FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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September 2, 2003

EDDIE M. JEANLOUIS, SR., Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. CENT 2002-279-DM
v.	:	SC MD 2002-04
	:	
MORTON INTERNATIONAL, Respondent	:	Weeks Island Mine & Mill
	:	Mine ID 16-00970

DECISION ON LIABILITY

Appearances: Toni K. Jeanlouis, St. Martinsville, Louisiana, for the Complainant; Willa B. Perlmutter, Esq., Patton Boggs, LLP, Washington, DC for the Respondent.

Before: Judge Feldman

This case is before me based on a discrimination complaint filed on August 30, 2002, pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 (the "Act"), 30 U.S.C. § 815(c)(3) (1994), by Eddie M. Jeanlouis, Sr. (Jeanlouis) against Morton International (Morton).[1] The provisions of section 105(c)(1) of the Act, 30 U.S.C. § 815(c)(1) protect a miner's right to express safety related concerns. Section 105(c)(1) provides, in pertinent part, "No person shall . . . in any manner discriminate against . . . any miner . . . because such miner . . . exercise[d] . . . any statutory right afforded by this Act."

The hearing in this matter was conducted in Lafayette, Louisiana, on May 20 and May 21, 2003. Jeanlouis' wife, Toni K. Jeanlouis, who is not an attorney, represented him at the hearing. The parties filed post-hearing briefs.

[1] Jeanlouis' complaint which serves as the jurisdictional basis for this matter was filed with the Secretary of Labor (the "Secretary") on November 20, 2001, in accordance with section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2). Jeanlouis'complaint was investigated by the Mine Safety and Health Administration (MSHA). On July 1, 2002, MSHA advised Jeanlouis that its investigation did not disclose any section 105(c) violations. On August 30, 2002, Jeanlouis filed his discrimination complaint with this Commission which is the subject of this proceeding.

I. Statement of the Case

This case requires resolving whether Jeanlouis' March 10, 2001, warning to Dalton Alleman, a temporary and inexperienced loader operator, is protected activity. Jeanlouis alleges his statements are protected because they were uttered in response to Alleman's unsafe loader operation. Morton admits Jeanlouis' suspension was motivated by Jeanlouis' confrontation with Alleman. However, Morton asserts Jeanlouis' behavior was not protected because it was motivated by Jeanlouis' desire to cause a work slowdown. Consequently, on March 23, 2001, Morton suspended Jeanlouis for two weeks without pay. Jeanlouis seeks relief from the suspension.

As discussed herein, to prevail a complainant must demonstrate that he engaged in protected activity, and, that the adverse action complained of was motivated by that activity. Jeanlouis need only prove that his March 10, 2001, behavior was protected since Morton admits this behavior was the reason for Jeanlouis' suspension.

For the reasons discussed below, the preponderance of evidence demonstrates Jeanlouis' behavior was protected because it was motivated by his concern for safety rather than a desire to encourage a work slowdown.[2] I reach this conclusion for several reasons. Namely: (1) the information provided to Morton by Alleman, who did not testify, is not credible; (2) Jeanlouis had no motive to cause a work slowdown since the company did not maintain accurate production statistics for each loader operator prior to March 10, 2001; (3) Jeanlouis had never been warned about his production; (4) Jeanlouis did not encourage any other loader operator to slow down; and (5) company policy encourages employees to warn other employees about unsafe practices. Consequently, Jeanlouis' discrimination complaint shall be granted since his suspension was motivated by protected activity.

II. Preliminary Findings Of Fact

a. Background

The Weeks Island Mine and Mill located near Lafayette, Louisiana is a mining complex owned and operated by Morton International. The complex includes an underground salt mine located on Weeks Island. The underground mine is operated in three shifts: the day shift from 7:00 a.m. to 3:00 p.m.; the evening shift from 2:30 p.m. to 10:30 p.m.; and the graveyard shift from 10:00 p.m. to 6:00 a.m. The shifts overlap so that the mine is covered throughout the day. Employees work on rotating shifts.

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[2] Having concluded that Jeanlouis' suspension was motivated by his March 10, 2001, protected activity, I have not addressed the significance, if any, of Jeanlouis' complaint about overcasts, or, his request for light duty due to a neck injury that occurred when his loader bucket hit an overcast. An overcast is an irregularity in the mine floor.

