

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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March 28, 2005

JOSEPH M. ONDREAKO,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 2004-141-DM
	:	RM MD 2003-11
v.	:	
	:	Mine I.D. 42-00149
	:	Bingham Canyon Mine
KENNECOTT UTAH COPPER CORP.,	:	
Respondent	:	

**DECISION**

Appearances: Joseph M. Ondreako, West Jordan, Utah, pro se;  
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 Joseph M. Ondreako 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. Ondreako alleges 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 July 9, 2003, Mr. Ondreako filed a discrimination complaint with the local office of the Department of Labor’s Mine Safety and Health Administration (“MSHA”). On September 2, 2003, the Secretary filed an application for temporary reinstatement on Ondreako’s behalf. A hearing on the application was held before me on October 2, 2003. I granted the application for temporary reinstatement. *Sec’y of Labor on behalf of Ondreako v. Kennecott Utah Copper Corp.*, 25 FMSHRC 612 (Oct. 2003). Upon appeal, the Commission affirmed my decision. 25 FMSHRC at 585 (Oct. 2003).

On December 17, 2003, the Secretary determined that the facts disclosed during her investigation into Ondreako’s discrimination complaint do not constitute a violation of section

105(c) of the Mine Act. On that basis, counsel for the Secretary advised me that he would not be filing a complaint of discrimination on Ondreako's behalf. By order dated December 22, 2003, I dissolved the order of temporary reinstatement pursuant to 29 C.F.R. § 2700.45(g).<sup>1</sup>

On January 16, 2004, Ondreako filed this proceeding on his own behalf under section 105(c)(3) of the Mine Act. Mr. Ondreako started working at Kennecott in November 1999 as a haul truck driver. (TR Tr. 14).<sup>2</sup> About six months later he transferred to the roads and dumps department operating dozers, graders, and track hoes. After receiving the requisite training, Ondreako also operated electric shovels whenever an extra operator was needed.

Prior to his employment with Kennecott, Ondreako worked for Newmont Mining Company. He operated hydraulic shovels for Newmont. In 2002, Kennecott bought a hydraulic shovel and Ondreako transferred to the shovel department to operate this shovel. He eventually was given the title "Advanced Operator." (TR Tr. 19). Ondreako operated both electric shovels and the hydraulic shovel during this time.

On April 26, 2003, Ondreako was assigned to operate the No. 52 electric shovel on the 4940 bench. When he arrived at the shovel he walked around it to perform a preshift examination of the equipment and his surroundings. (TR Tr. 28). Everything looked fine. When he got into the operator's compartment of the shovel and looked at the dig face, he noticed that there was rock containing ore and waste rock in the area. He called Alan Pearson, the dispatch supervisor, on the radio and was told to continue digging the ore that the previous shovel operator had been producing. The ore-bearing rock that other shovel operators in the pit were loading was soft, which tended to plug up the crusher. (TR Tr. 29). The ore that was in the area of Ondreako's shovel was hard and management wanted to mix that material with the other material at the crusher so that the crusher could continue to operate.

Ondreako testified that he advanced the shovel into the dig face and the face looked secure. As Ondreako dug further into the face, he became concerned that he was becoming rat-holed. The dig face was taking on the shape of a tight horseshoe. He testified that it is more difficult to see the face around him when he is inside a rat hole and that it is more difficult to load the haul trucks. (TR Tr. 30-32). He called Pearson and asked if he could "square the dig face," which involves repositioning his shovel so that the front of the shovel would be parallel to the line of rock he was loading. Pearson told him to keep working because the rock he was loading was needed at the crusher. Ondreako kept on working but he was concerned that he would soon be working in a narrow slot. Ondreako heard Pearson ask Anthony Hoffman on the

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<sup>1</sup> Ondreako remained employed at Kennecott after I dissolved this order because the miners who were laid off were subsequently recalled by Kennecott and offered employment.

<sup>2</sup> References to the transcript and exhibits in the temporary reinstatement case, WEST 2003-403-DM, are indicated as (TR Tr. \_\_\_; TR Ex. \_\_\_). References to the transcript and exhibits at the hearing in this docket are indicated as (Tr. \_\_\_; Ex. \_\_\_).

radio, “Did you copy that? Joe needs to move.” (TR Tr. 32). To which Hoffman replied, “Joe, go ahead and stay there. I’ll be right down and I’ll get with you.” *Id.* Ondreako kept working without repositioning. Hoffman was the operations supervisor over shovels and Ondreako’s immediate supervisor at that time.

