

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3993/FAX 303-844-5268

May 11, 1998

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 97-122-M
Petitioner	:	A.C. No. 26-00271-05503
	:	
v.	:	
	:	Genesis Mine
NEWMONT GOLD COMPANY,	:	
Respondent	:	

SUMMARY DECISION

Before: Judge Cetti

This case is before me upon a petition for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 *et seq.*, the Act and on cross-motions of the Parties for Summary Decision and Respondent's Motion for Declaratory Relief.

On September 15, 1996, a 150- ton Caterpillar end dump haul truck operated by Respondent's driver Gary Morin backed through a berm at an elevated dump site at the Genesis Mine. The haul truck overturned and traveled 50 feet down the sloped embankment coming to rest upside down at the base of the dump. The driver, Gary Morin, was hospitalized at the Elko General Hospital. The post-accident drug test administered on Mr. Morin by the hospital as well as a pre-accident drug test of September 12, 1996 yielded results that were positive for marijuana. Newmont did not submit an MSHA 7000-1 Accident, Injury Report on the September 15, 1996, incident prior to October 23, 1996. Newmont asserts that since Mr. Morin was in the hospital on September 16th and retroactively resigned his employment effective September 12th, it was not required to file such a report.

The Secretary of Labor on behalf of the Mine Safety and Health Administration (MSHA), charges the Respondent, the operator of the Genesis Mine with the violation of 30 C.F.R. ' 56.9101 and 30 C.F.R. ' 50.20.

30 C.F.R. ' 56.9101 in relevant part provides:

Operators of self-propelled mobile equipment shall maintain control of the equipment while it is in motion.

Newmont asserts that MSHA should not have charged Newmont with the violation of C.F.R. ' 56.9101 but instead should have cited Newmont for a violation of 30 C.F.R. ' 56.20001 which provides:

Intoxicating beverages and narcotics shall not be permitted or used in or around mines. Persons under the influence of alcohol or narcotics shall not be permitted on the job.

CROSS MOTIONS FOR SUMMARY DECISION

When the Secretary and the Respondent, Newmont Gold, were unable to resolve their differences, the parties filed cross-motions for Summary Decision. The parties assert that there are no material facts in dispute and that the issues are ripe for summary decision.

Newmont in its Motion for Summary Decision contends that by charging Newmont for an alleged Aaccident,@ and deeming Newmont to have Afail[ed] to control@its equipment, AMSHA interprets its regulations in a manner that obviates the real cause of the incident. Newmont states:

MSHA, as it has in the past, masks the role that illegal drug use played in creating a safety hazard and damaging a valuable piece of equipment. Most importantly, MSHA=s actions mask the drug relationship from identification in its national database and training programs, depriving all interested parties of critical information and violating the purpose, goals and mandates of the Mine Act. Newmont also asserts that declaratory relief is both proper and necessary in this instance in light of the public policy importance of maintaining a drug-free workplace.

Newmont contends that the Commission Ashould exercise its sound discretion and issue declaratory relief mandating MSHA to list drug abuse as the cause of this incident and all such future incidents.@

JOINT STIPULATIONS

The parties, in support of their respective positions, jointly entered into the record under the heading AA. General Stipulations@stipulations Nos. 1 through 8 and under the heading AB. Specific Stipulations@stipulations Nos. 1 through 15. The parties state these stipulations of fact are admissible for all purposes.

A. General Stipulations

1. The Genesis Mine is owned and operated by Newmont Gold Company (ANewmont@).
2. The products of the Genesis Mine enter and affect commerce and the mine is within the jurisdiction of the Mine Safety and Health Act, 30 U.S.C. ' 801 *et seq.* (Athe Act@). The Administrative Law Judge has jurisdiction to decide these matters.
3. All of the citations at issue in this matter were properly served by an authorized representatives of the Secretary of Labor (ASecretary@).
4. All of the civil penalties and/or citations at issue in this matter were timely contested by the operator of the Mine.
5. The size of the Genesis Mine, as of February 12, 1997, was 1,005,387 man-hours and the size of Newmont was 4,059,826 man-hours.
6. Newmont's Genesis i.d. number had 15 assessed violations in the 25 months preceding February 12, 1997.
7. The amount of penalties assessed herein will not affect Newmont's ability to continue in business.
8. The parties agree that Newmont has sought this litigation to challenge positions of the Secretary with respect to the requirements of 30 C.F.R. ' 50.20, and the Secretary's enforcement policy with respect to 30 C.F.R. ' 56.20001.

