FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

March 27, 2002

LOUIS W. DYKHOFF, JR., Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEST 2001-409-DM
	:	WE MD 01-03
v.	:	
	:	Boron Operations
U. S. BORAX, INCORPORATED, Respondent	:	Mine I.D. 04-00743

DECISION

Appearances: Neil H. Herring, Esq., Sebastopol, California, for Complainant; Matthias H. Wagener, Esq., O'Melveny & Myers, Los Angeles, California, for Respondent.

Before: Judge Manning

This case is before me on a complaint of discrimination brought by Louis W. Dykhoff, Jr., against U.S. Borax, Incorporated ("U.S. Borax") under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(3) (the "Mine Act"). The complaint alleges that
Dykhoff was subjected to a number of retaliatory actions because he complained to the Department of Labor's Mine Safety and Health Administration ("MSHA") about the condition of a concrete slab in front of the truck docks at the main sack room in the shipping department at Respondent's Boron Operations. The primary retaliatory action complained of was that he was sent home on December 21, 2000, until he could climb the stairs to the lunch room in the shipping department. Dykhoff has not worked at the Boron Operations since that date. An evidentiary hearing was held in this case in Lancaster, California. The parties filed post-hearing briefs. For the reasons set forth below, I find that Mr. Dykhoff did not establish a violation of section 105(c) of the Mine Act and I dismiss his complaint of discrimination.

I. SUMMARY OF THE EVIDENCE

U.S. Borax is the operator a large mining, processing, and shipping facility in Kern County, California, called the "Boron Operations." Mr. Dykhoff worked at the Boron Operations from January 1979 until December 2000. At all relevant times, Mr. Dykhoff worked in the shipping department. The shipping department operates in two areas, the boric acid sack room and the main sack room, which are at opposite ends of the processing plant (the "plant"). The

main sack room is sometimes referred to as the Plant 9 sack room. Different products are shipped out from the two sack rooms. The employees at Boron Operations are represented by the International Longshore and Warehouse Union, Local 30 (the "union"). Mr. Dykhoff has held a number of union positions at the mine, including chief steward and union safety representative.

Mr. Dykhoff has a number of medical problems, including a degenerative joint disease in his right hand and both of his knees. He must wear bilateral knee braces at work at all times so that, if his knees give out, he does not fall over. (Tr. 27). Dykhoff also suffers from lower back problems.
Mr. Dykhoff was off work most of 1999 because of his back problems.

On December 14, 1994, Dr. Robert R. Lawrence, an orthopedic surgeon, filled out a U.S. Borax "Medical Evaluation Report – Work Limitations" form ("work limitations form") on behalf of Dykhoff so that he could return to work after having been off for medical reasons. (Tr. 28; Ex. C-2). Among other limitations, the form states that Dykhoff has a major permanent limitation with respect to climbing stairs and ladders. A note at the bottom of the form states "no prolonged ascending or descending stairs." On the same date, Dr. Lawrence executed a "Disability Certificate" which states: "No hauling, no lifting over 35 lbs, no stooping or squatting – no ladder climbing, no stair climbing." (Tr. 29; Ex. C-3).

On January 31, 1995, R. Wesley Ing, the U.S. Borax Safety Supervisor at that time, wrote Dr. Lawrence asking for clarification of the restrictions with respect to the ascending and descending of stairs. (Ex. 29-30; Ex. C-4). The letter asked the doctor for more specificity such as the number to times Dykhoff can ascend and descend stairs per shift. In a letter dated February 16, 1995,
Dr. Lawrence responded as follows:

> Thank you for your letter dated January 31, 1995, in which you asked that I define the limitation of no prolonged ascending or descending stairs. It is my orthopedic opinion that during an 8-hour shift the patient may ascend or descend flights of stairs approximately four (4) times, or as tolerated.

(Ex. C-5). The letter further states that Mr. Ing may contact Dr. Lawrence for further information.

At the boric acid sack room there is only one 4-step staircase that Dykhoff would need to use. (Tr. 31). At the main sack room there are two sets of stairs. The stairs that lead to the lunchroom contain two flights of 25 steps each that are rather steep. (Tr. 32). The stairs that lead to the foreman's office contain about 30 to 35 steps.

On March 1, 1995, Dr. Lawrence visited the boric acid sack room. On March 8, he sent a letter to Mr. Ing describing his findings as follows:

> After inspecting Mr. Dykhoff's workplace at U.S. Borax, and reviewing the patient's medical file again, the restrictions placed in my letter of February 16, 1995, remain unchanged. However, there is one thing that I would like to say, under no circumstances should the patient carry sacks of borax while going up or down stairs. If further clarification is needed, please do no hesitate to contact me.

(Ex. C-6). Dr. Lawrence did not visit the main sack room. (Tr. 35).

Dykhoff returned to work in the boric acid sack room in 1995 after the work limitations form had been submitted. He started on the super bag crew, but after a few months he was transferred to the truck crew. On the truck crew he loaded pallets of bagged product, including super bags, into trucks from conveyors or a storage area using a fork lift.

Dykhoff was off work for a period of time in early 1997. When he returned to work, a return- to-work clearance form containing similar restrictions as the earlier work limitations form was signed by Darryl Caillier of U.S. Borax's Human Resources Department and by representatives of the company's safety and shipping departments. (Tr. 35; Ex. C-7).

On September 9, 1998, Dr. John Odell, Dykhoff's primary physician, executed another work limitations form. (Tr. 36; Ex. C-9). It is similar to the one executed by Dr. Lawrence in 1994 because it lists a major permanent limitation with respect to climbing stairs and ladders. A note at the bottom of the form states "no prolonged ascending or descending stairs."

As stated above, Mr. Dykhoff was out on disability during most of 1999 because of a non-work related back injury, but he returned to work in January 2000. (Tr. 38; Ex. C-10). Dr. Odell signed another work limitations form for Dykhoff on January 3, 2000, with the same work restrictions with respect to stair climbing and a note about his herniated disc. (Ex. C-11). Upon his return, Dykhoff worked as a forklift operator on the super bag crew in the boric acid sack room. (Tr. 39). Dykhoff complained about safety conditions including inadequate lighting in the sack room, sulfuric acid fumes, and inadequate ventilation. He also testified that he "turned in" some fork lift forks because they had been "ground off using a grinder." (Tr. 41). Jim Goodner, who was the safety representative at the sack room, told Dykhoff that Jim Lorentsen, the foreman, had been asking who had been making all the safety complaints.

