FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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NEWMONT USA, LIMITED, Contestant, v. SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	CONTEST PROCEEDING Docket No. WEST 2010-652-RM Citation No. 6482848; 01/26/2010 Mine ID: 26-02314 Mine: Midas Mine
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. NEWMONT USA, LIMITED, Respondent	CIVIL PENALTY PROCEEDING Docket No. WEST 2010-1584-M A.C. No. 26-02314-224579 Mine: Midas Mine

DECISION ON REMAND

Appearances: Laura C. Bremer, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, CA, for the Secretary

Laura E. Beverage, Esq., Jackson Kelly, PLLC, Denver, CO, for the Respondent

Hiliary N. Wilson, Esq., Newmont Mining Corporation, Elko, NV, for the Respondent.

Before: Judge Lewis

PROCEDURAL HISTORY

On January 5, 2012, the undersigned ALJ issued a decision in Docket Nos. WEST 2010-652-RM and WEST 2010-1584-M.[1] In its decision this Court found that the Respondent mine operator, Newmont USA Limited ("Newmont,") had violated 30 C.F.R. § 57.8528[2], that the violation was significant and substantial (S&S) in nature, that the violative conduct did not constitute an unwarrantable failure, and that the proposed civil penalty of $35,500.00 should be reduced to $5,000.00.[3]

The Secretary and Respondent filed cross petitions for discretionary review, which the Commission granted on February 13, 2012. In its March 31, 2015 remand decision, the Commission affirmed this Court's finding of violation, vacated and reversed this Court's S&S finding, and vacated and remanded this Court's unwarrantable failure finding and penalty assessment.

After holding a telephone conference at which both parties agreed that a supplemental hearing would not be necessary, this Court set a briefing schedule for both parties to address the issues that were subject to the Commission's remand order. After careful review of the total record and the parties' briefs, this Court issues the within remand decision.

SUMMARY OF THE TESTIMONY AND FACTUAL RECORD

The ALJ hereby incorporates the summary of testimony as contained in his January 5, 2012 decision and factual background as contained in the Commission's March 31, 2015 remand decision as though fully recited herein. *Newmont USA Ltd.,* 34 FMSHRC 146 (Jan. 2012); *Newmont USA Ltd.,* 37 FMSHRC 499 (Mar. 2015).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Review of Commission Decision

In its March 31, 2015 remand decision the Commission[4] upheld my finding that §57.8528 had been violated in that the operator had failed to barricade the headings at issue and had failed to adequately post signs against entry. *Newmont USA Ltd.,* 37 FMSHRC 499, at 501. The headings were "unventilated" under the language of the standard because the operator had shut down the auxiliary fan and had tied off the ventilation bags in the headings. *Newmont USA Ltd.,* 37 FMSHRC 499, 502 (Mar. 2015).

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[1] This decision is available at 34 FMSHRC 146 (Jan. 2012). The decision incorrectly states the date of issuance as January 5, 2011.

[2] Section 57.8528, in pertinent part, provides that unventilated areas shall be sealed, or barricaded and posted against entry.

[3] The original assessed penalty amount in the January 5, 2012 decision was incorrectly stated as $35,000.

[4] Neither Chairperson Jordan nor Commissioner Young participated in this decision.

The Commission noted that the term "unventilated" is not defined in the standard and essentially held that the Secretary's interpretation (and this Court's finding) that air must sweep the face in a manner that would provide oxygen and clear contaminants was "clearly" reasonable and entitled to deference. *Id.*, 503-5. Noting further that the Secretary's interpretation of the term "unventilated" was consistent with the standard's purpose -- "to protect miners from the dangers posed by the headings with inadequate oxygen and accumulations of noxious gases" – the Commission held that the term "unventilated" includes airflow that is insufficient to sweep a heading's face and that the term "unventilated" in §57.8528 includes the failure to provide sufficient airflow to sweep the face. *Id.*, 504, *see also* Tr. 271.

In considering whether the violation was S&S in nature under the four step analysis in *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984), this Court found at the second step that the discrete safety hazard contributed to by the violation was that a miner might "access" an unventilated area, that was not properly barricaded, and "be *overcome* by noxious air or lack of oxygen." *Newmont USA, Ltd.*, 34 FMSHRC 161 (Jan. 2012), emphasis mine.

The Commission expressly upheld my finding that there was a violation of a mandatory safety standard contained in §57.8528. However, it did not explicitly state whether it agreed with my description as to the specific nature of the discrete safety hazard contributed to by the violation.

