FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001

December 8, 2004

STANLEY QUACKENBUSH,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. SE 2003-83-DM
v.	:	SE MD 2002-13
	:	
KENTUCKY-TENNESSEE CLAY,	:	Kentucky-Tennessee Clay
Respondent	:	Mine ID 38-00052

DECISION

Appearances: John P. Batson, Esq., Augusta, Georgia, for the Complainant;
R. Lee Creasman, Esq., Joshua H. Viau, Esq, Elarbee, Thompson, Sapp & Wilson, LLP, Atlanta, Georgia, for the Respondent.

Before: Judge Feldman

This case is before me based on a discrimination complaint filed with this Commission pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(3) (the Act). The complaint was filed by Stanley Quackenbush against the respondent, Kentucky-Tennessee Clay (KTC).[1] Quackenbush asserts that he engaged in protected activity when he complained about a hazard caused by tree limbs that protruded over train tracks traveled by company railcars. Quackenbush contends that his complaint motivated the company to issue a retaliatory disciplinary write-up on July 12, 2002, following a July 9, 2002, on-site MSHA inspection conducted in response to an employee complaint. The disciplinary action was taken because of Quackenbush's alleged failure to report the tree limb problem to the company in a timely manner. Quackenbush also asserts that he was ordered to clear the overgrowth from the tracks on August 2, 2002, in retaliation for his safety complaint. Quackenbush alleges that he sustained carpal tunnel injuries as a result of his track clearing assignment.

In response, KTC contends its July 12, 2002, disciplinary action, and its decision to assign Quackenbush to trim the trees and bushes alongside the train tracks, were not motivated by Quackenbush's protected activity. With respect to the job assignment, KTC alternatively maintains that Quackenbush was assigned to clear the tracks for business reasons that were unrelated to his protected activity.

[1] Quackenbush's complaint which serves as the jurisdictional basis for this case was filed with the Secretary of Labor on August 22, 2002, in accordance with section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2). The complaint was investigated by the Mine Safety and Health Administration (MSHA). On February 11, 2003, MSHA advised Quackenbush that the facts disclosed during its investigation did not constitute a violation of section 105(c). On March 6, 2003, Quackenbush filed his discrimination complaint with this Commission which is the subject of this proceeding.

This case was heard on July 13 and July 14, 2004, in Augusta, Georgia. The record was left open for the teleconference testimony of Glenn Mealer, Quackenbush's co-worker, who was unable to attend the hearing. Mealer's testimony was taken on July 20, 2004, at which time the record was closed. The parties' post-hearing briefs have been considered in the disposition of this matter.

For the reasons discussed below, Quackenbush's discrimination complaint with respect to his July 12, 2002, disciplinary notice shall be granted. However, Quackenbush's branch trimming job assignment was motivated by an independent business decision that would have been taken even if Quackenbush had not engaged in protected activity. Accordingly, Quackenbush's complaint regarding his assigned duties on August 2, 2002, shall be denied.

I. Findings Of Fact

a. KTC Operations

KTC processes kaolin clay at its Langley, South Carolina facility where it employs approximately fifty people. At all times relevant to this proceeding, Murray Penner was the Plant Manager, Teresa Bolin was the Safety Manager and Bob Wiley was the Production Supervisor. The clay processed at Langley is extracted from three different mine locations in Aiken County, South Carolina that are located one, seven and twenty-six miles away from the Langley facility. At these mine sites, overburden, consisting of dirt, sand and other debris, is removed from the top layer of earth to expose the kaolin. This is done through a process called "stripping" which involves the use of tractors and scrapers. After kaolin is exposed, it is dug out with a track hoe, loaded into dump trucks, and transported to the Langley plant storage area.

At the storage area, the clay is processed through hoppers and slicers from boulder size to small pieces varying in size from one to two feet in diameter. The clay is then transported to one of two mills, one a roller, and the other a set of huge hammers, that break and de-conglomerate the clay. The clay is then classified and prepared for shipment.