In mid-February 2000, Dykhoff discussed his job assignment with Richard Gibson, who is the supervisor of both the boric acid and main sack rooms. Dykhoff did not like operating a fork lift on the super bag crew, as compared with the same job on the truck crew, because there was no opportunity for him to rest. (Tr. 44). Gibson asked if he would like to work in the main sack room to which Dykhoff responded "No."

Several days after this conversation and on the same day that he raised the sulfuric acid fumes issue, Lorentsen told Dykhoff that he was being transferred to the truck crew in the main

sack room. Dykhoff testified that Lorentsen told him that he was being transferred because he "complained to Gibson." (Tr. 45).

On his first day at work at the main sack room, Joe Kalina, Dykhoff's foreman, told him that Mr. Duke Vetor, a shipping supervisor, was concerned about his having to climb stairs. Dykhoff was told to eat lunch at the office in the truck dock rather than climbing up the stairs to the lunch room. He was also told that if he needed a foreman, he should call one rather than climb the stairs. Dykhoff asked if he could park his car next to the main sack room so that he would not have to walk the four tenths of mile from the employee parking lot. The plant manager told him that he could park near the sack room but his parking privilege was revoked by Darryl Caillier a few days latter. Caillier wrote Dykhoff a letter stating that his work limitations did not warrant granting him permission to park next to the main sack room. (Tr. 53). Caillier testified that he wrote that letter after the plant manager asked him to look into the matter. (Tr. 226). Caillier stated that he reviewed Dykhoff's medical file and could not find any restrictions that would prevent him from walking to the main sack room from the employee parking lot.

In late February 2000, Dykhoff complained about the conditions in front of the truck dock at the main sack room. He testified that the docks and ramps were in bad repair. (Tr. 49-50). He stated that the surface was badly cracked and was full of potholes. Because the fork lifts do not have any suspension, Dykhoff testified that his back was being subjected to constant jarring which caused him severe pain.[1] (Tr. 50). Dykhoff talked to Gibson about this issue and Gibson apparently told Dykhoff to go see his doctor. When Dykhoff replied that he would go on company time, they both went to see Mr. Caillier. The company wanted Dykhoff to fill out worker's compensation papers, but he refused. Dykhoff asked for union representation, which was provided, and Kevin Long, the head of the Human Resources Department, jointed the meeting. When Long asked Dykhoff if he was reporting an industrial accident, Dykhoff replied, 'No . . . [t]his is an injury that happened off the job, and it's being aggravated by the job." (Tr. 52). Long told Dykhoff to go back to work.

On March 1, 2000, Dr. Odell gave Dykhoff a note requesting that Dykhoff be granted permission to park his car near the main sack room. (Ex. C-12). The letter states:

> My patient, Mr. Louis Dykhoff, has severe osteoarthritis of lower extremities and back . . . . I am requesting he be allowed to park his automobile in close proximity to where he works. He has been parking 0.2 to 0.4 mile from job. This is not acceptable for his health problems.

Id. Dykhoff testified that he never received a response from the company and that he had to continue parking in the employee parking lot.

---

[1] The references in the transcript to Mr. Caillier at page 49 line 20 and page 50 line 14 are incorrect and should be changed to Mr. Kalina.

In early March 2000, Dykhoff spoke to MSHA Inspector Harvey Brooks about the condition of the working surfaces at the truck dock. Dykhoff showed the inspector the cracks and potholes on the ramps, the slabs, and the docks at the main sack room. (Tr. 54-55, 315). About an hour later David Leach, a U.S. Borax supervisor, asked Dykhoff to show him the areas that he was concerned about. The company denied the union permission to take photographs of the area. (Tr. 282). A little later Leach told Dykhoff that he had generated a work order to have a coating applied to the area to smooth it out. Dykhoff testified that it was several weeks before the work was performed. A coating was applied to docks and ramps, but the slab at the loading docks was not repaired. (Tr. 57).

Dykhoff was off work for about 32 working days during June and July 2000. (Tr. 58-59). Dykhoff returned to work on July 17, 2000. He presented a note from Dr. Odell which stated: "May return to work July 17, 2000, see previous January work evaluation for restrictions." (Ex. C-14). Caillier called Dykhoff into his office to ask for a work limitations form and Dykhoff pointed to the reference in Odell's note to the January work limitations form. (Tr. 60). At about 3 p.m. that same day, Dykhoff was given a three-day disciplinary layoff by Mr. Gibson for excessive absenteeism. (Tr. 63, 227-28; Ex. C-15). Caillier recommended the disciplinary layoff because Dykhoff had an "absenteeism problem." (Tr. 229). The layoff was in accordance with the company's progressive discipline policy. Dykhoff had been disciplined in the past for excessive absenteeism. (Tr. 229-33; Exs. R-1, R-2). Most of his absences from work were related to his medical problems. (Tr. 263-64).

At about 9 a.m. on July 17, the day he returned to work, Dykhoff was looking at the bulletin board in the main sack room when Mr. Leach came down the stairs from the foreman's office and struck the back of his hard hat. According to Dykhoff, Leach stood there glaring at him. (Tr. 61). Leach then walked into the clerk's office next to the bulletin board. Dykhoff believes that Leach's actions demonstrate hostility towards his safety activities. He reported this incident to union Vice President Robert Jungers and to Mr. Caillier. He asked the union to "lodge a formal complaint" with the plant manager. Dykhoff also reported it to the Kern County Sheriff's Department. Leach testified that he merely tapped the back of Dykhoff's hard hat to say hello. (Tr. 143). Leach testified that after Dykhoff turned around, they smiled at each other.

