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KENNETH D. KELLAR V. OWL ROCK PRODUCTS
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
(303) 844-5267/FAX (303) 844-5268

May 23, 1994

KENNETH D. KELLAR, Complainant	:	DISCRIMINATION PROCEEDING
	:	
	:	Docket No. WEST 93-136-DM
v.	:	WE MD 92-31
	:	
OWL ROCK PRODUCTS, Respondent	:	Lytle Creek Mine

DECISION

Appearances: Kathryn A. Kellar, Lucerne Valley, California, pro se, for Complainant;

Patrick J. Brady, Esq., ALLEN, MATKINS, LECK, GAMBLE & MALLORY, Irvine, California, for Respondent.

Before: Judge Morris

STATEMENT OF THE CASE

This proceeding concerns a complaint of alleged discrimination filed with the Commission by Complainant against Respondent pursuant to Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (the "Act").

Complainant Kenneth D. Kellar, age 41, was employed by Owl Rock Products, Inc. ("Owl Rock") on October 21, 1989, and terminated August 6, 1992. (Tr. 27, 28). In the course of his employment, he complained to supervisors and to the Department of Labor, Mine Safety and Health Administration ("MSHA") over safety and non-safety related issues. The evidence also deals with his job activities.

The Complainant filed his initial discrimination complaint with MSHA. After completion of its investigation, MSHA advised the Complainant that the information received during the investigation did not establish a violation of Section 105(c) of the Act. Thereafter, the Complainant filed a complaint with the Commission.

Owl Rock filed an answer denying any discrimination and asserting that it automatically terminated Complainant after two consecutive "D" job performance ratings.

A hearing on the merits commenced on September 14, 1993, in Victorville, California. Complainant did not file a post-trial brief; Owl Rock filed a brief.

Section 105(c)(1) of the Act provides, in part, as follows:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment, has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such for employment has instituted or cause to be instituted any proceedings under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself of others of any statutory right afforded by this Act.

JURISDICTION

Owl Rock is a ready-mix sand and gravel plant operating in four counties in Southern California.

No issue is raised as to jurisdiction.

APPLICABLE CASE LAW

The general principles governing analysis of discrimination cases under the Mine Act are settled. In order to establish a prima facie case of discrimination under Section 105(c) of the Mine Act, a complaining miner bears the burden of proof to establish that (1) he engaged in protected activity and (2) the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub nom., Consolidated Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle

Coal Co., 3 FMSHRC 803, 817-818 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If the operator cannot rebut the prima facie case, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Pasula, supra; Robinette, supra; see also, Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987); Donovan v. Stafford Construction Co., 732 F.2d 954, 958-959 (D.C. Cir. 1984) Boich v. FMSHRC, 719 F.2d 194, 195-196 (6th Cir. 1983) (specifically approving the Commission's Pasula-Robinette test). Cf. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-403 (1983) (approving nearly identical test under National Labor Relations Act).

Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-2511 (November 1981), rev'd on other grounds sub nom., Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983); Sammons v. Mine Services Co., 6 FMSHRC 1391, 1398-1399 (June 1984). As the Eighth Circuit analogously stated with regard to discrimination cases arising under the National Labor Relations Act in NLRB v. Melrose Processing Co., 351 F.2d 693, 698 (8th Cir. 1965):

> It would indeed be the unusual case in which the link between the discharge and the protected activity could be supplied exclusively by direct evidence. Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence. Furthermore, the (NLRB) is free to draw any reasonable inferences.

Circumstantial indicia of discriminatory intent by a mine operator against a complaining miner include the following: knowledge by the operator of the miner's protected activities; hostility towards the miner because of the protected activity; coincidence in time between the protected activity and the adverse action complained of; and disparate treatment of the complaining miner by the operator.

In Bradley v. Belva Coal Company, 4 FMSHRC 982, 993 (June 1982), the Commission stated as follows:

> As we emphasized in Pasula, and recently re-emphasized in Chacon, the operator must prove that it would have disciplined the miner anyway for the unprotected activity alone. Ordinarily, an operator can attempt to demonstrate this by showing, for example, past discipline consistent with that meted to the alleged discriminatee, the miner's unsatisfactory past work record, prior warning to the miner, or personnel rules or practices forbidding the conduct in question. Our function is not to pass on the wisdom or fairness of

> such asserted business justifications, but rather, only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed.

IS COMPLAINANT'S CLAIM BARRED AS A MATTER OF LAW BASED UPON THE RULING OF THE APPEALS GRIEVANCE COMMITTEE?

As a threshold matter, Owl Rock asserts Complainant's case is barred as a matter of law.

Complainant appealed the August 1992 "D" evaluation which resulted in his termination, and the grievance committee upheld the evaluation by a 4-0 Decision. (Tr. 635, 636). Therefore, Owl Rock argues that, as set forth in the recent United States District Court decision of Delaney v. Continental Airlines, SACV 92-762 (June 1993), the ruling by the grievance committee operates to entirely bar Complainant's claim.

In the Delaney case, Continental Airlines maintained a grievance appeal procedure similar to Respondent's appeal procedure whereby a committee of individuals hears evidence from the aggrieved employee and company supervisors, and renders a decision which is "final and binding." In fact, it is argued that Owl Rock's appeal procedures are even fairer to employees than the procedures in Delaney, because Continental Airlines' committee was composed of only three executive level employees whereas Owl Rock's procedures provide for a more diverse and representative committee made up of two co-employees selected at random, two totally uninterested supervisors, and one human resources representative (who only acts as a tie-breaker if needed). (Tr. 626, 627).

After analyzing Continental Airlines' appeal process, and the strong presumption favoring upholding of such grievance committee rulings, the District Judge held that:

> The arbitration award is given the same legal effect as a judgment. Therefore, Delaney's present action must be dismissed in its entirety because none of the claims survives the arbitration award's issue preclusive effect." (Delaney Decision, p. 3).

Accordingly, Owl Rock asserts Complainant's claim should equally be barred because Complainant availed himself of Owl Rock's final, binding, and fair appeal procedures which upheld his second "D" evaluation.

I am unable to agree that Complainant is barred by the arbitration decision. Such a decision can be considered but it does not act as an absolute bar to a discrimination suit. Hollis

v. Consolidation Coal Co., 6 FMSHRC 21, 26-27 (January 1984); Casebolt v. Falcon Coal Co., 6 FMSHRC 485, 495 (February 1984).

The case at bar deals with the Federal Mine Safety Law. Delaney construes California law relating to arbitration.

Accordingly, Owl Rock's motion for a summary decision is DENIED.

SUMMARY OF EVIDENCE

At the time Mr. Kellar was hired, the company was engaged in a labor dispute with the Operating Engineers Union, and a large number of new employees were hired when the union went on strike. (Tr. 604).

