

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 4, 2005

SCOTT L. CROSBY,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 2004-105-DM
	:	RM MD 04-01
v.	:	
	:	Mine I.D. 42-00149
	:	Bingham Canyon Mine
KENNECOTT UTAH COPPER CORP.,	:	
Respondent	:	

DECISION

Appearances: David K. Smith, Esq., Midvale, Utah, for Complainant;
James M. Elegante, Esq., and Martha J. Amundsen, Esq.,
Kennecott Utah Copper Corporation, Magna, Utah, for Respondent.

Before: Judge Manning

This case is before me on a complaint of discrimination brought by Scott L. Crosby against Kennecott Utah Copper Corporation (“Kennecott”), 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”). Mr. Crosby contends that he was demoted and laid off because he complained about safety issues at the mine. An evidentiary hearing was held in Salt Lake City, Utah, and the parties filed post-hearing briefs.

I. BACKGROUND, SUMMARY OF THE EVIDENCE, AND FINDINGS OF FACT

Kennecott is the operator of the Bingham Canyon Mine, a large open pit copper mine in Salt Lake County, Utah. On or about September 30, 2003, Mr. Crosby filed a discrimination complaint with the local office of the Department of Labor’s Mine Safety and Health Administration (“MSHA”). On November 21, 2003, the Secretary determined that the facts disclosed during her investigation into Crosby’s discrimination complaint do not constitute a violation of section 105(c) of the Mine Act.

On December 19, 2003, Crosby filed this proceeding on his own behalf under section 105(c)(3) of the Mine Act. The complaint of discrimination states as follows:

Allegedly laid off because of cable truck accident on Feb. 26, 03. The brakes were reported to management timeless times. The drivers were forced to drive a cable truck even if the brakes were questionable.

Mr. Crosby started working at Kennecott in October 1980. He worked at the smelter for 15 years and then transferred to the mine in 1995. (Tr. 135). His primary job at the mine was to drive haul trucks. He also operated cable trucks, salt trucks, water trucks, and other trucks.

On February 26, 2003, Crosby was operating Cable Truck No. 969 (the “cable truck”). He had been operating the cable truck for about 6 months. (Tr. 158). Because the shovels in the pit were electric, they had trailing cables to provide power. As a cable truck operator, Crosby was responsible for tending the trailing cables and pulling slack in the cables. (Tr. 163). On February 26, Crosby did his normal pre-operational check of the cable truck and he checked the brakes. The brakes, including the parking brake, appeared to be in good operating order. (Tr. 165). Crosby was asked to put some slack in the cable for the No. 52 shovel so that a bridge could be installed.¹ With the help of his assistant, Richard Chavez, he used a cable hook to perform this task. Crosby, who was in the cab of the cable truck, testified that he had light pressure on the service brake as he was backing the truck. (Tr. 166). He testified that when he got close to the bridge, he pushed the service brake to stop the truck but it would not stop. (Tr. 166-67).

Because the trailing cable going over the bridge is live and the metal cable hook was extended, he did not want to hit the bridge. He put the cable truck in drive and tried to go forward. He testified that by the time he moved forward, he was very close to the rover truck behind him and worried that he had hit it. Crosby pulled the cable truck forward 30 to 40 feet and got out of the vehicle. (Tr. 167). He testified that before he got out of the cable truck, he engaged the parking brake. This brake releases all of the air in the system and is supposed to engage all of the brakes. (Tr. 168). Crosby testified that as he was approaching the rear of the cable truck to place a chock under the wheels, the cable truck “took off.” *Id.* There were several pedestrians in the area, so Crosby and Chavez began yelling. Crosby testified that he tried to get back into the truck to get it into gear, but he did not make it. Everyone in the area was able to jump out of the way before the cable truck hit the rover truck behind him. If the miners in the area had not jumped away, they would have been crushed between the two vehicles. (Tr. 169). The cable truck did not make contact with the bridge but it came within nine inches. By this time, Crosby was able to get in the cable truck and he pulled it away. Several miners put chocks under the wheels and Crosby applied the parking brake.