When Hoffman arrived at the shovel, he told Ondreako to keep loading, at least until after the 11:30 a.m. production meeting. (TR Tr. 33). Hoffman testified that Ondreako did not raise any safety issues with him at this time. (TR Tr. 156-57). Ondreako testified that the material he was loading was sitting higher than normal. (TR Tr. 34-35). The rock was similar to aggregate, but some large boulders were also present. At one point he noticed a large boulder sitting up on top of the material above the shovel. (TR Tr. 35). Kennecott requires shovel operators to manage large boulders in their work area so that they do not fall and damage the shovel or cause injury to the shovel operator. Ondreako testified that he was keeping an eye on the boulder when he saw it start to move as he was swinging the shovel toward the haul truck. (TR Tr. 36). He dumped the load on the ground and started to swing back toward the boulder to block it with the shovel’s bucket. Because the shovel is large, changing directions takes time and the boulder hit the right side boarding ladder on the shovel before he could block it with the bucket. *Id.* Ondreako testified that the boulder gave the shovel a jolt and caused about \$1,700 in damage. (TR Tr. 37).

Ondreako called Hoffman to tell him about the accident. Ondreako was tested for drugs and alcohol, the results of which were negative. Ondreako returned to work operating the same shovel. When Ondreako returned to work the following work day, he was sent home pending an investigation. (TR Tr. 39; Ex. C-1). The written notice of his suspension was sent to the local United Steelworkers union, rather than to the local Operating Engineers, which was Ondreako’s union. Ondreako testified that whenever there is an accident, a team is formed to investigate and the employees involved in the accident participate in the investigation. *Id.* Ondreako testified that he was told by Hoffman on May 8, 2003, that the investigation had been completed and that he was being demoted to an Operator B position. (TR Tr. 39; Ex. C-2). In this position he would no longer be a shovel operator, but would be operating other equipment in the roads and dumps department. The written notice of his demotion, dated May 3, 2003, was also sent to the Steelworkers Union rather than the Operating Engineers. Ondreako was surprised that the investigation had been completed without any input from him. The Operating Engineers did not participate in the accident investigation because it was not given notice of the suspension. (Tr. 39-41). The Operating Engineers filed a grievance on Ondreako’s behalf, but the grievance did not raise the notice issue.

Kennecott prepared an accident investigation report following Ondreako’s accident. (Ex. C-7). It is not clear when the report was prepared. Ben Stacy, the Operations Superintendent, signed the report on May 20, 2003, and Ted Himebaugh, the Operations Manager, signed it on May 22, 2003. As described below, Ondreako believes that this report inaccurately reflects what happened on April 26 and fails to indicate that he was not at fault.

On May 12, 2003, Ondreako called the local MSHA office to describe the events that took place. Inspector Dwayne Humphries suggested he file a discrimination complaint. Ondreako also discussed the condition of the benches above the Carr Fork Road at the mine. Ondreako had complained to management in late March and early April about operating the hydraulic shovel along a particular section of the road. On one occasion, Ondreako warned others over the radio that, because of the wet conditions, “the highwalls would be moving.” (TR Tr. 24). Hoffman testified that on one occasion, in response to Ondreako’s safety concerns, he permitted Ondreako to move the shovel further down the road. (TR Tr. 161-62). Inspector Humphries told Ondreako to call MSHA if the hydraulic shovel were to operate in that location again.

On May 23, 2003, when Ondreako observed that the hydraulic shovel was again operating along the section of Carr Fork Road that concerned him, he called MSHA. MSHA inspected the area following this call. (TR Tr. 44). MSHA issued two citations, one alleging a violation of section 56.3130 for allowing the benches to overfill with rock, creating a hazard to those working below, and another alleging a violation of 56.3200 for failing to install a barricade or berm in the affected area. (TR Ex. R-33).

