FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

WASHINGTON, DC 20004-1710

MAR 31 2015

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. WEST 2010-652-RM WEST 2010-1584-M
NEWMONT USA LIMITED	:	

BEFORE: Nakamura, Acting Chairman; Cohen and Althen, Commissioners

DECISION

BY: Nakamura, Acting Chairman; and Althen, Commissioner

These proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). At issue is a single order issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") pursuant to section 104(d)(2) of the Mine Act, 30 U.S.C. § 814(d)(2),[1] to Newmont USA Limited ("Newmont") at its Midas Mine, a gold mine in Nevada. The order alleges a violation of 30 C.F.R. § 57.8528, which provides: "Unventilated areas shall be sealed, or barricaded and posted against entry."

On January 5, 2012, the Judge issued his decision in this case. 34 FMSHRC 146 (Jan. 2011) (ALJ). The Judge concluded that a violation occurred and that the violation was

---

[1] Section 104(d)(2) provides:

> If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

30 U.S.C. § 814(d)(2).

significant and substantial ("S&S").[2] He further concluded that the violation was not attributable to an unwarrantable failure to comply with the standard[3] and reduced the civil penalty from $35,500 to $5,000.

The Secretary and the operator filed cross-petitions for discretionary review of the Judge's decision, which the Commission granted. For the reasons that follow, we affirm the Judge's finding of violation, vacate and reverse his S&S finding, and vacate and remand his non-unwarrantable failure finding. We also remand his penalty assessment.

I.

Factual and Procedural Background

A. Factual Background

On January 26, 2010, MSHA inspector Shon Guardipee began his regular inspection of the Midas Mine at the top of a spiral[4] with Newmont employee Ivan Castellanos and Jamie Wallake, the Miner Representative. As Guardipee approached the 5301 heading, which was the access off of the main haulage, he observed that the sill or auxiliary fan at the 5301 level was off and that the ventilation bags in the headings were tied off. There were signs hanging by a rope across the headings stating: "Danger, Heading Inspection Required." When Guardipee questioned the operator's and miners' representatives accompanying him, they informed Guardipee that the headings had been inactive for a week and a half. Guardipee subsequently issued the Order, and designated the violation as S&S and attributable to an unwarrantable failure to comply.

---

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

[3] The unwarrantable failure terminology is also taken from section 104(d)(1) of the Act, which establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards." 30 U.S.C. § 814(d)(1).

[4] The mine's headings are located off of vertical spirals connecting to main haulage roads. Tr. 23, 215; *see also* Sec'y Ex. B (cross-sectional map looking west at the Midas Mine and depicting the main haulage roads and spiral system as well as the ventilation). Newmont uses both a primary and secondary ventilation system. The primary ventilation is comprised of main fans and booster fans, as well as two intakes and four exhaust ducts, which are used to provide general airflow for the main haulage roads and spirals within the mine. Newmont's secondary ventilation system provides additional airflow for the specific spirals and their headings. This is done through sill fans, or auxiliary fans, which pull air from the main haulage roads into internal raises developed alongside each spiral. Subsequently, the spiral is fed air from the internal raise, and ventilation bags then direct the air toward the working faces in each spiral's heading. *See* Sec'y Ex. QQ. Each heading within a spiral is located 50 feet above or below the other heading. The air pulled upward into Spiral 1 "Ts off" into the 1-5301 North and South Headings.

On January 5, 2012, the Judge affirmed the violation and the S&S designation. He vacated the unwarrantable failure designation and assessed a civil penalty of $5,000 rather than the $35,500 proposed by MSHA.

B. The Judge's Decision

1. Whether a Violation Occurred

The Judge concluded the operator violated section 57.8528 by failing to barricade the headings and failing to adequately post signs against entry. He found that the headings were "unventilated" under the language of the standard, because the operator had shut down the auxiliary fan and tied off the ventilation bags in the headings. *Id.* at 161.