Mr. Kellar lacked mining experience but for 19 years he had been a warehouse person and a steelworker. (Tr. 29, 264). He initially was assigned to Owl Rock's mine in Prado, California. After a week, he was transferred to the Owl Rock mine in Barstow, California. He worked there first as a repairman welder and later bid for a bulldozer operator position. (Tr. 28, 265). He bumped over to the company's Lytle Creek operation on January 6, 1992. (Tr. 295, 617).

Although there were no significant problems with Mr. Kellar's job performance after his employment began, he was at times a difficult employee who had trouble getting along with others. (Tr. 146, 199).

In 1990, Mr. Kellar was working on a guard on the head pulley on the wet side of the shaker. Mr. Kellar did as he was told by his supervisor Bob Kelley. (Tr. 30-32). However, he was unable to affect the repair. Bob Kelley said to leave the guard off and "he would look at it on his way home." (Tr. 32). Before the guard was replaced, MSHA cited Owl Rock. (Tr. 33).

Company representatives Dan Scorza, Dave Tompkins, and Bob Kelley (or Vince Bommarito) held a "mock" MSHA meeting. When Dave Tompkins got an answer he thought was a good one, he would say, "That's the kind of answer you need to put in there." (Tr. 33).

Mr. Scorza later testified that employee Ferman Romero didn't tell the MSHA Inspector the truth as to when the guards were removed. They sat down and explained it was not necessary to give false statements on Owl Rock's behalf. (Tr. 610).

Mr. Romero confirmed the company version of this incident. Mr. Romero testified he had "lied" to the MSHA Inspector. The meeting was held to tell the workers what to expect in the way

of questions. Mr. Romero agrees the company also told them to tell the truth to the Inspectors. (Tr. 514, 519, 520).

At the MSHA investigation, Mr. Kellar stated that, "Bob Kelley told me to leave the guard off."

Bob Kelley "got distant" after that and had no time for Mr. Kellar. (Tr. 34-35). He was too busy to give Mr. Kellar any help. Kelley was transferred to Victorville and was succeeded by Vince Bommarito who had no mechanical or repair experience. (Tr. 37).

There was hardly any time for safety precautions at Owl Rock. However, after the MSHA investigation, safety was no longer lax. (Tr. 40).

Dave Tompkins held Mr. Kellar directly responsible because the safety work wasn't being done. Mr. Kellar was the maintenance man. (Tr. 40, 48).

At Lytle Creek Mr. Kellar's duties included writing mechanical reports on Owl Rock equipment. (Exhibit C-2 consists of 137 such mechanical reports.) On the pink sheet for October 31, 1991, Mr. Kellar did not identify any mechanical defects but on the back of the report he wrote the following: "Bob Kelley says not to put so much on the reports cause Tommy [Craig] work [sic]) alone and this is only temp so I don't need to be filling these out." (Exhibit C-1 is page 76 of Exhibit C-2; Tr. 47-49).

On January 9, 1992, as to Equipment No. 8220, various mechanical defects were noted and on the back of the pink slip Mr. Kellar wrote: "Brian Sterling says that this can get me in the same kind of trouble like at Barstow." (Ex. C-2, p. 77; Tr. 53). This bothered Mr. Kellar because he had started complaining about the safety of the crane (Equipment No. 8220). (Tr. 53).

Concerning the writing on the pink slip, I credit Mr. Brian Sterling's contrary testimony. He testified he didn't know where the statement [attributed to him] came from. His testimony, which I find credible, basically denies any knowledge of what might have happened to Mr. Kellar at Barstow. Mr. Sterling testified as follows:

> At the time when Ken Kellar came to the plant, I went through what I normally went through with any other employee that came in. Everything was the same.
>
> At that time he seemed very concerned that he tell me and give me his side of the story of what problems he had in Barstow, and he wanted to make sure that I got his side of this story.

> The thing was I had never heard the story, and I wasn't interested in the story. I had no contact with any of the supervisory personnel at Barstow. I didn't even know who they were, I had never met any of them. I had never had any discussion about the Barstow plant; I was unfamiliar with it; I was unaware of where it even was.
>
> And so, I told him, "No, I don't care what your problems were. I don't need to hear your side of it because I haven't heard anything about it at all. I will take your performance here at this plant and my evaluation of you, and how you do here will be based strictly on what your performance is here. And what happened at Barstow is in the past. I'm not concerned with it. I don't want to know about it. Let's just go out there. You're starting with a clean slate here."
>
> You know, I'm not going to form my conclusion on each person that comes under my control by myself. I don't want all this feedback ahead of time to give me some coloration because it might be totally different.
>
> I have had people come to my plant that I found out later were considered to be very poor employees somewhere and have turned out to be outstanding employees for me. And I'm sure vice versa. People that maybe didn't work real well for me might have worked quite well for someone else.
>
> But I did tell Mr. Kellar I didn't want, I wasn't concerned with, I didn't want to hear about it. And that was the end of the discussion, and we went ahead and sent him out to get his familiarization with the plant, and we moved out from there. (Tr. 819-821).

The first time he heard about Mr. Kellar's problems (except through him) was when he had to give him his evaluation prepared by Barstow supervisors. Mr. Sterling had no real input into that evaluation. (Tr. 825).

All of the mechanical reports (pink sheets) were given to the MSHA Inspectors. (Tr. 50). In addition, during the MSHA investigation, Owl Rock's safety man and Dan Scorza (Human Resources Manager) said it was alright for Mr. Kellar to keep a copy of the reports. However, Mr. Kellar described his conversation with management as "argumentative." "MSHA said I could record it and keep the record in my possession." (Tr. 51, 53).

Rob Reid also told Mr. Kellar to quit filling out the mechanical forms. This was described by Mr. Kellar as "argumentative conversation" with management. (Tr. 52, 53).

Mr. Kellar also frequently complained about other safety and non-safety issues from almost the beginning of his employment.

With respect to safety issues, he complained at the Barstow Mine to different levels of supervisors about a crane, inadequate

lighting, firearms, a head pulley, a deck, welding in water, hanging plates, of being overworked, of injuries, and other matters. (Tr. 110, 271, 274, 278-282).

Concerning the crane: the equipment had a dry cable and it would fall six to eight inches with a load. No effort had been made to grease it and a new cable was needed. (Tr. 110, 354, 355). The cable also had no load capacities and no stickers. (Tr. 355). Mr. Kellar told supervisors Kelley, Bommarito, and Tompkins about the crane. (Tr. 110, 355). The crane at Barstow was a constant safety issue. (Tr. 499, 754).(Footnote 1) Mr. Kellar told MSHA the crane was unsafe and it was red-tagged when he com- plained about it in front of MSHA. (Tr. 111).