At this underground facility, cutters and drillers cut the floor and drill holes for blasting. After the holes are loaded and the face is shot, loader operators in 988 Caterpillars muck the loose salt from the area. The loader operators are followed by scalers, who scale loose material from the ribs and face. The loaders re-enter the area to clean the cuts after which the entire process begins again.

Loader operators haul salt from the floor, ribs and face to the feeder where the salt is conveyed to a stockpile before being hoisted to the mill. The distance from the face to the feeder varies from approximately 50 to 100 yards. The loaders haul the salt in entries approximately 20 feet high and 50 feet wide. There is a two-way traffic pattern in the entries. Thus, loaders pass each other while traveling in opposite directions. Caterpillar 988 loaders travel the entries in second gear at approximately seven to 14 miles per hour. The maximum speed of a 988 Caterpillar is 21.8 miles per hour. To promote safety, Morton encourages employees to speak directly to other employees if they are observed doing something that is unsafe. (Tr. 253-54, 372-73).

On or before March 10, 2001, the loader operators kept track of their daily trips from the face to the feeder by recording each trip on a manual counter or "clicker." Load counts were based on an honor system with no means of company verification. (Tr. 242-43, 393-94). Although the company was developing a new tracking system for measuring loader operator productivity, Charles Edward Young, Morton's Facility Manager, admitted that statistics were not available to employees in March 2001, and that Jeanlouis had never been warned about his productivity. (Tr. 602-06, 610-12).

b. Eddie Jeanlouis

Jeanlouis has been employed at the Weeks Island underground mine since May 1994. He was hired as a general laborer, he was promoted to a scaler, and he ultimately became a loader operator. Jeanlouis has had several mishaps during his nine year tenure at Morton that were not attributed to misconduct. In December 1994, Jeanlouis upended his loader onto its bucket. In August 1999 he drove his loader over a power center. Finally, in January 2001 his loader rolled over, reportedly because of a hole in a bench and low tire pressure. None of these incidents resulted in injury and Jeanlouis was never disciplined. (Tr. 546).

Dalton Gary, a Morton loader operator for approximately 20 years, has known Jeanlouis for almost ten years. (Tr. 273). Gary, and Lynel Wilson, the union's chief steward, both opined that Jeanlouis was not the type of employee that was capable of intimidating another employee. (Tr. 282, 302-03). Gary believed that Jeanlouis did not have a history of disciplinary problems. (Tr. 275). Finally, with respect to productivity, Gary opined Jeanlouis' load count was the same as the other loader operators. (274-75).

Morton management personnel repeatedly testified that Jeanlouis was a good employee. For example, Derek Christian, the third shift supervisor who has been employed by Morton for 21 years, testified Jeanlouis was a good employee who had never been disrespectful or insubordinate. (Tr. 228). Christian stated, to his knowledge, Jeanlouis had never been reprimanded. (Tr. 227). Christian testified that he was surprised Jeanlouis had been suspended because he did not believe Jeanlouis said "[w]hat he was alleged to have said to [Alleman]. . . . I base my opinion on [Jeanlouis'] work ethic on my shift." (Tr. 231-32). Finally, Christian testified that he never had any problems with Jeanlouis' productivity as a loader operator. (Tr. 232-34). Leonard Olivier, the day shift supervisor who has been a Morton employee for 33 years, testified he has never had any complaints about Jeanlouis' work performance. Olivier, consistent with the testimony of Christian and Gary, also opined Jeanlouis' productivity as a loader operator was "average." (Tr. 392).

As Facility Manager, Young is responsible for overseeing everything that occurs at the Weeks Island plant site including production and operation at the underground mine. Young is responsible for safety, quality control and customer service. Charles Justice, the Human Resource Manager, reports to Young. Young testified that, with the exception of the March 10, 2001, incident, "Mr. Jeanlouis appears to be a good employee. He's had no incidents at all that I'm aware of . . . And, you know, I don't really have anything bad to say about him." (Tr. 595). Young conceded that Morton did not have any concerns about Jeanlouis' temperament. (Tr. 656).

c. Dalton Alleman

Dalton Alleman was subpoenaed to testify by Jeanlouis. Alleman appeared on the morning of the hearing and requested to be released from the subpoena. In support of his request, Alleman submitted a letter from Dr. J. B. Falterman, Sr., dated May 19, 2003, indicating Alleman was not a candidate for court proceedings because he was on medication for anxiety and that he had recently been released from the hospital. Both parties agreed that Alleman should be excused from testifying. (Tr. 6-7).