The Judge found that the plain language of 30 C.F.R. § 57.2 unambiguously defines "barricade" to require the "prevent[ion] [of] vehicles, persons or flying materials" from entering unventilated areas, such as the headings in question. *Id.* According to the Judge, this requirement was not met because the operator had merely strung a rope barrier from rib-to-rib at the entrance to each heading and the signage merely stated: "Danger, Heading Inspection Required." The signage did not state that entry into the headings was prohibited or that the headings were unventilated. *Id.*

2. Whether the Violation Was S&S

The Judge also concluded that the violation was S&S. *Id.* at 161-62. He found that the hazards of low oxygen and a build-up of toxic gases were reasonably likely to occur and that the rope across the entry to a heading with a warning sign that inspection was needed was an insufficient barricade and signage to comply with the standard.

Although the Judge acknowledged that new miners at the Midas Mine are required to take a four-week training class that included inspection procedures for entering headings, Tr. 228, he further found that subcontractors do not have to take this training. Thus, he concluded that subcontractors might unwittingly enter an unventilated heading notwithstanding the rope and signage that an inspection was required.

The Judge also considered the testimony of Kevin Hirsch, Assistant District Manager for the Western District of MSHA, that mines need to be ventilated to ensure that oxygen remains at the appropriate levels above 19.5 %. The Judge subsequently reasoned that, without proper ventilation, oxygen levels may not be continually adequate. 34 FMSHRC at 151, 162; Tr. 119. Consequently, he concluded that low oxygen was reasonably likely to occur, assuming continuation of normal mining operations.

The Judge further found that a build-up of toxic gases was reasonably likely to occur. 34 FMSHRC at 161-62. Although the Judge recognized that the mine was non-gassy and that this may be a mitigating factor for S&S purposes, he concluded that the operation of the diesel and other equipment in the mine made it reasonably likely that the build-up of toxic gases would

occur. Accordingly, the Judge found that the barricade procedures did not reduce the reasonable likelihood of miners suffering exposure to toxic gases or a lack of oxygen. As a result, the Judge found that the violation was S&S.

3. Whether the Violation Resulted from an Unwarrantable Failure to Comply

The Judge concluded that the violation did not result from an unwarrantable failure to comply with the standard. He referred to a meeting in June 2009 between MSHA and mine operators, including members of Newmont management, at which the parties discussed the requirements of section 57.8528. He found, however, that they only discussed what MSHA would accept as a "barricade," as opposed to the meaning of "unventilated," which would determine *when* a "barricade" must be used in the first place. 34 FMSHRC at 151, 164; Tr. 40-44. While noting that Newmont was cited six times under the standard after the 2009 meeting, based upon the testimony of Newmont witnesses, the Judge held that the operator possessed a good faith belief that its policy of roping off headings due to be worked on in the near future complied with the standard.

The Judge further found that, in response to the six citations, Newmont updated its barricading procedures. Under the revised procedure, Newmont continued the practice of stringing a rope with a sign cautioning "Danger, Heading Inspection Required" across headings that were presently in production or development, or scheduled for production or development within four weeks. The Judge found that Newmont considered such headings to be active headings. Based upon his finding that Newmont had a good faith belief that its procedures complied with MSHA's requirements, the Judge held that the operator's violation of section 57.8528 did not result from an unwarrantable failure to comply with the standard.

4. The Penalty

The Judge assessed a civil penalty of $5,000 rather than the $35,500 penalty proposed by the Secretary. In doing so, he relied in part on the settled penalty amounts for the prior citations to conclude that the proposed penalty in the instant case was "excessive." *Id.* at 165.

II.

Disposition

A. The Judge Properly Concluded that a Violation Occurred.

1. The Secretary's definition of "unventilated" is reasonable and entitled to deference.

30 C.F.R. § 57.8528 provides: "Unventilated areas shall be sealed, or barricaded and posted against entry." The Secretary asserted that the face of the heading was "unventilated" because air did not sweep the face in a manner that would provide oxygen and clear contaminants. The term "unventilated" is not defined in the standard. Thus, the standard is silent with respect to whether a face is "unventilated" if airflow is insufficient to sweep the face.

When a standard does not provide a definition for a term, the Commission looks to the term's ordinary meaning. *See, e.g., Jim Walter Res. Inc.*, 28 FMSHRC 983, 987 (Dec. 2006). "Unventilated" is the opposite of "ventilated," and "ventilate" has been defined as "to expose to air and esp[ecially] to a current of fresh air (as for purifying, curing, or refreshing)." *Webster's Third New Int'l Dictionary Unabridged* 2541 (1986). This indicates that airflow must be sufficient to "purify" or "refresh" the area that is being ventilated. This definition supports the Judge's interpretation that air must sweep the face in order for the area to be ventilated. Although we do not find the dictionary definition to lead inexorably to a plain meaning for "unventilated," we arrive at the same outcome as the Judge, for we must defer to the Secretary's interpretation.