Concerning inadequate lighting: Mr. Kellar didn't know the dates but he complained continually about the lights in the pit after he went on the night shift. (Tr. 271). This was before the PVC and electrical disconnect incidents. (Tr.273). In re- sponse to the inadequate lighting complaint, the company hooked up a light bar and purchased drop lights.(Footnote 2)

Concerning the firearms: Mr. Kellar confronted Supervisor Bob Kelley about company employees shooting firearms adjacent to company property. A bullet can ricochet and there were residen- ces within one-quarter of mile. This occurred once or twice a week. (Tr. 91-94).

Witness De Forge testified that he, Bob Kelley, Dave Fortin, and Vince Bommarito, were shooting on property not owned by Owl Rock. The shooting was after working hours and before dark. (Tr. 147). This was not a sanctioned gun range; however, it was used by the local sheriff's department. (Tr. 148, 161).

Firearms are forbidden on company property but others who brought them on company property didn't discharge them during working hours. (Tr. 169, 400, 440). Exhibit C-13 was marked by Mr. Kellar to show the gun range. (Tr. 561).

Concerning the head pulley: Rob Reid asked Mr. Kellar to grease the head pulley on the radial arm stacker. Extension ladders were available as the head pulley was 32 feet above ground. (Tr. 849). Mr. Kellar refused the request by both

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1 I find Mr. Kellar's uncontroverted testimony of complaints about the crane to be credible. The testimony is supported by fellow workers Faust and Romero. (Tr. 499, 537-538).

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2 I find the uncontroverted evidence by Mr. Kellar concerning the inadequate lighting to be credible.

Messrs. Reid and Sterling. Mr. Reid testified that he was not aware that Mr. Kellar had called MSHA. No one from MSHA ever talked to him about it. (Tr. 130, 132, 794, 795).

Mr. Reid felt that Mr. Kellar was a qualified maintenance mechanic. Greasing the head pulley should have been no problem. (Tr. 850).

Concerning the deck: The deck was a replacement which re- placed an old Cedar Rapids with a new LJ and also replaced the old cantilevered deck made out of two-inch channel.

About the time of the first MSHA discrimination investiga- tion or along about that time, Mr. Kellar raised a concern that the deck was not being fully welded.

Mr. Kelley had a subcontractor inspect it. He said it was adequately welded but Kelley told him to put a weld anyplace he could. (Tr. 721-722).

An employee, who the company believes to be Mr. Kellar, filed an OSHA complaint about the deck. An engineering study was done. The engineer said the deck was more than adequate and probably three times overbuilt. The engineer said it did not have to be 100 percent welded nor did the cross-ties. (Tr. 724). OSHA did not issue any citations. (Tr. 725).

Concerning welding under wet conditions: On one occasion, Mr. Kellar was working on a conveyor when the water was turned on in the plant. After being shocked, Mr. Kellar refused to work. (Tr. 127).

Mr. Kellar talked about the incident at safety meetings; everybody complained. Mr. Marlo replied that " A little shock won't hurt you." This is a common pun in the welding industry. (Tr. 461).

When Rob Reid testified, he denied directing Mr. Kellar to a specific location before turning on the water. When the water is turned on, there are areas where it can run down. (Tr. 797). According to Mr. Reid, there are times when a welder has to get wet. Mr. Reid would try to prioritize the job so it didn't have to be done in adverse weather conditions. (Tr. 798). If the welder is not using DC reverse polarity, it is not unsafe to weld in wet conditions. (Tr. 797; Ex. 4).

Hanging heavy screens (plates) and injuries: This incident occurred April 10, 1991, while four or five men were sheeting a building. The wind was blowing in 45-mile per hour gusts.
Mr. Kellar's previous experience was that workers do not sheet in such wind. (Tr. 335, 364). Mr. Kellar confronted Foreman Todd

Craig who contacted Vince Bommarito. Mr. Bommarito stated they should either do the job or he'll get someone that will.
Mr. Kellar took that to mean his job was on the line. (Tr. 364).

Mr. Bommarito testified and claimed the windy conditions were not a safety issue. If they could not get the job done, the company would hire a subcontractor to do the work. (Tr. 870).

[The evidence is uncontroverted that the workers all com- plained about the windy conditions whole hanging the plates. This was an activity protected under the Mine Act.]

A secondary issue involves whether Mr. Kellar was injured when he was struck by an 80-pound plate. Mr. Kellar claims that one of the plates struck him flat on the back. (Tr. 364).

However, Mr. Bommarito testified that Mr. Kellar told him he had "staged" the incident. He stated he had seen the plate mov- ing about six times. He lined up so that if the plate flopped over it would hit him. (Tr. 871, 873).

Witnesses Romero and Craig stated they didn't see the plate strike him, but Mr. Kellar complained of being injured. If a worker reported an injury, it was held against him in his evalua- tion. (Tr. 243, 506, 507).

Supervisor Kelley also testified that Mr. Kellar stated he had "staged out" the incident of being struck by the plate. As a motive he told Kelley he wanted to "get to" Vince [Bommarito] and "worry him." (Tr. 717).

[I credit the unrebutted testimony of witnesses Bommarito and Kelley on this issue. Their unrebutted testimony is sup- ported by the fact that Mr. Kellar declined to see a doctor.]

In the conversation that followed Vince Bommarito's redirec- tion concerning the plates, Elbert Evans told Mr. Kellar they could either work now and grieve later, or call MSHA, or they could go home. Messrs. Byron and Evans went back to work on the screens. (Tr. 764).

Elbert Evans also testified concerning the plate incident. Based on his experience and in reviewing Exhibit T, he concluded that the accident to Mr. Kellar could not have happened as claimed. (Tr. 764-766).

The day following the alleged back injury, Mr. Kellar came in very angry and told Mr. Bommarito that he had endangered his life and he wanted to go home. However, he did not want to see a doctor. (Tr. 870, 871).

The next job performance evaluation for Mr. Kellar was in September 1991. At that time Mr. Kellar's score was a "30". In the safety category he dropped from an "8" to a "1". Under the safety category were noted the electrical disconnect, the PVC pipe (infra) as well as the injury to his finger and back. For the evaluations, definitions, rating criteria, and performance levels, see Tab E in Respondent's trial exhibits. (Tr. 664). Tab E includes evaluations of Mr. Kellar dated February 14, 1991; September 1991; February 13, 1992; June 11, 1992, and June 12, 1992; and August 5, 1992. The Owl Rock process also allows a self-evaluation by the employee involved. The self evaluation by Mr. Kellar--(a "C")--was dated August 12, 1992. (Tr. 664).

Mr. Kellar testified his second injury occurred when he was repairing a ten-inch hose. Pressure caused him to catch his finger between the hose and the barbed fitting. (Tr. 135, 365).

Complaints of overwork: Mr. Kellar complained to Rob Reid that there was too much work for the crew. (Tr. 41, 815, 816). Brian Sterling testified that when employees were overworked, they'd hire subcontractors, especially on project work.
(Tr. 818).