Once ready for shipping, the clay is loaded into rail cars by the bulk loading crew, which consists of an engineer and a switchman. The railcars are backed into a shed where large pipes load clay into the top of the railcars. Upon leaving the shed, the train travels about 1,000 to 1,500 feet to a switch where the switchman washes excess clay or spillage from the outside of the railcars. After washing, the railcars are taken by locomotive, usually three or four at a time, to the mainline where the clay filled cars are decoupled for shipment to customers.

The rail line running from the plant to the mainline is approximately one and one half miles long and crosses two public roads. The first leg of the trip is approximately one mile during which time the train travels downhill at approximately ten miles per hour, with the locomotive in front, until it reaches Huber Clay Road. At that point the switchman, who had been riding in the engineer compartment, exits the train to stop traffic so that the train can cross Huber Clay Road. The switchman then climbs aboard the side or rear of the train while the train

travels an additional 1,000 feet where the tracks cross Highway 421. The train travels at speeds of approximately two to four miles per hour between Huber Clay Road and Highway 421.

At Highway 421 the switchman once again gets off the train to stop traffic so the train can cross. The switchman climbs back aboard the side or rear of the train for a distance of a few hundred feet until the train arrives at the mainline drop-off site. When riding on the ladder attached to the side of the train, the switchman has the greatest exposure to being struck by overgrown branches. (Tr. 238). Upon arriving at the mainline, the cars are decoupled and empty cars are connected to the locomotive. The empty cars are transported uphill back to the processing plant with the locomotive in the back, to begin the cycle over again.

b. Quackenbush's Employment

Stanley Quackenbush was 40 years old during the relevant times in this proceeding. He is approximately five feet eight inches tall and weighs about 193 pounds. (Tr. 36). Quackenbush's employment history includes working from 1987 until 1999 as a carpenter in construction jobs that included framing houses. Prior to working in carpentry, Quackenbush was a production forklift operator from 1982 to 1987. (Resp. Ex. 1; Tr. 201). Quackenbush also has a history of self-employment in the remodeling business that includes construction of porches and decks. (Tr. 160).

Quackenbush testified that he had a "slight case" of carpal tunnel since a 1999 automobile accident. (Tr. 133-34, 180-81). He initially learned of his condition after it was identified in a February 1, 1999, electromyography (nerve conduction study) conducted shortly after his accident. The electromyography revealed evidence of "a slight case of carpal tunnel in [his] left hand." (Tr. 181-83; Comp. Ex. 8). Although the diagnostic test showed evidence of a mild condition, prior to August 2, 2002, Quackenbush was never treated for carpal tunnel. Despite any history of relevant treatment, he reportedly experienced "tingling" in his hands and arms when operating his weed-eater at home. (Tr. 178-80). After he recovered from his car accident, Quackenbush had no physical impairment that interfered with his activities. (Tr. 179). In this regard, Quackenbush testified he was able to perform construction work without difficulty at Kelly Construction Company when he returned to work in 1999 after his accident. (Tr. 185-86).

Quackenbush began working for KTC in April 2000 as a utility worker. As a utility worker, his duties consisted of cleaning the plant, which included lifting forty-five to fifty pound bags of clay, sweeping, and shoveling clay weighing up to twenty pounds per shovel when wet. Later, Quackenbush held the position of "super sacks" which required him to fill and weigh sacks of clay, and load the sacks onto a pallet with a forklift. At no time during his employment in these general laborer positions did Quackenbush notify anyone that he had any physical limitations that prevented him from performing the full range of his job duties. (Tr. 200-01).

On or about September 10, 2001, KTC posted a job opening notice for the "bulk loader" position. The duties of the bulk loader, which were listed in the notice, included "making sure

the railroad track is kept clean and safe," "performing the duties of a switchman when the train is being operated," and "performing other duties that may be assigned by your supervisor." (Resp. Ex. 2; Tr. 160-01). On September 17, 2001, Quackenbush submitted a bid for the bulk loader position and he was selected for the job. (Resp. Ex. 3; Tr. 161).