In October 2000, Dykhoff was approached by Leach who told him that he had to wear a U.S. Borax issued hard hat. Dykhoff was wearing an Oakland Raiders hard hat. Dykhoff testified that the hard hat was an "ANSI, NIOSH approved hard hat." (Tr. 65). Leach told him that, because it was not issued by the U.S. Borax warehouse, he could not wear it. Dykhoff testified that he was going to get his U.S. Borax issued hard hat from his vehicle during a break, but before he could do so, Leach again questioned him about the Raiders hard hat. Leach told Dykhoff it was a safety violation for him to continue wearing the Raiders hat and had him wait until someone from the warehouse brought him a new one. Leach told Keith Baird, a union official, that all employees must wear U.S. Borax issued hard hats. (Tr. 118). Mr. Baird also testified that Leach told him that Dykhoff is an "itch" that he has to "scratch." (Tr. 119-20). Leach does not recall making this remark to Baird. (Tr. 146) Leach testified that U.S. Borax requires the use of

company issued hard hats by all employees. (Tr. 144). He stated that the company has this policy to ensure that all hard hats meet MSHA requirements and to control the stickers and decals that employees put on their hard hats.

On December 6, 2000, Dykhoff talked to MSHA Inspector Mike Burgess about the cracks and potholes in the slab in front of the main sack room dock. (Tr. 68). He told the inspector that the slab aggravates his back and that other employees had complained to him about the cracks and potholes. Inspector Burgess took photographs of the area. Dykhoff also showed the inspector pre-shift inspection cards completed by employees that noted the poor condition of the slab. Inspector Burgess told Dykhoff the next day that the condition of the slab did not violate MSHA's safety standards but that the company had agreed to fix the problem.[2] (Tr. 73).

On December 8, 2000, Dykhoff took time off work to attend a parent-teacher conference for his son. When he told his supervisor, who was Tony Artiago at that time, he was informed that he would have to bring in written proof that he attended the conference. Dykhoff testified that he had not been required to provide such proof when Kalina was his supervisor. Dykhoff told Artiago that the proof requirement was discrimination and harassment. (Tr. 70). Dykhoff supplied a note from the guidance counselor at the school, who told him that he had never been asked for a note before. (Tr. 71; Ex. C-17). Dykhoff testified that Artiago asked for the note at the request of the Human Resources Department.

Leach testified that, as far as he knew, no employee had ever specifically sought permission to take leave to attend a parent-teacher conference. When Artiago told him about Dykhoff's request, he called Caillier to find out what to do. (Tr. 145, 171). Caillier told him that U.S. Borax did provide for such leave but that verification was required. Leach told Artiago to give Dykhoff time off but that Dykhoff must provide proof that he attended the conference. (Tr. 146). Caillier testified that when he was asked about whether an employee could take time off to attend a parent-teacher conference, he looked at the corporate policy book. (Tr. 235). Caillier discovered that an employee is entitled to up to 40 hours of unpaid leave per year to attend school activities. (Tr. 235-37, 265-66; Ex. R-4). He testified that he read the written policy quickly and thought that written documentation was required, but the policy actually states that the company may request documentation from the school as proof of participation in the activity. (Tr. 307; Ex. R-4). An employee may also ask for regular paid leave for such activities if he has such leave available.

On December 12, 2000, Dykhoff was transferred from the truck crew at the main sack room to the "10-Mol packing line" at the main sack room. (Tr. 74). Apparently he was transferred at the direction of Mr. Leach. Dykhoff testified that the packing line job was "a lot more physically demanding" because there is no opportunity to sit down and rest. (Tr. 74-75).

---

[2] Dykhoff met with Inspector Burgess a number of times later in December to discuss safety issues including the concrete slab at the loading dock for the main sack room and his job transfers within the main sack room.

He worked on this packing line for one day and was then transferred to the super bag crew at the main sack room. At the time of this second transfer, the packing line had broken down. Dykhoff testified that he saw Leach and Artiago looking at him. Dykhoff testified that Artiago told him that Leach told him to transfer Dykhoff. In order to make this transfer, an employee from the super bag crew was transferred to the packing line. (Tr. 76, 314-15). Dykhoff considers working with the super bag crew to be an even more demanding job because of the speed at which he had to work. The job requirements were the same as when he had worked on the super bag crew at the boric acid sack room. (Tr. 78).

Leach testified that Dykhoff was transferred to the 10-Mol crew because the condition of the slab was aggravating Dykhoff's back. Leach stated that he talked the matter over with Frank Murphy and MSHA Inspector Burgess. Murphy also discussed the matter with Caillier. (Tr. 284; Ex. C-30). Murphy recommended that Dykhoff be relocated until such time as the necessary repairs to the slab could be completed. (Tr. 147, 176). The slab was aggravating Dykhoff's back problem but he would not be required to drive the forklift over the slab as a packing line employee. The floor was smooth inside the main sack room where the 10-Mol employees work. Leach also testified that the 10-Mol packing line frequently breaks down and that the pace of the 10-Mol line was not particularly fast. (Tr. 151-52). According to Leach, Dykhoff would have plenty of time to rest when working on the 10-Mol line. (Tr. 152-155). Leach testified that he was aware of Dykhoff's complaint to MSHA of March 8, 2000, but he did not realize that Dykhoff's complaint also applied to the condition of the slab, in addition to the ramps and docks. (Tr. 167-68).

Leach testified that Dykhoff was transferred from the 10-Mol line to the super bag station after Mr. Artiago relayed concerns that Dykhoff expressed about some of his duties on the 10-Mol line. (Tr. 156). Apparently, Dykhoff complained to Artiago that he was required to use his arms to lift loads that exceeded his work limitations. Leach said that Dykhoff was transferred to the super bag line because he would not be required to get off the forklift to lift material on that crew and he would not need to drive the forklift over the cracked slab. (Tr. 157). Leach did not confer with Dykhoff before transferring him to these new positions. (Tr. 174).

Although the slab was patched about a week after Dykhoff raised the issue with Inspector Burgess, Dykhoff remained on the super bag crew. (Tr. 86). When Dykhoff asked to be reassigned to the truck crew, he was advised by Lorentsen, who was the foreman that day, that Leach was of the opinion that the surface of the slab was not smooth enough for Dykhoff to be driving on. Leach testified that the repairs to the slab did not eliminate the uneven seams in the concrete. (Tr. 192). He felt that even with the repairs, the company would be "subjecting Louis to unnecessary trauma to his back by asking him to drive on that slab." *Id.*

The weekly safety meetings for the employees in the main sack room were held in the lunch room. Because the lunch room was up two flights of stairs, as described above, Dykhoff was given his safety instructions in the truck dock office or in the clerk's office by a foreman.