Other incidents: On one occasion during a heavy rain, Mr. Kellar told the company he was going home. He was docked three hours but the other crew behind Mr. Kellar was not docked. (Tr. 132, 133). Mr. Kellar stated that not everyone is treated fairly. The continuation of the heavy rain or lack of it was not established. I am unable to conclude that this minimal evidence establishes discrimination.

Mr. Kellar complained to Vince [Bommarito] when he was told to drive a truck without a clutch. He ended up driving the truck that night. Karl Byron drove it for almost a week without a clutch. Mr. Kellar had already told the company that he didn't want to be a part of the team but he would be a good employee. (Tr. 108, 109).

Other incidents included the presence of rocks on the cat-walks. This condition, according to witness Barnes, was brought up at safety meetings. This was a protected activity but it adds little to the case. (Tr. 452).

Incidents involving burying oil and the use of safety glasses fail to add any dimension to the case. (Tr. 466, 467, 510, 551-553, 561-562).

Mr. Kellar also raised numerous complaints which were unrelated to safety and which he would escalate into disputes requiring excessive management time to resolve. Mr. Kellar's general approach was to be very combative and not accept any resolution until he had involved other supervisors and often the

corporate Human Resources manager. For example, these instances involve marking time cards, the cigarette incident, the crowbar fabrication, the flex-cose and belt clamp incidents.

Concerning marking time cards: Mr. Kellar refused to fill in the job code number in pencil on his time card in accordance with Owl Rock's standard procedure. (Tr. 713). He told the dispatcher it was illegal; however, internal billing procedures require a correct job number. (Tr. 714). The issue had nothing to do with safety. (Tr. 715).

Mr. Kellar was not satisfied with the explanation he re- ceived from his immediate supervisor concerning this procedure and he only acquiesced to the company's request after meetings with two highest management representatives in the district. This required approximately 10 hours of management time. (Tr. 713-715).

Concerning the "cigarette incident": This involved Messrs. Kellar and Bommarito and different versions of what occurred. According to Mr. Bommarito, once in a while Mr. Kellar would of- fer him a cigarette. Occasionally, Mr. Bommarito would ask for a cigarette. On one occasion, Mr. Kellar was doing some welding. His gloves were on and he had a stinger and a rod in one hand when Mr. Bommarito asked for a cigarette. Mr. Kellar started to put his gloves down and Mr. Bommarito said he would get them. He then took the pack out of Mr. Kellar's pocket. Mr. Kellar then put his gloves down, got his lighter out and lit the cigarette for Mr. Bommarito. The two men went on with their conversation. (Tr. 865, 866).

According to Mr. Bommarito, it was the next morning that Mr. Kellar accused him more or less of breaking into his house and getting involved in his personal property. (Tr. 866).

Mr. Kellar testified that he and Mr. Bommarito were not friends at all before this incident. (Tr. 360, 361). Mr. Kellar further stated that Mr. Bommarito asked for a cigarette and Mr. Kellar reached for them. At this point Mr. Bommarito grabbed the pack. This infuriated Mr. Kellar and he complained to Super- visor Bob Kelley. Mr. Kelley stated he was outside the chain of command. Mr. Kellar said he needed a mediator. Shortly after this incident the two men became friends and their attitudes

improved(Footnote 3) at least until Mr. Kellar thought Mr. Bommarito lied at Mr. Kellar's grievance hearing. (T. 361, 362).

Concerning the "crowbar fabrication": Supervisor Bob Reid was in the office organizing the work for the evening's mainte-nance. (Tr. 785-786). Mr. Dan Anaya, shift leadman, approached and said Mr. Kellar was working the shop area and he should have been conducting his plant inspection duties. (Tr. 786-787).

Reid went to the shop area and Mr. Kellar said he was build- ing a bar. Reid told him he should return to the plant and con- duct his inspection duties. (Tr. 786-787). Reid thought that would be the end of it, but Mr. Kellar decided the leadman was out of line in questioning him. In short, no one should question
what he was doing. (Tr. 788). There was a little more name calling on Mr. Kellar's part. Later that morning, the plant foreman arrived and Mr. Kellar complained about the way Reid dealt with the problem; it was unfair. (Tr. 788, 789).

Witness Barnes stated the crowbar involved a safety factor because if they don't have proper tools, they can't do the job safely.(Footnote 4) (Tr. 479-480).

When Brian Sterling (plant foreman) came to the plant,
Mr. Kellar said people had accused him of wasting time because he was preparing a tool to be used elsewhere on the shift. (Tr. 830). Brian Sterling said he would check it out. It was decided they would tell Mr. Kellar that management had made a mistake. The matter took an additional hour and a half because Mr. Kellar kept returning and inquiring why no one had faith in him and would this incident affect his evaluation. (Tr. 830, 831). Mr. Sterling tried to calm him down but Mr. Kellar would not "let go." (Tr. 833).

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3 While this was not a protected activity, I credit Mr. Bommarito's version. It is uncontroverted that Mr. Kellar lit Mr. Bommarito's cigarette and the men engaged in conversation. These actions indicate Mr. Kellar was not infuriated as he claimed. In addition, he did not complain until the following day.

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4 I am not persuaded by Mr. Barnes's testimony. He made the above statement immediately after stating that Mr. Kellar made the crowbar because it would make the job "easier." Mr. Barnes also stated that he didn't think it was a safety issue. (Tr. 478). I credit the testimony of John Reid, maintenance leadman at the Lytle Creek plant during Mr. Kellar's employment. Mr. Reid would be more knowledgeable concerning this issue and he stated the crowbar fabrication had nothing to do with safety. (Tr. 791).

Rob Reid apologized in front of Mr. Kellar for any part he had in the confusion. In Reid's opinion, Mr. Kellar should not have been fabricating the crowbar. (Tr. 789, 790). Mr. Kellar claimed he was making a bar for a job they were about to do. (Tr. 790).

Concerning the use of flex-cose: John R. Reid was the main- tenance leadman, night shift, at Lytle Creek. He had conflicts with Mr. Kellar over his attitude. There was always an argument over how a job would be performed.

In one case, Mr. Reid observed a rip in the splice and he directed Mr. Kellar to use flex-cose to fix the rip. [A flex-cose is a mechanical clamping device used to clamp conveyor belts together. (Tr. 815)]. About 45 minutes later he observed
Mr. Kellar cutting out a patch of belting and he stated he was going to put the patch in. Mr. Reid said, "I don't think so."
Mr. Kellar stormed off and ultimately he put the flex-cose in.

Concerning building belt-clamps: On another occasion Mr. Kellar was building belt clamps in the shop area. When Mr. Reid pointed out that clamps were available, he said he didn't want to spend the time looking for them. Mr. Reid walked over to the shop area and found the clamps himself. Mr. Kellar finished the job, bothered that Mr. Reid had questioned his motives. (Tr. 782-783).