If a term is ambiguous, the Commission defers to the Secretary's interpretations of his own regulations as long as they are reasonable. *Tilden Mining* Co., 36 FMSHRC 1965, 1967 (Aug. 2014) (Secretary's interpretation is reasonable and entitled to deference); *Wolf Run Mining Co.*, 32 FMSHRC 1669, 1678-82 (Dec. 2010). In *Auer v. Robbins*, the Supreme Court found that an agency's interpretation of its own regulation is entitled to deference unless it is plainly erroneous or inconsistent with the regulation. 519 U.S. 452, 461 (1997). Here, the Secretary's interpretation clearly is reasonable and is neither erroneous nor plainly inconsistent with the language and the purpose of the standard.

In the context of underground mining, a heading is not "refreshed" unless the airflow is sufficient to sweep its face, regardless of any primary ventilation or natural airflow. MSHA has noted that "auxiliary ventilation is often necessary to supply air to dead-end working places, maintain uncontaminated environments, and to condition air in faces for temperature and humidity control." New and Revised Safety and Health Standards for Radiation (Radon Daughter Exposure); Fire Protection and Control; Ventilation, Loading, Hauling and Dumping; Travelways and Escapeways; Hoisting; and Sanitary Facilities, 44 Fed. Reg. 31908, 31912 (June 1, 1979) (adopting section 57.8534, which describes procedures for the shutdown or failure of auxiliary fans). Further, the Secretary's interpretation is consistent with the standard's purpose, which is to protect miners from the dangers posed by headings with inadequate oxygen and accumulations of noxious gases. Thus, the term "unventilated" includes airflow that is insufficient to sweep a heading's face, and we hold that the term "unventilated" in section 57.8528 includes the failure to provide sufficient airflow to sweep the face.[5]

---

[5] Newmont argues that the Secretary's interpretation would reduce the flexibility of operators to direct air where it is needed—that is, to areas where miners are working and where equipment is emitting potentially noxious gases. It contends that, under the Secretary's interpretation, the failure to barricade a heading when turning off a fan for short periods of time, e.g., two minutes or so, to have a conversation, talk on a radio, or repair a ventilation bag, would violate the standard. Such a brief stoppage is not the case before us, and the Secretary has not asserted the position put forward by the operator. *But see* Tr. 123-24. We decline to act on the basis of conjecture of events that are not before us. Moreover, policy decisions to promulgate regulations effectuating the safety purposes of the Mine Act are the province of the Secretary. The Commission adjudicates whether a regulation is reasonable and not plainly inconsistent with the Act. *See Sec'y of Labor v. Excel Mining*, LLC, 334 F.3d 1 (D.C. Cir. 2003).

2. Substantial evidence supports the Judge's finding that the airflow in the 1-5301 headings was insufficient to sweep the face when Newmont turned off the auxiliary fan and tied off the ventilation bags.

Newmont's witnesses did not dispute Guardipee's conclusion that the airflow in the headings was insufficient to sweep the face. Tr. 271. On the contrary, Sid Tolbert, the Mine Supervisor at the Midas Mine, admitted on cross-examination that the natural flow in the mine was insufficient to sweep the face. He acknowledged that air would sweep the face only when the auxiliary fan was running and the ventilation bags were operational. 34 FMSHRC at 162; Tr. 271. As a result, we find that substantial evidence supports the Judge's finding that the airflow in the 1-5301 headings was insufficient to sweep the face when the operator turned off the auxiliary fan and tied off the ventilation bags. Accordingly, we affirm the Judge's finding of a violation.

B. <u>The Judge Erred in Concluding that the Violation was S&S.</u>

A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, the Commission further explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory 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.

6 FMSHRC 1, 3-4 (Jan. 1984).

There is not substantial evidence to support a finding that the violation contributed to a discrete hazard reasonably likely to result in an injury. Guardipee's air readings in the North Heading showed no evidence of any build-up of contaminants. Tr. 64; Sec'y Ex. A, at 6. Furthermore, Guardipee failed to take any readings in the South Heading, and he went no further into the South Heading than immediately after the point where the ventilation bags were choked off, which was only about 13 feet into the heading. Tr. 322. Significantly, the mine is non-gassy.