In his concurring and dissenting opinion, Commissioner Cohen observed that while I had articulated the relevant hazard my description was over inclusive: "it was sufficient to describe the relevant hazard as a danger that a miner will access the area and *be exposed* to noxious air or the lack of oxygen." *Newmont USA Ltd.*, 37 FMSHRC 499, at 508 (Mar. 2015) (Cohen, Comm'r., concurring in part and dissenting in part).

As set forth herein, this Court has heavily relied upon Commissioner Cohen's insightful analysis in deciding the within remanded matters.[5]

In its majority decision the Commission referred to my finding that the barricade procedures utilized by Newmont did not reduce the reasonable likelihood of miners suffering exposure to toxic gases or a lack of oxygen. *Newmont USA Ltd.*, 37 FMSHRC at 504. However, in its S&S analysis, the Commission again appears to describe the hazard posed as "the build-up of toxic gases or lack of sufficient oxygen." *Id.*, at 505.

In hindsight, perhaps a better articulation of the discrete safety hazard posed by the violation – as suggested by Commissioner Cohen – may have compelled a different holding by the Commission as to my S&S determination. However, in following the directives of the Commission in its remand order, this Court shall assume that the discrete safety hazard posed was that of miners being overcome by noxious or oxygen-deficient air.

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[5] In reviewing Commissioner Cohen's thoughtful opinion, the undersigned is reminded of William O. Douglas's observation that "the right to dissent is the only thing that makes life tolerable for a judge of an appellate court." William O. Douglas, AMERICA CHALLENGED, at 4 (1960).

It is worth noting that in a recent decision, my distinguished colleague, ALJ William Moran, expressed similar regrets regarding his description of the second *Mathies* element and the Commission's reversal of his S&S determination possibly because of such. *Oak Grove Resources, LLC*, SE 2009-261-R (Apr. 2016), at 4. Like Judge Moran, I believe that the recent holding in *Knox Creek Coal Corp. v. Secretary of Labor*, 811 F.3d 148 (4th Cir. 2016), may have some relevance to the instant matter. In *Knox Creek Coal*, the Fourth Circuit held that "for a violation to contribute to a discrete safety hazard, it must be at least somewhat likely to result in harm." *Knox Creek Coal Corp.*, 811 F.3d 148, 162 (4th Cir. 2016). The Circuit Court further noted that the legislative history of the Mine Act suggests that Congress did not intend the S&S determination to be a particularly burdensome threshold for the Secretary to meet and that Congress intended all except *technical* violations of mandatory standards to be considered Significant and Substantial. *Id.*, at 163.

I fully recognize that I am bound by the Commission's reversal of my S&S determination. However, I would submit that a *Knox Creek Coal* analysis of the discrete safety hazard contributed to by the violation – whether it be *exposure* to lack of oxygen or noxious gases in unventilated headings or being *overcome* by such – would indicate that the presence of noxious gases or inadequate oxygen in unventilated headings should be assumed and that there was a sufficiently reasonable likelihood that the hazard contributed to would result in an injury so as to support an S&S determination.

As noted in my original decision, by failing to adequately guard unventilated headings the mine operator contributed "to the chance that a miner will underestimate the level of danger, access the area and be overcome by noxious air or a lack of oxygen." *Newmont USA, Ltd.*, 34 FMSHRC at 161.

The record included evidence submitted by the operator suggesting a danger of noxious gas or oxygen-deficient air in unventilated headings. Multiple slides in the operator's Power Point presentation discuss the risk of spontaneous gas build-up. One slide, titled "Naturally Occurring Contaminants" notes the hazard of "Gases released into the mine *or from rock strata*." RX-7 (emphasis added). Another slide, titled "Unwanted Mine Atmospheric Conditions" warns specifically against "Stagnate (sic) Air – No Air Flow: ... stratified air, or high gas concentration," within the Midas Mine. RX-7.

In reversing my S&S determination, the Commission cited testimony of the mine supervisor, Sid Tolbert, and mine manager, Mark Ward: "[f]urther, the operator's witnesses testified that the rock strata of the mine would not allow for any loss of oxygen to occur, a point which the Secretary did not dispute. Tr. 256, 291." *Newmont USA Ltd.*, 37 FMSHRC at 505. Tolbert asserted at hearing that sufficient air could be circulated through tied off ventilation bags. Tr. 271. However, Tolbert further acknowledged that without fans operating, air will not sweep the face of unventilated headings. Tr. 271. Newmont's policy, in case of auxiliary fan failure, is to evacuate the area until the problem is resolved. Tr. 326. This, I would submit, suggests the operator's materials and practices acknowledged the potential dangers of even a briefly unventilated heading. Further, in assessing the probability of harm under *Knox Creek Coal* such would be supportive of an S&S determination.