Concerning light fixtures: On another occasion, Reid ob- served Mr. Kellar putting together a light fixture. Reid sugges- ted that Mr. Kellar look around for a light instead of construct- ing one. Mr. Kellar said he didn't want to spend the time doing that. Reid found a light and gave it to Mr. Kellar. (Tr. 783, 784). Mr. Kellar was upset because Reid questioned his motive. Reid explained that if a light is available, why not use it. (Tr. 785).

RUNNING OVER PVC PIPE AND ELECTRICAL DISCONNECT

On July 27, 1991, Mr. Kellar, driving a 966 skip loader, was digging an eight-foot trench. While driving back and forth, he clipped and broke some PVC pipe. (Tr. 74-76).

Mr. Kellar advised his supervisor (Vince Bommarito) who stated they would bury the trench that night. Mr. Kellar bermed the road and continued working. (Tr. 75). Owl Rock had not fur- nished Mr. Kellar with a spotter. (Tr. 76). Mr. Bommarito de- clined to call underground services. (See Ex. C-23, California "Call Before You Dig" pamphlet).

On August 1, 1991, Mr. Kellar was written up when he re- ceived an "Employee Warning Report" from his supervisor Mr.
Vince Bommarito. The report involved stated as follows:

> Violation of Company Rule E-22 - Careless or unsatisfactory performance of job duty - ran over electrical connector while operating skip loader. This incident warrants a one-day suspension. Another incident of this nature will result in further disciplinary action including suspension and/or discharge. [Ex. 4(a)].

Mr. Kellar opposed the warning report by filing an employee complaint resolution form. It stated in part as follows:

> Company replaced a permanent line with a temp. cable approx. 2 months ago, this left the line exposed to traffic, personnel, etc.. During the process of back-filling (per supervisor) the pipeline, the cable was pulled apart, or snapped, by the pressure of the skip loader. [Ex. C-4(b)].

The immediate supervisor's (Vince Bommarito) response in writing was as follows:

> The cord is 1.24 inch 4-4 S.O. Cord 600 v. with a Crouse-Hinds disconnect which is approved by N.E.C. as a 90-temp cord. The cord was installed on July 17, 1991. All employees were informed the cord was there and the reason for the Crouse-Hinds disconnect was to avoid drive-over traffic. The procedure was to shut down the pump, disconnect the Crouse-Hinds and move it out of the way of traffic. Ken got out of the loader twice to move the cord out of his way without disconnecting the cord. Ken ran over it to the point of breaking the Crouse-Hinds disconnect. [Ex. C-4(b)].

Bob Kelley, the immediate supervisor of Vince Bommarito, stated in writing as follows:

> I (Kelley) issued the warning report based on Ken's admission that he was aware that the connection was in danger of being run over but made no attempt to prevent doing so. This - just a few days after running over some new P.V.C.

Owl Rock's Human Resource Manager Mr. Scorza's written response stated:

> Ken indicated he did not know the electrical line's location and did in fact attempt to control his vehicle to prevent damage but got too close. Ken's concern was in the wording which indicated he was informed of the procedure. Ken was not informed of the procedure and assumed incorrectly what should have been done, leaving the line connected and then--but not waiting until the plant--be shut down, then again by rolling over the line

Witness Bommarito confirmed that Mr. Kellar knew the electrical disconnect was in the way of the skip loader. Bommarito also believed the one-day suspension was proper. (Tr. 861).

OWL ROCK'S JOB PERFORMANCE EVALUATION SYSTEM

Witness Daniel P. Scorza, Human Resources manager for Owl Rock, testified concerning the company's performance evaluation system. He explained that the system applicable to the hourly employees rates the employees in categories of A, B, C, and D. "A" is exceptional; "B" is good; "C" is standard; and "D" is below standard.

An evaluation is made every six months. The Owl Rock policy is to cover six months in all categories except safety which covers the previous 12 months. (Tr. 680). The five categories are:

VERSATILITY AND JOB SKILLS
ATTITUDE
ATTENDANCE AND DISCIPLINE
SAFETY
JOB PERFORMANCE

About 50 percent of the employees are in the category A and B; the remaining (less D ratings) are in Category C.

FRIENDLY WARNINGS

On November 7, 1991, Mr. Kellar received a "friendly" warning(Footnote 5) from Supervisor Elbert Evans for erratic behavior in operating a bulldozer. (Ex. C).

Mr. Kellar also received a separate "friendly" warning from Bob Burmeister on December 10, 1991, for refusing to use a pencil to write the job code on his time card. (Ex. C; Tr. 615).

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5 A "friendly warning" is an option on the employee counseling form. The available "action taken" can be:

FRIENDLY WARNING
WRITTEN WARNING
SUSPENSION
DISCHARGE
COMMENDATION

Exhibit C.

The same date, December 10, 1991, he received a friendly warning from supervisor Kelley for pushing oversized rocks through the plant after they had been ejected by the No. 5 belt. (Ex. C; Tr. 615).

If these supervisors had given Mr. Kellar formal (instead of friendly) warnings, he would have been terminated under the com- pany's disciplinary program. (Tr. 615).

PARTICULAR JOB PERFORMANCE RATINGS

(See Exhibit C for employee warning reports and friendly warnings; see Exhibit E for evaluations, criteria, performance levels, definitions, and Job Performance).

Mr. Kellar's initial job performance evaluation was in February 1991 when he scored a 42, a "B" rating. (Ex. E).

In September 1991, Mr. Kellar received a "C" evaluation. He appealed this evaluation under the appeals grievance process available to Owl Rock employees for resolving disputes regarding such an evaluation. (Tr. 626, 627; Ex. E).

In accordance with the evaluation program, the grievance committee was composed of two of Mr. Kellar's hourly co-workers selected at random, two supervisors who had no prior working ex- perience with the employee, and one Human Resources representa- tive to act as a tie breaker if needed. (Tr. 626-628; Ex. A; Ex. O).

Mr. Kellar and supervisors Vince Bommarito and Todd Craig, who prepared the "C" evaluation attended the hearing to present evidence.

During the hearing, Mr. Kellar became very angry and walked out before the hearing was completed. (Tr. 318, 319, 628). The grievance committee ruled in a unanimous 4-0 decision to uphold the "C" rating. The Human Resources representative abstained. (Tr. 635).

About February 13, 1992, Mr. Kellar was given a "D" perform-ance evaluation. (Ex. E, 2-13-92 review). The valuation covered the period of August 1, 1991, to January 31, 1992. It was based solely on input from his supervisors at Barstow concerning his performance at that mine. (Tr. 868).

At the new mine and with new supervisors, Mr. Kellar continued to engage in disputes with his supervisors about non-safety issues.

At Lytle Creek, Mr. Kellar also received two warnings as a result of failing to follow proper time card procedures. (Tr. 834-836). Other employees at Lytle Creek received similar warn- ings but Mr. Kellar called Mr. Scorza to complain about the warn- ings, requiring 45 minutes of his time. (Tr. 617, 618, 834, 836). Brian Sterling, the Lytle Creek foreman, gave himself a one-day suspension for failing to clock out properly. (Tr. 835-836).