Furthermore, the operator presented undisputed testimony that whenever the equipment would be running in the headings, the operator, as a precautionary measure, would block off the opposite, unventilated heading to prevent access by miners. Tr. 294. In addition, any air that could become contaminated from drilling and blasting in the headings would not recirculate through the mine, but rather vent upwards through the portal exhaust. Tr. 226. The Secretary

did not offer any evidence to the contrary. These factors do not support a finding of a build-up of toxic gases in the headings creating a reasonable likelihood of injury to a miner.

Concerning the likelihood of any oxygen deficiency, Guardipee's air readings in the North Heading showed no evidence of any loss of oxygen, and, as stated above, he failed to take any readings in the South Heading. Further, 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. The record evidence of the geology of the mine thus mitigates the likelihood of any oxygen deficiency. We note that the Secretary failed to introduce evidence of the likelihood of a hazard from oxygen-deficient air. In sum, substantial evidence does not support the reasonable likelihood of the build-up of toxic gases or lack of sufficient oxygen that would be reasonably likely to result in injury to miners.[6] Accordingly, we reverse and vacate the Judge's S&S finding.

C. The Judge Erred in Vacating the Secretary's Unwarrantable Failure Designation.

Unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). 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*, 52 F.3d 133, 136 (7th Cir. 1995) (approving unwarrantable failure test).

Whether the conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case, including (1) the extent of the violative condition, (2) the length of time that it has existed, (3) whether the violation posed a high risk 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 has been placed on notice that greater efforts are necessary for compliance. *See Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013); *IO Coal Co.*, 31 FMSHRC 1346, 1350-57 (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). 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. *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001).

---

[6] The Secretary argues that Kevin Hirsch, the MSHA Assistant District Manager, stated that headings need to be ventilated to ensure that oxygen remains at the appropriate levels above 19.5 %, and to prevent oxygen levels from changing unexpectedly in the future. Tr. 27. This statement, however, is contradicted by Tolbert's testimony that even with the auxiliary fans off, there would still be sufficient air circulation in the mine. Tr. 227, 236, 241. For example, Newmont checked the air circulation in August 2011 during a power outage. The mine did not have any problems with air quality or quantity at that time. Tr. 242.

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.

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.

D. The Judge's Penalty Assessment Must be Remanded.

The Judge assessed a civil penalty of $5,000 rather than the $35,500 penalty proposed by the Secretary. The penalty assessment must be remanded.

In reviewing the Judge's assessment, it appears that he improperly relied in part on penalty amounts from similar citations that had previously been settled in finding that the proposed amount was "excessive." 34 FMSHRC at 164-65; *see also* Tr. 312-13. This constitutes an abuse of discretion, as the amount of penalties assessed in the context of a settlement should not be used to arrive at penalties assessed in a very different context—in a decision on the merits after a hearing.[7] There is no way a Judge can know the facts in settled cases sufficiently to consider the penalty in such cases in determining a penalty in a litigated case. Further, the Judge cannot know other factors that may have played a role in reaching settlement. Use of settlements as templates for penalty assessments, therefore, would violate the obligation of the Judge to make an independent judgment and would be made based on insufficient knowledge of facts, including the motivations for settlement. In short, the results of settlements should not be considered in the assessment of penalties.

Accordingly, in light of the foregoing, we remand the case to the Judge to re-assess the penalty. In so doing, he should also consider: (1) our deletion of the S&S designation; and (2) his unwarrantable failure finding made on remand.[8]

---

[7] As in *Sequoia Energy, LLC*, 36 FMSHRC 832, 835 n.5 (Apr. 2014), we need not reach the broader question of whether the Judge acted improperly by considering past penalty amounts assessed against the operator. We find error based on the narrower issue of the use of past settlements as a point of comparison.

[8] Furthermore, as with all penalty cases, if the Judge's assessment of the penalties "substantially diverge[s]" from those originally proposed, the Judge must "provide a sufficient

III.