At the time of the in March 2001 incident, Alleman was a relatively new employee who was training to become a loader operator. (Tr. 84-86, 309-10, 595-96; Comp. Ex. 7). Without specifying the date, Christian stated that he once warned Alleman to slow down his operation of a loop truck. (Tr. 229-30). Gary and Wilson also testified they were aware of instances when Alleman was observed operating equipment at excessive speeds. (Tr. 276-78, 280, 309-11).

Company officials stated Alleman was "volatile" and that he had "erupted vocally a couple of times." (Tr. 543-44, 659-60). Approximately six months after Jeanlouis' suspension, Alleman was suspended from October 13 through October 20, 2001, for reckless operation

of a Gator after he "bumped" a fellow employee's Gator.[3] At the time of the incident, Alleman was involved in an altercation with the other Gator operator. At that time, Aleman was referred for anger management sessions. (Tr. 535-43). Alleman was again referred for anger management classes in April 2002. (Tr. 657-61).

d. The March 2001 Incident

On March 10, 2001, Jeanlouis worked the day shift, and Alleman and Wendell Chambers, a powderman, worked the evening shift. Alleman approached Jeanlouis as Jeanlouis was parking his loader at the end of his shift. Jeanlouis testified that he and Alleman had almost collided the previous week when Alleman operated his Caterpillar 988 loader in high gear around a corner at a high rate of speed passing between Jeanlouis and the beltline. (Tr. 83-84). Jeanlouis stated he told Alleman:

> You need to slow down. You're driving the loader too fast. . . . you and I almost got in a collision . . . about a week before this.

(Tr. 82).

Jeanlouis stated Alleman replied "you can't tell me how to run a loader." (Tr. 82-83). Jeanlouis testified he answered:

> Well Dalton, I'm not trying to tell you how to run a loader. All I'm asking you just to be safe. Just watch yourself. I mean be safe for yourself and the other employees.

(Tr. 82-83).

At the beginning of the March 10, 2001, evening shift, Chambers was at his locker, approximately 10 feet away from Jeanlouis and Alleman. (Tr. 329). The loader was parked between the locker and where Jeanlouis and Alleman were speaking. (Tr. 324-25, 328-29). Chambers was the only person who overheard any portion of the conversation. (Tr. 464-66). Chambers testified he overheard Jeanlouis tell Alleman "to slow down" and that "you're making us look bad." (Tr. 325-27). Chambers indicated "[he had] no idea what [Jeanlouis] meant by that, by what he said." (Tr. 327-28). Chambers stated, "there was nothing else I overheard." (Tr. 326). Chambers testified he did not overhear any reference to "load counts" in the conversation. (Tr. 331). Chambers stated neither Jeanlouis nor Alleman was threatening the other. (Tr. 325). Morton does not contend that Jeanlouis encouraged any of the other loader operators to "slow down." (Tr. 680).

[3] A Gator is a four-wheel mine transportation vehicle manufactured by John Deere.

e. The Investigation

Alleman reported his March 10 conversation to Leonard Olivier, the day shift foreman. Unlike Chambers who opined that the conversation was non-confrontational, Olivier related Alleman told him Jeanlouis "was in my face." Alleman told Olivier:

> Mr. Jeanlouis jumped all in my face and jumped in my shit about how much salt I'm hauling and how fast I'm hauling the salt saying I'm making other operators look bad.

(Tr. 368).