B. Specific Stipulations

1. On September 15, 1996, Gary Morin was employed by Respondent Newmont Gold Company (hereinafter ANewmont@) as a haul truck driver.
2. On September 15, 1996, Gary Morin was operating a 150-ton Caterpillar model 785 B end dump haul truck (i.d. #HT-094) at the Genesis Mine.
3. At about 1:30 p.m. on September 15, 1996, the haul truck being operated at the time by Gary Morin backed through a berm at the elevated dump site of the north area leach pad, overturned and traveled about 50 feet down the sloped bank coming to rest on its top at the base of the dump.
4. Gary Morin was sent by Newmont to the Elko General Hospital during the early evening of September 15, 1996, and was admitted for observation. He was discharged from the hospital on the morning of September 17, 1996.

5. Gary Morin submitted to a voluntary random drug test administered as part of Newmont's routine program on September 12, 1996.

6. Newmont did not have the results of the September 12, 1996, Morin drug test at the time of the incident on September 15, 1996.

7. Newmont was notified after the accident that the September 12, 1996, Morin drug test yielded results that were positive for marijuana.

8. Elko General Hospital administered a post-accident drug test to Gary Morin which yielded results that were positive for marijuana.

9. Upon notification of the test results on September 16, and while in the hospital for observation, Gary Morin resigned from employment with Newmont, effective September 12, 1996 (the date of the first drug test).

10. Prior to his retroactive resignation, Gary Morin's next scheduled shift was to begin September 16, 1996.

11. Gary Morin also was unable to return to work his next scheduled shift on September 16, 1996, because he had not been discharged by Elko General Hospital.

12. On October 23, 1996, MSHA Inspector Bob Caples issued Newmont Citation No. 7951406 for an alleged violation of 30 C.F.R. ' 50.20. The violation was characterized as non-significant and substantial, and the citation was modified to reflect no negligence based on confusion caused by different information given the company by HSAC (MSHA's statistical center in Denver, Colorado).@

13. Prior to October 23, 1996, Newmont did not submit to MSHA an MSHA 7000-1 Accident, Injury and Illness Report on the Morin September 15, 1996, haul-truck incident.

14. On September 20, 1996, Inspector Caples issued Citation No. 4140633 to Newmont for an alleged violation of 30 C.F.R. ' 56.9101. The alleged violation was characterized as significant and substantial, and the citation was modified to reflect no negligence.

15. Newmont has not been cited by MSHA for a violation of standard 30 C.F.R. ' 56.20001 related to the September 15, 1996, haul-truck incident, despite MSHA's awareness that Gary Morin tested positive for marijuana on the day of the incident.

Citation No. 4140633

This citation alleges a significant and substantial violation of the mandatory safety standard 30 C.F.R. ' 56.9101 which mandates that the operator of mobile equipment, such as the haul-truck in question to Amaintain control of the equipment while it is in motion.@

Item 8 of the citation describes the alleged violation as follows:

At about 1:30 P.M. on September 15, 1996 Gary Morin, haul truck driver did not maintain effective control of the 150 ton Caterpillar model 785B, end dump haul truck, company I.D. #HT-094, while in the process of attempting to dump his loaded truck at the North area leach pad at the Genesis Mine. Due to the speed of the truck while backing and not applying the brakes in a timely manner the truck traveled through the berm at the elevated dump site and after over-turning, traveled about 50 feet down the sloped bank coming to rest on its top at the base of the dump.

The parties stipulate that on September 15, 1996, Gary Morin was operating a 150-ton Caterpillar model 785B end dump haul truck (I.D. #HT-094) at the Genesis Mine and that at about 1:30 p.m. on September 15, 1996, the haul-truck being operated at the time by Gary Morin backed through a berm at the elevated dump site of the north area leach pad, overturned and traveled about 50 feet down the sloped bank coming to rest on its top at the base of the dump. (Specific Stipulations Nos. 1 and 2).

On January 12, 1996, Newmont Gold Company (ANewmont@), pursuant to Commission Rule 10(b), 29 C.F.R. ' 2700.67 moved that Citation Nos. 7951406 and 4140633 be vacated and requested that Athis Court issue Declaratory Relief mandating that MSHA: (1) enforce its prohibition against drug use on mine sites; and (2) abandon its current policy of hiding drug-abuse caused incidents and initiate a national policy of reporting such incidents, identifying them as a hazard to employees and emphasizing prevention through its enforcement and training efforts.@

Newmont asserts that MSHA should have cited Respondent for violation of 30 C.F.R. ' 56.20001 rather than 30 C.F.R. ' 56.9101 for the incident involving the fall of the haul-truck. The citation, nevertheless, alleges a violation of ' 56.9101 which provides that:

The operators of self-propelled mobile equipment shall maintain control of the equipment while it is in motion.