Casey Kalipetsis testified that when the MSHA inspector arrived on May 23, David Lanham, the operations supervisor over the roads and dumps department, drove him to the Carr Fork Road because he was a Steelworkers Union representative. Lanham kept asking him who called MSHA. When Kalipetsis did not answer, Lanham stated the he already knew “it was that fucking Ondreako.” (Tr. 126-28; Ex. C-14). Kalipetsis testified that as they were leaving the inspection site, Lanham said, “I know Ondreako is out to fuck Anthony Hoffman over getting him washed out of the shovels dept., but now he’s fucking me.” (Tr. 128; Ex. C-14). As discussed below, Lanham denied that he ever said those words to Casey Kalipetsis and denied even discussing Ondreako with him.

The step two grievance hearing on the shovel accident was held on June 24, 2003. A Kennecott human resources representative took notes at the meeting. (Ex. C-18). Among those present at the hearing was Steve Kalipetsis, who was Ondreako’s union representative and Casey’s father. Steve and Ondreako presented their case that the accident occurred because Ondreako was not permitted to square the dig face. In addition, it was their position that Ondreako was not at fault because the boulder was hidden in the bank and, as a consequence, he could not have taken any precautions against it. (Tr. 69-70). Ondreako stated that as soon as he saw the boulder start to move, he did everything he could to protect the shovel. Hoffman stated that when he was in the area moments before, he did not see anything of concern in the area that Ondreako was loading. (Ex. C-18 at 2). He also stated that Ondreako told him that he could safely operate the shovel in the area. Ondreako admitted that the conditions he was working under did not present a “horrendous safety issue” at the time Hoffman was there. *Id.* at 3. Ondreako complained that the company’s accident report did not reflect what actually happened.

John Simonson, a team leader, gave his version of what he thought happened. He thinks that Ondreako hit the rock with the body of the shovel. Ondreako contends that Simonson was just speculating because he not present during the physical investigation of the accident. (Ondreako Br. 6-7). Ondreako believes that Simonson's participation demonstrates that Kennecott was trying to frame him for the accident. At the grievance hearing, Hoffman, who was at the accident scene, said that during his initial investigation, he did not see anything that Ondreako was doing wrong. (Ex. C-18, p. 4). Himebaugh kept stressing that Ondreako, as operator of the shovel, was responsible for the accident. (Ex. C-18 3-4). Ondreako denied responsibility saying that management took control of his work environment when he was denied the opportunity to square the face. He also stressed that other employees have damaged ladders on shovels without receiving any discipline. Steve Kalipetsis stated that Ondreako exposed a large rock as he was shoveling and that he did all that he could to protect the equipment. Byron Timothy, an advanced operator and re-rate supervisor, stated that a face can shift as the area is shoveled and the shovel operator does not "know what's behind the material." *Id.* at 5. Himebaugh was concerned that Ondreako was not accepting any responsibility for the accident.

When Ondreako asked, "What separates me from the other guys [who damaged ladders on shovels]? *Id.* at 6. Himebaugh replied "possibly your past discipline." At that point, Ondreako said "I will take this to MSHA and request a full investigation of the entire safety program because this investigation is not accurate." *Id.* Timothy stated "we need to have these incidents stop and we need to keep our faces square and not tunnel in." *Id.* Hoffman agreed with this assessment but then stated, "but if people will not accept any responsibility it concerns me." *Id.* Hoffman also said that he had concerns about how the accident was investigated.

Because Ondreako had previously been suspended, Stacy indicated that demotion was an appropriate level of discipline in this case and that termination would result following further incidents. *Id.* at 7. Ondreako continued to maintain that he was not at fault for the accident. Richard Brewster, a heavy equipment operator, asked Hoffman how he came to the conclusion that Ondreako was at fault. *Id.* at 8. Hoffman said the each employee is responsible for his work environment and when he asked Ondreako at the site if he could safely work without squaring the face, Ondreako replied "yes."