Olivier was upset that Jeanlouis talked directly to Alleman without going through management. Olivier told Alleman:

> Well let me point out one thing to you, if that is the way the conversation went, it shouldn't have went like that. Eddie or nobody else has the right to dictate to you or anyone else how to perform your job. We train you in order to do a job and to do it as efficiently as possible. We train you as a loader operator. If you progress well, you're doing pretty good as a loader operator, and unless myself or the other foremen have a problem with the way you're operating the loader, no one is to dictate to you or anybody else how to perform the job. You need to go ahead and continue doing your work as well as possible and as well as you see fit, and, if we see a problem, we'll address the problem with you.

(Tr. 372).

Shortly after talking to Alleman, Olivier asked Jeanlouis if he "[told] Alleman anything about him running the loader too fast, hauling too much salt and making the other operators look bad." (Tr. 373-74). Jeanlouis replied that "I didn't tell Alleman nothing like that. I told Alleman he was running that loader too fast. It was like he was running that loader in third gear." (Tr. 374). Olivier replied:

> Well, okay. The only thing I want to point out to you , I don't know what exactly went on between you and Mr. Alleman, but it's not your job or anybody else's job to dictate to the other people on their efficiency of their work . . . . We don't need that kind of stuff going on between employees.

(Tr. 374-75).

After speaking to Jeanlouis, Olivier learned that Alleman had also complained about Jeanlouis to Lane Hendricks, Morton's Mine Production Superintendent. Hendricks requested Olivier to document his conversations with Alleman and Jeanlouis so the company could "pursue it." (Tr. 376). On March 19, 2001, Olivier prepared written notes of his conversations. The notes were recorded several days after Olivier spoke to Alleman and Jeanlouis. (Comp. Ex. 3). In the final analysis, Olivier opined that "it was one word against the other." (Tr. 379).

On March 14, 2001, the matter was brought to the attention of Charles Justice, Morton's Human Resource Manager by Dan Schmidt, Morton's Mine Manager. Schmidt informed Justice that Alleman had told Olivier that Jeanlouis had confronted Alleman "about the number of loads [Alleman] was hauling." (Tr. 443). Significantly, as noted, Chambers did not report overhearing any remarks about load counts. (Tr. 331).

Justice began his investigation on March 16, 2001, when he interviewed Alleman. Alleman told Justice that Jeanlouis had confronted him, that it was a rather heated discussion, that Jeanlouis told him to slow down the number of loads he was hauling, and, that he was making others look bad. Alleman alleged Jeanlouis said, "you get a hundred today, they'll want 110 or 120 tomorrow. If you don't get it, they'll have you up there in front of a kangaroo court." (Tr. 447). Justice made notes of his interview with Alleman. (Resp. Ex. 5). The allegations by Alleman to Justice about 'load counts and a kangaroo court' are inconsistent with Olivier's testimony and notes that do not reflect that Alleman initially made these allegations. (Tr. 368; Comp. Ex. 3).

On March 16, 2001, shortly after interviewing Alleman, Justice interviewed Chambers because Alleman stated Chambers had witnessed the conversation. (Tr. 454). Chambers told Justice, "I heard a little, what I got was Eddie telling Dalton he needed to slow down, he was going too fast with loads. He (Dalton) was trying to make everyone look bad." (Resp. Ex 6). Although Chambers did not interpret what he had overheard, Justice concluded what Chambers overheard had to do with load counts not safety. (Tr. 459-60). Chambers testified he did not tell Justice that he overheard anything said "about load counts." (Tr. 330-31; Resp. Ex. 6).

After interviewing Alleman and Chambers, Justice concluded he was investigating charges of harassment and encouraging a work slowdown. (Tr. 461-62). Article I, section 1.6E of the union contract with the International Chemical Workers Union Council gives Morton the unqualified right to discipline or discharge employees engaging in a work slowdown. (Resp. Ex. 8).

On March 19, 2001, Justice held a fact finding meeting with Jeanlouis, Schmidt, Hendricks, personnel officer Myra Russo, and union representative Frederick Williams. At the meeting Jeanlouis continued to maintain that he told Alleman to slow down because he was operating unsafely. (Tr. 118). Justice told Jeanlouis he violated section 1.6 of the bargaining agreement because "you can't tell a fellow worker to slow down, no way, no how, on salt." (Tr. 118-19). Jeanlouis was informed he was suspended and he was immediately escorted off of the island by a security guard. (Tr. 119).