Finally, while the Commission left the term "non-gassy" undefined and although I found that the mine itself *may* not have emitted gases, I also found that Respondent ran diesel and other equipment in the mine which did emit combustible gases that could build up over time in unventilated areas. *Newmont USA, Ltd.*, 34 FMSHRC at 162.

Given that Respondent's own training materials, as well as its company policy, acknowledged the risks of spontaneous gas build-up and oxygen deficiency in unventilated areas, I would further submit that the third element of *Mathies* would be satisfied utilizing the *Knox Creek Coal* approach to likelihood of harm.

See also the recent decision of my esteemed colleague, ALJ Thomas McCarthy, at *Northshore Mining Company*, No. LAKE 2015-340-M, slip op. at 1 (April 11, 2016). In his decision Judge McCarthy also perceptively examines how the recent holding in *Knox Creek Coal* appears to shift the focus of the S&S analysis from the third to the second *Mathies* prong and to restrict consideration of the facts bearing on the reasonable likelihood of injury under the third prong. *Northshore Mining Company*, slip op., at 8.

Judge McCarthy observed that under *Knox Creek Coal* the occurrence of the hazard should be *assumed* under the third prong of *Mathies*. Evidence of the likelihood that the hazard will occur should not be considered at the third prong; rather the inquiry is whether the hazard, assuming it occurred, would result in serious injury. *Id.*, 8.

Judge McCarthy further notes a similar *Mathies* analytical approach suggested by the Seventh Circuit in *Peabody Midwest Mining, LLC v. FMSHRC*, 762 F.3d 611 (7th Cir. 2014). In *Peabody Midwest Mining*, the Seventh Circuit held that the "question is not whether it is likely that the hazard (a vehicle plummeting over the edge) would have occurred 'but rather' whether, if the hazard occurred (regardless of likelihood) it was reasonably likely that a reasonably serious injury would result." *Northshore Mining Company*, at 8, citing *Peabody Midwest Mining*, 762 F.3d 611, at 616.

Utilizing the analytical approach to *Mathies* under *Knox Creek Coal* and *Peabody Midwest Mining*, the undersigned submits that once the discrete safety hazard contributed to by violation (miners accessing unventilated headings and being exposed to noxious fumes and/or lack of oxygen) was established at *Mathies*' second prong, its occurrence should have been presumed under the third prong of *Mathies*, and that further, given the case evidence presented, it was reasonably likely that a reasonably serious injury would result. Thus, the analytical framework within *Knox Creek Coal* and *Peabody Midwest Mining* would appear to support my initial S&S finding.

II. The Operator's Belief That it Was in Compliance Was Not Objectively Reasonable

In its remand order the Commission found that this Court had erred in vacating the Secretary's unwarrantable failure designation by, *inter alia*, failing to determine whether Newmont's belief that it was in compliance was objectively reasonable:

> The Judge erred by failing to determine whether the operator's belief that it was in compliance was objectively reasonable. The Judge found that "Hirsch gave 'operators specific guidance about what the Western District would accept as a barricade,'" but no guidance regarding *when* a barricade must be used. 34 FMSHRC at 164. The Judge therefore concluded that the operator possessed a good faith belief that its policy of roping off headings that were to be worked in the near future in non-working areas complied with the standard. His analysis, however, overlooks the fact that, as a matter of law, an operator's belief that it is in compliance constitutes a defense to an unwarrantable designation only if the belief was objectively reasonable. *See IO Coal*, 31 FMSHRC at 1356-60. The Judge erred by failing to make a finding as to whether the belief was "objectively" reasonable and explaining the reasons for such a finding.
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> We remand the case to the Judge to make factual findings on the elements of an unwarrantable failure and whether the operator had an objectively reasonable belief that the rope and sign utilized by the operator complied with the regulation.

Newmont USA, Ltd., 37 FMSHRC at 505-6.

The Secretary contends that MSHA had clearly provided notice to the Respondent that its use of roping and sign procedures in headings – where fans were shut down and/or where ventilation bags were tied off – violated §57.8528. Thus, any belief that the Respondent held that such measures complied with the standard was objectively unreasonable. *Pet'r's Opening Brief on Remand*, 11.

