

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, DC 20001

September 28, 2010

MICHAEL R. LEE,	:	DISCRIMINATION PROCEEDING
Complainant,	:	
	:	Docket No. WEST 2009-1063-DM
v.	:	Case No. RM-MD 2008-13
	:	
GENESIS, INC.,	:	Mine ID: 24-01-01467
Respondent.	:	Troy Mine

DECISION

Appearances: Michael R. Lee, *pro se*, Troy, Montana, Complainant;
Karen L. Johnston, Esq., Jackson Kelly, PLLC, Denver, Colorado, on behalf of
Respondent.

Before: Judge Paez

This case is before me upon a complaint of discrimination filed by Michael R. Lee (“Lee”) against Genesis, Inc. (“Genesis”), pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977 (the “Act” or “Mine Act”), 30 U.S.C. § 815(c).

I. Procedural Background

Lee filed a complaint on August 20, 2008, with the Mine Safety and Health Administration (“MSHA”), pursuant to section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2).¹ By letter dated June 4, 2009, MSHA informed Lee that, based on the information

¹ Section 105(c)(2) of the Mine Act states, in relevant part:
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. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as [s]he deems appropriate. . . . If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, [s]he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner, . . . alleging such discrimination or interference and propose an order granting appropriate relief.
30 U.S.C. § 815(c)(2).

gathered during its investigation of his complaint of discrimination, it had determined that a violation of section 105(c) of the Mine Act did not occur. Lee, without the assistance of counsel, initiated this case on June 23, 2009, under section 105(c)(3) of the Act, 30 U.S.C. § 815(c)(3).² Lee alleges he was terminated from employment at Genesis for complaints he made regarding health and safety at the Troy Mine. Lee also alleges that Genesis denied him his safety bonus and that Genesis attempted to have Lee's unemployment benefits denied.³ A hearing was held in Coeur d'Alene, Idaho, pursuant to section 105 of the Act, 30 U.S.C. § 815. At the conclusion of the hearing, the parties were permitted to submit written post-hearing briefs.⁴

Genesis acknowledges that Lee engaged in a protected activity and suffered adverse action. However, Genesis asserts there is no causal connection between the two and that Lee was terminated based on poor performance. Therefore, the general issue before me is whether Lee's termination was motivated in part by the protected activity, or whether Genesis would have taken action based on Lee's unprotected activity alone.

For the reasons stated below, Complainant's discrimination claim is dismissed.

II. Findings of Fact

² Section 105(c)(3) of the Mine Act states, in relevant part:
Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred. 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 notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1).
30 U.S.C. § 815(c)(3).

³ During the hearing, Lee did not present any evidence regarding his alleged safety bonus. However, in a letter dated September 28, 2008, to the Montana Department of Industry, Lee states he was paid a safety incentive after his termination. (Compl. Ex. C-95.) Regardless, the safety incentive is discretionary. (Compl. Ex. B-101.) Further, Lee admitted that Genesis unsuccessfully contested Lee's receipt of unemployment benefits, as Lee in fact received unemployment benefits from the State of Montana. (Tr. 16, 217; Compl. Ex. D.)

⁴ After the hearing, Lee submitted a Post-Hearing Statement on January 27, 2010. Genesis submitted a Post-Hearing Brief on January 26, 2010, and a Response to Complainant's Post-Hearing Statement on February 3, 2010. Lee submitted a Reply Statement on April 2, 2010.

Genesis operates the Troy Mine in Montana where Lee worked. The Troy Mine is an underground mine that produces copper and silver concentrate. (Tr. 28.) This mine does not use the sophisticated technology that more modern mining operations have adopted. Rather, the Troy Mine employs an older system of crushers and float circuits that filter out the valuable ore from the rock and debris using mechanical and chemical processes.