In a disciplinary letter dated March 23, 2001, Jeanlouis was advised that Morton concluded he had encouraged a work slowdown in violation of the Collective Bargaining Agreement by verbally intimidating Alleman in an attempt to coerce Alleman to reduce the number of loads he hauled per shift. Consequently, Jeanlouis was suspended without pay for two weeks. He was permitted to return to work as of Monday, April 2, 2001. (Comp. Ex. 7).

III. Further Findings and Conclusions

a. The Timeliness Issue

Section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2), provides that any miner "who believes that he has been . . . discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint of discrimination with the Secretary alleging such discrimination." The subject adverse action is the imposition of Jeanlouis' two week suspension on March 23, 2001. The 60 day filing period specified in section 105(c)(2) ended on May 23, 2001. Jeanlouis initially filed his complaint with the Secretary on November 20, 2001, approximately six months late.

Morton sought dismissal of Jeanlouis' complaint as untimely during the pre-trial phase of this proceeding. During pre-trial conferences, I advised Morton that the Commission has previously determined the 60 day filing period specified in the statute is not jurisdictional, and, that in the absence of a showing of prejudice, a late filing may be excused. *See Hollis v. Consolidation Coal Co.*, 6 FMSHRC 21, 24 (Jan. 1984), *aff'd mem.*, 750 F2d 1093 (D.C. Cir. 1984). However, I deferred ruling on Morton's motion until after the hearing to provide Morton an opportunity to argue in support of dismissal in its post–hearing brief. (Tr. 30-31).

The Commission has concluded that "a miner's genuine ignorance of applicable time limits may excuse a late filed discrimination complaint." *Schulte v. Lizza Indus., Inc.*, 6 FMSHRC 8, 13 (Jan. 1984). Jeanlouis is represented by his wife, who is not an attorney. Although the explanation for Jeanlouis' late filing is not well articulated, Jeanlouis asserts he was unaware of his miner's rights under the Act. (Resp. Ex. 2). Jeanlouis' assertion is supported by fellow loader operator Dalton Gary who testified he was not familiar with his miner's rights although he has been employed by Morton for 23 years. (Tr. 282-83). Finally, Young testified he was unaware of any previous discrimination cases brought against the company during the last 15 years. (Tr. 627-28). Thus, it is reasonable to conclude that Jeanlouis was unaware of the filing deadline specified in the Mine Act.

Having concluded Jeanlouis was unfamiliar with the filing requirements, the focus shifts to whether Morton has been prejudiced by Jeanlouis' six month delay. *Sec'y of Labor on behalf of Hale v. 4-A Coal Co.*, 6 FMSHRC 905, 908-09; (June 1984); *Sec'y of Labor on behalf of Hale v. 4-A Coal Co.*, 8 FMSHRC 905 (June 1986); *Sec'y of Labor on behalf of Nantz v. Nally & Hamilton Enters.*, 16 FMSHRC 2208, 2214-15 (Nov.1994); *Sec'y of Labor on behalf of Poddey v. Tanglewood Energy, Inc.*, 18 FMSHRC 1315, 1325 (Aug. 1996). Morton argues:

> [if Jeanlouis'] complaint had been timely filed and [the] matter proceeded on ordinary schedule, Mr. Alleman's problems would never have come to the court's attention . . . . it would be grossly inappropriate now to penalize Morton because of Mr. Jeanlouis' unilateral delay. Had the complaint been filed within the required time frame and prosecuted in accordance with the usual schedule, the trial could well have taken place in the late summer or early fall of 2001- before Mr. Alleman's anger management issues had developed.[4]

(*Resp. Mem. Of Law*, p.6).

Thus, Morton views Jeanlouis' untimely filing as prejudicial because it resulted in the exposure of adverse facts that occurred after Jeanlouis' suspension. The consideration of relevant evidence that comes to light because of a hearing delay does not give rise to a claim of legal prejudice. Rather, Jeanlouis' filing delay was fortuitous because it provided a better opportunity to weigh the conflicting accounts of the March 10, 2001, confrontation. Accordingly, Morton's motion shall be denied. *Nantz*, 16 FMSHRC at 2214-15 (failure to meet time limits in sections 105(c)(2) and 105(c)(3) should not result in dismissal, absent a showing of "material legal prejudice").

b. Analytical Framework

As the complainant in this case, Jeanlouis has the burden of proving a *prima facie* case of discrimination. In order to establish a *prima facie* case, Jeanlouis must establish that he engaged in protected activity, and the aggrieved action was motivated, in some part, by that protected activity. *See Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-2800 (October 1980) *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981).