This Court found that the Secretary's arguments on this point to be much more persuasive than the Respondent's counterarguments.

Given MSHA's repeated guidance to Newmont regarding the types of barricades permitted in areas where ventilation bags had been tied off, the operator's asserted subjective belief that it was in compliance by using roping and signs cannot be deemed reasonable. *See also New Warwick Mining Co.*, 18 FMSHRC 1365, 1371 (1996) (holding that an operator's efforts at compliance are not reasonable when the operator chose to act in a manner contrary to MSHA's guidance).

The unreasonableness of Newmont's purported subjective belief is further confirmed in light of Assistant District Manager Hirsch's description of a near fatality at Miekle Mine when miners walked into an area where the unventilated tubing had been tied off. The six citations issued in October of 2009 should have dispelled any question in the minds of Newmont's management from the June meeting as to when and what barricades were needed.

In reviewing the record this Court must now conclude that Respondent's failure to erect mandated barricading was very probably due to a "contest of wills" between the mine operator and MSHA rather than any objectively reasonable belief of the Respondent as to its compliance. The confrontation between Inspector Stull and McFarlane regarding the operator's use of a chain across a heading during an earlier inspection in which McFarlane emphasized the operator's intention not to barrier up all headings that were going to be mined soon is revelatory. *See also* Tr. 145-156 and *Pet'r's Opening Brief on Remand* at 15.

In concluding that the operator's belief that it was in compliance was not objectively reasonable, this Court again found the analysis of Commissioner Cohen to be particularly instructive:

> My colleagues rightly conclude that the Judge erred by failing to make a finding on whether Newmont's belief was objectively reasonable. However, I would go further and find, under the facts in this case, that any belief which Newmont had that its procedures complied with the regulations was not objectively reasonable.

Newmont USA Ltd., 37 FMSHRC *at* 510 (Cohen, Comm'r., concurring in part and dissenting in part).

Commissioner Cohen noted multiple instances where MSHA explicitly provided notice to the operator that Newmont's practice of barricading headings with rope and signage was not sufficient and constituted a violation of the Mine Act. First, there was the June 2009 meeting in Elko, NV, where MSHA Assistant District Manager Kevin Hirsh gave specific guidance as to what MSHA deemed to be an acceptable barricade under 30 C.F.R. § 57.8528. *Id.*, at 510-1. Commissioner Cohen notes that this Court did not "take into consideration what occurred between the June 2009 meeting and the issuance of Order No. 6482848 on January 26, 2010." *Id.*

Commissioner Cohen refers, of course, to the six separate citations issued between October 14 and October 22, 2009, five of which concerned either partial or absent barricades in headings. *Id.*, at 511. "Any question in the minds of Newmont's management from the June meeting as to *when* a barricade was needed should have been dispelled by the six citations issued in October." *Id.*. Relatedly, Commissioner Cohen recounts the October 20, 2009 confrontation between Inspector Stull and Midas Health and Safety Specialist McFarland. *Id.* McFarland's outburst exclaiming that "they're not going to put a barrier up in all the headings that are going to be mined soon," as well as Stull and his supervisor Jim Fitch's subsequent hour-long meeting and clarification with Midas staff regarding barricading requirements under 30 C.F.R. § 57.8528 is also described. *Id.* As Commissioner Cohen reasons, "[s]urely, any reasonable question of what §57.8528 required was dispelled by the events of October 20-21." *Id.*, at 511.

Commissioner Cohen also examined Newmont's "Updated Barricade Procedure," in detail:

> The new policy created three categories of headings - "Active Heading" (headings are presently in production or development or scheduled for production or development within four weeks), which only require a rope barrier; "Short Term Inactive Heading" (headings which are scheduled for production nor development within 4 to 12 weeks, or have been removed from active status due to changes in ground or ventilation), which require a snow fence barricade or a berm; and "Long Term Inactive Heading" (headings which are scheduled for production or development beyond 12 weeks, or where mining activities are complete), which require a chain link fence. NM Ex. 8. Significantly, while the barricades for Short Term Inactive and Long Term Inactive Headings are "intended to restrict access into the area", the rope barrier for Active Headings is only "intended to impede access." *Id.* Moreover, the signage required for Active Headings does not clearly restrict access but only says "Heading Inspection Required." *Id.*

> The distinction in the new barricading policy between areas requiring a snow fence, berm or chain link fence designed to "restrict access," and areas requiring only a rope barrier designed to "impede access" is keyed to the length of time until production or development - i.e., more or less than four weeks. Although Newmont's new barricading policy explicitly references and quotes §57.8528, it totally ignores the distinction which triggers the need for a barricade - whether an area is "unventilated." Despite the series of §57.8528 citations and the meeting with MSHA in October, Newmont's new barricading policy simply does not require a barricade for an unventilated area if the area is scheduled for production or development within four weeks.