The process begins with the extraction of copper and silver ore that is embedded in rock. Once this ore is extracted from the ground, it is crushed, travels on a conveyor belt to a secondary crusher, and then travels to the fine ore bin. (Tr. 28, 248.) From the fine ore bin, the rock is conveyed to the concentrator, which contains the grinding circuit and the flotation circuit. (Tr. 248.) The particles exit the grinding circuit through cyclones, which separate out the heavier debris using centrifugal force, and then enter the float circuit as slurry, which is a mixture of water and finer particles. (Tr. 115, 249-50.) The flotation circuit is located in the “ball mill” area of the mine and consists of two circuits – the rougher circuit and the cleaner circuit, which are used to separate out the copper and silver ore from the slurry. (Tr. 251-52.) The flotation operator is required to adjust the amount of chemicals added to the slurry in response to the changes in “feed grade” – i.e., the percentage of valuable ore flowing into the circuits. (Tr. 256.) The flotation operator also has the responsibility to continually evaluate slurry moving through the rougher circuit and determine through visual inspection whether the “reagent” levels—i.e., chemical substance levels—need to be adjusted. (Tr. 176, 258-59.) This whole process is aimed at extracting as high a percentage of copper and silver ore from the mined rock as possible.

Not long after Lee was hired, Genesis installed an on-stream analyzer to assist in real-time analysis of the feed grade traveling through the flotation circuit. (Tr. 256.) As the slurry leaves the mill, it goes to the refuse or “tailings area” for thickening and then goes through a system of pipes over the length of several miles to the tailings pond. (Tr. 30, 253-54.) If the copper and silver ore is not recovered from the slurry before it reaches the tailings, then it is forever lost. (Tr. 254-55.) Thus, the ore recovery rates from the flotation circuit achieved by a flotation operator are critical to the profitability of the mining operation. Indeed, during the entire milling process, a number of samples are taken at various points on each shift for analysis at the mill assay lab to determine whether a proper rate of ore recovery is taking place. (Tr. 255-56.) The Genesis mill installed an on-stream analyzer in the fall of 2006, and it became operational in June 2007. (Tr. 256-57.) A flotation operator’s performance is based upon recovery rate measurements. (Tr. 86-87.) The flotation operator is part of a four-person team that also includes a tailings operator, a grinding operator, and a grinding helper. (Tr. 254.) The Troy Mine had a day shift and a night shift. (Tr. 119.)

Michael Lee worked as a miner over a period of approximately twenty-five years before he was hired by Genesis. (Tr. 24.) Genesis first hired him on January 23, 2007, as a temporary employee at the Tech 1 level. (Tr. 26.) Lee’s brother, who worked for Genesis, recommended Lee for the job, and Lee was at times on the same four-person team with his brother during his employment with Genesis. (Tr. 265-66, 457-58.) In March 2007, Genesis offered Lee a permanent job working in the secondary crusher and, occasionally, in the ball mill. (*Id.*) Lee was promoted to Tech 2 shortly after he was offered permanent employment. (Tr. 26; Ex. R-2.) A few months later, Lee was moved to the concentrator and promoted to Tech 3. (Tr. 27, 268;

Ex. R-2.) Mill Manager Steve Lloyd testified that he “expected a lot” out of Lee because of his prior experience (Tr. 280.) Lee was employed in a similar mining operation in Alaska for several years just prior to his employment with Genesis, though that mining operation was heavily computerized unlike the Troy Mine (Tr. 146-47, 279-80.) Lee had been terminated from the position at the Alaska mine because he failed a drug test. (Tr. 148.)

The record establishes that Lee engaged in protected activity. In the spring of 2007, Lee complained about dim lighting in the secondary crusher, and he provided maintenance supervisor Clint Jensen with a list of light fixtures needing repair. (Tr. 36-37.) Lee testified they were not fixed for several months. (Tr. 37.) Steve Lloyd addressed the repair himself. (Tr. 310.) Later, in July 2007, Lee observed an ignition switch problem on a tailings pickup truck. (Tr. 164.) Lee called a mechanic to fix the problem and marked the issue on a vehicle preshift safety card. (Tr. 164.) However, he did not have any verbal communications with anyone in management regarding the condition. (Tr. 164-65.) Lloyd testified that he did not learn of this issue until he read Lee’s prehearing documents in this matter. (Tr. 311.) In October 2007, Lee left a note for Lloyd pointing out the failure of an emergency stop button. (Tr. 45; Ex. R-6.) Lloyd corrected the condition, responded to the note, and thanked Lee for bringing the issue to his attention. (Tr. 165; Ex. R-6.) During the fall of 2007, Lee marked “no safe access” on his pre-shift cards for several days because he observed an open flame from a heater in a reagent storage area within 15 feet of the chemical storage area. (Tr. 50.) This issue was abated by red-tagging and shutting off the heater. (Tr. 320.) In a November 21, 2007, meeting, Lloyd informed Lee that he was not getting promoted to Tech 4 because he needed more experience. (Tr. 337; Ex. R-7.) However, Lee received his promotion approximately one month after this meeting. (Tr. 339; Ex. R-2.)

