8, 64:20–65:17, 74:6–12.) However, Hamilton indicated that in underground coal mining it is common for ventilation to leak air and to require adjustment. (Tr. 52:18–53:7.) Despite the significant hazard this condition presented, I recognize that mining conditions change rapidly. At times, such dynamism may allow methane to accumulate quickly. *See* discussion *infra* Part V.B.1. In this context, however, the potentially brief duration significantly mitigates Respondent's reason to know of the violative condition. Further, the adjustment of the ventilation curtains appears to be a somewhat common event in underground coal mining, and Excel restored the required ventilation within ten minutes. Accordingly, these minor adjustments also mitigate Excel's reason to know of the violation.

Notwithstanding the danger the cited condition presented, in light of the seemingly brief duration and minor extent, I conclude that Excel's conduct constituted a low level of negligence, and Citation No. 8252975 is **MODIFIED** to change the cited level of negligence to low.

B. Citation No. 8252975

While Inspector Hamilton conducted his inspection of Panel 6 that led to his issuance of Citation No. 8258130, his colleague Inspector Stiltner simultaneously inspected the left side of Panel 6. *See* discussion *supra* Part III.C.2. Stiltner likewise identified a violation of 30 C.F.R. § 75.370(a)(1) and issued Citation No. 8252975. Excel again admitted that the cited conditions constituted a violation of its ventilation plan, but Respondent again contends that that Secretary has not satisfied his burden of proving his gravity and negligence allegations. *See* discussion *supra* Part II.

1. Gravity

a. S&S

The Secretary claims in his posthearing brief that potential sources of methane and ignition sources on Panel 6 demonstrate that Citation No. 8252975 was S&S. (Sec’y Br. at 14–16.) Specifically, the Secretary notes that methane could accumulate quickly on Panel 6 because the Van Lear Mine was a gassy mine. (*Id.* at 15–16.) The Secretary also suggests that methane may collect in the gob areas and leak back onto the panel if Excel did not provide adequate ventilation. (*Id.*) Finally, the Secretary claims that the continuous miner and shuttle cars provided ignition sources. (*Id.* at 16.)

Although Respondent concedes that the first, second,¹¹ and fourth elements of the *Mathies* test have been satisfied, Excel argues that the Secretary has not satisfied his burden of proving that the methane explosion hazard was reasonably likely to cause injuries. (Resp’t Br. at 16–22.) First, Excel notes that no methane was present at the time of the inspection and disputes whether a roof fall would force methane out of the gob and into the working area. (*Id.* at 18–19.) Second, Excel argues that the Van Lear Mine liberated less methane during the retreat mining of Panel 6 than it did during advance mining. (*Id.* at 21–22.) Respondent therefore surmises that the confluence of factors do not demonstrate that a methane ignition hazard was reasonably likely to result in injury. (*Id.* at 22.)

Looking at the evidence before me, it is uncontroverted that sparks from the continuous mining process would provide an ignition source. Thus, this case turns on whether methane gas would be present in the course of continued mining operations. As the Secretary notes, the Van Lear Mine is a gassy mine that liberated more than 500,000 cubic feet of methane every twenty-hour hours. Indeed, the high levels of methane liberation at Van Lear prompted MSHA to perform spot inspections at the mine every ten days.

¹¹ Respondent also claims the record is “devoid of any indication as to why [the low air volume] was likely to cause injury.” (Resp’t Br. at 20.) Respondent’s argument seems to conflate the second and third elements of *Mathies*. The question before me under *Mathies*’ third element is whether a methane accumulation hazard—rather than the insufficient air—is reasonably likely to result in reasonably serious injuries. See discussion *supra* Part IV.A. Nevertheless, I note that ventilation plans set forth *minimum* requirements and that Excel provided only 82% of the minimum required air on the section. (See Resp’t Br. at 20–21 & n.6.)