Ondreako believes that he was suspended and demoted because of his past safety complaints. He points to the fact that Hoffman told him on April 26 that he was not at fault for the accident. He also relies on a computer summary of the accident which he obtained from Kennecott during discovery. There is a summary of the accident in a computer-generated database of 2003 accidents and incidents. (Ex. C-11). Under the column entitled "Accident/Incident Description" it states "ES #52 (J. Ondreako) damaged boarding ladder, 10' rock broke from bank, struck ES." *Id.* Under the column entitled "Corrective Action" it states "Reminded operator to report large boulders that are visible, in this case it was not apparent." *Id.*

Ondreako contrasts this account of the accident with the report that was presented to Himebaugh. In that report, it states:

A 10 ft. rock rolled out from the bank landing in front of the shovel. When Joe swung around to put another dipper of muck in the truck, the right side of the ladder came in contact with the rock bending the ladder. Joe said that he had no idea that the rock was in front of him. He thinks that as he was loading the truck the rock may have sloughed from the bank as he swung back into the face to get another dipper. Upon inspection of the site there was a large section of the bank that had sloughed off.

(Ex. C-7). In the section of the report entitled “What additional corrective actions should be taken to control the immediate or basic (root) cause,” it states:

Operator has be[en] reminded to report large boulders that he can see that could unexpectedly slough off. In some cases, these can be brought down safely with the shovel and/or crawler dozer. In this case.

Ondreako contends that the description of the accident is inaccurate because it states that he hit the rock with the body of the shovel. He also believes that the final sentence of the corrective action section was deliberately chopped off. The sentence is obviously incomplete and it should have said, “In this case it was not apparent,” as it did in the computer database. (Ex. C-11). Ondreako believes that the company altered the accident report to justify disciplining him for this accident in retaliation for his safety activities.<sup>3</sup>

The day after the grievance hearing on June 25, 2003, Stacy notified Ondreako that he was being laid off. Ondreako was ordered to leave the mine. (TR Tr. 51). Ondreako received a letter dated June 26, 2003, notifying him that his layoff was effective July 5, 2003. (TR Tr. Ex. G-2). Kennecott laid off about 119 employees effective July 5, 2005.<sup>4</sup> 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. Ondreako was rated by Simonson, Pearson, and Lanham on May 23, 2003, the same day as MSHA’s inspection of the Carr Fork Road. (TR Ex. R-28). When the scores were tabulated, Ondreako was ranked 404 out of 410 at the mine. (TR Ex. R-30). 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 Qualification Assessment worksheets.

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<sup>3</sup> Ondreako took the grievance to the third step under the collective bargaining agreement. On September 3, 2003, Ondreako settled the grievance for a monetary sum. (TR Ex. R-21).

<sup>4</sup> This layoff included employees in the Bingham Canyon Mine, the smelter, the refinery, and other facilities operated by Kennecott.

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.<sup>5</sup> A committee of Kennecott's upper-level supervisors and managers was given the task of developing a "fair and objective method of ranking employee qualifications to meet the requirements of the organization." (TR Tr. 103-06; Tr. 276-81; TR Ex. R-23). Although seniority was considered in the rankings, it was only one of many factors that the committee decided to include. After the committee determined what factors are important to Kennecott, the committee developed the Qualifications Assessment worksheet to be used when ranking employees. (TR Tr. 109-15; TR Ex. R-24). 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. (TR Tr. 125). They rated each employee by checking the box next to the statement in each category that 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 given the scoring formula. 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 began requiring supervisors to rate employees using these worksheets on a regular basis but this was the first time they had been used. Each employee was rated by at least three supervisors who were familiar with the employee's work. An average score for each employee was calculated using a computer spreadsheet. (TR Exs. R-25 & R-30). Ondreako received a score of 2.1271, which ranked him at number 404 out of 410 mine operations employees. Each laid off employee has recall rights under the collective bargaining agreement. (TR Tr. 130-31). When market conditions improved in late 2003 and early 2004, all 39 employees who had been were laid off at the mine were recalled and offered employment at Kennecott. (Tr. 294-95). Ondreako was reinstated by my order on or about October 23, 2003, and continues to be employed at Kennecott as a result of this recall, even after I dissolved the order of reinstatement on December 22, 2003. At the time of the hearing, Ondreako was employed at the mine as an Operator B. (Tr. 302-03).

Kennecott contends that Ondreako's safety complaints were not taken into consideration when Ondreako was included in the mine-wide layoff. It argues that Ondreako failed to establish a *prima facie* case of discrimination. Kennecott also argues that the testimony and exhibits presented by Casey Kalipetsis should not be considered because they are not credible.

