

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 14, 1997

NEWMONT GOLD COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. WEST 97-159-RM
	:	Order No. 7704275; 4/21/97
	:	
	:	Docket No. WEST 97-160-RM
	:	Order No. 7704276; 4/21/97
	:	
	:	: Docket No. WEST 97-161-RM
	:	Order No. 7704277; 4/21/97
	:	
	:	Docket No. WEST 97-162-RM
	:	Order No. 7704278; 4/21/97
	:	
v.	:	Docket No. WEST 97-163-RM
	:	Order No. 7704279; 4/21/97
	:	
	:	Docket No. WEST 97-164-RM
	:	Citation No. 7704270; 4/17/97
	:	
	:	Docket No. WEST 97-165-RM
	:	Citation No. 7704271; 4/17/97
	:	
	:	Docket No. WEST 97-166-RM
	:	Citation No. 7704272; 4/17/97
	:	
	:	Docket No. WEST 97-167-RM
	:	Citation No. 7704273; 4/17/97
	:	
	:	Docket No. WEST 97-168-RM
	:	Citation No. 7704274; 4/17/97
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Genesis Mine
Respondent	:	Mine ID 26-00062

DECISION

Appearances: David J. Farber, Esq., PATTON BOGGS L.L.P.,
Washington, D.C.,
for Contestant;
James B. Crawford, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia.,
for Respondent.

Before: Judge Cetti

These ten consolidated cases are before me on the request of Newmont Gold Company (Newmont) for a hearing under section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq., the "Act" and Commission Rule 20, 29 C.F.R. 2700.20, to contest the validity of the five citations and the five 104(b) orders.

At the hearing, the Secretary by counsel entered into the record the order of the Secretary vacating the 104(b) orders in Docket Nos. WEST 97-159-RM through WEST 97-163-RM. (Ex. N-2) and requested an order dismissing these dockets. There being no objection, the undersigned Judge at the hearing verbally issued a bench order dismissing docket Nos. WEST 97-159-RM through WEST 97-163-RM and now by this decision confirms the bench order in writing. This leaves for resolution the issues arising out of the citations in Docket Nos. WEST 97-164-RM through WEST 97-168-RM including the validity of the citations.

STIPULATIONS

At the hearing, the parties entered into the record the following stipulations:

1. Contestant, Newmont Gold Company, is a mine operator as defined under section 3(d) of the Mine Act and has products and mining operations and extracts products which enter and affect commerce.
2. The Administrative Law Judge has authority to hear and rule in these proceedings under section 113(d)(1) of the Federal Mine Safety and Health Act of 1977.

STATEMENT OF THE PROCEEDINGS

On April 21, 1997, Inspector Bonifacio issued five citations to Newmont Gold Company. Each citation alleges an identical guarding violation of the moving parts of the front mounted engine of each of the five haul trucks used at the Genesis Mine. All five trucks were Dresser Haulpak 510 haul trucks. Each of the citations has an identical description of the alleged violation for all of the haul trucks. Each citation alleges violations of 30 C.F.R. ' 56.14107 concerning the guarding of moving parts of the engine of each haul truck. The identical description in each citation reads as follows:

The fan blades and accessories drive pulleys and v-belts located at the front of the motor on the Dresser Haulpak 510 haultruck Co. No. HT-026 weren't guarded. The unit is operated at the pit 24 hours per day and the motor is left running during shift change, the truck operator must stand within 7 feet of the moving parts in order to check for defects to the steering, braking and suspension components during the pre-operational inspection of the unit. The truck driver could contact the moving parts and sustain a serious injury.

The citations fixed the abatement time as 8 a.m. on April 21, 1997.

It is undisputed and clear from the citations and the record that the citations were not for guards that were available from the manufacturer or for missing guards that had been previously installed by the manufacturer or others and then removed for making repairs or maintenance and not replaced. The citations were issued because Respondent did not install new additional guards which the inspector believed should be added to supplement the guards installed by the truck's manufacturer.

As a preliminary matter Newmont presented undisputed evidence that no miner had ever sustained any injury because of contact with a moving machine part of the engine of any of the haul trucks.

Newmont entered into the record undisputed measurements it took to support its contention that in any event, the exposed moving parts of the truck's engine were at least seven feet away from walking or working surfaces. MSHA on the other hand never took any measurements whatsoever and thus, MSHA did not provide any *measurements* that refute Respondent's measurements or contentions that the moving machine parts came within the express exception stated in subsection (b) of the cited safety standard. Each citation was issued for the alleged violation of 30 C.F.R. ' 56.14107 which expressly provides under subsection (b):

AGuards shall not be required where the exposed moving parts are at least seven feet away from walking or working surfaces.@

In support of its position that the cited standard was applicable to the engines of haul trucks, counsel for the Secretary placed in evidence as Exhibit G-2 a copy of the preamble of the cited safety standard which states in part:

... larger, off-road vehicles present special hazards because of the greater accessibility to their moving machine parts. In some instances persons can walk directly under the vehicle to inspect the engine and be exposed to its moving parts. In most instances, these parts are already guarded by the manufacturer but guards are sometimes removed during repair work and not replaced. MSHA's

objective is to ensure that these guards remain in place. (Emphasis added).

In my opinion, the wording and context of the preamble shows that the promulgators of the standard intended that, except in a rare exceptional case, there would be no requirement to supplement the existing guards that the manufacturer of the truck had installed in and around the truck's engine area. The preamble clearly indicates that its primary purpose was to insure that the truck manufacturer's installed guards were reinstalled and remain in place after any removal for maintenance or repair of the engine.