On March 16, 1998, all five Commissioners in a unanimous decision interpreting the meaning of this identical safety standard ' 56.9101 stated AThe reasons for a loss of control are irrelevant to consideration of whether control over moving equipment was maintained.@ (Emphasis added). *Daaren and Janssen, Inc.*, slip op. (March 16, 1998). In that case, the operator of a front-end loader traveled through the berm and the loader fell 40 feet to the quarry

floor. In that case, as here, there was no evidence that the operator intentionally drove the mobile equipment through the berm.

On consideration of the entire record before me, I find the operator of the haul-truck did not maintain control of the truck while it was in motion. The most reasonable inference that I can draw from the record before me is that the accident would not have happened if the driver of the truck had maintained control of the haul truck while it was in motion. Clearly the driver of the truck did not maintain control of the haul truck while it was in motion as mandated by the safety standard. There is no evidence that Mr. Morin intentionally drove the truck through the berm. Citation No. 4140633 is affirmed.

SIGNIFICANT AND SUBSTANTIAL

Inspector Caples found the violation charged in Citation No. 4140633 to be significant and substantial. A significant and substantial (S&S) violation is described in § 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), as a violation of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard. A violation is properly designated S&S if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), 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 safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Id. At 3-4 (footnote omitted). See also *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). Evaluation of the criteria is made in terms of continued normal mining operations. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988), *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 1007 (December 1987).

In the instant case, it is clear from the particular facts surrounding the violation, primarily the failure to maintain control of the haul-truck as it was backing up to the berm at an elevated dump site, that it was a violation of such a nature that could significantly and substantially contribute to the cause and effect of a mine safety hazard and that there was a reasonable

likelihood that the injury that would result would be one of a reasonably serious nature. Accordingly, the violation is properly designated significant and substantial.

DECLARATORY RELIEF

Newmont is to be commended for its enforcement of its drug policy as set forth in Respondent's brief. Newmont is clearly seeking more help from MSHA to assist them achieve its worthy goal of a drug-free workplace. However, I see no legal basis in this case to grant Respondent's motion for declaratory relief seeking to require the Secretary to issue a citation to Respondent charging it with the violation of 30 C.F.R. ' 56.20001 or to enforce MSHA's anti-drug abuse policy at the mine and to stop the alleged hiding drug-abuse caused incidents, or to initiate national policy of reporting and identifying such use as hazardous or even emphasizing prevention through its enforcement and training efforts as requested by Respondent..

The Secretary has the authority and the discretion to cite or not cite violations of a particular safety standard under the Mine Act. The Commission in its decision *Secretary of Labor v. Mechanicsville Concrete Inc.*, 18 FMSHRC 877 at 879 (June 20, 1996) stated:

The Supreme Court has held that an administrative agency has virtually unreviewable discretion in making decisions not to take particular enforcement action relating to its statutory or regulatory authority. *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985): *see Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 538 (D.C. Cir. 1986). The Commission has recognized that the Secretary's discretion to vacate citations is unreviewable. *RBK Construction, Inc.*, 15 FMSHRC 2099, 2101 (October 1993).@ We perceive no material difference between the Secretary's discretion on the one hand to vacate a citation and his discretion on the other hand not to issue a citation in the first instance (Emphasis added).

I agree with the Secretary that the Secretary of Labor has the sole authority and discretion to cite or not cite a particular violation and to disseminate and develop enforcement policy under section 103 of the Mine Act.

See also *Thunder Basin Coal Co. v. Reich*, 127 L. Ed. 2d 29, 36, 40 (1994); *RBK Construction, Inc.*, 15 FMSHRC 2099, 2101 (October 1993); *Mettiki Coal Corp.*, 13 FMSHRC 760, 764 (May 1991).

Respondent's Motion for Declaratory Relief is denied.

Citation No. 7951406

MSHA charges Newmont with a non-significant and substantial violation of 30 C.F.R.

' 50.20 which requires that an operator file an AMSHA Form 7000-1" report Awithin 10 working days after an accident, occupational injury or occupational illness.@ An Aoccupational injury@ is defined in ' 50.2(e) as

any injury to a miner which occurs at a mine for which medical treatment is administered, or which results in death or loss of consciousness, inability to perform all job duties on any day after an injury, temporary assignment to other duties, or transfer to another job.

Citation No. 7951406, item 8, accurately states the facts as follows:

A MSHA 7000-1 Accident, Injury and Illness report was not completed and submitted for employee Gary Morin. Morin was involved in a haul truck roll-over on September 15, 1996. Mr. Morin was admitted to Elko General Hospital in Elko, Nevada on the 15th and released on September 17, 1996. Morin was scheduled to work on September 16, 1996.