Lee testified that, over time, he became more aware of safety issues in his workplace. (Tr. 225.) For example, on a preshift card, Lee wrote down that he felt there should be a horn on the regrind mill. (Tr. 358.) However, because it is not required by MSHA and did not appear to provide any greater measure of safety, Steve Lloyd denied this request. (Tr. 359.) Additionally, Lee provided Lloyd with a handwritten note regarding the sumps’ identification tags and switches. (Tr. 359-60.) Lloyd told Lee that only one sump was not identified properly, but he also acknowledged Lee’s concern over the switch problem and replaced it. (Tr. 360.)

In January 2008, Lee was assigned to shovel snow off of a roof. (Tr. 55.) While doing so, he pointed out that the ladder used to climb up to the roof was “rickety” and that there was no fall protection. (Tr. 57; Compl. Ex. B-14.) About ten minutes later, Lee was instructed to come down off the roof. (Tr. 58.) In February 2008, Lee found a note in the garbage can in Clint Jensen’s office identifying an unsafe spot in the mine due to a fallen rock. (Tr. 64, 67; Compl. Ex. F-135.) Lee contacted the district manager of MSHA and gave a statement regarding this note, but did not tell anyone at Genesis that he was doing so. (Tr. 69-70, 173; Compl. Ex. F.) During this time, Lee was working as a float operator and had been assigned to that position for approximately five months. (Tr. 283.) Lee was the primary float operator beginning in January 2008. (Tr. 282.)

Steve Lloyd testified that in March 2008 he removed Lee from flotation operator as a “wake-up call” to show he was concerned about Lee’s performance. (Tr. 283.) Lloyd stated that

in a performance meeting he made it clear to Lee that his current results were unacceptable, as Lee had the lowest recovery numbers of all four crews. (Tr. 280, 284.) Lee testified that he did not view this change as a punishment or demotion. (Tr. 97; Compl. Ex. B-13.)

In April 2008, Lee was moved to the ball mill in order to get additional training on the float circuit. (Tr. 463.) Also in April 2008, Mike Roby and Steve Lloyd addressed Lee's phone usage. (Tr. 81-82.) Lee was given a written warning to limit his personal phone calls on company time. (Tr. 81-83.) On May 30, 2008, Lloyd held a meeting with Lee to discuss performance expectations. (Tr. 293.) Clint Jensen and team leader and tailings operator Mike Roby were also present. (*Id.*) Lloyd communicated to Lee that he wanted Lee to do his best and to do as well as his peers, but Lloyd testified he did not give Lee specific recovery percentages because these numbers tend to fluctuate. (Tr. 293-94; Compl. Ex. B-35.) Lee went back on the flotation operator circuit in June 2008 and had the highest recovery of the month. (Tr. 295; Compl. Ex. A-d-1, 2.) In June 2008, another team leader, Kelly Cannon, had recovery numbers three points lower than other crews. (Tr. 294.) However, Cannon had only one week of flotation experience at that time. (*Id.*)