Glenn Mealer also held the position of bulk loader and he operated the locomotive. Quackenbush assumed the role of switchman when the train was in use. As bulk loaders, Quackenbush and Mealer were responsible for maneuvering the rail cars in the loading area, and for transporting the cars to the mainline for delivery to customers. While there were three shifts at Langley, at all times relevant to this proceeding, Mealer and Quackenbush were the only bulk loaders as the train was only operated for a single shift. Both Mealer and Quackenbush reported to Bob Wiley. As with his duties as a utility man and "super sacks," Quackenbush was able to perform his bulk loader/switchman job without any restrictions or physical limitations until his reported injury on August 2, 2002. (Tr. 179, 200-01).

c. July 9, 2002, MSHA Track Inspection

On July 9, 2002, MSHA Inspector James Enoch visited the Langley site to investigate a written complaint MSHA had received from an employee regarding overgrowth over the train tracks. (Tr. 335). Wiley, Bolin and Penner testified this was the first time they learned of hazardous tree limbs. (Tr. 224, 336, 403). Both Quackenbush and Mealor deny that they were the source of the MSHA complaint. (Tr. 166, 515). The identity of the complainant has not been revealed.

Both Quackenbush and Mealer testified they repeatedly communicated verbal complaints to management. (Tr. 42-50, 52, 61, 64, 169-70, 511). In this regard Mealer testified "I mentioned it to [Wiley] plenty of times about the trees need cutting, but it's just like they don't listen to you." (Tr. 511). Mealer testified Wiley and Bolin told them to write a work order if they wanted anything done about the overgrowth. (Tr. 508-09, 533, 535-36). Consequently, Mealer left a written work order for cutting tree limbs in Bolin's mailbox on July 8, 2002. (Tr. 340, 512-13). Quackenbush believed the write-up occurred on June 28, 2002. (Tr. 48-49). Bolin, who had just returned from vacation, was not aware of the work order when Enoch arrived at the mine site on July 9, 2002, because she had not read her mail. (Tr. 339-41).

Enoch rode the train with Quackenbush, Mealer, Bolin, Wiley and Penner. In addition to observing the track conditions, Enoch reviewed work orders from the previous three months to determine if hazardous track conditions had been reported. With the exception of the work order written by Mealer the previous day, Enoch did not find any relevant written complaints about overgrown trees. (Tr. 339, 343).

As a result of his inspection, Enoch issued Citation No. 6111950 on July 9, 2002, citing a violation of the mandatory safety standard in section 56.11001 that requires that a safe means of access to all working places must be provided and maintained. 30 C.F.R. § 56.11001.

Citation No. 6111950 stated:

> Tree limbs growing out over the railroad tracks constitutes (sic) unsafe access for the switchman who rides out on the end of the bulk railcar from the mainline to the loadout area. The slapping action of the limbs as he passes by could cause serious injury.

(Comp. Ex. 1).

The violation was designated as non-significant and substantial (non-S&S). A violation is non-S&S if it is unlikely that the hazard contributed to by the violation will result in the occurrence of a serious injury. *Nat'l. Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). Inspector Enoch established July 22, 2002, as the abatement date for the cited track violation. (Comp. Ex. 1). The abatement date was subsequently extended through the first week of August 2002. (Tr. 76).

d. July 12, 2002, Disciplinary Action

Wiley, Bolin and Penner testified neither Quackenbush nor Mealer had reported any tree limb problems before Enoch's July 9, 2002, inspection. (Tr. 224, 336, 404, 425-26). Each employee is responsible for reporting potential safety hazards in their work area. Penner did not consider Mealer's July 8, 2002, written work order as timely given the long term nature of the hazardous condition. Thus, on July 12, 2002, Wiley issued written warnings to Quackenbush and Mealer, which were removed from their files after thirty days, for "failure to report a hazard in your work area in a timely manner." (Comp. Exs. 3, 4; Tr. 424). Quackenbush conceded his file no longer contained any reference to the July 12, 2002, disciplinary notice and he did not suffer any loss of pay, demotion or other adverse action as a result of the warning. (Tr. 168-69).

e. Abatement of Citation No. 6111950

Upon receiving the citation, Penner began to consider options for trimming the overgrowth. Penner had never been involved with controlling the track vegetation. In the past, tree cutting arrangements were made by Oscar Rhoades, KTC's Purchasing Manager. Rhoades had hired contractors to cut limbs that impeded the track. Rhoades retired at the end of 2001. (Tr. 336-37). Penner requested an estimate from a local contractor. The estimate was between $8,000 and $10,000. Because the bid seemed high, Penner obtained a second bid that was similar to the initial estimate. (Tr. 415).