Ordinarily, a mine operator may rebut a *prima facie* case by demonstrating, either that no protected activity occurred, or the adverse action was not motivated in any part by protected activity. *Robinette*, 3 FMSHRC at 818 n.20. Since Morton concedes Jeanlouis' suspension was motivated by his interaction with Alleman, Morton's rebuttal is limited to establishing that Jeanlouis' March 10, 2001, activity was not protected. Determining whether Jeanlouis engaged in protected activity has two components. The first, is resolution of the differing accounts of the March 10, 2001, incident which presents a question of fact. After resolving the contextual nature of what Jeanlouis said, the remaining issue is whether the remarks constitute protected activity which is a question of law.

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[4] Morton notes that this case was further delayed by Jeanlouis' efforts to retain counsel. Although Jeanlouis did retain counsel, his counsel withdrew and he ultimately prosecuted his complaint himself. (*Resp. Mem. Of Law*, fn.4).

c. Jeanlouis' *Prima Facie* Case

As noted, Jeanlouis only has the burden of proving his March 10, 2001, activity is protected since Morton's motivation is not in issue. Jeanlouis' testimony is direct evidence. It is supported by the character evidence provided by Christian (Tr. 227-28, 231-32), Olivier (Tr. 392), Gary (Tr. 282), Justice (Tr. 546), Wilson (Tr. 302-03) and Young (Tr. 656). Jeanlouis' characterization of his conversation with Alleman is also supported by Chambers who did not overhear anything said about load counts. (Tr. 331). Jeanlouis' testimony is further supported by Morton's admission that Jeanlouis had no motive to encourage a work slowdown since he was not privy to productivity statistics, and, he had never been warned about his productivity. (Tr. 602-06, 610-12). Finally, Jeanlouis' assertion that he was motivated by safety is supported by the undisputed fact that there is no evidence that Jeanlouis encouraged any other loader operator to "slow down." (Tr. 680). Thus, Jeanlouis has presented a *prima facie* case that he engaged in protected safety-related activity.

d. Morton's Rebuttal Case

i. Communication of Complaint

Having presented a *prima facie* case, the burden of going forward shifts to Morton. As an initial matter, Morton argues that even if the confrontation was about safety rather than productivity, the confrontation does not constitute protected activity because Jeanlouis did not communicate his complaint directly to Morton. (*Resp. Mem. of Law*, fn.1). On the contrary, Jeanlouis did communicate his complaint to Morton when he discussed his complaint about Alleman with Olivier, a supervisory agent. Nevertheless, the issue is Morton's knowledge of the alleged protected activity. It is immaterial that the mine operator learned of the alleged protected conduct indirectly.

Moreover, the expression of safety related concerns among miners is consistent with the type of protected activity contemplated by the Mine Act. *Sec'y on behalf of Bernardyn v. Reading Coal Co.*, 22 FMSHRC 298, 309 (March 16, 2000) (dissenting opinion) *citing* S. Rep. No 95-181, at 36 (1977), *reprinted* in Senate Subcomm. On Labor, Comm. On Human Resources, *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624 (1978) (Act's anti-discrimination provision should be "construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation"). Suspending a miner for expressing safety concerns to a fellow miner would create a chilling effect on a miner's willingness to point out safety problems. In fact, Morton encourages employees to discuss safety concerns with each other. (Tr. 372-73).

ii. Independent Business Judgement Issue

Morton also relies on the Commission's decision in *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2516-17 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983), to assert that its suspension of Jeanlouis is a business decision that is entitled to deference. *Chacon* and its progeny hold that Commission Judges should not substitute their business judgment for that of the mine operator concerning whether a particular adverse action was "just" or "wise." The line of cases in *Chacon* limits the Commission's inquiry to whether the adverse action was motivated by an independent business decision that was unrelated to protected activity. For example, the termination of a miner for absenteeism or insubordination ordinarily will not be disturbed by the Commission even though the miner has a history of engaging in safety related activity, provided the mine operator demonstrates the termination was independently motivated by a legitimate business justification.