Conclusion

For the reasons stated above, we affirm the Judge's finding of a violation, but reverse and vacate the Judge's S&S finding. We also reverse and remand the case to the Judge to make additional factual findings regarding whether the violation resulted from an unwarrantable failure. Finally, we remand the case so that the Judge may re-assess the penalty in accordance with this decision.

Patrick K. Nakamura, Acting Chairman

William I. Althen, Commissioner

---

explanation of the bases underlying the penalties assessed by the Commission." *Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984).

Commissioner Cohen concurring in part and dissenting in part:

I dissent because I conclude that the Judge's decision to affirm the order as a significant and substantial (S&S) violation is supported by substantial evidence in the record. I concur with my colleagues as to the need to vacate and remand the Judge's unwarrantable failure findings, but write separately on that issue because I conclude that Newmont's alleged "good faith" belief that it was in compliance cannot be found to be objectively reasonable. I join with the majority on all other issues.

A. Significant and Substantial

The Judge determined that the Secretary sustained his burden of proof regarding each of the four elements of the test outlined in *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984). 34 FMSHRC 146, 161-62 (Jan. 2012) (ALJ). My colleagues reverse the Judge, finding that his decision is not supported by substantial evidence in the record. They conclude that the evidence does not "support a finding that the violation contributed to a discrete hazard reasonably likely to result in an injury." Slip op. at 6.

In reviewing a Judge's decision to affirm or reject a S&S designation, the Commission traditionally examines his findings regarding each of the four *Mathies* elements to see if they are supported by substantial evidence. *See, e.g., Black Beauty Coal Co.*, 34 FMSHRC 1733, 1741-44, 1748-49 (Aug. 2012). I conclude that the Judge's findings here regarding each of the four elements of the *Mathies* test are supported by substantial evidence. "Substantial evidence" only requires "such relevant evidence as a reasonable mind might accept as adequate to support [the Judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

1. The underlying violation of a mandatory standard

I join my colleagues in finding a violation of the standard. Slip op. at 6.

2. A discrete safety hazard – that is a measure of danger to safety – contributed to by the violation

The Judge found that the violation contributed to the danger that a miner will "access the area and be overcome by noxious air or a lack of oxygen." 34 FMSHRC at 161. I conclude that while the Judge articulated the relevant hazard, his description of the hazard was over-inclusive. *See Black Beauty*, 34 FMSHRC at 1741. It is sufficient to describe the relevant hazard as *a danger that a miner will access the area and be exposed to noxious air or a lack of oxygen.*

The Judge's conclusion that the Secretary sustained his burden of proof with respect to the second element is supported by substantial evidence in the record. The rope that hung across the 1-5301 headings was insufficient to prevent either the intentional or unintentional access of the area by a miner. 34 FMSHRC at 161-62; *see also* Dep. Tr. 46, 51, 52; Sec'y Ex. A, at 6. The Judge correctly concluded that the rope would not prevent a miner from traveling under or stepping over it.

While Newmont may provide rigorous training to its own employees regarding the inspection of headings, the Judge noted that Newmont's subcontractors do not receive the same benefit. As a result, the Judge found that the signs hanging from the rope which stated, "Danger, Heading Inspection Required" were not a sufficient warning. The sign failed to state that the area was unventilated or inactive, and as a result contributed to the danger that a miner may access the area. 34 FMSHRC at 162-63.

The hazard in this case includes a miner being exposed to noxious air or lack of oxygen. I disagree with my colleagues' conclusion that there is no substantial evidence in the record which supports the existence of this hazard. While the limited readings the inspector took in the headings neither indicated a lack of oxygen nor the build-up of gases at the exact time the inspection took place, this is not dispositive. As the Judge noted, conditions in a mine can change unexpectedly. 34 FMSHRC at 162. This is particularly true in this instance as the headings at issue were in a development area of the mine. *See* Tr. 213, 216. During this process, which can range from several weeks to years, the area is not mined continuously; instead, miners regularly visit the headings to take samples. Tr. 235, 285, 288-89. Depending on the information obtained from the samples, mining activities may proceed in these areas. Tr. 235. Significantly, the development process also includes drilling, blasting, and the use of diesel equipment which produces carbon dioxide and nitrogen dioxide. Tr. 255. Drilling and blasting work had occurred in the 1-5301 North heading during the month prior to the inspection. Tr. 264-65. As the Judge noted, the gases emitted by diesel and other equipment "can build up over time in unventilated areas." 34 FMSHRC at 162.