Crosby called Andy Hoffman, who was the shovel foreman and Crosby’s supervisor at that time. Hoffman and Ben Stacy, the operations superintendent, arrived at the scene shortly

¹ A bridge is a large metal frame that raises the cable above the ground so that a haulage truck can travel to either side of the shovel to be loaded without running over the cable. (Tr. 89-90).

thereafter. Casey Kalipetsis, Crosby's union representative, also arrived. Crosby told the men what had happened. According to Crosby, Stacy called him a liar. (Tr. 172). Stacy denies that he ever made this statement. (Tr. 293-94; 317-19). Crosby testified that he asked that the brakes on the cable truck be tested at that time and that Stacy said "no." (Tr. 173). Crosby was taken for a urine analysis and the cable truck was driven to the Dry Fork Shop.

After Crosby prepared his written statement of the accident, Hoffman told him that he was suspended pending the investigation of the accident. Crosby testified that he asked Hoffman if he could participate in the testing of the truck and the request was denied. (Tr. 174). According to Crosby, Hoffman called him a few days later and told him that the brakes on the truck failed during the test and that he should come back to work. (Tr. 175). Because Crosby was in southern Utah at the time and was scheduled to start a two week vacation, he declined to come to the mine "just to punch out." *Id.* According to Crosby, Hoffman told him that everything was fine and that he should enjoy himself during his vacation. *Id.*

When Crosby returned to work he was assigned a haul truck. Crosby testified that when his union representative reminded Hoffman that Crosby should be paid for the time he was suspended, Hoffman's attitude completely changed. (Tr. 176). Hoffman told Crosby that he would not be driving cable trucks anymore. (Tr. 181). Haul truck drivers and cable truck drivers receive the same pay, but Crosby preferred working with cable trucks. Crosby did not drive any cable trucks after February 26, 2003. It is Crosby's understanding that, after his accident, the brakes on the cable truck were repaired. (Tr. 183).

Crosby contends that the brakes on the cable truck worked intermittently. He testified that the brakes often worked well for a few days and then "all of a sudden, bingo, they were gone." (Tr. 158). He further testified that he would call Hoffman or David Lanham about the problem but, before they could respond, the brakes would start working again. (Tr. 159). If the brakes did not come back, the cable truck was taken to the Dry Fork shop to be adjusted or repaired. When he reported the truck as being defective, his supervisor would offer him another truck to operate. By that time, his cable truck was usually working again, so he would not trade it out. (Tr. 161). Crosby stated that if there were no other cable trucks available, management would make him continue to operate his cable truck. (Tr. 163). Mike Sparks, another cable truck operator, testified that the brakes did not work as well after Kennecott removed the automatic brake adjusters. (Tr. 116).

Blaine Withers, a truck shop supervisor, testified that it is highly unlikely that brakes on a cable truck will work, then not work at all, and then function properly again. (Tr. 254). The braking systems on cable trucks are air brakes, so if there is a leak they may stop working but they would not come back again. If there were a sudden loss of air, the brakes would engage because of the springs in the braking system. *Id.* Withers also testified that there are no such things as automatic brake adjusters on cable trucks. Mechanical devices on the trucks must be manually adjusted to take up the slack as the brakes wear down. (Tr. 247-48). He stated that the brakes on cable trucks have always been manually adjusted as the pads wear out. (Tr. 253).

Withers was asked to test the brakes on the cable truck after the accident on February 26. As a result of his testing, he concluded that the accident was not caused by any mechanical failure. (Tr. 247). He tested the brakes on the cable truck with Shawn Williams, another cable truck operator. He performed the tests on a grade of about six to eight percent with about 1000 feet of cable on the reel. He determined that the service brake was weak and the stopping distance was excessive. The parking brake would hold the truck if the vehicle were stopped and in neutral. The parking brake would not hold the truck if the vehicle were left in gear after it was stopped. (Tr. 246-48; Ex. R-1). The brakes were adjusted after the testing, but no repairs were made before the truck was placed back into service.

Hoffman testified that, at the accident scene on February 26, Crosby told him that he lost his brakes as he was backing the cable truck down the hill. (Tr. 529). Hoffman testified that Crosby told him that he pulled the truck up the hill a short distance and engaged the parking brake before it rolled down into the rover truck. Hoffman stated that, if Crosby believed that the brakes were not working, he should not have left it on the hill where it could potentially roll down to the area where miners were working but he should have left it where it was and called for help or he should have driven it to a flat area. (Tr. 530; Ex. R-7). Hoffman completed the company's accident report and concluded that Crosby failed to follow company procedures. (Ex. R-6). Because the parking brake was found to be operating properly, Hoffman concluded that Crosby's description of what happened after he moved the truck forward was inconsistent with the results of the company's investigation. (Tr. 534). Hoffman also characterized Crosby's accident/injury history as "extensive." (Ex. R-7). He stated that Crosby had been counseled about his accident rate in 2002. Based on these factors, Hoffman testified that the company determined that Crosby should be suspended for two days and disqualified from operating cable trucks.