Morton's reliance on *Chacon* for the proposition that I should defer to Morton's business judgment in this case is misplaced. To defer to a mine operator on whether a particular activity is protected would eviscerate the anti-discrimination provisions of section 105(c), as well as trivialize the Commission's role as a disinterested adjudicative body. Whether a miner's conduct constitutes protected activity is a question of law that can only be determined by the Commission.

e. Resolution of the Protected Activity Issue

i. Probity of Alleman Hearsay

Morton's assertion that Jeanlouis' conduct is not protected because he purportedly encouraged Alleman to 'decrease his load count to avoid a kangaroo court' is based on hearsay evidence since Alleman did not testify. Hearsay evidence is admissible in Commission proceedings as long as it is material and relevant. *REB Enterprises, Inc.*, 20 FMSHRC 203, 206 (March 1998) (citations omitted).

However, hearsay testimony is entitled to little weight if it is surrounded by inadequate indicia of probativeness and trustworthiness. *Mid-Continent Resources, Inc.*, 6 FMSHRC 1132, 1135-36, (May 1984). The credibility of Alleman's hearsay statements has been compromised by his conduct. Alleman asserted Jeanlouis was "in his face." However, Morton described Alleman as "volatile," and it required Alleman to attend anger management classes in October 2001 and April 2002. (Tr. 543-44, 657-61). Alleman denies that he was operating equipment unsafely as Jeanlouis charged, however, Morton suspended Alleman in October 2001, for reckless operation of equipment. (Tr. 535-43). Moreover, Gary (Tr. 276-78, 280), Christian (Tr. 230), and Wilson (Tr. 309-11), testified they were aware of instances when Alleman was observed operating equipment at excessive speeds. Thus, unlike Jeanlouis, Alleman has a history of employee misconduct.

Moreover, hearsay evidence is not probative if it is without corroboration, and if it lacks circumstances that lend to its credence. *Id* at 1136. Alleman's "kangaroo court" allegation was not corroborated by Chambers who testified he did not overhear any discussion of load counts. In addition, the "kangaroo court" remark reported to Justice on March 16, 2001, was not reported by Alleman to Olivier following the incident. Alleman simply told Olivier that Jeanlouis' warning was limited to 'slow down because you are making us look bad.' Moreover, Alleman's hearsay lacks credence in that the evidence reflects Jeanlouis had no apparent motive to encourage a work slow down.[5] On the other hand, Alleman had a motive to misrepresent Jeanlouis' warning to avoid disciplinary action for his alleged unsafe loader operation.

Morton has failed to demonstrate that Jeanlouis made any statements that clearly reflected an attempt to encourage a work slowdown. This conclusion is consistent with Olivier's testimony that indicates that, initially, the major issue was Jeanlouis' failure to speak to management instead of speaking directly to Alleman. What started as Jeanlouis' failure to go directly to management quickly escalated to charges that Jeanlouis encouraged a work slowdown. Such a charge provided Morton with the unfettered right to discipline Jeanlouis under the Collective Bargaining Agreement with little opposition from the union. (Tr. 118-19). In the final analysis, the evidence only supports that Jeanlouis told Alleman "to slow down, you're making us look bad." Having resolved the factual issue concerning the statement's content, the remaining question of law is whether the statement, when viewed in context, is protected.

Morton has expressed puzzlement, incredulity and surprise that Jeanlouis would attempt to incite a work slowdown. In this regard, Facility Manager Young was admittedly "puzzled" why Jeanlouis would encourage a work slowdown given the lack of productivity reports. (Tr. 618). Human Resource Manager Justice testified, it ". . . was a strange thing, . . . why would [Jeanlouis] have been concerned about the number of loads." (Tr. 544-45). Finally third shift supervisor Christian could not believe "[w]hat [Jeanlouis] was alleged to have said to [Alleman]," and he "was somewhat surprised" that Jeanlouis was suspended. (Tr. 230-32). Thus, the evidence, when viewed in context, demonstrates that it was unlikely that Jeanlouis was trying to encourage a work slow down.