Mr. Morin was released from his hospital confinement on September 17, 1996. Mr. Morin's Discharge Diagnosis; attached as Exhibit B to the stipulations filed by the Parties reads as follows:

DISCHARGE DIAGNOSIS:

1. Concussion.
2. Cervical strain.
3. Lumbar strain.
4. Contusion left elbow.

SUMMARY: Patient is a 37 year old Newmont haulpak driver who on 9-15-96 apparently drove his haulpak over a berm and suffered a rollover. He was belted in but struck his head, neck and left elbow. He presented to Elko General Hospital Emergency Room where a work up was undertaken. It was felt that he had significant concussion, cervical and lumbar strains and he was admitted for observation. Patient initially complained of significant head and neck pain but denied any numbness or tingling. Patient's activity was gradually advanced; his discomfort gradually subsided and by 9-17-96, he was mobile enough and feeling good enough to be discharged home.

DISCHARGE MEDICATIONS: Lortab prn.

PLAN: Follow up will be Thursday at Ruby Mountain Orthopedics.

D: 9-19-96

T: 9-22-96

Although Newmont sent Gary Morin to the Elko General Hospital right after the accident for observation, it is clear from the record that evidence of injury was found by the treating doctors at the hospital, such as significant concussion, cervical strain, lumbar strains and contusion of left elbow. Therefore, Newmont is unable to escape the requirement of filing an MSHA Report Form 7000-1 on grounds that Mr. Morin was hospitalized for observation only since evidence of injury was found. 30 C.F.R. ' 50.3(e) clearly implies that medical treatment does include hospitalization for observation where evidence of injury or illness is found.

I also find no merit in Newmont's contention that it was not required to file a 7000-1 report with MSHA because Mr. Morin while still in the hospital on September 16, 1996, retroactively resigned his job with Newmont effective September 12, 1996. The fact remains that Mr. Morin was confined to a hospital at the start of his next scheduled shift.

The purpose of the filing requirement is to notify MSHA of a serious incident occurring on mine property to allow MSHA to investigate, and to obtain and utilize information pertaining to accidents, injuries, and illnesses. 30 C.F.R. ' 50.1. Thus, an operator is not relieved of the requirement to file the report by changing the shift scheduling or obtaining a resignation after the accident or incident resulting in injury. Citation No. 7951406 is affirmed.

PENALTY

The Secretary, on further consideration after issuance of the citations, appropriately reduced the operator's negligence factor for each of the two citations to none and has proposed a penalty of \$81.00 for Citation No. 4140633 alleging a violation of 30 C.F.R. ' 56.20001 and a single penalty assessment of \$50.00 for Citation No. 7951406 alleging a violation of 30 C.F.R. ' 50.20.

Neither party presented evidence or stipulations that seriously challenged the penalties proposed by the Secretary. Upon my independent evaluation and consideration of the appropriate amount of penalty in accordance with the six penalty criteria of section 110(i) of the Act, I find the penalties proposed by the Secretary to be the appropriate penalty for each of the violations.

ORDER

The Secretary's Motion for Summary Decision is **GRANTED** and the Respondent's Motions for Summary Decision and for Declaratory Relief are **DENIED**.

It is further ordered that Respondent within the next 30 days pay a civil penalty to the Secretary of Labor of \$81.00 for the violation of 30 C.F.R. ' 56.20001 and \$50.00 for the violation of 30 C.F.R. ' 50.20. Upon receipt of payment, this case is dismissed.

August F. Cetti
Administrative Law Judge

Distribution:

Steven R. DeSmith, Esq., Office of the Solicitor, U.S. Department of Labor, 71 Stevenson St.,
Suite 1110, San Francisco, CA 94105

James B. Crawford, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson
Boulevard, Arlington, VA 22203

Henry Chajet, Esq., David Farber, Esq., PATTON BOGGS, L.L.P., 2550 M Street, NW,
Washington, DC 20037

/sh

STEVEN R DeSMITH ESQ
OFFICE OF THE SOLICITOR
U S DEPARTMENT OF LABOR
71 STEVENSON ST #1110
SAN FRANCISCO CA 94105

HENRY CHAJET ESQ
DAVID FARBER ESQ
PATTON BOGGS LLP
2550 M ST NW
WASHINGTON DC 20037

JAMES B CRAWFORD ESQ
OFFICE OF THE SOLICITOR
U S DEPARTMENT OF LABOR
4015 WILSON BLVD
ARLINGTON VA 22203