Hoffman testified that he never heard Crosby complain about his brakes on the mine radio on the day of the accident. (Tr. 539, 563). Crosby did not ask that a mobile repair crew check the brakes that day or ask that he be given a different truck that day. (Tr. 540). The pre-shift inspection report for the cable truck for that shift could not be located. (Tr. 541). Hoffman denied that either Kalipetsis or Crosby was prohibited from observing the brakes being tested by Withers. (Tr. 532). He also denied that he told Crosby that he was not going to be disciplined for the accident when Crosby was suspended pending the investigation. (Tr. 536).

On June 26, 2003, Crosby was advised that he was being laid off from Kennecott effective July 5. (Tr. 185). Crosby testified that when he asked Stacy and others why he was laid off, he was given evasive answers. Stacy does not recall discussing the layoff with Crosby. (Tr. 298). Crosby stated that when he called Stan Heal, the manager of employee relations, he was told he was laid off because he was only qualified to drive haul trucks and the company wanted employees who are multi-tasked. (Tr. 187). When Crosby told Heal that he was task-trained on many pieces of equipment, Heal suggested that he talk to his supervisor to see if there had been a mistake. Heal testified that he could not recall any conversation with Crosby, but when

employees called about the layoff he told them that the layoff was based on the Qualifications Assessment worksheets, described below. (Tr. 451).

Kennecott laid off about 119 employees effective July 5, 2005. These employees were laid off, not on the basis of seniority, but based on the average rating each employee received on Qualifications Assessment worksheets filled out by supervisors. After the scores were tabulated, Crosby was ranked 399 out of 410 in the mine department. (Tr. 375-77; Ex. R-18). When Kennecott determined that it needed only 371 employees at the mine, every employee ranked 372 and below was laid off effective July 5, 2003. Thus, 39 employees out of 410 were laid off at the mine based on the ranking they achieved following the tabulation of the scores from the Qualifications Assessment worksheets.

Kennecott used the Qualifications Assessment worksheets as the basis for determining who would be laid off based on a study performed by a consultant and changes in the collective bargaining agreement. A committee of Kennecott's upper-level supervisors and managers developed a method of ranking employee qualifications to meet the requirements of the organization. (Tr. 304-06, 351-580; Ex. R-12). Although seniority was considered in the rankings, it was only used to break a tie in the event two employees received the same score. After the committee determined what factors are important to Kennecott, the committee developed the Qualifications Assessment worksheet to be used when ranking employees. (Tr. 361-71; Exs. R-13 through 15). This worksheet has seven qualification categories, as follows: (1) Safety-Personal Safety Plan and Participation; (2) Safety-Incident Rate; (3) Work Output-Effectiveness; (4) Performance Effectiveness-Working with Others (Team Skills); (5) Performance Effectiveness-Adaptability; (6) Work Experience-Number of and Quality of Industrial Experiences; and (7) Technical Skills-Demonstration of Skills Needed to Complete Job Assignments. *Id.* Within each category there are five short statements, each with a box next to it that can be checked.

These worksheets were given to front line supervisors with instructions to rate employees. They rated each employee by checking the box next to the statement in each category which most closely matched the employee being rated. These front line supervisors did not participate in the development of the worksheets; they were not told that the information provided would be used in future layoffs, and they were not told that the worksheets would be scored. In addition, these supervisors were told not to discuss the ratings or employees with other supervisors but that they were to complete the worksheets independently. Kennecott now requires supervisors to rate employees using these worksheets on a regular basis but this was the first time the worksheets had been used. Each employee was rated by at least three supervisors who were familiar with the employee's work.² An average score for each employee was calculated using a computer spreadsheet. Each laid-off employee has recall rights under the collective bargaining agreement. When market conditions improved in late 2003 and early 2004, all 39 employees who had been

² Crosby was rated by Hoffman, David Lanham (an operations supervisor), and Allen Pearson (the dispatch supervisor).

were laid off at the mine were recalled and offered employment at Kennecott. As stated above, Crosby was recalled by Kennecott effective January 20, 2004, and continues to be employed at Kennecott.