In July 2008, Lee's recovery numbers on two shifts were fifteen points below that of other crews. (Tr. 76, 103, 300; Ex. R-4.) As Mike Roby testified, low recoveries mean monetary loss, because more copper and silver ore are lost as refuse in the tailings. (Tr. 462.) Lloyd believed Lee's performance problem was due, in part, to the fact that he did not rely on the analyzer and did not "pan his circuit" – i.e., did not place slurry from a float circuit in a pan and swirl it around to separate out the copper or silver ore to see how much is being recovered and use this information to adjust the amount of chemicals added to the float circuit. (Tr. 444.) Lloyd and Lee both testified that Lloyd spent time teaching Lee how to properly pan a circuit; however, Lee admitted he still had difficulty perfecting this technique. (Tr. 439-40, 442.) Also, Mike Roby believed Lee's performance was impacting the rest of the crew because Lee's crew members were becoming very negative. (Tr. 486.) For example, Lee was involved in a "heated argument" with his brother when they were on the same four-person team. (Tr. 494.) Lee also had shouting matches with Clint Jensen and Jeff Franke, another Genesis employee. (Tr. 303.) Additionally, Lee admitted to a disagreement with Mary Jo Moore that brought her to tears. (Tr. 128-31.) Lee even stated, "[t]hat is the only incident that I remember where I had intimidated somebody to tears." (Tr. 130-31.)

Lee was the day shift float operator on July 18, 2008, when a power bump (or loss of electricity) occurred that caused the mill water pumps to stop running. (Tr. 206-07.) Lee testified that if the mill water pumps go down, the float operator has to "start running" to limit the loss of copper and silver ore to the tailings. (Tr. 208.) Steve Lloyd testified that Lee did not respond to the bump "like the rest of the crew." (Tr. 370; Compl. Ex. B-36.) Lee did not jump up and run to drain his flotation cells, and he did not turn off his reagents. (Tr. 369.) After this incident, around July 24, 2008, Lloyd decided to terminate Lee. (Tr. 415.) Lloyd testified that he did not consider giving Lee a few days off rather than firing him, because he stated he was "actively counseling" Lee beginning in April 2008. (Tr. 419.) During the "counseling sessions," Lloyd did not give Lee any documentation and did not keep any documentation in a personnel file. (Tr. 419, 421.) Lee testified that Genesis's apparent policy, as conveyed to the state

unemployment division, was that mill employees who could not demonstrate competency at the Tech 4 level would be demoted to Tech 3. (Tr. 131-32; Ex. B-19, 20.) On August 4, 2008, Lloyd, along with Jensen, Roby, and Vic White, the human resources manager, held a meeting with Lee where he was informed that his employment at Genesis was being terminated for poor performance and spending too much time in the break room. (Tr. 75-76.)

III. Principles of Law

Section 105(c)(1) of the Mine Act provides in pertinent part:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the statutory rights of any miner . . . because such miner . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent . . . of an alleged danger or safety or health violation.

30 U.S.C. § 815(c)(1).

Under established Commission law, a complainant in a section 105(c) proceeding establishes a prima facie case of a violation if a preponderance of the evidence proves (1) that he engaged in a protected activity and (2) that the adverse action was motivated in any part by the protected activity. *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799-800 (Oct. 1980), *rev'd on other grounds, sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981).

The mine 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 the protected activity. *Id.* If the mine operator cannot rebut the prima facie case, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activities and would have taken the adverse action in any event based on unprotected activities alone. *Driessen*, 20 FMSHRC at 328-29; *Pasula*, 2 FMSHRC at 2800; *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981).

In evaluating whether a complainant has proven a causal connection between protected activities and adverse action, the following factors are to be considered: (1) knowledge of the protected activity; (2) hostility or animus toward protected activity; (3) coincidence in time between protected activity and the adverse action; and (4) disparate treatment. *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F. 2d 86 (D.C. Cir. 1983).

In analyzing a business justification as an affirmative defense for an adverse action, the Commission has held that:

[t]he proper focus, pursuant to *Pasula*, is on whether a credible justification figured into motivation and, if it did, whether it would have led to the adverse action apart from the miner's protected activities [T]he narrow statutory question is whether the reason was enough to have legitimately moved that operator to have disciplined the miner. *Cf. R-W Service System, Inc.*, 243 NLRB 1202, 1203-04 (1979) (articulating an analogous standard).

Chacon, 3 FMSHRC at 2516-17.