The clerks also received safety training in the clerk's office.[3] (Tr. 113-14). Dykhoff could get to these offices without having to climb stairs. He testified that he never ate lunch in the lunch room. In the past, Dykhoff climbed the stairs to the foreman's office only occasionally. He climbed these stairs more frequently after he became a day-shift union steward on November 29, 2000. (Tr. 80, 102, 157, 307; Ex. C-16). On December 13, 2000, Artiago told Dykhoff that he would have to climb the stairs to the lunch room to attend the safety meeting that day. Dykhoff told Artiago that he had restrictions. Dykhoff testified that Artiago replied that Leach told him that if Dykhoff can climb stairs to the foreman's office he can climb stairs to attend safety meetings. (Tr. 83, 120-21). Leach stated that he told Artiago to instruct Dykhoff that he would be required to attend the safety meetings. (Tr. 177). He did not deny telling Artiago that if Dykhoff can climb stairs to see the foreman, he can climb stairs for the safety meetings. (Tr. 190). Leach testified that he made this decision after observing Dykhoff climbing the stairs to the foreman's office on a regular basis over the previous month. (Tr. 180-81). Prior to that time, Leach stated that Dykhoff had not climbed the stairs. *Id.* Dykhoff attended the December 13 safety meeting in the lunch room and, after the meeting, told Artiago that he would not climb the stairs to the foreman's office any more because he did not want to climb the stairs to the safety meetings. Dykhoff testified that Artiago indicated that he would no longer be required to climb the stairs to the safety meetings.

Another safety meeting was held on December 20, 2000. Dykhoff did not attend the meeting in the lunch room. After the meeting, Leach asked him why he did not attend the safety meeting. Dykhoff explained that he thought that he had settled the issued with Artiago. He further explained that, under his work restrictions, he can only climb stairs four times a day or as he can tolerate. (Tr. 88). When Leach questioned the terms of his work restriction, Dykhoff asked for union representation. After Chief Steward Trini Esquival arrived, Leach explained that Dykhoff refused to climb stairs and that there is no restriction in his file that allows Dykhoff to refuse to climb stairs. (Tr. 90, 123-25). Leach told Dykhoff to go home, bring back a doctor's certification, and report to the Human Resources Department.[4] *Id.*

Leach testified that Mr. Dykhoff had demonstrated on many occasions that he was "fully capable of climbing stairs." (Tr. 157). He stated that it "poses an additional and unnecessary burden" on supervisors to "single him out and give him a safety talk on a one-on-one basis." (Tr. 157, 210). Leach believes that Dykhoff's separate safety talk was not very effective because he could not participate in the general discussion of safety issues. Leach also does not believe that his work restrictions prevented him from climbing the stairs to attend safety meetings. (Tr. 159).

---

[3] Charlene Umsted, a clerk in the main sack room shipping department, testified that she regularly received safety training in the clerk's office. (Tr. 213-14). She was never told that she had to go to the lunch room to receive safety training.

[4] Leach stated that they could not go to the Human Resources Department to see what work restrictions were in Dykhoff's file because the offices were not open that day. (Tr. 159-60).

Leach testified that Dykhoff told him that he was too tired to climb the stairs and that he could not tolerate climbing. (Tr. 191).

On or about December 21, Dykhoff brought a doctor's note to the Human Resources Department. (Tr. 91). The note, signed by Dr. Odell, states as follows:

> Because of inherited developmental bone disease, especially in the lower extremities, I am requesting for Mr. Louis Dykhoff that he be allowed to minimize the following, and only to his tolerance: (1) climbing ladder; (2) climbing stairs.

(Ex. C-18). Dykhoff presented this note along with Dr. Lawrence's letter of February 16, 1995, at a meeting held in Caillier's office. Caillier questioned these restrictions and said that they were different than what was on file. He told Dykhoff to go home and to stay home until he could climb the stairs. (Tr. 93). Leach told Dykhoff that he could not pick which activities that he would climb the stairs for. (Tr. 200; Ex. C-25).

Leach testified that in September 2000, after he became the general supervisor, he reviewed Dykhoff's work restrictions. After reviewing these restrictions, he formed the belief that Dykhoff could be required to climb stairs about four times per shift. (Tr. 183). He had previously signed a "Return to Work Clearance" on July 2, 1998, that set forth Dykhoff's work restrictions. (Ex. C-24). This form states that Dykhoff had a major limitation with respect to ascending and descending stairs, but it did not include a numerical limitation. *Id.*

Leach testified that he interpreted the Dykhoff's limitation to be that he could be required to climb stairs so long as it was not prolonged. (Tr. 195, 198; Ex. C-25). He based this conclusion on his personal observation of Dykhoff's work habits and what he believed to be his work restrictions. (Tr. 199). Leach believed that Dykhoff was capable of climbing the stairs to attend the safety meetings. (Tr. 209). He also discussed the matter with Caillier, who did not disagree with his approach. (Tr. 204-05, 207). Leach stated that he told Dykhoff to get clarification from his doctor because Leach understood that he could be required to use the stairs up to four times a day while Dykhoff was telling him that his restriction allowed him to refuse to climb the stairs. (Tr. 202). Leach testified that, as a supervisor, he could not "base [his] workday on what an employee can and cannot tolerate at that particular moment." *Id.* Leach stated that if Dykhoff cannot climb stairs, "then he needs to bring . . . documentation, a doctor's statement that he can't do the work." *Id.*

Caillier testified that at the meeting on December 21 in his office, Dykhoff brought a document from Dr. Odell that said that he should be required to climb stairs only "as tolerated". (Tr. 237;
Ex. C-18). Caillier testified that Dykhoff told him that his restriction was that he could only be required to climb stairs when he could tolerate it. (Tr. 244, 287-88). Caillier told Dykhoff that the company "couldn't accommodate those restrictions." *Id.* And 299). Caillier believed that

under his work restrictions Dykhoff could "minimize his climbing" but he could not refuse to climb stairs so long as prolonged climbing of stairs was not required. (Tr. 245, 289; Ex. C-20). Caillier believes that this "as tolerated" restriction is a new work restriction that differs from the ones previously placed in his medical file. (Tr. 238-39, 267). The "as tolerated" restriction "allowed him to climb at his tolerance, period." (Tr. 239). The previous restrictions stated that there should be no "prolonged ascending or descending stairs." *Id.* Caillier testified that Dr. Lawrence's restrictions stated that Dykhoff "could climb approximately four times a shift, but if he could tolerate more, he could climb more than four." *Id.* [5] Thus, Caillier interpreted Dykhoff's "no prolonged ascending or descending stairs" restriction to mean that "he could do it but he couldn't do it a lot." (Tr. 281-82).