I recognize that it *might* be possible to imagine a scenario where the air volume falls short by such an incremental margin as to have a de minimis impact on the S&S analysis. Yet, a nearly twenty percent shortfall of the *minimum* requirement is no such minor misstep. The plan’s minimum air volume was intended to sweep methane and harmful gases away from the working section and through the gob. It also helped ensure methane and gases did not seep back onto the section. Notwithstanding the concessions in Excel’s posthearing brief—and to the extent that Respondent’s argument might be construed as an argument regarding *Mathies*’ second element—I therefore determine that the violation of the ventilation plan contributed to a discrete safety hazard.

Furthermore, MSHA required the mine to provide ventilation pressure through the gob area and out of the bleeder system to prevent accumulation of methane in the gob. Regardless of what air pressure must be maintained at the *back* side of the gob and bleeder blocks, Excel fell well short of the 13,000 c.f.m. required on the working section. Insufficient air pressure through the gob would allow methane to accumulate in the course of continued mining operations. If a roof fall occurred in the gob area, some of that methane might be forced back on to the working section. As Stiltner explained, the minimum requirements of a ventilation plan are critical: “If [10,000 c.f.m. were enough air], they would probably have 10,000 in their plan. So there was a reason it was 13,000. It was either the mine being on the [ten-day] spot or a history of methane. . . . So evidently, 10[,000] wasn’t enough.” (Tr. 117:16–20.)

In addition, I accord little weight to Mine Engineer Arrington’s testimony that the pillars removed in retreat mining liberate smaller amounts of methane because some of the pillars’ methane has escaped as the advance mining process bored deeper into the mine. (Tr. 176:17–177:8, 178:21–179:10.) Although Stiltner agreed that methane would continue to escape from the coal pillars as the operator advanced (Tr. 153:25–154:22), neither Arrington nor Stiltner quantified, either in terms of cubic feet or percentages, the amount of methane that would dissipate from the coal pillars between the advance mining and retreat mining phases. Without that critical detail, I have no basis to infer that the Van Lear mine’s retreat mining panels were no longer “gassy.” Moreover, Arrington did not address Stiltner’s testimony that a roof fall in the gob area could force methane back onto the working section, providing fuel for an ignition.

Here, the Secretary has demonstrated that ignition and methane sources would be present in the course of continued mining operations. In light of the record and confluence of factors before me, I determine that a methane ignition hazard was reasonably likely to cause injuries in the course of continued mining operations, which satisfies *Mathies*’ third element. Given Excel’s concession of the remaining elements of the *Mathies* test, I therefore conclude that Citation No. 8272975 was properly designated as S&S.

b. Number of Miners Affected

The Secretary claims that the deficiency in airflow affected the safety of all five miners on the 007 MMU because the intake air was used to ventilate the whole section and miners work in close proximity during retreat mining. (Sec’y Br. at 17.) In contrast, Excel contends that the violative condition did not affect five miners and asks that I reduce the number of miners from five to two.¹² (Resp’t Br. at 23.) Looking at the evidence before me, I note that two of the

¹² Respondent also claims in its posthearing brief that the two shuttle car operators would have never been in close proximity to the continuous miner at the same time because they took turns loading coal at the miner and dumping it at the belt feeder. (Resp’t Br. at 23.) Yet Excel provides no support in the record for that claim. I note that two company representatives—Curtis Webb and Mike Hurley—travelled with Inspectors Stiltner and Hamilton on January 24. Perhaps Webb and Hurley would have provided evidence to support this position, but neither appeared at the hearing. Instead, Excel only presented testimony from Mine Engineer Arrington, who was not on Panel 6 that day and provided no evidence regarding the number of miners that would be affected.

members of the 007 MMU were located in the No. 3 Entry as the miner prepared to cut in the No. 2 Entry. However, Stiltner specifically testified that miners work in close proximity during the retreat mining phase. (Tr. 112:8–13.) In light of the record, I determine that these miners would have returned in close proximity to the continuous mining machine in the course of continued mining operations. Accordingly, I conclude that Citation No. 8252975 would affect five miners.

2. Negligence

The Secretary’s argument in this case reiterates his negligence theory for Citation No. 8258130: Excel was negligent because the section foreman or miner was responsible for taking air readings during his preshift examination, but failed to do so. (*See* Sec’y Br. at 17.) Yet, *unlike* Citation No. 8258130, the Secretary characterizes Respondent’s negligence in this case as “moderate” rather than “high.”