In June 1992 Mr. Kellar received an informal review from Mr. Scorza and two supervisors from Lytle Creek. The two super- visors were Brian Sterling and Marlo Ommen, the assistant opera- tions manager. (Ex. E, 6-12-92 review; Tr. 621). In light of Owl Rock's policy of immediate termination after two consecutive "D" performance evaluations, the operator's purpose in giving Mr. Kellar this review was to discuss how his current performance could improve from a "D" to a "C" and thereby avoid being termi- nated. (Tr. 621). Although Mr. Kellar's supervisors offered him numerous suggestions during this meeting for improving his per- formance to a "C" rating, Mr. Kellar's attitude remained argumen- tative and combative. He told his supervisors he would not be a team player and he had no loyalty to the company. (Tr. 320, 623, 842, 843).

Some of Mr. Kellar's other statements confirming his con- frontational approach to supervisors were:

> I will not ask any more questions at these meetings because of your response, and if you continue to talk to me this way, I'll deal with you myself.
>
> * * *
>
> Give me the job performance area because I am not going to change in the attitude area. This is me, and I'll only give in the area I want to.
>
> * * *
>
> You cut me off and that aggravates me, and this is not the way to deal with a person that has an attitude problem. (Ex. N; Tr. 622).

Mr. Kellar was given a "D" rating in his next performance evaluation on August 5, 1992. (Ex. E, 8-5-92 review). This eva- luation was prepared by Brian Sterling with input from John Reid, the shift leadman, and Mr. Ommen. Mr. Sterling also consulted Mr. Scorza to discuss the review. (Tr. 844, 847).

Mr. Kellar filed an appeal to his second "D" valuation. (Tr. 632). The grievance committee for this appeal was completely different from the prior review committee that considered his "C" evaluation in Barstow. (Tr. 632, 633, 634). Messrs. Kellar and Sterling presented their evidence and the committee unanimously voted 4-0 to uphold the "D" evaluation with the Human Resources representative abstaining. (Tr. 634-636). Based on the second "D" evaluation, Mr. Kellar was terminated.

Exhibit M shows various factors were involved in Mr. Kellar's evaluation. The following chart combines various facets of the evidence.

~1167
Date Period Event Evaluation Score
Exhibit10-21-89 K. Kellar hired MSHA
Investigation 6-19-90 8-01-90 to
1-31-91 Barstow 42(B) E Warnings 7-27-91
7-31-91 One-day
suspension PCV pipe
disconnect C Evaluation 9-X-91 2-01-92 to
7-31-91 Evaluation 30(C) E
Three
friendly
warnings 11-91
and
12-91 Time cards
Buried #5 belt
Oversized rock
returned to system C Evaluation 2-13-92 8-01-91 to
1-31-92 D 23(D) E Informal
evaluation 6-02 Four-month review
Warning 7-92 One-day
suspension Failure to punch
in D 23(D) C
See detailed analysis of evaluations, infra.

DISCUSSION AND FURTHER FINDINGS

Mr. Kellar made various complaints to MSHA concerning safety. These activities and other safety related complaints were protected under the Act. Mr. Kellar has established a prima facie case of discrimination under the Act. The issue thus presented is whether the adverse action complained of was motivated in any part by his protected activities. In other words, would Owl Rock have taken adverse action in any event for Mr. Kellar's unprotected activity alone.

Mr. Kellar's unprotected activities included his argumentative and antagonistic attitude towards Owl Rock's management. His attitude is reflected in the matter of the time cards, the cigarette incident, the crowbar fabrication, use of flex-cose, building belt clamps and light fixtures, and running over the PVC pipe and electrical disconnect.

Brian Sterling was the Owl Rock plant foreman while Mr. Kellar was at Lytle Creek. When Mr. Kellar came to Lytle Creek, Mr. Sterling instructed him in the safety ramifications, work rules, locking out, etc.

As the plant foreman, Mr. Sterling would be in the best position to know Mr. Kellar's attitudes. He testified at length stating:

> Ken Kellar was a difficult employee in that he was very rebellious. He was very antagonistic against management. He came to Lytle Creek with an apparent attitude that he was going to be discriminated against, not treated fairly, that I wouldn't give him a fair shake or be straight up with him.
>
> And one of the problems we had right off the bat, was he constantly questioned management and supervisory personnel. It didn't matter what it was. If we gave him a job, he would have to question it. He would have to say, "Well, it should be done this way; it should be done that way."
>
> In a lot of situations due to the time frame that we had to get work done. We would have to patch something, we wouldn't have time to take the whole plant apart and put it together right. We are building a bridge. We are putting a piece of metal back in where we are just going to wear it right back out by beating rock against it. And, we would want him to just cut a piece of metal put [it] up there, stab it in, burn it in, and leave it there. "Don't worry about it."
>
> But he would insist that it was necessary and the correct way would be to cut that out, trim it up, polish it up, cut a new piece of steel. It's steel that's laid on the ground; it's all rusty. He wants

to polish it up, he wants to put it in there, he wants 100 percent penetration weld to get through there, and it was a constant ongoing battle to get him to do this.

One time--and we had this discussion several times--about whether to patch or whether to fix. One time I had a bunch of work to do, and they were staying over to get some of it done; and I came out there, and he was supposed to be preparing some patches to be put on and all he should have had to do was go over there and cut it.

Ken Kellar represented himself as being an expert welder, an expert fabricator; this was his background, this was his trade. Yet, he comes in there, and I said, "I just want a patch on there."

I came back a little while later, and he is over there, and he's got his patches cut, and he is grinding the corners, and he is polishing the metal.

I got a little impatient, and I told him, "Hey, look. Don't bother with that. Just take it over there and put it on."

His comment to me at that time was that wasn't the right way to do it. He didn't want to do it that way. He didn't think we were doing things correctly, and that he was afraid that he would forget how to do his trade correctly if he continued to it the way we were doing it; that we would detrain him to a point where he would have to worry about whether he could go back to his old job and still be able to do the job correctly.

And that was his statement to me: that he didn't want to do a quick patch job because he wouldn't be able to--he could lose his ability to correct welding. And this to me seemed like an unrealistic attitude, but we had that problem.

Q. Let me stop you for a minute. Does the issue whether metal is polished or a weld is polished have anything to do with safety?

A. Not unless you're talking about structural welds, not unless you're building a bridge or putting up a catwalk or something like that.

If you're just patching up a bunker, or you are just patching a chute that you're going to run rock down, water, sand, and gravel down, then there is no safety involved here. All you are trying to do is keep it from leaking and keep the gravel inside the chute.

(Tr. 826-829).