IV. Further Findings of Fact and Conclusions of Law

Because Genesis neither contests that Lee engaged in a protected activity when he made several safety complaints nor contests that Lee suffered adverse action when his employment was terminated, the only issue to be decided is whether the adverse action was motivated, at least in part, by Lee's protected activity, or whether Genesis would have taken the adverse action for unprotected activity alone.

A. CAUSAL CONNECTION

1. Knowledge of Protected Activities

Steve Lloyd, who ultimately made the decision to terminate Lee, did not dispute that he was aware of Lee's safety complaints. In fact, Lee frequently went to Lloyd with his safety concerns. However, Lloyd was not aware of two of Lee's complaints: Lee's statement to MSHA regarding the note found in Jensen's garbage can and the pickup truck ignition switch problem. Lee admitted he did not inform anyone in management of these two complaints, and Lloyd testified he did not know about these complaints until after Lee initiated this discrimination proceeding. Moreover, Lloyd testified, in response to numerous questions, that none of Lee's safety concerns were in any way part of his decision to terminate Lee's employment. Lloyd stated that the reason he terminated Lee was due to Lee's poor performance. (Tr. 308.) Moreover, Lee testified that he had great respect for Lloyd and believed Lloyd was a good manager and truly concerned about safety, as evidenced by his actions in response to Lee's safety complaints. (Tr. 223.) I find Lloyd to be a very credible witness and credit his testimony about his being unaware of Lee's safety concerns reported to MSHA. Nevertheless, I determine that Genesis had knowledge of Lee's other protected activities, given Lee's history of reporting safety issues to Lloyd.

2. Hostility

Lee continued to receive promotions during his tenure at Genesis, even after making safety complaints. There is no evidence that Lee received any written warnings or demotions. Lloyd stated he "actively counseled" Lee to help Lee perform his job to the best of his ability. Additionally, Lee was personally thanked by Lloyd for bringing safety violations to his attention. While Lee testified that Clint Jensen seemed to be upset with him at times, there is no evidence that Jensen, or any other member of management, treated Lee with any hostility after making the

complaints or solely because of Lee's concerns. Moreover, Lee was permitted to take vacation even though he did not follow proper procedure for requesting time off. (Tr. 341.) Even though Lee did not receive his Tech 4 promotion when originally scheduled, after gaining more hands-on experience, he was promoted. Also, Lee did not consider being taken off the flotation circuit in March 2008 to be an adverse action.

Lee further alleges that Genesis informed, and continues to inform, potential employers that Lee is not eligible for rehire, which is preventing Lee from obtaining employment. Specifically, Lee stated that he believes Genesis was "blacklisting" him. (Tr. 239.) On cross-examination during the hearing, Lee addressed the allegation:

Q: Other than the comment from this woman [at the trucking company where Lee applied for a job] that Genesis stated you were not eligible for rehire, [are there] any other facts that cause you to conclude that you're being, as you said, blacklisted by Genesis?

A: No other facts, no.

(Tr. 241.) On redirect, Lee admitted he made assumptions and had "no way of knowing what Genesis is telling potential employers." (Tr. 242.) Other than this unsupported testimony, Lee offered no other evidence of Genesis's alleged blacklisting. I credit Lloyd's testimony as to his lack of knowledge about Lee's discussions with MSHA, as well as his reasons for terminating Lee due to performance. Because Lee was let go by Genesis due to its stated issues with his performance, I believe that informing potential employers that Lee is ineligible for rehire at Genesis is a reasonably accurate statement based on the actions Genesis took regarding terminating Lee's employment. Considering all the evidence adduced at hearing as a whole, I determine that neither Lloyd nor Genesis's management exhibited hostility or animus towards Lee due to his protected activities.

