

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
2 SKYLINE, Suite 1000  
5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041

February 26, 1999

GREGORY BENNETT, : DISCRIMINATION PROCEEDING  
Complainant :  
v. : Docket No. WEST 98-115-D  
: WE MD 97-21  
NEWMONT GOLD COMPANY, :  
Respondent : Twin Creeks Mine  
: Mine ID 26-01942

**DECISION**

Appearances: Mr. Gregory R. Bennett, Golconda, Nevada, *pro se*;  
David Farbar, Esq., Patton Boggs LLP, Washington, D.C. for Respondent.

Before: Judge Bulluck

This discrimination proceeding is before me on a Complaint of Discrimination brought by Gregory R. Bennett against Newmont Gold Company (Newmont), under Section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 815 (c). The complainant alleges unlawful discharge in retaliation for health and safety complaints that he had raised with Newmont.

Bennett filed his discrimination complaint with the Mine Safety and Health Administration (MSHA) pursuant to Section 105(c)(2) on July 25, 1997 (See Complaint File).<sup>1</sup> On December 22, 1997, MSHA notified Bennett that, based on its investigation of the allegations, it had

---

<sup>1</sup>Section 105 (c)(2) provides, in pertinent part, that Any miner...who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination.

concluded that a violation of Section 105(c) had not occurred. Bennett, *pro se*, initiated this proceeding before the Commission on January 16, 1998, under Section 105(c) (3), 30 U.S.C. ' 815 (c)(3).<sup>2</sup>

By motion filed on May 11, 1998, Newmont sought dismissal of Bennett's discrimination complaint, based on Bennett's failure to state a claim upon which relief may be granted. Based on Bennett's opposition to Newmont's motion, Bennett was granted permission to amend his pleadings by filing an 11-page narrative that he had previously submitted to MSHA during the initial investigation of his complaint. Bennett's pleadings, as amended, construed in the light most favorable to him, were deemed to adequately allege protected activity and adverse treatment under 105(c), for which he would be entitled to relief, if proven. Accordingly, Newmont's Motion to Dismiss was denied.

A hearing was held in Reno, Nevada. The parties presented testimony and documentary

---

<sup>2</sup>Section 105(c)(3) provides, in pertinent part, that **A**if the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of the notice of the Secretary's determination, to file an action in his own behalf before the Commission...@

evidence, and filed post-hearing briefs.<sup>3</sup> For the reasons set forth below, I conclude that Bennett did not prove that he had engaged in protected activity under the Act and that, even if he had, he was not discharged for having engaged in any protected activity.

## I. Stipulations

The parties stipulated to the following facts:

1. Newmont is subject to the jurisdiction of the Mine Act.
2. Mr. Bennett was an employee at Newmont or its predecessor beginning in 1990.

## II. Factual Background

Newmont owns and operates several gold mines in the northern Nevada area, including the Twin Creeks Mine, which was acquired from Santa Fe Pacific Gold in or around June 1997 (Tr. 115). Twin Creeks has two mills, Juniper and Pinion, which are approximately six miles apart (Tr. 413).

Bennett began working at Santa Fe Pacific Gold, Rabbit Creek project, in June 1990 (subsequently became the Pinion Mill at the Twin Creeks Mine, due to the merger of Santa Fe Pacific Gold and Goldfields Company in or around 1995), until June 1996, when he was transferred to the Juniper Mill, and remained at that location until his discharge in June 1997 (Tr. 110-13). As Juniper Mill foreman, Bennett's duties included oversight of operations and maintenance of a safe work environment for his subordinates (Tr. 113). Bennett reported directly to Greg McMillen, general foreman of the Juniper Mill until June of 1996, at which time Cindy Jones replaced McMillen as Bennett's general foreman (Tr. 114-15).

---

<sup>3</sup>By motions dated October 7 and 16, 1998, and November 9, 1998, Bennett sought 1) discipline of Newmont employees Blas Doran, Cindy Jones, Chris Conley, Richard Tucker and David Stacey for perjured testimony in his discrimination hearing, and 2) my withdrawal from his case, based on bias and denial of his right to fully present his case. By Order of November 10, 1998, both motions were denied.