Newmont USA Ltd., 37 FMSHRC at 511-2 (Cohen, Comm'r., concurring in part and dissenting in part).

Commissioner Cohen mentions that the 1-5301 headings appear to have been left inadequately barricaded even under Newmont's own Updated Barricade Procedure. *Id.*, at 512.

In his opinion concurring in part and dissenting in part, Commissioner Cohen summarized multiple instances in the record which showed that "it certainly cannot be said that Newmont's actions constituted objectively reasonable compliance with §57.8528 or suggested good faith": the six violations in October, 2009; McFarland's "adamant behavior on October 20," MSHA's subsequent meeting to clarify barricading requirements on October 21; the drafting of a new policy that effectively ignored the Secretary's instructions regarding unventilated headings; Newmont's own failure to follow its updated barricade policy. *Id.*

The Commission applies a mixed subjective/objective analysis in determining the motivations of parties in taking various actions. For example, in *Dolan v. F&E Erection Co.*, 22 FMSHRC 171, 175 (Feb. 2000), the Commission held that in determining the propriety of a work refusal the standard required both a subjective element of a miner's honest belief that a hazard exists as well as the objective requirement that the miner's belief be reasonable.[6]

As pointed out by the Commission in its remand decision, and so lucidly explained by Commissioner Cohen, this Court failed to employ both a subjective and objective analysis in reviewing the propriety of the mine operator's decision not to comply with MSHA directives.

This Court is reluctant to ascribe bad faith motivations to a party's actions when other, less pejorative arguable explanations exist. Thus was reached this Court's finding – which Commissioner Cohen understandably labeled "doubtful" – that Respondent had possessed a good faith belief that it was complying with the regulations when it roped off headings that were to be worked. *Newmont USA, Ltd.*, 34 FMSHRC at 164.

The pertinent question, however, is not the operator's good faith belief in its compliance but rather the objective reasonableness of that belief. The great weight of evidence in this matter, applicable case-law, the Secretary's persuasive arguments, and Commissioner Cohen's valuable

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[6] *See also Robinette v. United Castle Coal*, 3 FMSHRC 803 (Apr. 1981) wherein the Commission held that a miner's honest perception of a potentially hazardous condition must be one made in good faith *and* be reasonable under the total circumstances.

insights all support the conclusion that the Respondent could not have held an objectively reasonable belief that it was in compliance with §57.8528.[7]

III. The Operator's Conduct Constituted Unwarrantable Failure

In its remand order the Commission further directed that this Court make factual findings on the elements of an unwarrantable failure pursuant to, *inter alia*, its holding in *Sec. of Labor v. Manalapan Mining Co.*, 35 FMSHRC 289 (Dec. 1987).

In *Manalapan* the Commission reviewed the factors to be evaluated in determining unwarrantable failure:

> In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. Id. at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." Id. at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); see also *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).
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> Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, including (1) the extent of the violative condition, (2) the length of time that the violative condition existed, (3) whether the violation posed a high degree of danger, (4) whether the violation was obvious, (5) the operator's knowledge of the existence of the violation, (6) the operator's efforts in abating the violative condition, and (7) whether the operator had been placed on notice that greater efforts were necessary for compliance. See *IO Coal Co.*, 31 FMSHRC 1346, 1351-57 (Dec. 2009); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), rev'd on other grounds, 195 F.3d 42 (D.C. Cir. 1999). These seven factors need to be viewed in the context of the factual circumstances of a particular case, and some factors may be irrelevant to a particular factual scenario. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). Nevertheless, all of the relevant facts and circumstances of each case must be examined to determine if an operator's conduct is aggravated, or whether mitigating circumstances exist. Id.; *IO Coal*, 31 FMSHRC at 1351.

Manalapan Mining Co., 35 FMSHRC at 293.