3. Coincidence in Time

For the first thirteen months of Lee's employment, Genesis did not issue him any reprimands or take any disciplinary action against him. During those thirteen months, Lee made his safety complaints to management. Lee first brought a safety concern to Genesis's attention only a few months after he began employment at Genesis. The last "protected activity" that anyone at Genesis knew about prior to Lee's termination was in January 2008 when Lee was shoveling snow on a roof. Lee was not terminated until seven months later in August 2008. In other cases where adverse action was found to be motivated, in part, by a protected activity, the employees experienced adverse actions less than two months – usually within a few days – after engaging in a protected activity. *See Pasula*, 2 FMSHRC 2786; *Robinette*, 3 FMSHRC 803; *Chacon*, 3 FMSHRC 2508; *Driessen*, 20 FMSHRC 324; *Sec'y of Labor on behalf of Gatlin v. Kenamerican Res., Inc.*, 31 FMSHRC 1050 (Oct. 2009). Here, no such coincidence exists. I, therefore, determine that there is no coincidence in time between Lee's protected activity and the adverse action taken against him.

4. Disparate Treatment

In examining the disparate treatment factor, the Commission has stated that, “[t]ypical forms of disparate treatment are encountered where employees guilty of the same, or more serious, offenses than the alleged discriminatee escape the disciplinary fate which befalls the latter.” *Chacon*, 3 FMSHRC at 2512. Here, little evidence was offered as to whether other employees were disciplined or demoted based on performance. Both parties admitted that Lee was taken off of his flotation circuit to get more hands-on experience. And even Lee admitted that he did not perceive this event as a disciplinary action or demotion. While the evidence may tend to show that no other Genesis employee had been fired recently (*see* Tr. 509), Lloyd credibly testified that there were high performance expectations of Lee because of his prior experience. Even though the other crews’ recovery numbers all varied, Lee’s numbers were more contrasting than his experienced-operator peers. Lloyd testified that Kelly Cannon was not disciplined for his low numbers because he had little experience, whereas Lee had significant flotation circuit experience. Lloyd’s testimony on these facts was not undermined by cross-examination. Cannon was not guilty of the same, or more serious, offense as Lee. Lee had more experience and his recovery numbers were significantly lower.

Moreover, Lloyd testified that members of Lee’s team, including Lee’s own brother as well as the team leader, had complained about Lee’s lackadaisical approach to his work, such as remaining in the ball mill for long periods of time instead of actively checking the flotation circuits. Lloyd testified that he believed this affected the morale of the team, as testimony already reflected that Lee had interpersonal problems with some of his coworkers, some of which resulted in crying and in shouting matches. Lloyd also was aware that Lee had been using the company telephone to call his girlfriend in Alaska, and she also had been calling Lee at work on the company phone line. Although Lloyd did not discipline Lee for this, he did reiterate to Lee that these actions needed to stop. It is reasonable for Lloyd to have considered these other incidents in combination with the fluctuation in Lee’s performance to decide to terminate Lee. Notwithstanding the scant evidence on the discipline Genesis meted out to other employees for performance issues, I determine that the evidence presented does not establish that Lee suffered disparate treatment.

Consequently, in considering the above four factors, I determine that Lee has failed to prove a causal connection between his protected activities and the adverse action of his termination by Genesis.

B. AFFIRMATIVE DEFENSE

Genesis asserts as an affirmative defense a business justification for terminating Lee. The Commission has stated that, “[i]f a proffered [business] justification survives pretext analysis . . . , then a limited examination of its substantiality becomes appropriate.” *Chacon*, 3 FMSHRC at 2516. Here, I credit the testimony of Steve Lloyd who testified he had high performance expectations for Lee because of his many years experience – specifically, his experience at a more technologically advanced mine with a more difficult flotation circuit. (Tr. 280.) Lloyd expected Lee to “set the standard” on recovery and to help define how to make the flotation

circuit better, rather than “create the average.” (*Id.*) With regard to the July 18, 2008, power bump incident, Lloyd credibly testified that Lee did not respond to the bump “like the rest of the crew,” in that he did not jump up and run to drain his flotation cells or turn off his reagents. (Tr. 369-70; Compl. Ex. B-36.) According to Mike Roby, instead of responding to the power bump Lee continued to sit and eat, and Roby relayed that information to Lloyd. (Tr. 370.) Lee did not contradict Lloyd’s testimony regarding this incident.