Crosby testified that in September 2003, while he was on layoff status, Rob Black, a miner's representative, called him to tell him that he was mailing him the three qualifications assessment worksheets pertaining to him. (Tr. 190; Exs. C-10, C-11, and C-12). Crosby became very angry when he reviewed the assessment worksheets, especially because he was ranked poorly for his "incident rate." (Tr. 197-98). Mr. Black also mailed Crosby a copy of his accident/incident history at Kennecott which had been downloaded from a company database. (Tr. 204; Exs. C-15, R-19). Crosby testified that the collective bargaining agreement provides that any accidents or incidents that occurred more than five years ago should not be considered. Crosby believes that incidents from the years before 1995 when he worked at the smelter had to have been considered to give him such a poor rating. The history shows incidents back to April 1981. In addition, Crosby testified that his accident/incident report included incidents for which he was not responsible or negligent. (Tr. 199- 209).

As stated above, Crosby was rehired by Kennecott effective January 20, 2004. (Tr. 217). Crosby complains that since his accident on February 26, 2003, Kennecott will not allow him to operate any equipment except haulage trucks. (Tr. 223). He also contends that he has not been scheduled for cross-training by the company but that other employees are receiving such training. (Tr. 225). Crosby believes that he is being singled out by the company because he complained about the brakes on the cable truck before the accident on February 26. He also states that his accident/incident history is replete with errors and that Kennecott managers manipulated the data to ensure his layoff.

II. DISCUSSION WITH FURTHER FINDINGS 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) ("*Legis. Hist.*")

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. *Pasula* at 2800; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

A. Protected Activity

Crosby contends that he complained about the condition of the brakes on the cable truck. He testified that he "constantly" complained about the brakes prior to the accident on February 26. (Tr. 154). Crosby also testified that he often made oral safety complaints about conditions at the mine and that, as a consequence, he is "not real popular with the bosses" (Tr. 155). He testified that the company has only allowed him to operate the haul trucks since the accident and will not train him on other pieces of equipment. *Id.*

Kennecott denies that Crosby complained about the condition of the brakes on the cable truck. It contends that Crosby presented only vague, unsupported allegations that he complained about the brakes. Stacy, Lanham and Hoffman denied that Crosby complained about the brakes on the cable truck on the day of the accident. (Tr. 311-12, 502, 539). As stated above, Crosby testified that the brakes on the cable truck would fail intermittently and, if the truck was needed for production, he was told to get it to work. Withers testified that it is unlikely that the brakes on a cable truck would fail and then work again on an intermittent basis.

Although Kennecott denies that it was aware that Crosby was concerned about the safety of the brakes on the cable truck, for purposes of this decision, I find that Crosby raised legitimate safety issues concerning the brakes. I am giving Crosby the benefit of the doubt that management was aware that he complained about the brakes on the cable truck in the days preceding the accident. As a consequence, I find that he engaged in protected activity.

B. Adverse Action

Crosby contends that he suffered adverse action as a result of his protected activities. The adverse actions consist of (1) his two day suspension and disqualification from operating cable trucks following the February accident; (2) his inclusion in the layoff from July 5, 2003, through his re-employment at the mine on January 20, 2004, and (3) the company's failure to cross-train him for other positions at the mine. In determining whether a mine operator's adverse action is 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." *Sec'y 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 toward the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant.

1. Suspension and Disqualification

Kennecott disciplined Crosby for backing into the rover truck and for his conduct after the initial impact. It appears that Kennecott was especially concerned that Crosby moved the cable truck a short distance up the hill to park the truck after the initial impact. As Crosby got out of the cable truck it started moving down hill toward miners who were in the area. This part of the accident is described in the accident investigation report as follows:

Scott then pulled the cable truck 969 forward so he could get out of the truck and see if damage happened to the rover truck or the bridge. Scott got out of the cable truck and was walking toward the rover truck and bridge when the cable truck began to move backwards down the grade, through the bridge, and toward the rover truck positioned in front of the shovel dipper. The operators changing the shovel teeth started yelling “Get out of the way!” They made it in the clear and the 969 cable truck smashed in the front of rover truck 883 for a second impact. Scott then pulled cable truck 969 forward again in the same place (approximately 50-60 ft) and got out of the cable truck placing wheel chock behind the tires.