A major component of gold mining, particularly in northern Nevada, is safe control of the mercury that is also extracted from the ore during the gold-extraction process (Tr. 116-17, 183-84, 299). The type of mercury that is a byproduct of mining at Twin Creeks is elemental, as opposed to more hazardous organic and inorganic mercury (Tr. 300). Elemental mercury (silvery substance found inside thermometers) poses a hazard from excessive vapor inhalation, and is not dangerous when handled or ingested (Tr. 299-302). Newmont's ever-evolving mercury control program, specifically in the Juniper Mill, includes the following: Jerome Monitor samplings on every shift to ensure permissible mercury levels (Tr. 129-30, 217);<sup>4</sup> individual fit-tested and air-tested respirators for use in elevated mercury situations (Tr. 131-33, 216-17, 227, 302-04); protective clothing to prevent mercury exposure (Tr. 133-34, 217-18, 233-34); mercury vacuums that pick up visible mercury (Tr. 310-11); and use of chemical additives, such as sodium sulfide, HGX and DTC, which bind with mercury to inhibit vaporizing (Tr. 121-22, 135-36, 234-35, 310-11, 356, 371-73).

Additionally, exceeding MSHA's requirements, Newmont employs an intensive health-monitoring program which includes monthly urine testing of mill employees for elevated mercury levels (refinery employees are tested weekly), whereby testing at a biological exposure index for a sustained period results in removal of affected employees to mercury-free areas, until systemic mercury drops to an acceptable level (Tr. 136-37, 235-37, 243, 304-07). There has never been an instance of mercury poisoning at Twin Creeks (Tr. 243, 305, 308).

It is essential in describing the work environment at Newmont to note the emphasis placed on mercury containment by all mill employees, to a degree that daily discussions on the subject are pervasive and suggestions about improving the company's approach to the problem are not only welcomed, but encouraged (Tr. 21, 116-17, 192, 211-12, 233-34, 238, 369).

In March of 1997, Bennett had discussions with Newmont's human resource manager, Chris Conley, concerning Bennett's frustration with being blown-off by his supervisor as to how the mercury in the mill should be controlled, his desire to leave the company, whether he should untimely submit an incident report of a back injury to Newmont, and his concern of not being re-employable due to his injured back (Tr. 9-13, 404-06, 408; Bennett Br. at 7, 12).

Several weeks later, on April 22, 1997, a meeting was held between Bennett, his general foreman Cindy Jones, loss control manager (also called safety coordinator) Richard Tucker and other management officials, to discuss the incident report of the March 1996, back re-injury, untimely submitted by Bennett in April 1997 (Tr. 13-20, 253-56, 315-18). At that meeting,

---

<sup>4</sup>A Jerome Monitor is a hand-held instrument with an air probe at one end that takes an instantaneous reading of mercury vapor in the sample location (Tr. 308).

characterized by Bennett as a general complaint forum for him (Tr. 19), Bennett alluded, without specificity, to safety concerns at the Pinion Mill, which apparently included lifting requirements, and was requested by management to provide a list identifying those items needing correction (Tr. 14-19, 351-52). Additionally, Bennett raised, at least, one generic issue respecting mercury at the Juniper Mill, by stating, according to his testimony, that we are not addressing the mercury in the Juniper Mill (Tr. 19; see also 120) or, according to Cindy Jones, by bringing up sodium sulfide to be added to the sag discharge screen (Tr. 356). Bennett never provided management with the list of specific safety items (Tr. 353, 366).

Bennett also had informal discussions with Richard Tucker beginning in April 1997, which Bennett described as a general safety philosophy-type. No specifics (Tr. 36-38). According to Tucker, Bennett expressed his desire to take care of the mercury problem if we would allow him to, but we would need to give him the opportunity to do that, and we would need to keep his supervisors, management, other people, out of the area and let him handle it, and he could take care of it (Tr. 312-13). Chris Conley, human resources manager, testified to similar conversations with Bennett, in which Bennett expressed his concerns of mercury contamination in the refinery; that he had a solution to that, but that Cindy Jones wasn't listening to him; that if the company had followed his solution, the problem would not still exist (Tr. 408).

Against this backdrop, on the morning on May 9, 1997, what was normally a routine meeting between Jones and Bennett, became a confrontation that marked Bennett's last day of reporting to duty at Newmont. Bennett summarized the meeting in the following testimony:

My supervisor, Cindy Jones, walked into the foreman's office. I believe she started to address some of the daily activities. At that point, I had two environmental release reports, set them down on the table, and I said, you can't have things both ways. I said, I can't work in this environment anymore. Nobody will take care of nothing. And I think the Court by now can appreciate how I go off on a rant, and this is probably basically what I did, saying, You can't do this; you can't do that. There came a point when Cindy Jones stood up and said, I'm going to Phil Walker's office, and as far as I'm concerned, you can go home (Tr. 40).

