

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

May 24, 2011

JUSTIN NAGEL

v.

NEWMONT USA LIMITED

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Docket No. WEST 2010-464-DM

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

On January 5, 2010, Justin Nagel, acting *pro se*, filed a complaint of discrimination against Newmont USA Limited (“Newmont”) under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(3) (2006). On January 10, 2011, the judge in that case issued a Decision and Order Granting Respondent’s Motion to Dismiss for Failure to Comply with Discovery Orders and Lack of Candor with the Tribunal.

Mr. Nagel filed a Notice of Appeal on January 24, 2011. In that document, he stated that he was appealing the judge’s decision of January 10, 2011. We treated this document as a timely-filed petition for discretionary review of the judge’s decision.<sup>1</sup> Commission Procedural Rule 70, 29 C.F.R. § 2700.70.

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<sup>1</sup> The statute provides that the only way to seek review by the Commission of an Administrative Law Judge’s decision is to file a “petition for discretionary review.” Section 113(d)(2) of the Act, 30 U.S.C. § 813(d)(2). Although Mr. Nagel’s filing was entitled “Notice of Appeal,” we treated it as a petition for discretionary review. Mr. Nagel’s argument that he has a right to file a “notice of appeal” is apparently based on Commission Procedural Rule 80(d), 29 C.F.R. § 2700.80(d), which relates solely to a judge’s decision in a referral for disciplinary proceedings. Other than referrals for disciplinary proceedings, review of a judge’s decision may be had by filing a petition for discretionary review pursuant to Commission Procedural Rule 70, 29 C.F.R. § 2700.70.

On February 18, the Commission issued an order denying Mr. Nagel's petition for discretionary review as well as his motion for a new hearing filed on February 11, 2011.

On March 22, Mr. Nagel filed a Motion to Vacate Commission Order, in which he sought to overturn the Commission's February 18 order.

Pursuant to Commission Procedural Rule 78, 29 C.F.R. § 2700.78, a party may file a petition for reconsideration of a Commission order within 10 days of its issuance. We will treat Mr. Nagel's Motion to Vacate Commission Order as a petition for reconsideration. However, Mr. Nagel's motion was filed 32 days after the issuance of the February 18 order and therefore was not timely. Even if it had been timely, we conclude that it did not provide any basis for reconsidering the February 18 order. For the foregoing reasons, the Motion to Vacate Commission Order is hereby denied.<sup>2</sup>

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<sup>2</sup> On May 3, 2011, Mr. Nagel also filed a "Motion to Vacate Newmont's answer to Nagel's complaint as ordered by judge Lesnick and answer truthfully," which addressed an answer served by the operator on June 10, 2010 – almost one year ago. We hereby deny that motion as being filed too late and lacking any merit.

The February 18 order denying Mr. Nagel’s petition is the final Commission order in this case. Accordingly, *the Commission will no longer accept for filing any document submitted by Mr. Nagel seeking to vacate or modify the February 18 order in any way.* If any such document is submitted in the future, the Commission will not consider it and will not issue any order addressing the document.

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Mary Lu Jordan, Chairman

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Michael F. Duffy, Commissioner

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Michael G. Young, Commissioner

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Robert F. Cohen, Jr., Commissioner

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Patrick K. Nakamura, Commissioner

Distribution:

Justin Nagel  
P.O. Box 182  
Rathdrum, ID 83858

Richard Tucker  
Newmont Mining  
1655 Mountain City Hgwy.  
Elko, NV 89801

Richard J. Matthews, Esq.  
Rebecca R. Rivenbark, Esq.  
Hiliary N. Wilson, Esq.  
Newmont Mining  
1655 Mountain City Hgwy.  
Elko, NV 89801

Donna Vetrano Pryor, Esq.  
Patton Boggs LLP  
1801 California Street, Suite 4900  
Denver, CO 80202

Mark N. Savit, Esq.  
Patton Boggs LLP  
1801 California Street, Suite 4900  
Denver, CO 80202

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 Thomas McCarthy  
Federal Mine Safety & Health Review Commission  
Office of Administrative Law Judges  
601 New Jersey Avenue, N. W., Suite 9500  
Washington, D.C. 20001-2021