The Inspector Exceeded His Statutory Authority In Issuing Citations That Did Not Conform With the Statutory Requirements of Section 104(a) of the Mine Act

The inspector did not act in conformance with the mandate of section 104(a) of the Act in issuing the citations in question. Section 104(a), in addition to requiring the citation to be in writing, mandates that the 104(a) citation fix a reasonable time for the abatement of the violation. The time specified for abatement in the written citation was 8 a.m. on April 21, 1997, which was more than 7 hours before the written citation was issued to the operator. The citations were issued on April 21st at approximately 3:30 p.m. Thus it clearly appears that the inspector did not even attempt to comply with this mandatory requirement of fixing a reasonable time for abatement of the alleged violations and under the facts of this case, the citations should be dismissed.

Counsel for MSHA in attempting to justify its issuance of the written citations that did not conform to the statutory requirements, entered into the record evidence and arguments which on close analysis demonstrate that it was pushing for enforcement of what the inspector referred to as an oral citation issued a few days before the abatement time of 8 a.m. April 21, 1997. This oral citation must also fall as it clearly exceeds the statutory authority granted in section 104(a) of the Mine Act.

The evidence presented by the Secretary demonstrates that the inspector was apparently intentionally trying to enforce an oral citation. First the inspector testified that, although he never observed haul truck drivers making the required preoperational inspections of the haul trucks, he determined on the 9th of April by interview with truck drivers and the foreman and looking at the trucks, there was a violation of the cited standard in that the factory installed guards were inadequate. (Tr. 161, 737). The inspector notified this determination to the maintenance foreman Mr. Mueller. The inspector testified Mr. Mueller agreed that he would install supplementary guards as soon as possible. Mr. Mueller, on the other hand, gave credible testimony that the inspector misunderstood what he said. He only said he could, not that he would, add the requested supplementary guarding.

On April 14, 1997, the inspector inquired about the supplemental guarding and learned Mr. Mueller's boss, Mr. Peske, wanted to check with the truck's manufacturer about a permanent

guard installation and the fact that additional guards might cause other problems.¹ The inspector agreed but insisted that temporary guards to be installed as soon as possible. (Tr. 169).

The inspector testified that on April 17th he went to the MSHA field office and at the request of Dennis Tobin, the MSHA supervisor, made a call to Mr. Bill Miles, an agent of Newmont. (Tr. 172). The inspector testified the MSHA supervisor, Mr. Tobin, got on the line and told Mr. Miles that, in lieu of Newmont's request for a ruling on whether they needed to install additional guarding or not, "Yes he had checked on it and that it was a violation" and added that a citation was issued "effective then" with an abate time of 8 a.m. April 21, 1997.

On April 21 the inspector went to the mine "a little bit before 12 o'clock," talked to Mr. Mueller and handed him "draft copies" of the citations. (Ex. N-1). The "draft copies" had printed at the top and bottom in large print "DRAFT COPY ONLY - NOT FOR ISSUE." The inspector testified that Mr. Mueller and others seemed to have no knowledge of the conversation of April 17 between Mr. Tobin and Mr. Miles. On further questioning, the inspector testified that citations were issued verbally on Thursday, the 17th of April to Mr. Miles. (Tr. 177).

Again, on further direct examination, the inspector testified that on April 21, 1997, he explained to Mr. Mueller and other company officers, "that the citations had been issued the previous Thursday (April 17, 1997) per a conversation with Mr. Miles." This obviously referred to the phone conversation between Mr. Tobin and Mr. Miles. (Tr. 179).

Thus it is clear from the record that the abatement time of 8 a.m. April 21, 1997, on the written citations was no inadvertent error. It was the abatement date orally specified on Thursday, April 17, 1997, to Mr. Miles and again specified in the written citations served approximately 3:30 p.m. on April 21, 1997, seven hours after the abatement time deadline. The inspector testified that when he went to the property on April 21 just before 12 o'clock, to see what "action" had been done and testified "and if no action was done, you issue a noncompliance order" and that is exactly what the inspector did. (Tr. 181, lines 21-22). Thus it is clear from the record that both the oral and written citations are invalid for failure to conform to the statutory authority clearly set forth in section 104(a) of the Mine Act which requires that the citation be in writing and that it fix a reasonable abatement time. As stated by the Chief Law Judge Merlin in his Order of Dismissal in D.H. Blattner & Sons, Inc., 17 FMSHRC 1073, 1074 (June 1995), "An Administrative agency is a creature of Congress and cannot exceed the jurisdiction given to it by

¹At the hearing Newmont contended that the additional engine guards created a greater hazard for drivers because of fire that could result from overheating the haul truck's engine and its interference with the engine fire suppression system.

Congress.@ Lyung v. Payne, 476 U.S. 926, 937 (1986); Killip v. Office of Personnel Management, 991 F.2d 1564, 1569 (Fed Cir. 1993).@ *See, also*, Kaiser Coal Corp., 10 FMSHRC 1165, 1169 (September 1988). The citations are dismissed.

ORDER

Citation Nos. 7704270, 7704271, 7704272, 7704273 and 7704274 are vacated and Docket Nos. WEST 97-164-RM, WEST 97-165-RM, WEST 97-166-RM, WEST 97-167-RM and WEST 97-168-RM are **DISMISSED**. Order Nos. WEST 97-159-RM, WEST 97-160-RM, WEST 97-161-RM, WEST 97-162-RM and WEST 97-163-RM are **DISMISSED**, pursuant to the Secretary's order dismissing the corresponding 104(b) orders.

August F. Cetti
Administrative Law Judge

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