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<sup>5</sup> This process is described in more detail in my decision granting temporary reinstatement. 25 FMSHRC at 615-16.

David Lanham testified that when he filled out the Qualifications Assessment worksheet for Ondreako on May 23, he did not know that it was Ondreako's call to MSHA that prompted the MSHA inspection that day. (TR Tr. 188). He filled out the worksheet independently. He became Ondreako's supervisor only after Ondreako was demoted to an Operator B in the roads and dumps department following the shovel accident. (Tr. 193). Lanham denied having a discussion with Casey Kalipetsis about Ondreako when he drove him to Carr Fork Road to meet up with the MSHA inspectors on May 23, 2003. (Tr. 190-92). Lanham testified that if he had uttered the words that Casey Kalipetsis attributed to him, everyone at the mine would have heard about it and upper management would have "come down" on him. (Tr. 191).

Anthony Hoffman testified that Stacy and Himebaugh made the decision to suspend and demote Ondreako following his April accident, with input from Hoffman. (Tr. 206). It was all part of the progressive discipline system at the mine. Ondreako was suspended and demoted because he had been involved in previous accidents and had been previously suspended. Hoffman testified that many miners have been disciplined for accidents in the same manner as Ondreako. Hoffman stated that he prepared the accident investigation report for this accident and that the words in the section describing corrective actions are his. (Ex. C-7). He denied that the sentence "In this case" in that document was incomplete. (Tr. 216). He did not draft the words "in this case it was not apparent" in the 2003 summary of accidents on the computer spreadsheet. (Tr. 217; Ex. C-11). Although Hoffman had been Ondreako's immediate supervisor until the shovel accident, he did not fill out a Qualifications Assessment worksheet for him because he was on leave at that time. (TR Tr. 156). Hoffman testified that Ondreako did not raise any safety issues when Hoffman talked to Ondreako after he asked to square the face on April 26.

Ben Stacy testified that under Kennecott's progressive discipline system, Ondreako could have been terminated for the April 26 accident because he had been suspended for a previous incident. (Tr. 226-28). When front line supervisors were given the Qualification Assessment worksheets, they were not told that it would be scored. (TR Tr. 165). At that time, he was not aware that Ondreako was responsible for the May 23<sup>rd</sup> MSHA inspection. (TR Tr. 171).

Ted Himebaugh testified that Kennecott employees have been suspended and terminated for damaging equipment. (Tr. 234). Degree of damage is not as important as the employee's negligence, operating skills, past discipline, and accident history when determining appropriate discipline. (Tr. 236). He testified that the decision to suspend and demote Ondreako was made before May 3, 2003. Himebaugh stated that, at the grievance hearing, he wanted to make sure that Ondreako was not forced to work under conditions that he believed created a hazard. When Ondreako stated that there was no significant safety hazard, Himebaugh wanted Ondreako to accept at least some responsibility for the accident. (Tr. 248). Himebaugh testified that Ray Hanson, a Kennecott safety engineer, put the information in the database of 2003 accidents. (Tr. 269; Ex. C-11). The information in that database is from the preliminary investigation, which is not necessarily updated. This database is used to make sure that all accidents are investigated; it is not used to keep track of an employee's accident history. (Tr. 273).



## **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, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95<sup>th</sup> Cong., 2<sup>nd</sup> 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 (4<sup>th</sup> Cir. 1987).

### **A. Protected Activity**

There is no dispute that Ondreako engaged in protected activity when he complained to management about safety conditions at the mine and made safety complaints to MSHA.

### **B. Adverse Action**

Ondreako contends that he suffered adverse action as a result of his protected activities. The adverse action is (1) his suspension and demotion following the April shovel accident; and (2) his inclusion in the layoff effective July 5, 2003, through his re-employment at the mine on October 23, 2003. 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 Demotion to Equipment Operator**

Although the exact sequence of events that led up to the shovel accident are in dispute, there is no question that the ladder on the shovel was damaged while Ondreako was operating it. Ondreako contends that, at first, Kennecott did not attribute any negligence to him but that Stacy and Himebaugh subsequently charged him with causing the accident. He relies on testimony of his witnesses, Hoffman's statements at the grievance hearing, and the discrepancy between Exhibits C-7 and C-11. He believes that his suspension and demotion were unfair and that this discipline was in retaliation for his safety activities.