Penner considered the estimates to be extremely high. Penner believed the company could avoid the expense by assigning KTC employees to trim the branches using equipment that could be purchased for less than $1,000. Penner ordered a commercial weed-eater with a hedge trimmer attachment to perform the pruning. (Tr. 415). The weed-eater without the hedge trimming attachment weighs approximately 11 pounds. (Comp. Ex. 5). It is unclear how much additional weight is added with the attachment.

While waiting for the weed-eater to be delivered, realizing that MSHA had established July 22, 2002, as the abatement date, Penner enlisted the help of maintenance mechanics Earl Morris and Wes Taylor. Morris and Taylor volunteered to work on a Saturday using their personal chain saws to clear the brush along the side of the track. Morris and Taylor cut back the brush while standing on the front platform of the locomotive while Cliff Jones operated the train. However, they were unable to clear all of the branches because the chain saws lacked the reach of the weed-eater/hedge trimmer. (Tr. 415-16).

Once the hedge trimmer arrived, Penner decided that Quackenbush and Mealer were the logical choices to trim the branches because they routinely traveled the train tracks. (Tr. 420-21). Penner explained his decision followed normal plant policy that kept maintenance mechanics free to perform repairs while production employees were responsible for maintaining their own work areas. (Tr. 420-22, 434; Resp. Ex. 2). Moreover, once Quackenbush and Mealer were trained to use the brush trimmer, they could take care of overgrowth as the need arose during the course of their trips to and from the mainline. (Tr. 421).

Based on Penner's decision, on August 1, 2002, Wiley told Mealer that he and Quackenbush were going to be task trained on the new trimmer, and that they were to cut the branches the following day. (Tr. 231). The next day, on Friday, August 2, 2002, Wes Taylor, a maintenance mechanic, went down to the pit area to get Mealer and Quackenbush to task train them on the new equipment. (Tr. 298-99). Mealer and Quackenbush were non-responsive, so Taylor returned to the office and informed Wiley that Mealer and Quackenbush did not want to cut the limbs. (Tr. 233). Taylor returned to the pit area with Wiley. Wiley asked Mealer and Quackenbush if there was a problem. He explained to the men that Taylor was going to task train them, and he emphasized that they were responsible for cutting the branches. (Tr. 234).

Quackenbush and Mealer testified that Wiley pointed his finger at Quackenbus and told him he would be cutting the branches while Mealer operated the train. (Tr. 132, 520). Taylor testified that he did not see Wiley point his finger. (Tr. 302). Quackenbush also testified that he expressed concerns to Wiley regarding the adequacy of the tie-off on the train handrail, and the lack of a radio on the train to report an injury. (Tr. 135, 519). Mealer stated Wiley was unresponsive to Quackenbush's safety concerns in that he continued to insist that Quackenbush and Mealer cut the limbs even if they did not want to. (Tr. 520).

At approximately 9:00 a.m., Taylor took the newly purchased trimmer and safety equipment, including a harness, safety goggles, and gloves, down to the tracks with Mealer and Quackenbush. (Tr. 298). Taylor showed them how to start the equipment and he told them to read the operational manual. (Tr. 302-04; Comp. Ex. 5). Taylor testified it took only a few minutes to task train them, and that starting and operating the weed-eater with the hedge trimmer attachment "was not very hard at all." (Tr. 320-22). As Quackenbush began reading the manual, he showed Taylor that the manual cautioned that prolonged use of the equipment can cause carpal tunnel syndrome. (Comp. Ex. 5). Quackenbush told Taylor that he had been diagnosed with carpal tunnel in the past. (Tr. 133-34). Taylor asked Quackenbush if he had notified anyone at the company, or if he had a doctor's note. (Tr. 103, 302). Quackenbush responded that he had not. (Tr. 103, 302-03; Comp. Ex 6). Taylor suggested that Quackenbush could talk to Bolin if he had a problem operating the trimmer. (Tr. 303). Taylor also suggested Quackenbush take a break if he felt tired. (Tr. 522).