Moreover, the record revealed other problems Lee experienced. Employees were allowed one five-minute phone call per shift. (Tr. 83.) Lee asserts that all of his calls were made on his breaks but that he did make long distance calls to his girlfriend in Alaska. (Tr. 84, Compl. Ex. B-16.) Lee asserts that he stopped making phone calls after Mike Roby held a meeting with the whole crew and admits that he received a written warning. (Tr. 82, 84, Compl. Ex. A.) Also, Lee made plans to go to Alaska in December 2007 and marked his vacation in the flotation operator’s log book to try to find a replacement. (Tr. 194.) However, Lee did not talk to Clint Jensen or Steve Lloyd about taking vacation. (Tr. 341, Compl. Ex. B-34.) Even though his vacation was not authorized under the normal policy, Lee was permitted to take vacation because he had already purchased plane tickets. (Tr. 341-42.) At the hearing, Lee testified that he could not remember if he purchased plane tickets before noting his vacation request. (Tr. 195.)

Additionally, Lee testified that, on average, he would spend a maximum of 2.5 hours over the course of a 12-hour shift in the control room and/or break room. (Tr. 197.) However, Steve Lloyd testified that several people, including Lee’s brother, Joe, and Patty Regh, informed him that Lee would actually spend five to six hours in the break room. (Tr. 299.) Joe Lee and Patty Regh did not testify at the hearing even though Lee acknowledged that he could have subpoenaed them to either corroborate his testimony or cross-examine them. (Tr. 512.) The excessive time in the break room was a major concern for Lloyd because, in order to do well at the Genesis Mill, an operator needs to keep after the circuit and watch it carefully. (Tr. 299.) Lloyd also testified that Lee’s attitude was affecting other crew members in that they felt it unfair that Lee was spending so much time in the break room. (Tr. 302.) Lloyd felt that if he reassigned Lee, Lee’s attitude would continue to be a problem. (Tr. 302.) Indeed, Lloyd had already reassigned Lee in a previous month and though Lee showed he could do the job well in June, by July his numbers had slipped below average and there was no evidence of a change in Lee’s attitude. Mike Roby’s testimony regarding Lee’s attitude supported Lloyd’s assertions.

As stated above, low recovery numbers create a negative financial impact on the company. A recovery percentage just three points lower than the other average numbers over the course of one month can mean almost \$100,000 in lost revenue. (Tr. 296.) The alleged justification of poor performance would have motivated Genesis for terminating Lee. The potential monetary loss for Genesis in July 2008 could have been up to \$500,000. Based on this calculation and the fact that Lee did not impeach or contradict this evidence, I find that Genesis’s disciplinary action was not “so out of line with normal practice that it was a mere pretext” to a “discriminatory motive.” *Id.* While being mindful as to not substitute for the operator’s business judgment, surely such a large monetary loss in such a short amount of time is enough to discipline an experienced employee. Accordingly, Lee’s unprotected activity of spending multiple hours in the break room, which led to his low recovery numbers, motivated Genesis to

terminate Lee's employment. Genesis has established it would have taken adverse action for an unprotected activity alone.

Moreover, I find Lee to be less credible because, throughout his testimony, he frequently forgot dates of events and could not remember pertinent facts relating to incidents. (*See* Tr. 26, 34, 43-44, 46, 52-53, 82-85, 160, 179-80, 200, 206.) Lee's credibility is further diminished by the fact that he would not directly answer questions posed by Genesis's counsel, and his testimony was weakened significantly by cross-examination. (*See* Tr. 197, 204, 207, 225, 234-35.)

For all of the reasons discussed above, I conclude that Lee did not prove, by a preponderance of the evidence, a prima facie case with regard to the adverse action being motivated, in any part, by the protected activity. Additionally, I conclude that Genesis prevailed in its affirmative defense. Therefore, Lee has failed to establish that Genesis discriminated against him in violation of section 105(c) of the Mine Act.

V. Order

In light of the foregoing, it is hereby **ORDERED** that Complainant's discrimination claim be **DISMISSED**.

Alan G. Paez
Administrative Law Judge

Distribution: (Certified Mail)

Michael R. Lee, 140 Little Lane, Troy, Montana 59935

Karen L. Johnston, Esq., Jackson Kelly PLLC, 1099 18th Street, Suite 2150, Denver, CO 80202

/ac