\*\*\*\*\*

I referenced my back, yes I did. I told her, I can't quit because I'm not able to get a job somewhere else. I said, I can't go anywhere. I have to have something, settlement or severance or something. And the rest of the comments ensued

(Tr. 160). Bennett was referencing two reports, prepared for the Nevada Department of Environmental Protection (NDEP), in which he had documented environmental spills that had

occurred at the mine site on January 18, 1997, and May 2, 1997, respectively.<sup>5</sup> Cindy Jones had altered those reports in a manner that characterized the spills as more serious than Bennett had reported, and Bennett believed that Jones had, in essence, falsified the information reported (Tr. 42-44, 358).

Cindy Jones's account of that meeting was that it was extremely heated, Bennett complained about the environmental spill reports, and he invited her to go down to the Pinion Mill where, according to him, she would find a lot of safety items that had not been corrected, without identifying those items specifically (Tr. 350-51; Ex. C-31).

At some point when the meeting got out of control, Bennett was either directed or given permission by Jones to go home (Tr. 46-47). Sometime that same afternoon, on behalf of Newmont, Jones called Bennett at home, informed him that he was being placed on medical leave, and requested that he get examined by a doctor (Tr. 48, 159-60, 263-64). Bennett was examined by a local physician of his choosing, Dr. McQuillen, who cleared Bennett for return to duty, without restrictions (Tr. 49-50). Over the next month, numerous contacts occurred between Newmont and Bennett, but despite Newmont's assurances to Bennett that he had not been fired, numerous requests that he return to work, and warnings that unexcused absence of three days would result in termination, Bennett refused to return to duty (Tr. 51-56, 138, 174, 412, 416; Ex. R-5). Bennett also refused the options of voluntary resignation or transfer to a comparable foreman position in the Pinion Mill (Tr. 139, 148, 151, 152-54, 170-71, 213, 219-20, 388, 413-14; Ex. R-3). Accordingly, Bennett was terminated on June 10, 1997, for his repeated refusal to come to work (Ex. R-6; Tr. 418, 423).

### III. Findings of Fact and Conclusions of Law

---

<sup>5</sup>According to Bennett, he met with NDEP officials after his termination and reported the alleged falsified environmental release reports. NDEP's investigation of Bennett's allegations resulted in a finding of no wrongdoing on the part of Newmont (Tr. 70-74, 142).

In order to establish a *prima facie* case of discrimination under Section 105(c) of the Act,<sup>6</sup> a complaining miner bears the burden of establishing that 1) he engaged in protected activity and 2) the adverse action of which he complained was motivated in any part by the protected activity. *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (October 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F. 2d 1211 (3<sup>rd</sup> Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981); *Secretary of Labor on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842 (August 1984); *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (November 1981), *rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp.*, 709 F. 2d 86 (D.C. Cir. 1983).

The operator may rebut the *prima facie* case by showing that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the operator cannot rebut the *prima facie* case in this manner, it, nevertheless, may defend affirmatively by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.* at 2800; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F. 2d 639, 642 (4<sup>th</sup> Cir. 1987); *Donovan v. Stafford Const. Co.*, 732 F. 2d 954, 958-59 (D.C. Cir. 1984); *Boich v. FMSHRC*, 719 F.2d 194, 195-96 (6<sup>th</sup> Cir. 1983) (specifically approving the Commission's *Pasula-Robinette* test).