Considering the *Manalapan* factors *seriatim* this Court makes the following findings:

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[7] As will be discussed *infra*, this Court recognizes that if a mine operator reasonably, but erroneously, believes in good faith that his cited conduct is the *safest* method of compliance with applicable regulations, his actions will not constitute aggravated conduct that exceeds ordinary negligence. *Black Beauty Coal Co. v. FMSHRC*, 703 F.3d 553 (2012). But in the instant matter, if the danger to be avoided was the exposure of miners to noxious air or lack of oxygen in unventilated headings – clearly the *safest* method of compliance was the more substantive barricading procedures directed by MSHA so as to prevent access to unventilated areas.

1. The Extent of the Violative Condition

Given Newmont's admission that its procedures required miners to erect rope barriers and "Heading Inspection Required" signs in areas to be mined within four weeks, even if the ventilation bags had been tied shut, the scope of the violative condition was extensive.

The Respondent contends that, because the inspector issued one citation concerning a single area, the violation cannot have been extensive. *Respondent's Response Brief on Remand*, 8. Further, the Respondent argues that this is confirmed by the inspector's failure to cite Newmont's Standard Operating Procedure (SOP) or other policies. *Id.*

This final point by the Respondent fails to persuade. It is unclear to this Court just how Inspector Guardipee would have cited Newmont for its SOP or company-wide policies when he was standing in the 1-5301 North and South headings. There is uncontradicted evidence that the Respondent, as a matter of policy, routinely erected insecure, ineffective barricades that failed to impede miner access. Newmont also routinely failed to warn miners about the dangers of noxious air in unventilated headings by neglecting to post signs to that effect. For these reasons, I find the violation was extensive.

This factor weighs in favor of a finding of unwarrantable failure.

2. The Length of Time the Violative Conditions Existed

The record reveals that the ventilation bag was tied off for at least one month. *Pet'r's Opening Brief on Remand*, 16. The Respondent offers no argument or evidence to the contrary, instead urging this Court to give primary weight to the factor of dangerousness within this unwarrantable failure analysis. *Respondent's Response Brief on Remand*, 7.

Similar to circumstances that obtained in *Excel Mining*, 37 FMSHRC 459 (Mar. 2015), the violative condition here existed for a period of weeks. There the Commission found that the length of time the condition had existed, as well as other factors, proved highly aggravating and inclined toward a finding of unwarrantable failure. *Id.* at 468.

The Secretary also cites numerous Commission cases in his brief supporting an unwarrantable failure designation "where the violative condition existed for a period of time from longer than one shift to several weeks." *Pet'r's Opening Brief on Remand*, at 16. Further, the Secretary argues, "violations have been found to exist over a long period of time where the practice was long standing." *Pet'r's Opening Brief on Remand*, at 16, *citing Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (Jul. 2001); *Consolidation Coal*, 23 FMSHRC 588, 594 (Jun. 2001); *Windsor Coal*, 21 FMSHRC 997, 1000 (Sept. 1999); *Sierra Rock Prods.*, 37 FMSHRC 647 (Mar. 2015).

Given the lengthy period of time this condition obtained, this factor also militates in favor of a finding of unwarrantable failure.

3. Whether the Violation Posed a High Degree of Danger

The Commission in *Manalapan* reaffirmed that the factor of dangerousness may be so severe that by itself it warrants a finding of unwarrantable failure. *Manalapan Mining Co.,* at 294. However in the case *sub judice* the Commission specifically found that this Court erred in concluding that the violation at issue was S&S and held that there "was no substantial evidence to support a finding that the violation contributed to a discrete hazard reasonably likely to result in an injury." *Newmont USA Ltd.*, 37 FMSHRC 499, at 504.

This Court agrees with the Secretary's contention, that "although the danger may not have been 'reasonably likely,' this does not mean that unventilated underground headings are not dangerous." This contention has some merit, especially considering, as the Secretary does, that "assuming continued operations, the air quality would continue to diminish." *Pet'r's Opening Brief on Remand*, 17.

Given that the Commission's findings constitute "the law of the case," this Court is constrained to conclude that the degree of danger posed by Newmont's violation was *not* high. *Eastern Ridge Lime Co.,* 21 FMSHRC 416 (Apr. 1999) (finding that decision by appellate court obliged lower court on remand to follow appellate court's decision); *Manalapan Mining Co.*, 36 FMSHRC 849 (Apr. 2014) (finding that judge, on remand, violated law of the case doctrine in FMSHRC context by reversing an initial, uncontested finding).

Nonetheless, while this Court cannot find a high degree of danger in this case, Newmont's conduct in this instance was unwarrantable. An absence of a high degree of danger does not suggest safety, and leaving headings unventilated and effectively unbarricaded gives rise to some measure of added danger beyond the usual ration of risk offered to a miner. An unventilated heading, left untouched for weeks on end, would naturally see its air quality diminish, perhaps to the point of danger for a nearby miner.