(Ex. R-6). The accident report states that the first impact was caused by Crosby’s failure to “follow TRACK and conduct proper risk assessment.”³ *Id.* The report states that the second impact was caused by “improper usage of parking brake.” *Id.* In the comments section, the report states that “Scott’s story about the incident is inconsistent with the facts that came out of the investigation.” *Id.* When the truck was tested by Withers, he determined that the parking brake would hold the cable truck on a grade as long as the truck was not in gear.

In his suspension and disqualification letter to Crosby, Hoffman states that the “proper actions that you should have taken were to stop the equipment you were operating immediately and call your supervisor when you thought you may have had an accident, not keep operating the cable truck.” (Ex. R-7).

³ TRACK stands for “Think through the task, Recognize the hazards, Assess the risks, Control the hazards, and Keep safety first at all times.” (Tr. 445).

Crosby complains that company management did not initially blame him for the accident but then disciplined him after he returned from his vacation. He faults the company for holding equipment operators responsible for all accidents, whether there is any showing of negligence. He contends that the accident would not have occurred if the brakes were in better working condition and that he was a scapegoat for Kennecott's poor maintenance practices which values production over safety.

Kennecott uses a progressive discipline system. Crosby has what Kennecott considered to be an extensive incident history. On February 8, 2003, he was assisting another driver move cable with a different cable truck. The truck backed over the cable pothead and damaged a brake canister on the truck. (Ex. R-19). Crosby contends that this accident was not his fault because he was not operating the cable truck. Crosby and the cable truck operator were held accountable for the incident for failure to check the area before starting the work. *Id.* Between 1999 and 2003, Crosby was involved in three other incidents where he received some form of discipline including a verbal warning and a written warning. (Ex. R-20). Although not considered to be discipline, Crosby received counseling twice in 2001 for unsafe acts and for using abusive language.⁴

Crosby contends that his cable truck had been in and out of the shop in early 2003 for faulty brakes. He testified that the cable truck operators complained about the conditions of the brakes, but the brakes were never repaired. (Tr. 576). He believes that Kennecott disciplined him for the accident to cover up the fact that the brakes were not properly maintained. *Id.* Mike Sparks, another cable truck operator, testified that he drove the subject cable truck on a regular basis. (Tr. 116). He testified that the cable truck was in the shop for adjustment or maintenance on a weekly basis in the month or so before Crosby's accident. (Tr. 117). Sparks testified that, after February 26, he went to the shop on Crosby's behalf to get a copy of the maintenance records for the cable truck, but was told that Stacy had taken them all. (Tr. 118). Apparently, the notebook kept inside the cable truck which drivers use to record the results of their preshift examinations and to record any safety problems could not be located. Crosby believes that the missing preshift book would have revealed the brake problems that had been reported.

Kennecott produced what it represented to be the maintenance file for the cable truck. (Exs. R-2, R-28 through R-31). Withers testified that the record does not indicate that the brakes on the cable truck were repaired or rebuilt in the weeks before Crosby's accident. (Tr. 250, 457-

⁴ While Crosby worked at the smelter in the early 1990s, he was suspended once and he was also terminated from his employment for violating a probationary agreement regarding alcohol abuse. Crosby testified that any incidents or discipline he received prior to 1998 should not be considered because they occurred more than five years before the accident. In addition, he testified that he suffered severe post traumatic stress syndrome during that period because he witnessed a close friend commit suicide. (Tr. 579). Crosby also made threatening calls to Kennecott supervisors. (Tr. 391-92, Ex. R-21).

67). The records show that the brakes were adjusted after Crosby's accident. (Tr. 250, 461; Exs. R-2, R-31).

I find that Crosby did not establish that he was disciplined as a result of any complaints he had made about the brakes on the cable truck or as a result of any other safety complaints he had lodged. As stated above, a mine operator's motivation in disciplining a miner is not always clear with the result that circumstantial evidence must be considered. There was certainly a coincidence in time between the protected activity and the discipline. Kennecott contends that its supervisors were unaware that Crosby complained about the brakes on the cable truck. When he conducted his preshift examination, the brakes were working. Management was aware that Crosby, along with other employees, reported brake problems on mobile equipment from time to time and, as stated above, I assume for purposes of this decision that management was aware that Crosby had complained about the brakes on the cable truck in the days before the accident.