Given the similarities between the cases, it is unclear why the Secretary’s theory leads to different results for the two violations before me. As with Citation No. 8258130, I have concluded that Citation No. 8252975 was appropriately designated as S&S in the context of continued mining operations. Like his colleague, Inspector Stiltner was unable to describe similarities between Citation No. 8252975 and any of those violations. (Tr. 139:25–141:2, 120:22–121:6, 134:17–21, 135:8–12, 146:2–146:8.) Stiltner also admitted that that he did not know how long the violative condition existed and could not describe the details of the curtain adjustments Excel made on Panel 6. (Tr. 141:7–142:2.) Finally, those curtain adjustments were completed in just a half-an-hour, which suggests they were not extensive.

In light of the record before me and similarities between the cases, I again conclude that Excel’s level of negligence was low. Excel has a duty to maintain the required air velocity, and Respondent was negligent in failing to ensure it had the required air coursing through this section before mining. Nevertheless, the Secretary has provided no evidence describing that these conditions existed for a significant amount of time or extended across a large portion of Panel 6. He also presented no evidence regarding Respondent’s air measurement policies or linking the present violation to any of the fifty previous ventilation plan violations at the Van Lear Mine. Finally, Respondent was able to restore the required air flow in just thirty minutes. Accordingly, the apparent short duration and limited extent of the ventilation failure on Panel 6 significantly mitigates Respondent’s negligence in this case. 30 C.F.R. § 100.3(d) at Table X (suggesting “low” negligence is appropriate where the mitigating circumstances are “considerable.”)

Based on the above, I determine that Excel’s conduct constituted “low” negligence, and Citation No. 8252975 is **MODIFIED** to change the cited level of negligence to low.

C. Penalty Assessment

Turning to the six penalty factors specified in section 110(i) of the Mine Act, I note that Excel has stipulated that the proposed penalty would not affect its ability to remain in business. (Ex. J–1 at 2.) Moreover, nothing in the record suggests the proposed penalties are inappropriate for the size of the mine, and I also note that Respondent promptly abated each citation in good

faith. Although I have affirmed the Secretary's gravity determinations, I have modified each citation to reduce Excel's level of negligence to "low." Finally, the Secretary's Assessed Violation History Report lists 37 final citations or orders within the previous fifteen months at the Van Lear Mine that involved 30 C.F.R. § 75.370(a)(1). Of those final citations and orders, only six were designated as S&S.

I recognize that the Secretary has proposed special assessments of \$13,600.00 and \$11,500.00, respectively, for Citation Nos. 8258130 and 8252975. However, the Secretary's proposed penalties are not binding upon me. I also recognize that both violations exposed Excel's miners to serious dangers. Had the Secretary demonstrated the substandard air velocity existed for a significant amount of time or required major efforts to restore the required air flow, had resulted from poor internal policies at Excel, or had been a recurring problem at the Van Lear Mine, I might have been inclined to affirm his negligence determinations and, therefore, his proposed penalties. However, I note that the Secretary presented no evidence demonstrating the duration or extent of the conditions in question. Likewise, he provided no evidence suggesting Respondent's policies led to the low air velocity or that low air velocity at the miner or in the intake entry was an on-going problem at the mine. As I noted, conditions often change rapidly in an underground mine. Given this rapidly changing environment, even a fastidious operator may sometimes fail to provide the air velocities required under their plans. The Mine Act is a strict liability statute, and this dynamic environment does not excuse those failures. However, I have determined Respondent's negligence to have been low. I therefore determine that a penalty of \$4,000.00 for each violation is appropriate based on the six section 110(i) factors.

VI. ORDER

In light of the foregoing, I hereby **ORDER** that Citation Nos. 8258130 and 8252975 are **AFFIRMED** as S&S and **MODIFIED** to reduce the level of negligence from "moderate" to "low." Excel Mining, LLC is **ORDERED** to **PAY** a civil penalty of \$8,000.00 within 40 days of this decision.



Alan G. Paez
Administrative Law Judge

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/pjb