The actions of the inspection party are themselves indicative of the potential that noxious gases and/or lack of oxygen existed in the unventilated 1-5301 headings. MSHA Inspector Shon Guardipee proceeded about 13 feet into the South Heading when he saw that the ventilation bag was tied off. He turned around and realized that Mine Foreman Ivan Castellanos and the other members of the inspection party had not crossed the rope and followed Guardipee into the heading. Tr. 322. Castellanos testified that he did not enter the heading, and had "held my people back," because "there was a hazard present." *Id.* He explained that it was against company policy to enter a heading which was unventilated. Tr. 327.

3. A reasonable likelihood that the hazard contributed to will result in an injury

The issue for the third element of the *Mathies* test is whether the hazard contributed to by the violation was reasonably likely to result in injury. *Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010). The Judge found that it was reasonably likely that a miner accessing the unventilated areas would be overcome by noxious air or a lack of oxygen. 34 FMSHRC at 161. I conclude that the Judge's decision is supported by substantial evidence.

I decline to join my colleagues in reweighing the testimony to account for the operator's precautionary measures that are taken during development work in the mine, or to make factual findings as to how air in the mine would potentially circulate. *See* Slip op. at 6. As stated above, the hazard of exposure to noxious air or inadequate oxygen has already been established under step 2 of the *Mathies* test.

I disagree that the Secretary "failed to introduce evidence of the likelihood of a hazard from oxygen-deficient air." Slip Op. at 7.[9] The Secretary's evidence included the identification of a similar situation at the nearby Barrick Meikle Mine, not long before the violation in this case, where one miner entered an unventilated area and lost consciousness, a second miner attempted to save him and either lost consciousness or became disoriented, and it took a third miner turning on ventilation fans to get the other two to safety. 34 FMSHRC at 150. It was this incident which triggered the inclusion of a presentation on the barricading required by 30 C.F.R. § 75.8528 at MSHSA's meeting with mine operators in Elko, NV in June 2009. Tr. 40-41, 76; 34 FMSHRC at 151.

4. A reasonable likelihood that the injury in question will be of a reasonably serious nature

The Judge concluded that it was reasonably likely that an injury that would occur would be of a reasonably serious nature. 34 FMSHRC at 161. The inspector concluded the injury would be expected to be fatal. Sec'y Ex. F. The Judge noted that Inspector Guardipee provided specific examples of miners losing consciousness from noxious air in similar situations. 34 FMSHRC at 150. Newmont does not dispute that losing consciousness due to exposure to noxious air is a reasonably serious injury.

In conclusion, I would affirm the Judge's factual findings and conclusions regarding each of the *Mathies* elements as they are supported by substantial evidence in the record.

B. Unwarrantable Failure

I agree with my colleagues that the Judge erred in vacating the Secretary's unwarrantable failure designation and that the case must be remanded for reconsideration of that issue. The Judge vacated the unwarrantable failure designation because he found that Newmont was not on notice of the Secretary's interpretation of the regulations. 34 FMSHRC at 164. Thus, the Judge determined that Newmont "possessed a good faith belief that its policy of roping off headings that were to be worked in the near future complied with the regulations." *Id.*

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.

---

[9] It really should not be necessary for the Secretary to introduce case-specific evidence that noxious gases or inadequate oxygen can result in injury to miners. The history of mining is replete with such examples, including the 2010 disasters at the Sago and Aracoma Mines. As the Commission has noted, "[t]he dangers of low oxygen are well-known and obvious," and so "[o]xygen levels less than the required level constitute substantial evidence of a reasonable likelihood of an injury-producing event occurring." *Kellys Creek Res. Inc.,* 19 FMSHRC 457, 462 (Mar. 1997).

The Judge's determination that Newmont was not on notice is based on his finding that at the June 2009 meeting in Elko, NV, MSHA Assistant District Manager Kevin Hirsch gave specific guidance as to what its Western District would accept as a barricade, but did not set forth policy as to when a barricade must be used under 30 C.F.R. § 57.8528. However, the Judge's determination does not take into consideration what occurred between the June 2009 meeting and the issuance of Order No. 6482848 on January 26, 2010. Sec'y Ex. F.