I agree that there are some inconsistencies in the evidence. It appears that initially Hoffman did not think that Ondreako was responsible for the accident. When the accident was recorded in the database, the safety engineer wrote that the boulder that struck the shovel "was not apparent." (Ex. C-11). By May 3, 2003, however, management had concluded that Ondreako was responsible for the accident. The suspension letter signed by Hoffman states, "Your failure to recognize and take action against the hazard of a boulder falling from the bank and striking your equipment is unacceptable and is a crucial part of your everyday duties concerning ground control inspections." (Ex. C-2). The letter goes on to state:

In reviewing your employee file, I found that you have active discipline in the form of a one-day suspension for equipment damage. In fact, this is the third event of equipment damage within a three year time frame documented in your file. This is an unacceptable pattern of behavior that you have been asked to correct before by your supervisor.

*Id.* The letter goes on to state that, "You have demonstrated you can work safely and productively as a dozer/grader/truck operator and you are being given the opportunity to return to this level of work instead of having your employment terminated." *Id.*

Ondreako contends that the company's stated reason for the discipline is pretext to hide its discriminatory motive because other employees have damaged equipment without being suspended. (Ondreako Br. 26-27). Ondreako's witnesses testified that Ondreako was a very safe shovel operator. (Tr. 18, 101-02, 107-08, 112-15, 158-59). These witnesses also gave examples of employees who have damaged equipment with only a written warning or no discipline at all. Kennecott's witnesses cited examples of employees who have been suspended or terminated for damaging equipment. When Ondreako asked Himebaugh at the grievance hearing, "What separates me from [these] other guys," Himebaugh responded "Possibly your past discipline." (Ex. C-18, p. 6).

Ondreako maintains that the accident would not have occurred if he had been allowed to square the face as he had asked. He argues that it was unsafe for him to continue operating his shovel without squaring the face because his visibility was reduced. Although everyone agrees that squaring the face has a safety component, I find that Ondreako did not advise management that he was concerned about safety when he made his request. Hoffman came to his work area after he made the request. Hoffman asked Ondreako if he could work a little longer before repositioning his shovel. The evidence establishes that Ondreako agreed to keep working and that he did not tell Hoffman that he had any particular safety concerns. At the grievance hearing in June, Ondreako admitted that he did not indicate to Pearson or Hoffman that there were significant safety issues when he asked them about repositioning the shovel. (Ex. C-18, pp. 2-3). Ondreako also stated that at the time he asked to move his shovel “there was no safety issue.” (TR Tr. 148-49; Ex. C-18, p. 5). From the time of the accident through the grievance hearing Ondreako was adamant that his discipline was unfair. I agree with Ondreako that there are some inaccuracies in the accident report, but those inaccuracies are not significant to this case. Ondreako did not communicate to management that he needed to square the face to ensure his safety or to protect the shovel.

Ondreako made several safety complaints in the month before the accident. He complained about conditions along the Carr Fork Road in late March and early April 2003. Although his concerns were not directly addressed, he was told by Hoffman on one occasion that he could move his shovel down the road so he would not have to work in that area. Ondreako believes that he was disciplined following the shovel accident because he had raised these safety issues.

These complaints were known to management and were proximate in time to the adverse action. Kennecott management did not display any overt hostility to the complaints, but it does not appear that the benches were cleaned in response to the complaints. Ondreako believed that the condition presented a significant safety hazard. The evidence does not establish that Kennecott management was hostile to Ondreako’s concerns or hostile to his warning given over the mine radio that the material above the road could be moving.

In his brief, Ondreako contends that his complaints about the benches above the Carr Fork Road had significant operational implications for Kennecott. (Br. 13-15). He states that because the road had to be narrowed, production was affected because haul trucks use the road to transport waste rock to the dumps. *Id.* There was no testimony on this issue at the hearing.

I also find that Ondreako did not establish disparate treatment. Kennecott presented credible evidence that Ondreako’s suspension and demotion were consistent with its system of progressive discipline. The record reveals that in October 2001, Ondreako ran over the trailing cable of the shovel he was operating; in September 2001 he failed to follow his supervisor’s order to leave a dozer at a particular location at the end of his shift; and in May 2001 he damaged a trailing cable. (TR Exs. R-6 through 14). He received a verbal warning for the first event, a

written warning for the second, and a one-day suspension for the third. Ondreako also received counseling in December 2002, as a result of these incidents, in which he agreed to improve his safety performance. (TR Ex. R-14). Anecdotal evidence of miners who were not suspended for other accidents does not negate these facts.