Caillier also stated that Dykhoff was aware of the company's interpretation of his work restriction prior to December 2000, but Dykhoff denies it. (Tr. 295, 315). Dykhoff testified that U. S. Borax understood from the time he was transferred to the main sack room that "I was only to climb stairs as much as I could tolerate." (Tr. 316). It appears that this was the only occasion that Dykhoff refused to climb stairs. (Tr. 297). Caillier testified that he told Dykhoff that the company could not accommodate what it considered to be this new work restriction and that he should not return to work until he could do a minimum amount of stair climbing. Caillier stated that he reached this conclusion after he discussed the matter with Leach. (Tr. 270-71).

Caillier also testified that the shipping operator's job description includes a requirement to climb stairs on a frequent basis and that this requirement was a critical part of the job. (Tr. 246-47; Ex. R-7). Another critical requirement is the ability to get on and off equipment on a frequent basis. *Id.* Caillier further testified that the job description presented by Dykhoff in this proceeding was out-of-date in December 2000. (Tr. 248; Ex. C-8). That job description lists climbing stairs as important but not critical. (Tr. 258; Ex. C-8). Caillier stated that the job description set forth in Exhibit R-7 was put into place in December 1999. (Tr. 248-49, 258). Mr Baird testified that he was unaware of this change in the job description. (Tr. 312). Caillier believes that Dykhoff was always required to climb stairs, but that the company tried to limit the amount of stair climbing he had to do. (Tr. 275-76). Caillier also testified that he observed Dykhoff ascend and descend the stairs to the foreman's office several times during a single shift earlier in December 2000. (Tr. 307).

---

[5] Caillier recalls that Mr. Ing received oral clarification from Dr. Lawrence that the "no prolonged ascending or descending stairs" meant that he should be able to climb stairs at least four times in a shift. (Tr. 239-40). Dykhoff testified that Dr. Lawrence told him that "you might be able to [climb stairs] four times a day, but only if you can tolerate it" (Tr. 319).

II. SUMMARY OF THE PARTIES' ARGUMENTS

A. Mr. Dykhoff

Mr. Dykhoff argues that climbing stairs to the lunch room to attend weekly safety meetings in not an essential function of his job. He maintains that U.S. Borax did not present any factual or legal justification for ending his longstanding exemption from climbing the stairs to the lunch room for these meetings. The stair-climbing restrictions placed on Dykhoff have remained unchanged since Dykhoff returned to work in 1994 and U.S. Borax had no basis to start disregarding these restrictions in December 2000. There was simply no business justification for U.S. Borax to discontinue accommodating Dykhoff's stair climbing restriction.

U.S. Borax's refusal to continue accommodating Dykhoff's limitations was motivated by its hostility towards his MSHA complaints. U.S. Borax was displeased by the complaints that Dykhoff made about his work area in the main sack room in February 2000. The company refused to permit him to take photographs of the broken concrete. The company did not make any repairs for three months and failed to repair the slab in front of the truck dock. Shortly after Dykhoff lodged these complaints, Caillier revoked the consent that had been previously granted that allowed Dykhoff to park close to the main sack room. In July 2000, when Dykhoff returned after a month long absence, Leach "thumped" Dykhoff's hard hat and glared at him. On that same day, Dykhoff was disciplined for excessive absenteeism, even though his absence was the for *bona fide* medical reasons. Leach also prohibited Dykhoff form wearing a non-company issued hard hat because Dykhoff was an "itch" that he had to "scratch."

The character of U.S. Borax's reactions to Dykhoff's safety complaints demonstrates animus. Although the company's witnesses testified that they welcomed safety complaints, they were hostile to Dykhoff's complaints. For example, the company refused to allow the union to take photographs of the slab. The company can offer no explanation why Dykhoff's safety activities were reported to Caillier, the head of the Human Resources Department. Dykhoff was transferred to the 10-Mol line as punishment for complaining about the condition of the slab.

The timing of U.S. Borax's actions with respect to Dykhoff demonstrates animus. Immediately after Dykhoff reported the slab condition to the MSHA inspector, the company started harassing Dykhoff by, for example, requiring him to bring a note from his son's school to justify his absence for a parent-teacher conference. More importantly, even though Dykhoff had been exempted from climbing stairs upon returning to work in January 2000, it became "urgently important" for the company to deprive Dykhoff of this accommodation in December 2000 after he brought his complaint to MSHA. The company could offer no explanation for this sudden change in policy.

The explanations offered by U.S. Borax for requiring Dykhoff to attend the weekly safety meetings in the lunch room were pretext to hide its unlawful conduct. The company knew of Dykhoff's work restrictions yet acted as if these restrictions were a new unreasonable demand

being made by Dykhoff. The "as tolerated" language had existed in Dykhoff's work restrictions since 1994. The transparent invalidity of the company's pretextual reasons for sending Dykhoff home on December 21, 2000, demonstrated by its witnesses' lack of candor, is strong evidence of its retaliatory motivation.