I find that Crosby did not establish hostility or animus toward his protected activities, however. The preponderance of the evidence establishes that if the operator of mobile equipment reports that the brakes on his vehicle are not working properly, Kennecott attempts to address the problem. (Tr. 101, 254, 333-36). Equipment operators are not required to drive trucks with defective brakes. (Tr. 563-64). There is simply no credible evidence that Kennecott is hostile to an employee who reports that the brakes on a vehicle are not working.

I also find that Crosby did not establish disparate treatment. Kennecott management believed that Crosby had a significant history of accidents and discipline. (Tr. 383-84, 389-90). He had received a verbal warning and a written warning in the five years prior to his accident. (Ex. R-20). I find that Crosby's conduct following the first impact with the rover truck played a significant role in the decision to suspend him and disqualify him from operating cable trucks. Whether his suspension and disqualification were fair and just discipline for his actions is not within my jurisdiction. I find that there is no credible evidence to support Crosby's argument that he was disciplined to cover up the fact that the brakes were not properly maintained. There has been no showing that other equipment operators, with similar incident and discipline histories, have been treated differently by Kennecott.

Much of the argument and evidence presented by Crosby concerns the company's alleged policy of placing blame for accidents on employees without regard for their negligence. Crosby paints a picture of an employer who always disciplines equipment operators for accidents that are not their fault. Crosby genuinely believes that his discipline was unfair. In a 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. 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 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. 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 judgment 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 Kennecott's alleged business justification for suspending and disqualifying Crosby from operating cable trucks is credible. His past history of accidents and discipline was the key factor in the level of discipline. The letter of suspension and disqualification states that his "personal incident rate exceeds the Kennecott Utah Copper average significantly . . ." (Ex. R-7). The reasons set forth by Kennecott for suspending and disqualifying Crosby were "enough to have legitimately moved that operator to have disciplined the miner." *Haro* at 1938.

2. Layoff Effective July 5, 2003

Crosby also argues that he was chosen for layoff because he complained about the brakes on the cable truck. This argument is closely tied to his other claims because he believes that he would have received a higher rating following the qualifications assessment process if he had not been disciplined for the February 26, 2003 accident.

Kennecott presented evidence concerning the system it used to rate employees. The evidence was quite similar to the evidence it presented in *Ondreako v. Kennecott Utah Copper Corp.*, 27 FMSHRC 334 (March 2005). The front line supervisors who rated employees using the Qualifications Assessment worksheet did not know that the worksheet would be scored or what it would be used for. Because all previous layoffs at the mine had been based on seniority, supervisors did not know that scores derived from these worksheets would be used to rank employees in future layoffs. (Tr. 472, 546-47).

Kennecott contends that its qualifications assessment review process is both fair and objective. Many of Crosby's arguments concern the fairness of the review process. He points to the fact that the supervisors who rated him considered his accident and discipline history since the beginning of his employment with Kennecott in 1981. It was Stacy's intention that supervisors would look only at an employee's work history for the previous five years. Apparently, this instruction was not communicated to all of the supervisors because Pearson and Lanham considered Crosby's entire accident/discipline history with Kennecott. (Tr. 473, 512). The supervisors reviewed each employee's incident history and discipline history kept on a computer database when filling out the Qualifications Assessment worksheet. Crosby has worked at Kennecott for over 20 years and he had a rather extensive incident and discipline history. This history had a significant impact on his rating. Hoffman only considered Crosby's work history over the previous five years. (Tr. 551). Crosby also complains that many of the incidents on the accident/incident history should not be considered because he was not at fault. For example, one incident involved first aid that he received.

All of these arguments go to the fairness of the system developed by Kennecott. The Qualifications Assessment worksheets were developed in the spring of 2003 so supervisors had never been asked to fill them out before. It is clear that the implementation of this new system was not perfect because clear instructions were not given to supervisors. The supervisors spent about ten minutes independently rating each miner. The supervisors relied on their observations of the miners they were assigned to assess as well as the incident and discipline information obtained from the company's database. Because it appears that many supervisors did not limit their review to the previous five years, an employee with a short work history could well have an advantage over a long-term employee. Nevertheless, I find that there is no credible evidence to show that Crosby was treated differently in this regard. Supervisors who reviewed Crosby's entire work history followed the same procedure when rating other Kennecott employees. Any unfairness in his ratings is not related to his protected activities. There is no credible evidence that any complaints Crosby made about the brakes on his cable truck influenced the ratings given

by Hoffman, Pearson, or Lanham. Both Lanham and Hoffman testified that they were not aware that Crosby complained about the condition of the brakes on the cable truck before his accident. (Tr. 502, 539). Crosby received his highest rating from Pearson. (Ex. R-26).