Between October 14 and October 22, 2009, MSHA issued six separate citations to Newmont at the Midas Mine for violations of section 57.8528. Sec'y Exs. Q, W, CC, GG, JJ, MM. Four of these citations (Sec'y Exs. W, CC, GG, MM) explicitly stated that the heading in question lacked a barricade, and a fifth citation (Sec'y Ex. JJ) stated that there was only a partial barricade. 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.

Moreover, MSHA Inspector Jack Stull testified, without contradiction, that on October 20, 2009, in the course of his issuing Citation No. 6488537 for lack of a barricade and a proper sign at the 1-4750 South Heading (Sec'y Ex. W), Midas Mine Health and Safety Specialist Sandy McFarland became "really mad," swore at Stull, and "said that they're not going to put a barrier up in all the headings that are going to be mined soon." Tr. 145-46. The next day Stull and his supervisor Jim Fitch met with McFarland and other Newmont officials. Tr. 153-54. In a meeting lasting an hour, Fitch explained barricading as required by 30 C.F.R. § 57.8528. Tr. 155-57; Sec'y Ex. K, at 15-16. Surely, any reasonable question of what section 57.8528 required was dispelled by the events of October 20-21.

In November, following the issuance of the October citations, Newmont changed its barricading procedures. Tr. 237-38, 295. 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.[10] 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 section 57.8528, it totally ignores the distinction which triggers the need for a barricade –

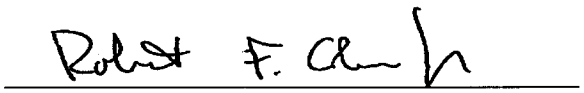
[10] In the transcript, the updated barricade procedures are referred to as "Exhibit 4." Tr. 237-40, 295, 306. However, this document is marked as "Exhibit 8" in the record.

whether an area is "unventilated." Despite the series of section 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.

Moreover, the 1-5301 headings which are the subject of the January 26, 2010 Order in this case do not appear to even be within Newmont's new policy allowing rope barriers for areas scheduled for production or development within four weeks. According to Midas Mine Supervisor Sid Tolbert, on January 26, 2010, Newmont was still evaluating whether it would continue developing the 1-5301 North and South Headings, and had not scheduled either heading for production or development. Tr. 263. Hence, in merely putting up a rope barrier, Newmont was ignoring its own policy that rope barriers were to be used only for those headings actually scheduled for production or development within four weeks.

Given the series of six citations for section 57.8528 violations in October, McFarland's adamant behavior on October 20, the meeting with MSHA the next day, the promulgation of a new policy which does not recognize that the gravamen of section 57.8528 is whether or not an area is "unventilated," and Newmont's ignoring of its own policy in permitting the 1-5301 headings to be unbarricaded on January 26, 2010, the Judge's finding of "good faith" is doubtful. Even crediting the Judge's finding, it certainly cannot be said that Newmont's actions constituted objectively reasonable compliance with section 57.8528.

Finally, I note that in the Judge's unwarrantable failure analysis, he did not explicitly consider and weigh several of the factors enumerated in Commission decisions such as *Manalapan Mining Co.*, 35 FMSHRC 289, 293 (Feb. 2013) and *IO Coal Co.*, 31 FMSHRC 1346, 1350-57 (Dec. 2009). Such factors include the duration of the violation, the danger posed by the violation, and the history of violations of section 57.8528 showing that Newmont had been placed on notice that greater efforts were necessary for compliance. In considering the issue of unwarrantable failure on remand, the Judge should consider these factors.



Robert F. Cohen, Jr., Commissioner

Distribution:

Laura E. Beverage, Esq.
Meredith A. Kapushion, Esq.
Jackson Kelly PLLC
1099 18th Street, Suite 2150
Denver, CO 80202
lbeverage@jacksonkelly.com
makapushion@jacksonkelly.com

Hilary N. Wilson
Newmont Mining Corp.
1655 Mountain City Highway
Elko, NV 89801
hilary.wilson@newmont.com

Melanie Garris
Office of Civil Penalty Compliance
MSHA
U.S. Department of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Administrative Law Judge John K. Lewis
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
875 Green Tree Road
7 Parkway Center, Suite 290
Pittsburgh, PA 15220