A miner's refusal to work is protected under the Mine Act if it is based upon a reasonable, good faith belief that the work involves a hazard. *Conatser v. Red Flame Coal Co.*, 11 FMSHRC 12, 17 (January 1989) (*citing Pasula*, 2 FMSHRC at 2789-96; *Robinette*, 3 FMSHRC at 807-12; *Secretary v. Metric Constructors, Inc.*, 6 FMSHRC 226, 229-31 (February 1984), *aff'd sub nom. Brock v. Metric Constructors, Inc.*, 766 F.2d 469, 472-73 (11<sup>th</sup> Cir. 1985)). Moreover, where reasonably possible, a miner refusing work should ordinarily communicate ... to some representative of the operator his belief in the safety or health hazard at issue. *Id.* (*citing Secretary on behalf of Dunmire and Estle v. Northern Coal Co.*, 4 FMSHRC 126, 133 (February 1982)). While the miner's communication may be simple and brief, it must effectively put the operator on notice of the perceived hazard, so as to avoid situations in which an operator at the time of a work refusal is forced to divine the miner's motivations for refusing work. *Id.* (*citing Dillard Smith v. Reco, Inc.*, 9 FMSHRC 992, 995-96 (June 1987)). The Commission has provided a framework in which to analyze the effectiveness of the communication, by subjecting it

---

<sup>6</sup>Section 105(c)1 of the Act provides that a miner cannot be discharged, discriminated against or interfered with in the exercise of his statutory rights because: (1) he has filed or made a complaint under or related to this Act, including a complaint ... of an alleged danger or safety or health violation; (2) he is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101; (3) he has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding; or (4) he has exercised on behalf of himself or others ... any statutory right afforded by this Act.

to an evaluation of the specific words used, the circumstances in which the words are used, and the results, if any, that flow from the communication. *Id.* The Commission has emphasized that the alleged protected activity must not be premised upon a difference of opinion--not pertaining to safety considerations--over the proper way to perform the task at hand. @ *Ramsey v. Industrial Contractors Corporation*, 12 FMSHRC 1587, 1589 (August 1990) (quoting *Sammons v. Mine Services Co.*, 6 FMSHRC 1391, 1398 (June 1984)).

Bennett has failed to establish a *prima facie* case, in that he has not proven that he communicated to Newmont a reasonable, good faith belief that the work in either mill, Juniper or Pinion, involved a hazard. Bennett has only been able to prove that he engaged in unprotected confrontational discussions with management that were production oriented and not descriptive of any safety complaints. *See id.* at 1593.

Bennett has pinpointed, with specificity, two meetings during which he believes that he engaged in protected activity. Respecting the first, an April 11, 1997, meeting, he offered the following testimony:

The way I began that was, AJim, did you ever get up in the morning and your back just hurts because you worked hard all day?@ That got a big round of laughter. And he says, ATell me what happened.@ And I said, AWell, over the years we have had tasks that we had to perform that were well beyond our safety margins for lifting.@ Well there aren't any safety margins for lifting, and many times I had hurt my back--for most of, I want to say '94, '95 and part of '96 I had had--I was hunched over. I was having a lot of problems with my back, serious pain. Jim Venesky said to me, ABo, that happened in another administration.@ He says, AThat's when Serat (phonetic) and Wolf was here.@ And I said--and also I believe he stated, AIf we have these tasks and you tell us, we'll mechanize it.@ I stated, AWe have told you about these tasks. They're on the safety sheet. They're logged on the log book. They're ignored@(Tr. 14).

\*\*\*\*\*

I asked if they would walk across the hundred yards to go look with me at these tasks I was talking about ...When I stated that to Jim Venesky, who was the one that was questioning me, he said, AWhat are you talking about?@ And I do not think that I specifically talked of the tasks that I was referring to in that meeting (Tr. 18).

\*\*\*\*\*

The subject got off, and it was a general complaint forum for me. I made a comment, AWe are not addressing the mercury in the Juniper Mill.@ Roger Johnson got angry. He said, AWhat are you talking about, Bo?@ At that point I



had not gone above my supervisor. That's something else that's a very touchy thing to do. I didn't want to make accusations to my supervisor or of my supervisor in the meeting. At the very least, it's bad taste. And also, I felt maybe this would stir something for these issues to get addressed....I looked at my supervisor, Cindy Jones; was waiting for her to respond. She looked up and said, "We add sodium sulfide to the mill." At that point, I didn't say anything because it was untrue. At that point--I think it was at that point I said, "Maybe Cindy and I should get together and see if we can work some of these things out"

(Tr. 19-20).