B. U.S. Borax

Mr. Dykhoff did not establish a *prima facie* case of discrimination. Dykhoff produced no direct evidence that the actions taken by the company with respect to his employment were based on his complaints about safety. Dykhoff's complaint of discrimination is based only on his groundless speculation that U.S. Borax unlawfully discriminated against him. The testimony of Leach and Caillier make clear that Dykhoff's job transfers, instruction to attend safety meetings, and removal from work had nothing to do with any of his safety complaints. Many of the events that Dykhoff uses as proof of discriminatory motive are minor, discrete, and remote in time from any protected activity. Most of the events that Dykhoff contends were discriminatory took place months before his complaint of discrimination was filed and are time-barred under section 105(c)(2) of the Mine Act. There has been no showing of a connection between his safety activities and the company's decision (1) to discipline him for excessive absenteeism; (2) to require him to wear a company hard hat; and (3) to require him to submit proof that he attended a parent-teacher conference. Dykhoff's case also ignores the fact that his transfers within the main sack room were made to protect him from conditions that may have aggravated his medical problems.

Even if a *prima facie* case were established, the adverse actions complained of were not motivated in any part by his protected activities. Caillier and Leach testified credibly that the personnel actions that Dykhoff objects to were made for legitimate, nondiscriminatory reasons. U.S. Borax transferred Dykhoff to different work areas to help minimize aggravating his preexisting medical conditions. Leach required Dykhoff to attend the mandatory weekly safety meetings because Dykhoff demonstrated that he was capable of climbing stairs and the requirement was within his work restrictions. Caillier sent Dykhoff home because he did not believe that his work restriction allowed him to refuse to climb stairs in the manner that he did on December 21 and, to the extent his restriction would allow such a refusal, the company could not accommodate it. U.S. Borax also argues that it was motivated by Dykhoff's unprotected activities and would have taken the adverse actions based on these unprotected activities alone.

III. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners "to play an active part in the enforcement of the [Mine] Act" recognizing that, "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No.

181, 95th Cong., 1st Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 623 (1978).

A miner alleging discrimination under the Mine Act establishes a *prima facie* case of prohibited discrimination by presenting evidence sufficient to support a conclusion that he engaged in protected activity and suffered adverse action motivated in any part by that activity. *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-800 (October 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981); *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998). 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. *Pasula*, 2 FMSHRC at 2799-800. If the mine operator cannot rebut the *prima facie* case in this manner, it nevertheless may defend by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.*; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

I find that Mr. Dykhoff engaged in protected activity when he complained about fumes in the boric acid sack room and the condition of the ramps, docks, and slab at the main sack room. He had also raised many other safety issues over the course of his employment at Boron Operations and U.S. Borax was well aware of these safety activities.

In determining whether a mine operator's adverse action was motivated by the miner's protected activity, the judge must bear in mind that "direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (November 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir 1983). "Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence." *Id.* (citation omitted). In *Chacon*, the Commission listed some of the more common circumstantial indicia of discriminatory intent: (1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. *See also Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 530 (April 1991).

There can be no dispute that U.S. Borax was aware of Dykhoff's safety complaints. The company knew that he had lodged a number of safety complaints both to management and to MSHA in 2000. The primary complaints concerned the condition of the loading docks, ramps, and slab outside the main sack room. Some, but not all, of the adverse actions that Dykhoff complains of occurred shortly after he engaged in protected activities. Because of Dykhoff's rather unique medical condition and his resulting work restrictions, it is difficult to assess whether there was disparate treatment. But the company did not treat Dykhoff differently with respect to some of the alleged adverse actions, such as requiring him to wear a U.S. Borax hard hat.

Dykhoff contends that the company demonstrated hostility and animus towards his protected activity, while the company denies that it was hostile towards his safety activities. These issues are discussed in more detail below.

It should be noted that Dykhoff has been an active participant in safety issues at Boron Operations for many years.[6] Thus, the safety concerns raised in this case are not isolated events. He has also been active in union affairs including the union's safety advocacy. It should also be noted that Dykhoff filed a number of complaints following the company's decision to send him home on December 21, 2000, including a complaint under the Americans with Disabilities Act of 1990 ("ADA"). Much of the evidence and many of the arguments in this case concern whether the accommodations made by U.S. Borax in response to Dykhoff's medical condition were reasonable. I do not have jurisdiction to consider whether the company violated the ADA when it took the actions described above that Dykhoff believes were adverse to his interests. My findings and conclusions in this decision should not be construed as entering any findings with regard to ADA issues.

The Commission has cautioned its administrative law judges that 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 Mine Act." *Delisio v. Mathies Coal Co.*, 12 FMSHRC 2535, 2544 (December 1990) (citations omitted). Consequently, I cannot enter a decision in favor of a complainant in a section 105(c) case simply because I believe that he was treated in an unfair or unduly harsh manner by his employer.

The alleged adverse actions in this case are varied. I find that Dykhoff failed to establish that the following actions taken by the company are in any way related to his safety activities: (1) Dykhoff's transfer from super bag crew in the boric acid sack room to the truck crew in the main sack room in mid-February 2000; (2) the company's denial of Dykhoff's request to park near the main sack room rather than in the employee parking lot; (3) the company's denial of the union's request to take photographs of the cracks and potholes in the area outside the main sack room; (4) the company's decision to discipline Dykhoff on July 17, 2000, for excessive absenteeism; (5) the company's decision not to discipline Leach for thumping the back of Dykhoff's hard hat on July 17, 2000; and (6) Leach's order that Dykhoff wear a company issued hard hat. I reach this conclusion for a number of reasons, as discussed below.

First, I note that these alleged adverse actions may be time-barred because they occurred more than 60 days prior to the date he filed his complaint of discrimination. Section 105(c)(2) of the Mine Act provides the any miner "who believes that he has been . . . discriminated against by

---

[6] Another complaint of discrimination brought by Dykhoff at the Boron Operations was litigated before this Commission, *Dykhoff v. U.S. Borax Corp.*, 21 FMSHRC 791 (July 1999); *aff'd* 22 FMSHRC 1194 (Oct. 2000). The discrimination complaint alleged that the company disciplined him for excessive absenteeism at least in part because he had engaged in protected activity.

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." If Dykhoff believed that these actions were adverse and discriminatory, he was obligated to file complaints with MSHA within 60 days. No explanation was given for his failure to do so. Nevertheless, because there was no showing that U.S. Borax was prejudiced by the delay, I do not base my holding with respect to these claims on Dykhoff's failure to file a timely complaint of discrimination. The delay did not prevent U. S Borax from defending against these claims.