Mr. Kellar himself confirmed Mr. Sterling's views when he testified without equivocation at trial that as far as he was

concerned, the two write-ups (involving the operation of the skip loader) was "the point of no return" and "my attitude turned negative towards the company on July 31, 1991." (Tr. 286).

The Judge is aware that witnesses Bazzelle, Barnes, and Romero described Mr. Kellar as a "good and safe worker," "good employee," and "not a difficult employee." (Tr. 442, 443, 463, 500). However, it is apparent from the credible record that Mr. Kellar's negative attitude confirmed by Mr. Kellar himself, was towards his immediate supervisors.

Numerous actions by Owl Rock demonstrate the operator lacked retaliatory intent as a result of the MSHA investigation or safety complaints thereafter. These actions included giving Mr. Kellar a "B" (good) performance evaluation in February 1991 and a "C" (standard) performance evaluation in July 1991. In addition, the company by Supervisor Kelley granted Mr. Kellar's request to change positions from a welder repairman to a bulldozer operator. Further, Mr. Kellar was given "friendly" warnings in late 1991 carrying no disciplinary consequences. Formal written warnings could have resulted in Mr. Kellar's termination.

Finally, Mr. Kellar's performance at Barstow involved a separate group of supervisors and co-employees from the second "D" at Lytle Creek in August 1992.

EMPLOYEE EVALUATION PROCESS

Was it merely a transparency for Disparate Treatment?

Mr. Kellar seeks to persuade the Commission that the evaluation process is merely a show to disguise discriminatory intent.

Witness Raymond Barnes testified that "this evaluation system was set up to eliminate blacks, minorities, and other undesirables on the job." (Tr. 482).

Mr. Barnes bases his view of disparate treatment on an occasion when Owl Rock hired a maintenance trainee. At the time, Mr. Barnes, a repairman, went on vacation. The trainee scored higher than Mr. Barnes did. However, Owl Rock brought in three men to replace him. In short, Mr. Barnes was not promoted to journeyman mechanic and he felt the evaluation system was penalizing him because he couldn't perform certain types of duties. (Tr. 482, 484).(Footnote 6)

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6 Mr. Barnes simply fails to offer a credible testimony to support his broad allegations.

On one occasion, Mr. Reid said Mr. Barnes had a negative influence on Mr. Kellar. Mr. Barnes got upset because there were no other blacks on the job and he felt they were discriminating against him. (Tr. 453, 454).

Witness Ferman Romero testified(Footnote 7) that whether someone was written up depends on the person involved. He (Romero) would probably be written up but Bill DeForge(Footnote 8) (front-end loader operator) would not. (Tr. 512).

Witness Faust also described the appeal process as a "joke." (Tr. 549). It would have been fairer if he had been able to ask questions. (Tr. 550). You couldn't bring in witness statements and Bob Kelley was asked not to be at the hearing. (Tr. 551).

Contrary to Complainant's position, I credit Owl Rock's evi- dence which shows numerous other employees routinely received warnings or were disciplined for careless or erratic operation of equipment, safety violations, time card, attendance, or perfor- mance problems. (Tr. 195, 312, 511, 665, 666, 711, 732, 745). With respect to the time card warnings, discussed supra, Mr. Sterling estimated that out of 436 employees at that facil- ity, 40 received warnings for failure to follow time card pro- cedures. (Tr. 834, 836). (See also Exhibit F for analysis of 1990 and 1991 Disciplinary Actions. It shows that in 1991 the company issued 233 warning notices and 108 suspensions; there were 15 discharges.)

Further, supervisors and co-workers testified they fre- quently raised safety issues to management and they did not re- ceive any discriminatory treatment for doing so. In addition, Owl Rock encouraged its employees to raise safety issues.
(Tr. 757, 758, 853, 856).

Elbert Evans testified that even though he complained to MSHA with Owl Rock's full knowledge, he was never discriminated against or subjected to any discipline for having done so.
(Tr. 758).

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7 I do not find Mr. Romero's testimony to be credible. If there is a degree of discretion involved as to a write-up, the record fails to establish how the person involved affects such a write-up.

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8 William De Forge testified but neither party explored this issue with him. (Tr. 144-167). However, Mr. De Forge testified Mr. Kellar's attitude to- wards the company was "very negative. He always had something bad to say about them." (Tr. 163).

Many employees, including some of Mr. Kellar's supervisors, raised some of the same safety concerns as Mr. Kellar. (Tr. 718, 720, 721). Mr. Evans testified he gave Mr. Kellar a pamphlet with MSHA's phone number so he could call MSHA with his safety concerns. (Tr. 757). Even though Mr. Evans complained about safety he was described as the type of employee Owl Rock liked. (Tr. 103, 104, 315).

Mr. Kellar admitted there was an emphasis on safety as time went by after the union strike at Barstow. Further, management was encouraging employees to report safety violations and other employees also received written warning and a suspension for safety-related violations. [For example, Ferman Romero was written up for not putting the lock on an electrical box. (Tr. 311, 312)].

A lack of disparate treatment is also shown by the uncontro- verted evidence that Mr. Kellar was one of five employees with a "DD" in 1992. (Tr. 693). In 1990 Owl Rock discharged 13 em- ployees; in 1991, 15 were discharged. (Tr. 690-694).

The evaluations of Mr. Kellar's job performance are critical to a resolution of this case. (Exhibit M is a written chronology of a portion of the evidence.)

HISTORY OF COMPLAINANT'S JOB EVALUATIONS

As previously noted, Mr. Kellar's first evaluation from Vince Bommarito in February 1991 covered the period from Aug- ust 1, 1990, to January 31, 1991. He received a "B" (Good) rating with a total score of 42. A maximum rating is a score of 50.

In July 1991 he received two warnings and a one-day suspen- sion for the skip loader incident. His next evaluation from Vince Bommarito was in September 1991 for the period from Febru- ary 1, 1991, to July 31, 1991. His "versatility and job skills" dropped one point from 8 to 7. His "attitude" dropped from an 8 to 7. "Attendance and discipline" dropped from a 10 to an 8. "Safety" dropped from an 8 to 1. The form reflects the safety items involved the electrical disconnect, the PCV pipe, and a finger and back injury. A total score of 30, a "C" was recorded.

It is apparent the incidents involving the electrical dis- connect and the PVC pipe had the most severe effect on Mr. Kel- lar's subsequent evaluations. However, the record fails to reveal any discriminatory intent by Owl Rock for activities protected by the Mine Act.

Mr. Bommarito testified the 1991 evaluation for safety was a "1." This was due to a lost-time injury and two warnings in July. (Tr. 866-867).