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 demoting Ondreako is credible. The discipline may seem harsh since the boulder was apparently concealed in the rock at the time Ondreako performed his preshift examination, but his past history of accidents and discipline was the key factor in the level of discipline. I find that Ondreako’s safety complaints and safety concerns were not considered by Kennecott management when they decided to demote him to an Operator B position. His suspension was removed from his record and he was paid for the lost time prior to the second step grievance hearing. (TR Ex. R-20 p. 2).

## **2. Layoff Effective July 5, 2003**

Ondreako contends that he was selected for layoff because he called MSHA to investigate conditions along the Carr Fork Road, he was disciplined for the shovel accident, and he complained about safety. He believes that when Lanham, Pearson, and Simonson evaluated him in the Qualifications Assessment worksheet, they downgraded him because of his safety activities.

It is important to understand that Kennecott’s employment practices changed considerably in the year or so leading up to the layoff. In the past, those employees with the least seniority were subject to layoff in the event of a reduction in force. (TR Tr. 105). The layoff that occurred in mid-2003 was based on the employee rankings obtained through the Qualifications Assessment worksheets rather than on seniority. The content of these worksheets was developed by Himebaugh, Stacy, and other managers at the mine. When front line supervisors were asked to rate hourly employees using these forms, they did not know how the results would be scored or what the scores would be used for. (Tr. 278). This was the first time that supervisors had been asked to fill out the Qualifications Assessment worksheets. (TR Tr. 110). The supervisors were not told that the worksheets would be used to determine who would be laid off in the event of a reduction in force. (TR Tr. 127, Tr. 278).

All three supervisors who filled out a worksheet for Ondreako rated him rather poorly. (TR Ex. R-28). In filling out that part of the worksheet for safety-incident rate, the supervisors relied on the summary of Ondreako’s accidents and discipline. (TR Ex. R-6). Kim Moulton, Director of Employee Relations, testified that Ondreako’s disciplinary record demonstrated “high risk behavior.” (TR Tr. 90). Ondreako had three incidents within a short period of time. All of these incidents occurred after he had been trained to operate shovels. A major reason for Ondreako’s low ratings was his history of accidents and discipline.

All three of the supervisors who rated Ondreako testified that they did not know that MSHA inspected the conditions along the Carr Fork Road on May 23, 2003, because of a

complaint by Ondreako. Ondreako contends that he brought up the issue shortly after the preshift safety meeting that day. (Tr. 138-40). As stated above, Casey Kalipetsis testified that Lanham told him that he knew that Ondreako had called MSHA and cursed at Ondreako for doing so. Kennecott believes that this evidence should be stricken from the record as being “completely without credibility.” (Kennecott Br. 8).

Evidence concerning the alleged conversations between Lanham and Casey Kalipetsis was first presented by Ondreako in response to Kennecott’s motion for summary decision. As part of Attachment 2 to Ondreako’s response is a statement dated March 4, 2004, from Casey Kalipetsis. In the statement, Kalipetsis says that Lanham told him he knew that Ondreako had called MSHA. I denied Kennecott’s motion for summary decision in this case based, in part, on this written statement.

At the hearing, Casey Kalipetsis testified that Lanham made the statements to him as they were driving to meet up with the MSHA inspectors on May 23. (Tr. 126-28). Ondreako introduced as an exhibit a typed statement of Mr. Kalipetsis that details this conversation. (Tr. 130-32; Ex. C-14). Kalipetsis first testified that he wrote up this statement within a day or two after the inspection and that he gave a copy to Ondreako. (Tr. 131). Kalipetsis testified that he made his original notes on a pad of paper. (Tr. 133). He stated that he frequently takes notes at the mine. He was a union steward for the Steelworkers Union. Kalipetsis next testified that he typed up his notes at Ondreako’s request within a couple of weeks after May 23, in June 2003. (Tr. 136). Kalipetsis testified that his statement dated March 4, 2004, attached to Ondreako’s response to the motion for summary decision, is another copy of the notes he made. (Tr. 140).