Dykhoff did not establish that his transfer from the boric acid sack room to the main sack room was related to his complaints about fumes or the condition of the fork lift trucks. Dykhoff told Gibson that he did not want to work as a fork lift operator on the super bag crew because there was no opportunity for him to rest. Instead, Dykhoff wanted to operate a fork lift on the truck crew. As a consequence he was transferred to the truck crew at the main sack room. There is no evidence that working on the truck crew in the main sack room was any more arduous that working on the truck crew in the boric acid room. The only difference was the fact that the main sack room had more stairs and it was a little farther from the parking lot. The mere fact that foreman Lorentsen had been asking who was making safety complaints does not indicate that his transfer was in retaliation for these complaints. I find that preponderance of the evidence shows that Dykhoff was transferred because he told Gibson, who supervised both sack rooms, that he wanted to work on the truck crew. Thus, Dykhoff continued to work under Gibson at the same rate of pay after this transfer. There is insufficient evidence for me to draw an inference that his protected activities played any part in this transfer.

There has also been no showing that the company's refusal to allow Dykhoff to park at the main sack room was a result of his safety activities. When he was given permission to park at the sack room by the plant manager, Mr. Caillier was on vacation. When Caillier returned, the plant manager asked him about the parking situation. Caillier determined that Dykhoff's work restrictions did not prevent him from parking in the employee parking lot. There is no evidence that Caillier took Dykhoff's safety activities into consideration when he made this determination and I cannot draw an inference to the contrary.

Dykhoff contends that the company denied the union's request to take photographs of the cracks and potholes in the area outside the main sack room in March 2000 in retaliation for his safety activities. He argues that this refusal shows that the company was hostile to his safety concerns. This refusal is not an adverse action because it did not affect Dykhoff's employment status. The company is not denying that the conditions complained of did not exist. Photographs of the cracks in the slab that were taken by Mr. Murphy in December 2000 were introduced into the record. (Exs. R-33 & R-34).

Dykhoff contends that the company's decision to discipline him at the end of his shift on July 17, 2000, for excessive absenteeism is related to his safety complaints. I fail to see the connection. The discipline was issued the day he returned from a lengthy absence. He has a record of being off work for considerable lengths of time because of his medical conditions. He

has been disciplined in the past for excessive absenteeism. Even if the company was motivated in some small part to discipline him on July 17 because of his safety activities, I find that they would have issued the same discipline even if he had not raised safety issues.

The incident where Leach thumped the back of Dykhoff's hard hat is very minor. Leach maintains that he did not mean anything by it, but Dykhoff believes that it demonstrated management's continuing hostility towards his safety activities. This incident did not result in any adverse action being taken against Dykhoff, but it may indicate a hostile attitude towards Dykhoff's safety complaints, as discussed in more detail below.

Similarly, Leach's order to Dykhoff that he remove his Oakland Raiders hard hat and wear a company issued hard hat is not particularly significant. Except for contractor employees, everyone working at Boron Operations was required to wear U.S. Borax hard hats. Leach wanted Dykhoff to change hard hats more quickly than Dykhoff thought was necessary. This fact does not indicate animus towards his safety complaints. Moreover, this incident did not result in any adverse action against Dykhoff.

The events of December 2000 have more significance. Dykhoff again raised the issue about the condition of the slab with an MSHA inspector. This was the second time that he had raised this issue. The slab had not been repaired with the ramps and docks earlier in the year. Dykhoff believed that this was a deliberate action on the part of the company and that Leach lied about it at the hearing. I find no evidence to support this claim. At most the company was negligent for not taking the matter more seriously or listening more carefully to Dykhoff's legitimate complaints. The company did not deliberately fail to repair the slab as retaliation for Dykhoff's complaints.

Dykhoff discussed the slab with the inspector on December 6 and took time off to attend a parent-teacher conference on December 8. Dykhoff did not ask for vacation leave, but asked for leave to attend a school function.[7] The request went up the chain of command until an inquiry was directed to Caillier. I credit the statements of company witnesses that they had never encountered a specific request like this one. I also credit Caillier's statement that when he looked at the corporate policy he thought that Dykhoff was required to supply a note from the school. In reality, the company could ask for such a note but it was not mandatory. This event occurred very soon after Dykhoff spoke to Inspector Burgess about the slab. By itself it did not demonstrate hostility to his safety complaints. Requiring Dykhoff to bring a note could be regarded as demeaning, but only slightly so. The company's policy provided for such notes and this was the first time that anyone had requested such unpaid leave. Consequently, I find that the company's demand for a note from Dykhoff was not motivated by his safety complaints.

---

[7] Although there is no evidence on this issue, Dykhoff may not have had any paid vacation leave available at that time, given the fact that he had to take off a significant amount of time because of his medical problems.

On December 12, Leach transferred Dykhoff to the 10-Mol line as a direct result of Dykhoff's complaint about the condition of slab outside the main sack room. On the truck crew, Dykhoff had to drive his forklift over the cracks and potholes as he loaded material. On the 10-Mol line he operated the forklift exclusively on the concrete inside the plant. I credit Leach's testimony that he made this decision after he discussed the issue with Murphy, the company's safety director, and Inspector Burgess. Murphy recommended the transfer. Leach believed that this transfer would help Dykhoff with his back pain and that the workload in his new position was no more arduous than on his previous crew. I find that the company did not have an ulterior motive behind this transfer. I cannot draw an inference that Dykhoff was transferred in retaliation for his safety complaint, rather he was transferred to remove him from the hazardous area, at least until the area could be patched. I credit the testimony of Leach that the company did not perceive that Dykhoff's new position would be more difficult for him. I note that it may have been advantageous for all concerned if the company had discussed the proposed transfer with Dykhoff in advance, but the wisdom of an operator's employment policies are not before me except insofar as those policies may conflict with rights granted under section 105(c) of the Mine Act. I find that this transfer did not conflict with section 105(c).