Kennecott rated employees in the past using a different method from the Qualifications Assessment worksheets. These ratings concerned quantitative production and they were not used for purposes of layoff. Crosby points out that he was one of the highest rated haul truck drivers in 2000, 2001, and 2002, based on production. (Tr. 142-44; Exs. C-4, C-5, C-6 and C-7). In 2000, Stacy took Crosby into his office to congratulate him for being the “top dog” in terms of production for a haul truck driver that year. (Tr. 146-47; Ex. C-4). Crosby offered this evidence to show that Kennecott turned against him in early 2003 and he argues that the only explanation for this turnaround is Crosby’s safety complaints. Although this argument has some appeal, I reject it. Clearly, Crosby is to be congratulated for his work. Nevertheless, the work for which he was commended was as a haul truck driver. He was permitted to continue operating haulage trucks at the same rate of pay after the February 2003 accident. More importantly, the Qualifications Assessment worksheet does not stress quantitative production in the categories used to rate employees. Crosby scored somewhat higher in categories entitled “work output,” “work experience,” and “technical skills,” but his scores were still in the midrange or below. To get high scores in these areas, an employee must, for example, demonstrate that he is a “highly motivated employee,” a “team player,” and that he “adapts quickly to changes in the business.” (Ex. C-10). I have no way of knowing whether the ratings that Pearson, Hoffman, and Lanham gave Crosby in these areas accurately reflect his abilities, but there has been no showing that these ratings were tainted in any way by Crosby’s concerns about the maintenance of brakes on the cable truck.

In conclusion, I find that Crosby was included in the 2003 layoff for reasons that are not protected under the Mine Act. He was selected based on the ratings he received as a result of the Qualifications Assessment worksheets.

3. Lack of Training Opportunities

Crosby is also concerned that Kennecott has not given him the opportunity to cross-train on other pieces of equipment since his February 2003 accident. (Tr. 155-56). It is clear that it is to an employee’s advantage to be qualified to operate many pieces of equipment. Crosby contends that he has been denied the chance to attend training classes. Crosby testified that whenever he raises the training issue with his supervisor, he is told that he was hired as a truck driver and that is all he will ever be. (Tr. 223). The current training schedule for dozer/motor graders, for example, shows that he is not scheduled for training on that equipment through early 2006. (Tr. 223-25; Ex. C-17). Crosby believes he has been denied training opportunities because he raised safety issues.

Kim Moulton, who is now the director of organizational development, testified that under the new collective bargaining agreement, miners can be transferred anywhere in the mine without

regard to union affiliation. (Tr. 409-10). As a consequence, the company has developed a training plan with a goal of cross-training as many miners as possible so that they can work at other positions in the mine. He testified that it will take years to complete this training because there are 410 employees in mine operations. (Tr. 410). Those employees who receive the highest qualifications assessment ratings are cross-trained first. (Tr. 411). Stacy testified that “the odds of [Crosby] being able to cross-train after a serious accident were probably slim” because the company would offer such training to those who did better on the qualifications assessment. (Tr. 310). As a consequence, Crosby has not yet been given the opportunity to cross-train because he received a relatively low rating. Neither Crosby nor his union filed a grievance on this issue.

The training issue is closely tied to the qualifications assessment issue, discussed above. I credit the company’s evidence that Crosby has not been cross-trained because of his score on the qualifications assessment. His prior incidents and discipline had a negative effect on his rating. Each employee is rated on a regular basis, so an employee’s rating is not static and can improve. I find that Crosby did not establish that he has been denied training opportunities because he complained about safety issues at the mine or complained about the condition of the brakes on his cable truck.

III. ORDER

For the reasons set forth above the discrimination complaint filed by Scott L. Crosby against Kennecott Utah Copper Corporation under section 105(c) of the Mine Act is **DISMISSED**.

Richard W. Manning
Administrative Law Judge

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