Mealer and Quackenbush took turns cutting the branches as the train stopped while moving down the track. (Tr. 528). They cut the branches by extending the weed-eater with the hedge trimmer attachment over the top and to the side of the train as they stood on the platform at the front of the locomotive. They tied-off on the handrail surrounding the platform with a rope that was four feet long. As they leaned out from the train, the rope would prevent them from hitting the ground if they fell, but it would not prevent them from falling against the side of the train. (Tr. 135, 526). Mealer felt it was unsafe to stand on the train and hold the heavy trimmer out away from his body. (Tr. 529). Mealer and Quackenbush cut the limbs for approximately three hours. (Tr. 528). Although both Mealer and Quackenbush took turns cutting the brush, Mealer believed Quackenbush cut more often than Mealer did. (Tr. 530-31). At no time did Mealer or Quackenbush refuse to perform the work. Quackenbush did not complain to Taylor about carpal tunnel-like pain while using the equipment. (Tr. 303). Quackenbush believed he would be fired if he refused to trim the branches. (Tr. 144).

When Quackenbush went to lunch, his arms were bothering him. Quackenbush tried to contact Bolin on Friday afternoon on August 2, 2002, but she did not return his call. When Quackenbush returned to work on Monday, August 5, 2002, he told Bolin that his arms were hurting since using the weed-eater the previous Friday. (Tr. 371). Bolin immediately took Quackenbush to the Family Medical Center in Aiken, South Carolina. Quackenbush did not return to work after August 5, 2002, and he subsequently had surgery on both hands. He received workers' compensation until April 2003. Quackenbush returned to work at KTC from April 2003 until October 2003, at which time he again reported he could no longer work because of pain in his arms. Quackenbush is currently receiving workers' compensation benefits and he has not worked since October 2003.

Mealer, Donald Thurmond who currently is Mealer's switchman, and Earl Morris from the maintenance department, continue to periodically trim the brush with the weed-eater. (Tr. 539-40, 542-43). Since August 2, 2002, KTC has designed and constructed a platform extension that attaches to the train. This new platform is placed on the existing platform on the

front of the locomotive after the train's handrail is removed. The new platform overlaps the train making it easier to reach out and cut the branches. (Tr. 527, 539-40).

II. Further Findings and Conclusions

a. Statutory Framework

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

> No person shall discharge or in any manner discriminate against . . . 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 in a coal or other mine . . . .

30 U.S.C. § 815(c)(1).

Quackenbush has the burden of proving a *prima facie* case of discrimination. In order to establish a *prima facie* case, he must establish that he engaged in protected activity, and that the aggrieved action was motivated, in some part, by that protected activity. *See Sec'y of Labor o/b/o 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 o/b/o Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981). Quackenbush relies on his tree limb complaints as the protected activity. The adverse actions complained of are the July 12, 2002, disciplinary notice and Quackenbush's August 2, 2002, job assignment.

KTC may rebut a *prima facie* case by demonstrating, either that no protected activity occurred, or that the adverse action was not motivated in any part by protected activity. *Robinette*, 3 FMSHRC at 818 n.20. KTC may also affirmatively defend against a *prima facie* case by establishing and that it would have taken the adverse actions complained of even if the protected activity had not occurred. *See also Jim Walter Resources*, 920 F.2d at 750, *citing with approval Eastern Associated Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987); *Donovan v. Stafford Constr. Co.*, 732 F.2d 954, 958-59 (D.C. Cir. 1984); *Boich v. FMSHRC*, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's *Pasula-Robinette* test).

b. July 12, 2002, Disciplinary Notice

A fundamental element of a discrimination complaint is the mine operator's knowledge of the protected activity. Mealer and Quackenbush assert they repeatedly complained about tree limbs hitting the train. Penner, Wiley and Bolin deny any knowledge of hazardous track conditions prior to Enoch's July 9, 2002, inspection. Assuming, *arguendo*, that relevant complaints were not verbally communicated to company officials in the weeks preceding

Enoch's inspection, it is undisputed that Penner, Wiley and Bolin were aware of a protected safety related complaint by virtue of the July 8, 2002, work order.[2] Moreover, Wiley reluctantly conceded that it was reasonable to conclude that Mealer and Quackenbush were responsible, directly or indirectly, for the MSHA complaint since they were the most familiar with, and affected by, the track conditions.[3] (Tr. 251-55). Notwithstanding the fact that Mealer and Quackenbush were the logical MSHA informants, their participation in Enoch's July 9, 2002, inspection, alone, is protected activity.