A day or so later, Dykhoff was transferred again, this time to the super bag station. On the 10-Mol line he was required to get off the fork lift from time-to-time to lift material. This lifting violated his work restrictions. Consequently, he was transferred to a crew where such lifting would not be required. Again, Dykhoff was not consulted. Dykhoff believes that Leach stared at him while he was resting as a result of breakdown in the 10-Mol line broke down and subsequently transferred him to deny him the ability to rest. He contends that Leach took this action as a consequence of his safety complaints. I do not credit Dykhoff's testimony in this regard. There is nothing in the record to support his premise. He relies, in large measure, on the various indications of animus towards him that have been discussed above. I conclude that he was transferred solely because Dykhoff's work limitations and that this transfer did not violate section 105(c) of the Mine Act because it was not motivated by his safety complaints.

The crucial events in this case relate to the company's requirement that Dykhoff begin taking his safety training in the lunch room in the main sack room. On December 13, he complied with the request, but on December 20 he refused because he thought that an agreement has been made that he could continue receiving his training on the ground level. The parties presented evidence about the terms of Dykhoff's work restrictions with respect to climbing stairs. I find that much of what they presented is not relevant to the issues in this case. The basic standard set by both Drs. Lawrence and Odell was that Dykhoff was restricted from "prolonged ascending or descending stairs." When the company asked for clarification, Dr. Lawrence responded with a letter that was quite ambiguous. As set forth above, it stated that no prolonged ascending or descending meant that during an eight-hour shift Dykhoff "may ascend or descend flights of stairs approximately four times, or as tolerated." Apparently Dykhoff interpreted this ambiguous language to mean that he could be required to climb stairs only when he could tolerate it. The company believed that he could be required to climb stairs about four times a day and perhaps more if he could tolerate it.

The stair climbing issue did not come to a head until December. Up until that time, the company did not require him to climb stairs and Dykhoff did not voluntarily climb stairs except on an occasional basis. Starting in late November, however, Dykhoff began voluntarily climbing the stairs to the foreman's office. Company management believed that Dykhoff climbed the stairs to the foreman's office fairly regularly in the weeks prior to December 13. On at least one shift, he ascended and descended the stairs more than once. I find that U.S. Borax decided to require Dykhoff to attend the weekly safety meetings in the lunch room because its managers observed him voluntarily climbing the stairs to the foreman's office. Leach and Caillier took the position that Dykhoff should not be permitted to pick and choose when and for what activities he would climb the stairs.

At the meeting on December 21, Dykhoff stated that he could be required to climb stairs only if he could tolerate it. The company believed that this was a "new" interpretation of his work restriction. Much of the dispute at the hearing about whether the language in the work restrictions changed over time or how often Dykhoff can be required to climb stairs is irrelevant to the issues in this case. I credit the testimony of Caillier and Leach that they did not previously understand that Dykhoff's work restriction permitted him to refuse to climb stairs in situations where there was no prolonged ascending and descending stairs.

It must be understood that prior to December 13, U.S. Borax did not require Dykhoff to climb stairs at all. Starting on December 13, the company required Dykhoff to climb the stairs to the lunch room only once a week, to attend the weekly safety meetings. He was not required to climb stairs at any other time during his work week. I find that the company's decision to start requiring Dykhoff to attend safety meetings in the lunch room was not motivated in any part by his protected activities.

In a section 105(c) discrimination case, a judge may conclude that the justification offered by the employer for taking an adverse action "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." *Chacon*, at 3 FMSHRC 2516. In *Chacon*, the Commission explained the proper criteria for analyzing an operator's business justification for an adverse action:

> The Commission and its judges have neither the statutory charter not 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 judgement 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. If a proffered

> justification survives pretext analysis . . . , then a limited examination of its substantiality becomes appropriate. The question, however, is not whether such a justification comports with a judge's or our sense of fairness or enlightened business practice. Rather the narrow statutory question is whether the reason was enough to have legitimately moved that operator to have disciplined the miner.

Chacon, at 3 FMSHRC 2516-17 (citations omitted). The Commission 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 judgement or a sense of "industrial justice" for that of the operator. As we recently explained, "Our function is not to pass the wisdom or fairness of such asserted business justifications, but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed."

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

I find that the U.S. Borax's alleged business justification for the challenged adverse action is entirely plausible and credible. Dykhoff had been exempted from climbing the stairs because of his work restriction. When company supervisors observed Dykhoff climb the stairs to the foreman's office in December 2000, they believed that he demonstrated a capacity to climb stairs. More importantly, when Dykhoff asserted at the December 21 meeting that he has the right to refuse to climb stairs any time that he cannot tolerate it, the company believed that this assertion was both new and incorrect under his existing work limitations on file with the company. U.S. Borax managers understood that he was merely restricted from "prolonged ascending and descending stairs." I do not have the jurisdiction to resolve this dispute, but I find that the company's position on this issue was genuine. The company did not use this issue as "pretext . . . to cloak the discriminatory motive." *Chacon*, at 3 FMSHRC 2516.

In addition, even if the some or all of the company's actions were motivated in part by Dykhoff's protected activities, I find that it would have sent Dykhoff home on December 21 for his unprotected activities alone. Dykhoff presented evidence that the events of 2000, described above, demonstrated the company's animus towards his protected safety activities. I find that the company would have taken the same position at the December 21 meeting even if Dykhoff had not made any safety complaints. The company believed that requiring Dykhoff to climb the stairs

to the lunch room once a week to attend safety meetings was consistent with his work limitations. It believed that Dykhoff's refusal to climb the stairs violated the terms of his work restrictions. Dykhoff was sent home on December 21 as a direct result of this dispute over the terms of his work restrictions and U.S. Borax would have sent him home for this reason alone.

IV. ORDER

For the reasons set forth above, the complaint filed by Louis Dykhoff, Jr., against U.S. Borax Incorporated under section 105(c) of the Mine Act is **DISMISSED**.

Richard W. Manning
Administrative Law Judge

Distribution:

Neil M. Herring, Esq., 503 Sandretto Drive, Sebastopol, CA 95472-9431 (Certified Mail)

Matthias H. Wagener, O'Melveny & Myers, 400 South Hope Street, Los Angeles, CA 90071-2899 (Certified Mail)

RWM