In November and December 1991 Mr. Kellar received three friendly warnings. In January 1992, Mr. Kellar exercised bump-ing rights and moved to Lytle Creek. His next evaluation from Vince Bommarito and Elbert Evans was in February 1992 for the period of August 1, 1991, to January 31, 1992. In this evalua- tion, his "versatility and job skills" remained at a 7. His attitude dropped from a 7 to a 3. The category of "Attendance and Discipline" dropped from an 8 to a 7. The category of "Safety" remained a 1 and "Job Performance" went from 7 to 5. His total score was 23, a "D."

In March 1992, Mr. Kellar received a warning for failing to punch out at the end of a shift.

In June 1992 Brian Sterling gave Mr. Kellar a four-month informal review. "Versatility and Job Skills" remained at a 7. "Attitude" (Footnote 9) increased to a 4 from a 3. "Attendance and Dis- cipline" decreased from a 7 to a 5. "Safety" increased from a 1 to a 4. "Job Performance" remained a 5. Using the same crite- ria, the score was 25 for the four-month review.

In July 1992 Mr. Kellar received a warning and a one-day suspension.

His next evaluation was in August 1992 for the period from February 1, 1992, to July 31, 1992. The evaluation by Mr. Omman remained the same as the informal evaluation of June 1992. It was a "D" evaluation scoring 25 points.

In finding Owl Rock's performance evaluation to be credible, I note that each of the five performance categories contains spe- cific criteria to be followed when rating an employee. The valu- ation further contains definitions of performance. A careful re- view of the evaluation as to Mr. Kellar fails to show any intent by Owl Rock to discriminate against him in violation of the Mine Act. (See Exs. E and M).

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9 Exhibit M shows a score of 23 points, but I credit the individual evaluations for August 1992 as the individual categories add up to 25 points.

The following format indicates the performance evaluations for Mr. Kellar:

	2-14-91	3-X-91	2-13-92	6-11-92	6-12-92	8-5-92	*Self 8-12-92
Versatility & Job Skills	8	7	7	7	7	6	8
Attitude	8	7	3	4	4	3	7
Attendance & Discipline	10	8	7	5	5	5	5
Safety	8	1	1	4	4	4	7
Job Per-formance	8	7	5	5	5	5	6
Total	42	30	23	25	25	23	33

* Mr. Kellar's self-serving evaluation is not persuasive since attitude, safety, and job performance are excessively high.

HOSTILITY

The record fails to establish hostility on the part of Owl Rock in relation to Mr. Kellar's protected activities.

The evidence also establishes legitimate reasons for Mr. Kellar to receive the written and friendly warnings as well as the "C" and two "D" evaluations.

Mr. Kellar received a "C" in September 1991, based mainly on problems with the PVC pipe and electrical connector on July 1991, as well as attendance and Mr. Kellar's performance in his new job as a bulldozer operator. [Ex. E (9-91 review); Tr. 867].

Mr. Kellar's evaluation in February 1992 dropped from a "C" to a "D" because of continuing problems with his attendance and job performance, and problems with his attitude. [Tr. 748, 868; Ex. E (2-13-92 review)]. Mr. Kellar's supervisor Vince Bommarito, who prepared both the "C" and "D" evaluations, testified that after Mr. Kellar was given the written warnings for the PVC pipe and electrical connector accidents in July 1991 he became very argumentative and negative and was unable to concentrate on his job tasks. (Tr. 868).

Similarly, the written warnings for running over the PVC pipe and the electrical connector were justified. Even though Mr. Kellar was fully aware of the location of both the PVC pipe and the electrical connector, he carelessly operated his skip loader and ran over them. (Tr. 243, 245). Mr. Kellar admitted to Robert Kelley, Elbert Evans, and Vince Bommarito that he had

made a mistake; he felt "so stupid"; he had been in a hurry; he was wrong; and he knew he was going to be written up. (Tr. 709, 743, 861).

Brian Sterling also testified at length why Mr. Kellar received his second "D" evaluation in August 1992. Mr. Sterling's evaluation was based in part on Mr. Kellar's poor work attitude. (Ex. E (8-5-92 review); Tr. 844, 847). In addition, the appropriateness and fairness of the evaluations and warnings are evidenced by the fact that independent appeals committees upheld his "C" and second "D" evaluations as well as the grievance regarding the warning for the electrical disconnect. (Tr. 624, 625, 635, 636).

In sum, Mr. Kellar was at times a difficult, hostile, and combative employee, who constantly debated and challenged his supervisors' directions, who told his supervisors that he did not want to be a team player, and that he had no loyalty and who experienced job performance problems for things such as the careless operation of equipment, attendance and failure to follow time card procedures. (Tr. 285, 286, 618, 703, 704, 780, 785, 826, 829, 842, 844).

Even though Owl Rock attempted to assist Mr. Kellar to improve his performance, as evidenced by the personal meetings and informal reviews, Mr. Kellar did not make the effort to try to improve his performance. (Tr. 842, 844).

Contrary to any "hostility," Owl Rock encouraged employees to raise safety issues and investigated and took corrective action when employees (including Mr. Kellar) did so. (Tr. 718-720, 751, 753).

The MSHA investigation occurred in June 1990. The record here fails to show any coincidence in time, particularly when Mr. Kellar received a "B" evaluation in February 1991.

In sum, Mr. Kellar has not proven that Owl Rock discriminated against him.

CLOSING ARGUMENT

Mr. Kellar, through his representative, Ms. Kellar, argues the Owl Rock appeals process is biased because they don't give you any witnesses or rights to bring into the hearing, but the the company can bring in supervisors and management personnel.

Further, the company can carry over a safety incident up to one-year or two evaluations. Mr. Kellar argues that such a carryover would leave Mr. Kellar with only 33 days to bring up his score. (Tr. 881-884).

These two issues relate to the employment contract between Owl Rock and its employees. It is the Judge's function to determine whether Owl Rock discriminated against Mr. Kellar in violation of the Federal Mine Law. I find no such discrimination on this record. Whether the employment contract is fair or unfair is a matter to be resolved by the parties.

Whether an employee can bring witnesses and present evidence at a company hearing was only minimally developed in the evidence. (Faust, Tr. 549-551). However, the failure to furnish such an opportunity, depending on the evidence, could tarnish the results of the hearing.

However, on the record of this case and assuming that the operator's actions were motivated in part by Mr. Kellar's protected activities, the operator established by a clear preponderance of the evidence that it was also motivated by business reasons (its employee job performance requirements) and Mr. Kellar's unprotected activities, and on that basis the operator would have taken the adverse action of termination in any event.

Accordingly, I enter the following:

ORDER

For the reasons stated herein, this proceeding is DISMISSED.

John J. Morris
Administrative Law Judge

Distribution:

Mr. Kenneth D. Kellar, Mrs. Kathryn A. Kellar, 10298 Custer, Lucerne Valley, CA 92356 (Certified Mail)

Patrick J. Grady, Esq., ALLEN, MATKINS, LECK, GAMBLE & MALLORY, 18400 Von Karman, Fourth Floor, Irvine, CA 92715-1597 (Certified Mail)

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