The July 12, 2002, disciplinary notice charging Quackenbush with failing to report a hazard *in a timely manner* occurred shortly after the protected work order and participation in the MSHA inspection. Protected activity is unqualified. It does not lose its statutory protection simply because a mine operator considers the activity to be untimely. With respect to the suspected MSHA complaint, a miner has an unfettered right to advise MSHA of a hazardous condition. Section 105(c) of the Mine Act protects a miner's right to inform MSHA of a hazardous condition even if the miner had not brought the condition to the mine operator's attention. To allow a mine operator to insist on prior notice before a miner is allowed to contact MSHA would create a chilling effect. Thus, the July 12 discipline was motivated by protected activity, regardless of the timing of the July 8 work order. Accordingly, the disciplinary notice violated section 105(c) of the Mine Act.

c. August 2, 2002, Job Assignment

Quackenbush's protected complaint about a hazardous condition does not, alone, insulate him from being assigned to remedy that condition. Rather the issue is whether Quackenbush was the victim of discriminatory retaliation manifest by disparate treatment because of an unreasonable job assignment.

In determining whether a mine operator's action violates the statutory protection accorded to miners, the scope of a discrimination proceeding is limited to whether the operator's reported rationale for the adverse action complained of is a pretext to mask prohibited retaliation. In this regard, the "Commission does not sit as a super grievance board to judge the industrial merits, fairness, reasonableness, or wisdom of an operator's employment policies except insofar as those policies may conflict with rights granted under section 105(c) of the Act." *Delisio v. Mathies Coal Co.*, 12 FMSHRC 2535, 2544 (December 1990) (citations omitted).

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[2] Although the work order was written by Mealer, it was clear that the work order was also filed on behalf of Quackenbush. (Tr. 48-49, 513).

[3] The identity of the MSHA complainant has not been revealed. The Commission has held that ". . . discrimination based upon a suspicion or belief that a miner engaged in protected activity, even though, in fact, he has not, is proscribed by section 105(c)(1)." *Sec'y o/b/o Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475, 1480 (Aug. 1982), *aff'd. sub nom*, *Whitley Dev. Corp. v. FMSHRC*, 770 F.2d 168 (6th Cir. 1985).

The Commission has addressed the proper criteria for considering the merits of an operator's asserted business justification.

> Commission judges must often analyze the merits of an operator's alleged business justification for the challenged adverse action. In appropriate cases, they may conclude that the justification is so weak, so implausible, or so out of line with normal practice that it was mere pretext seized upon to cloak the discriminatory motive.
>
> The Commission and its judges have neither the statutory charter nor the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity. Once it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate. We and our judges should not substitute for the operator's business judgment our views on "good" business practice or on whether a particular adverse action was "just" or "wise." The proper focus, pursuant to *Pasula*, is on whether a credible justification figured into the motivation and, if it did, whether it would have led to the adverse action apart from the miner's protected activities.

Sec'y of Labor o/b/o Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2516-17 (November 1981) (citations omitted), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). The Commission subsequently further explained its analysis as follows:

> [T]he reference in Chacon to a "limited" and "restrained" examination of an operator's business justification defense does not mean that such defenses should be examined superficially or be approved automatically once offered. Rather, we intended that a judge, in carefully analyzing such defenses, should not substitute his business judgment or a sense of "industrial justice" for that of the operator. As we recently explained, "Our function is not to pass on the wisdom or fairness of such asserted business justifications, but rather only to determine whether they would have motivated the particular operator as claimed."

Haro v. Magma Copper Co., 4 FMSHRC 1935, 1938 (November 1982) (citations omitted).

Thus, resolving whether the selection of Quackenbush was a pretext to conceal a retaliatory motive requires analyzing whether KTC's proffered business justification is plainly credible and plausible. As an initial matter, it is undisputed that clearing the train track was a legitimate business necessity as it was required to abate an MSHA citation, as well as to maintain safe track conditions. Penner's decision to minimize company expense by performing the job

in-house rather than contracting it out is a decision committed to company discretion that is not amenable to judicial micromanagement.