It is clear from the record that Bennett's comments at the May 11<sup>th</sup> meeting were part of daily routine discussions about mercury as a byproduct of gold-extraction. Moreover, based on Bennett's credible testimony as to his state of mind during this period, I am persuaded that any concerns Bennett may have communicated to Newmont about mercury were discussed from an operational perspective. On this issue of whether Bennett had a reasonable, good faith belief that he was working in a hazardous work environment, Bennett's testimony during cross-examination, that he never formed such belief, is particularly illuminating:

Q. Now, as of the date of the April 11<sup>th</sup> meeting, did you believe that any of the three issues that we've just talked about, the sodium sulfide, the scrubber tank, the fan from the bullion room ever posed a direct health or safety threat to you?

A. In the Juniper Mill?

Q. Yes.

A. I was becoming unclear at that point, so I can't answer that. Prior to that I had always felt comfortable. I took the responsibility to come to work. I don't have any problem accepting that. And prior to that, I thought things were reasonable, so I can't answer "Yes" or "No."

Q. Okay. But prior to that you thought things were reasonable, but about that time you began to become unsure, is that correct?

A. Yes.

Q. Now, you just didn't know one way or the other if there was a health or safety threat to you or not?

THE COURT: So becoming unsure was around sometime in April of '97?

THE WITNESS: Probably a bit before that, but...

THE COURT: Well, when, roughly?

THE WITNESS: I'm going to say early February, I'm not sure anymore. I'm not sure anymore. I'm beginning to question.

Q: All right. Before you were formally terminated from your employment at Newmont on June 10<sup>th</sup>, did you ever form a conclusion that this fan issue, the tank issue, or the sodium sulfide issue posed an actual health or safety threat to you, Bo Bennett?

A. You know, I'm worried about it. I'm worried about it. So not drawing a conclusion--I don't know anymore. I'd always felt sure, but I can't answer that.

THE COURT: Always felt what?

THE WITNESS: I always was comfortable prior to that point. I don't know anymore.

THE COURT: The question is, though, at any time before June 10<sup>th</sup> of 1997, did you ever go from unsure to making a conclusion one way or the other?

THE WITNESS: No, ma'am. No.

Q: So you don't believe that you personally were at risk of getting ill from mercury because the mercury exposures, the fan or the sodium sulfide issue or the tank, correct?

A: I don't think that's correct. I didn't know anymore. I didn't form a conclusion, but I didn't know anymore

(Tr. 122-24). In addition to mercury issues, Bennett testified a great deal about having back problems, and suggested that he also complained about the lifting requirements at Newmont. It is clear, however, that any allusion by Bennett to lifting duties in the April 11<sup>th</sup> meeting concerned the Pinion Mill, where Bennett had not worked since June 1996 (Tr. 11-12, 351, 355). Moreover, the record indicates that Bennett had been placed on light duty in the Fall of 1996, restricting him permanently to sedentary work (Tr. 118-19). Indeed, Bennett conceded that he had injured his back prior to his employment at Newmont in 1990, and that duties at the Juniper Mill neither included heavy lifting nor contributed to his back problems (Tr. 11, 38-39, 117-19; see also 355, 361, 370, 428; Ex C-30 at 15). In any case, Bennett never complied with Newmont's request that he provide a list of specific safety concerns at the Pinion Mill (Tr. 366).

The second meeting, occurring the morning of May 9, 1997 and resulting in a heated confrontation between Bennett and Jones, included health and safety complaints, according to Bennett. Bennett testified that he referenced the two environmental spill reports when he told Jones, "You can't have things both ways. I can't work in this environment anymore. Nobody will take care of nothing" (Tr. 40). He explained that he was conveying to her that no one was addressing the mercury issues, and that the release reports had been falsified (Tr. 24-31; 42-44). He also testified that he referenced his back problems during that encounter by telling Jones that "I can't quit because I'm not able to get a job somewhere else. I can't go anywhere. I got to have something, settlement or severance or something" (Tr. 160). Cindy Jones testified similarly that the May 11<sup>th</sup> incident involved environmental spill reports and references to unspecified safety concerns at the Pinion Mill, where Bennett neither worked at that time nor had any supervisory responsibility (Tr. 350-51, 365). Jones also testified that she lacked authority to discharge Bennett, that she felt he did not trust her because she had altered the environmental spill reports and that, in response to suggesting the possibility of transferring Bennett to the Pinion Mill as foreman, Bennett responded that he could not work with the general foreman at that mine because he received zero support from him (Tr. 387-88; see also Ex. C-31).