This factor weighs in favor of a finding of unwarrantable failure.

4. Whether the Violation Was Obvious

The condition was also obvious. A rope with an attached sign is obviously not a barricade of snow fence or chain link. More fundamentally, a rope or chain with an attached sign will not deter a miner from entering an unventilated heading as effectively as snow fence or chain link barriers would. As discussed *infra* and *supra*, Newmont could not have had a good faith, objectively reasonable belief that a rope with an attached sign constituted a barricade. Therefore, the violation was obvious.

This factor also weighs in favor of a finding of unwarrantable failure.

5. The Operator's Knowledge of the Existence of the Violation

Newmont admitted knowledge of the violation when it promulgated its "Updated Barricade Procedure" of November 2009. RX-9, *see also* Commissioner Cohen's analysis *supra.*

By consciously employing the word "barrier" instead of "barricade," Newmont appeared to both accept the letter of Secretary's interpretation of "barricade" yet still defy the spirit of §57.8528 by ignoring the Secretary's instructions regarding unventilated headings. RX-9. Further, by describing headings that had not seen a working miner in two to four weeks as "active," Newmont tried to write into its "Updated Barricade Procedure" ambiguity to leave headings effectively unbarricaded and unsafe for up to weeks at a time. RX-9. To argue, as Respondent does, that the printing and promulgating of this "Updated Barricade Procedure" is indicative of good faith is gainsaid by this risible "barrier" and "barricade" distinction.

This factor further weighs in favor of a finding of unwarrantable failure.

6. The Operator's Efforts in Abating the Violative Condition

The Operator made no effort to abate the violative condition before Inspector Guardipee issued Order No. 6482838. "The focus on the operator's abatement efforts is on those efforts made prior to the citation or order." *IO Coal*, 31 FMSHRC at 1356. Given the October 2009 inspection should have made clear that Newmont's previous barricading practices were unacceptable, it is problematic why the operator did not do more to abate the violation condition.

In not erecting a snow fence, the Respondent did not contend that it has no snow fence. Indeed the record reveals there was snow fence on site. Tr. 271-2. The Respondent does not contend that it would be onerous to erect these barricades; the time to construct one is less than half an hour. Tr. 251. Removing a snow fence barricade takes only a few minutes. *Id.* The risk contemplated of a miner entering an unventilated heading without proper equipment plainly outweighs the burdens on the Respondent in guarding against this risk. As I noted in my initial decision in this matter, "a time intrusion of less than forty minutes does not seem like such a substantial burden as to outweigh the life or safety of a miner." *Newmont USA, Ltd.*, 34 FMSHRC 146, at 163.

The Respondent's violative conduct and failure to abate such again appear to have been driven not so much by a good faith and reasonable interpretation of §57.8528's requirements -- but rather a "contest of wills" between MSHA and the Respondent which itself appears to have been based upon the Respondent's unwarranted concerns regarding the minimal delays in time and production entailed in following MSHA barricading directives. Such a failure to abate would constitute aggravated conduct supporting a finding of unwarrantable failure.

7. Whether the Operator Had Been Placed on Notice That Greater Efforts Were Necessary for Compliance

In analyzing this factor, I have already cited the numerous instances, as summarized by Commissioner Cohen, *supra*, where the Respondent had actual or constructive notice from MSHA that its barricading practices violated §57.8528. *See supra*. Even subtracting from consideration the Elko, NV meeting with MSHA officials, Newmont had at least two more warnings regarding its inadequate barricading policy. There was the series of citations issued in October of 2009, most of which concerned inadequate barricading. Sx. W. As the Secretary notes in his brief, "[p]rior similar violations put an operator on notice that greater efforts are necessary for compliance with the standard." *Pet'r's Opening Brief on Remand*, at 11, citing *Manalapan Mining Co.*, 35 FMSHRC 289, 295-6 (2013).

Further, there was the October 20, 2009 confrontation with Mr. Stull, during which Mr. McFarland expressed unequivocally his desire to disregard or circumvent MSHA barricading instructions. Tr. 145-6. At that meeting, Stull explicitly warned Mr. McFarland that MSHA would continue to issue citations so long as Newmont refused to comply with MSHA instructions. Tr. 146.

This Court must find that a warning from an MSHA inspector that failure to follow that inspector's instructions will lead to further citations is evidence that Newmont was placed on notice that greater efforts were necessary for compliance.