Having concluded that the decision to use employees rather than a contractor to trim overgrowth was an independent and legitimate business decision, the focus shifts to whether the selection of Quackenbush evidenced disparate or otherwise inappropriate treatment. On August 2, 2002, Quackenbush was a 40 year old physically fit individual with a job history of manual labor, including work as a construction laborer. Quackenbush had performed all job duties at KTC without any physical limitations.

Although "slight" carpal tunnel in Quackenbush's left wrist was revealed by a clinical nerve conduction study in 1999, he had never been treated for carpal tunnel. Significantly, although he mentioned a carpal tunnel history to Taylor, Quackenbush concedes that neither Wiley nor any other management person was aware that he had any physical impairment on August 2, 2002. Having failed to communicate his carpal tunnel condition to management, his previously diagnosed carpal tunnel is not relevant to the issue of alleged retaliatory conduct.

While the initial method of cutting branches left room for improvement, as evidenced by the new platform attachment currently in use, there is no evidence to suggest Penner, Wiley or Bolin, intended to harass or intentionally inflict injury. Moreover, the retaliatory claim based on the assertion that Wiley knew the job obviously was unsafe is undermined by Quackenbush's assertion that Taylor, Morris or other Maintenance Department employees should have performed the work instead of Quackenbush. (Comp. Br. 19).

The specific task of tree pruning was not within any company job description as this function had been performed by outside contractors. However, Quackenbush's job history as a utility man performing general labor made him a suitable candidate to use a hedge trimmer. Moreover, Quackenbush and Mealer were the logical choices to trim the branches because they were familiar with track conditions. (Tr. 420-21). In this regard, production employees were responsible for maintaining their own work areas. In fact, the responsibilities detailed in the "bulk loader" job description included "making sure the railroad track is kept clean and safe." (Resp. Ex. 2). In addition, selecting bulk loaders to trim the branches kept maintenance mechanics free to perform repairs. Once Quackenbush and Mealer were trained to use the brush trimmer, they could take care of the overgrowth on an as needed basis during the course of their round trips to the mainline. In fact, Mealer and Thurmond continue to operate the hedge trimmer from the train periodically. Consequently, Penner's justification for selecting Mealer and Quackenbush is credible and plausible.

Commission judges may not substitute their view for a mine operator's business judgment on whether a particular business practice is "just" or "wise." *Chacon,* 3 FMSHRC at, 2516-17. While, with the benefit of hindsight, the August 2, 2002, method of trimming the train tracks may not have been prudent, there is no evidence the job assignment was motivated by a desire for retaliation.

In the final analysis, Quackenbush has failed to demonstrate that the August 2, 2002, job assignment was in retaliation for his protected safety related complaints. Even if Quackenbush had shown that the assignment was partially motivated by his complaints, KTC has affirmatively demonstrated that it would have assigned Mealer and Quackenbush to clear the brush from the train tracks even if they had not engaged in protected activity. Accordingly, Quackenbush's discrimination complaint with regard to his August 2, 2002, job assignment shall be denied.[4]

ORDER

In view of the above, Stanley Quackenbush's discrimination complaint with respect to his August 2, 2002, work assignment **IS DENIED.**

Stanley Quackenbush's discrimination complaint with respect to his July 12, 2002, disciplinary notice **IS GRANTED**. **IT IS ORDERED** that Kentucky-Tennessee Clay shall expunge, within thirty (30) days of the date of this decision, any reference to the disciplinary action from Quackenbush's personnel file, and that no reference to the discipline shall be disclosed to any prospective employer or other interested party.

IT IS FURTHER ORDERED that upon timely expungement of Quackenbush's personnel records, the discrimination proceeding in Docket No. SE 2003-83-DM **IS DISMISSED**.

Jerold Feldman
Administrative Law Judge

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[4] Having concluded that Quackenbush's work assignment was not motivated by protected activity, I have not addressed the issues of whether damages for pain and suffering are recoverable under section 105(c) of the Mine Act, and, if so, whether South Carolina's Workers' Compensation Act bars the recovery of such damages.