As Olivier opined, "it was one word against the other." (Tr. 379). On balance, it is more likely that Jeanlouis was attempting to warn Alleman, who was training to become a loader operator, not to try to impress management by operating at a higher speed than the other loader operators. In other words, the credible evidence reflects that Jeanlouis' conduct was protected because it was motivated by a concern for safety rather than by a concern over productivity.

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[5] Young concedes Jeanlouis had no reason to be concerned about his productivity. (Tr. 602-06, 610-12). However, Young speculated Jeanlouis' statements may have been motivated by a desire for overtime. (Tr. 579). There is no evidence to support such speculation, especially since Jeanlouis did not encourage other loader operators to slow down.

Assuming, *arguendo*, Jeanlouis' statement, "slow down, you're making us look bad," was also motivated by his unprotected desire for a work slowdown, a significant portion of Jeanlouis' warning concerned safety issues. After all, the goal was for Alleman to operate more slowly. If Alleman had not been operating faster than the other loader operators, the comments Morton seeks to attribute to Jeanlouis would be senseless. Subordinating productivity to promote safety is a fundamental goal of the Mine Act. The Commission has concluded, when a significant portion of a conversation concerns safety, it is protected even if unprotected statements are uttered during the same conversation. *Sec'y of Labor on behalf of Knotts v. Tanglewood Energy, Inc.*, 19 FMSHRC 833, 839-40 (May 1997).

As a final matter, Morton asserts Alleman's personnel problems are irrelevant because they came to light after Jeanlouis was suspended. Morton's relevancy objections were overruled because the evidence is relevant as it pertains to Alleman's credibility. (Tr. 537-39, 656-62). The ultimate issue is not, as Morton suggests, whether it had a good faith reasonable belief in March 2001 that Jeanlouis did not engage in protected activity. Rather, the proper question is whether Jeanlouis' March 2001 activity was protected. A just resolution of this question requires the beneficial use of hindsight. As Young, Morton's Facility Manager, candidly conceded, "[if] this happened today, . . . perhaps I [would] look at [it] a little different, yes, sir, I would." (Tr. 660-61).

To prevail, a complainant need only show that the adverse action complained of was motivated by protected activity. The failure of a mine operator to recognize the protected nature of the activity is not a defense. Accordingly, Jeanlouis' complaint shall be granted because his two week suspension was motivated by his protected activity.

ORDER

In view of the above **IT IS ORDERED** that Eddie M. Jeanlouis, Sr.'s discrimination complaint concerning his suspension without pay for the two week period preceding his return to work on April 2, 2001, **IS GRANTED.**

This Decision on Liability is an interim decision. It does not become final until a Decision on Relief is issued. Accordingly, **IT IS FURTHER ORDERED** that the parties should confer **before September 19, 2003**, in an attempt to reach an agreement on the specific relief to be awarded. If the parties agree to stipulate to the appropriate relief to be awarded they shall file a Joint Stipulation on Relief **on or before September 26, 2003.** An agreement concerning the scope and amount of relief to be awarded shall not preclude either party from appealing this decision.

If the parties cannot agree on the relief to be awarded, the parties **ARE FURTHER ORDERED** to file, **on or before October 3, 2003**, Proposals for Relief specifying the appropriate relief to be awarded. For the purposes of calculating relief, the parties are encouraged to stipulate to an average weekly salary, including overtime. If the parties cannot reach a joint stipulation, the parties should furnish documentation, such as payroll records, pay stubs or tax returns, to support their average weekly pay calculation. After Petitions for Relief are filed, I will confer with the parties to determine if there are disputed factual issues that require an evidentiary hearing.

Commission Rule 44(b), 29 C.F.R. § 2700.44(b), provides that the Judge shall notify the Secretary in writing immediately after sustaining a discrimination complaint brought by a miner pursuant to section 105(c)(3) of the Act. Consequently, the Secretary shall be provided with a copy of this decision so that she may file a petition for assessment of civil penalty with this Commission.

Jerold Feldman
Administrative Law Judge

Distribution: (Certified Mail)

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