Finally, Jim Fitch, Mr. Stull's supervisor, made the trip to the Midas Mine the day after Stull and McFarland's contentious tête-à-tête, on October 21, 2009, and explained to McFarland and others in a meeting lasting an hour what MSHA would accept as proper barricading under §57.8528. Tr. 155-7. Certainly this meeting itself constituted notice, if the October 20, 2009 confrontation somehow did not.

Conclusion

Considering the above *Manalapan* factors, both individually and *in toto*, in the context of the particular facts of the case *sub judice* and further considering that Respondent could not have held an objectively reasonable belief that its actions were in compliance with §57.8528, this Court finds that the Respondent's conduct clearly constituted unwarrantable failure.

IV. Penalty

Section 110(i) of the Mine Act establishes the six criteria to be considered in determining the appropriateness of a civil penalty.

Further, the Commission has outlined its authority for assessing civil penalties in *Douglas R. Rushford Trucking*, stating that "the principles governing the Commission's authority to assess civil penalties *de novo* for violations of the Mine Act are well established." 22 FMSHRC 598, 600 (May 2000). While the Secretary's system for points in Part 100 of 30 C.F.R. provides a recommended penalty, the ultimate assessment of the penalty is solely within the purview of the Commission. *Id.* Thus, a Commission judge is not bound by the penalty recommended by the Secretary. *Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008). The *de novo* assessment of civil penalties does not require each of the penalty assessment criteria to be given equal weight. *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997).[8]

[8] As Judge Moran observed in *Oak Grove Resources, LLC*, "S&S is not among the identified statutory penalty criteria." *Oak Grove Resources, LLC*, SE 2009-261-R, at 16, *see also* 30 U.S.C. §820(i). This Court analyzes the penalty criteria absent consideration of the now-deleted S&S finding, but aware that the operator's conduct constitutes an unwarrantable failure.

In this case, the special assessment for Order No. 6482848 was $35,500. I have considered each of the special penalty factors below:

1. **The operator's history of previous violations.** In the 130 inspection days prior to the issuance of Order No. 6482848, the Respondent was issued 118 citations. Six citations or orders in a previous inspection were violations of 30 C.F.R. §57.8528. *Pet'r's Opening Brief on Remand*, 20.

2. **The size of the operator's business.** The Respondent operates a medium mine, "Midas." Newmont employs roughly 160 employees. *Pet'r's Opening Brief on Remand*, 20.

3. **Whether the operator was negligent.** In its previous decision, the Court did not make a finding as to the level of negligence. As this decision finds the operator's conduct one of unwarrantable failure, the operator was plainly negligent.

4. **The effect on the operator's ability to continue in business.** The Petitioner and Respondent both acknowledge that Newmont's ability to continue in business will not be imperiled by the payment of the penalties in this case. JS-8. As such, I presume there would be no such effect. *Sellersburg Stone Co. v. FMSHRC*, 735 F.2d 1147, 1153 n. 14 (7th Cir. 1984).

5. **The gravity of the violation.** The gravity of the potential harm in this order having been found less than likely by the Commission in its remand order, the Secretary nevertheless argues that the gravity of a violation and its S&S nature are not the same. *Pet'r's Opening Brief on Remand*, 20. This may be true, but a finding of S&S is surely indicative of a grave violation, whereas a finding that a violation was not S&S, then, suggests less seriousness in terms of gravity. Despite the fact that the Respondent's conduct constituted unwarrantable failure, the mixed record concerning the Midas Mine's non-gassiness, as well as the Commission's finding that the violation was not S&S and unlikely to cause harm to a miner, leads me to conclude the gravity of this violation is not an aggravating factor.

6. **The demonstrated good faith of the Respondent in abating the violation**. The Respondent's good faith is not disputed by the Secretary. JS-7.

In recognition of both Newmont's unwarrantable failure to maintain adequate barricades in unventilated headings, as well as the Commission's findings on remand, I conclude that a penalty of $20,000.00 is appropriate. The lack of an appreciable injury, as well as the Commission's finding that the violation was not likely to cause harm, suggest a penalty reduction is warranted from the Secretary's proposed amount of $35,500.00 to $20,000.00. *Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984).

ORDER

It is hereby **ORDERED** that Respondent **PAY** the Secretary of Labor the sum of $20,000.00 within 30 days of this Decision.[9] Upon receipt of payment, this case is hereby **DISMISSED**.

John Kent Lewis
Administrative Law Judge

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