Bennett's assertions that he believed he had been fired by Newmont on May 9<sup>th</sup> are inconsistent with his own testimony that he is aware that Cindy Jones, alone, did not have the authority to fire him (Tr. 148). Moreover, Bennett admitted that he believed Chris Conley when Conley assured him on May 12<sup>th</sup> that he was still employed (Tr. 56, 138; see 412).

Conley testified that he had had a discussion with Bennett in March of 1997, which he summarized as follows:

As I recall, he was very unhappy with his supervisor, Cindy Jones. He told me that she had changed a spill report that he had completed; that it was just one of many times that she had failed to listen to him enough about what should be done with the process, gold process. And it was obvious to me that Bo was very unhappy with the company and with his current supervisor.

\*\*\*\*\*

As I recall, Bo said that his--he had been with the company for sometime; that he was a very experienced process foreman; that Cindy Jones didn't listen to him enough about how to solve problems, and it frustrated him a great deal. I, again, could tell by the emphatic and sincere way he was talking to me that he felt very deeply about the things he was telling me....He felt that he actually was not being respected at all

(Tr. 405-06; see also 408, 445). Bennett corroborated Conley's testimony and admitted that he had been thinking about leaving the company between March and June 1997, when he was terminated (Tr. 146). Moreover, Conley testified that he wanted to keep Bennett on board

because Bennett was considered a very competent, caring, effective supervisor (Tr. 419; see also 434-35; Exs. R-3, R-4). Accordingly, and especially because Conley appreciated the futility of resolving problems between Bennett and Jones, Conley offered Bennett the comparable Pinion Mill foreman position (Tr. 139, 413, 419; see Ex. R-3). Conley testified that Bennett responded that the general foreman he'd be reporting to there did not have his confidence either; that there had been some past promises that general foreman--his name is Greg McMillen--had made to him that he did not keep, and he did not want to work for him either (Tr. 414). Bennett testified similarly that he was not interested in assuming the position at the Pinion Mill, as long as the problem with Greg McMillen existed (Tr. 151-54). According to Conley, he did all that he could to persuade Bennett to return to work, so that he could keep Bennett on the payroll (Tr. 445).

Bennett, despite discussions and written notice that his vacation leave was exhausted and he would be terminated upon three unexcused absences, Bennett consistently refused to report to work; he communicated to Newmont that he did not wish to return to an environment where his supervisor altered his work product (Tr. 138-39, 149-50, 155, 414; see Exs. C-17, C-18, C-19, C-20, R-5, R-6). Looking to the allegations in Bennett's discrimination complaint and the 11-page narrative, as well as his interview with MSHA on August 14, 1997, Bennett never specifically raised health and safety concerns and as relief, he sought restoration of the environmental release reports to their original text, back pay and severance pay, but did not seek any modification of his work environment (Exs. C-8, C-9, R-1; see also Tr. 26-33).

I note, especially in light of Bennett's accusations that all Newmont witnesses gave perjured testimony, that I found all witnesses, including Bennett, highly credible. Although Bennett appeared somewhat confused, sometimes unresponsive, easily frustrated and even hostile at times, he essentially gave a detailed and sincere account of his claim. Unfortunately, he is misinformed as to what constitutes protected activity and what rights are accorded to him by the Act.

Having failed to prove, as a foundation for his refusal to report to duty, that he communicated to Newmont a reasonable, good faith concern that his work involved a safety or health hazard, it must be concluded that Bennett did not engage in protected activity and his work refusal was not protected.

Assuming, *arguendo*, that Bennett had established a *prima facie* case of discrimination under Section 105(c) of the Act, Newmont has clearly rebutted his case by proving that Bennett was terminated for a legitimate business-related reason: that he refused to return to duty at the Juniper Mill, accept a transfer to the Pinion Mill or voluntarily resign, after exhaustion of his vacation leave.

### **ORDER**

Accordingly, inasmuch as Bennett has failed to establish, by a preponderance of the evidence, that he was terminated for engaging in protected activity under the Act, it is

**ORDERED** that the complaint of Gregory R. Bennett against Newmont Gold Company, under Section 105(c) of the Act, is **DISMISSED**.

Jacqueline R. Bulluck  
Administrative Law Judge

Distribution:

Mr. Gregory Bennett, P.O. Box 61, Golconda, NV 89414 (Certified Mail)

David J. Farber, Esq., Patton Boggs, L.L.P., 2550 M Street, N.W., Washington, DC 20037  
(Certified Mail)

nt