Later, Kalipetsis testified that Ondreako did not know about his conversation with Lanham in the truck until after the temporary reinstatement hearing held on October 8, 2003. (Tr. 141-42). Kalipetsis testified that he was in the office used by the foremen, where Kennecott posts MSHA documents, when he saw the transcript of the temporary reinstatement hearing. (Tr. 142-3, 146-49). It was in question and answer format. (Tr. 146). Kalipetsis testified that he read Lanham’s testimony that he did not know who called MSHA on the morning of May 23, 2003. *Id.* Kalipetsis also testified that the transcript was mounted on the wall where everyone could see it. (Tr. 148). Kalipetsis said that it was only after he read the transcript that he told Ondreako about his conversation with Lanham in the truck. (Tr. 143).

For the reasons set forth below, I do not credit the testimony of Casey Kalipetsis concerning the alleged conversations with Lanham in the truck. Kalipetsis changed his testimony several times during the hearing as to when he wrote up the notes that Ondreako introduced as an exhibit at the hearing, as described above. (Ex. C-14). He also changed his testimony concerning Ondreako’s knowledge of his conversation with Lanham. At first he stated that he typed up the exhibit within a week after the MSHA inspection at Ondreako’s request. Then he indicated that he probably gave the statement to Ondreako in June 2003. Finally, he testified that Ondreako did not know about his conversation with Lanham until after my hearing in the

temporary reinstatement case. It defies logic that Kalipetsis would have kept this conversation a secret, especially from Ondreako.

In addition, I do not credit the testimony of Casey Kalipetsis that he saw the transcript of the temporary reinstatement hearing in the office used by the foremen. Transcripts are not required to be posted and it is highly unlikely that a mine operator would post such a document. Each of the foremen who used the office testified that they had never seen the transcript to the temporary reinstatement hearing and that they did not see it lying around the office. (Tr. 175-76, 204-06). Stacy and Himebaugh also testified that they had not seen the transcript. (Tr. 222, 233-34). Casey Kalipetsis may well have seen a copy of the transcript, but he did not see it in the office. Ondreako had a copy. The only document Kennecott was required to post was a copy of my October 9, 2003, decision and order granting temporary reinstatement. Kalipetsis testified that the document he saw in the office was not my temporary reinstatement decision. (Tr. 146). Kalipetsis was not laid off in the reduction in force.

It is clear that Ondreako and Casey Kalipetsis knew each other. (Tr. 143). For example, they talked about safety issues including the conditions along the Carr Fork Road on the morning of May 23 before the MSHA inspector arrived. (Tr. 138-39; Ex. C-14). If Lanham had made such inflammatory statements to Casey Kalipetsis in the truck, Kalipetsis would have told Ondreako because he knew Ondreako had called MSHA as a result of his concerns about the conditions along the road and, a few days later, he also knew that Ondreako was selected for layoff. All of the unions filed grievances against Kennecott for the manner in which the reduction in force was conducted. Because the method used to reduce the workforce was controversial, it is hard to believe that Casey Kalipetsis, who was a union steward for the Steelworkers local, would have forgotten about his conversations with Lanham or would have failed to mention the conversations to Ondreako or others at the mine. Lanham's alleged statements were not mentioned at the temporary reinstatement hearing.<sup>6</sup>

Lanham denied talking about Ondreako with Kalipetsis in the truck that day. (Tr. 191-92). He testified that on May 23, 2003, he was asked by his supervisor if he would like to be involved in an MSHA inspection as a learning experience. (Tr. 184). Lanham testified that he did not recall anyone raising issues about the placement of the shovels or conditions along Carr Fork Road earlier that day. Lanham picked up Casey Kalipetsis in his truck, because he was the

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<sup>6</sup> There were many legal challenges to the process Kennecott used in the 2003 layoff. Kennecott states that there were 46 discrimination complaints filed based on race, age, sex, religion, and union activity. (Tr. 283-284; Kennecott Br. 21). At least two discrimination cases were filed under the Mine Act. In this environment, it is likely union representatives were aware of these legal challenges including Ondreako's temporary reinstatement case. The mining community is small, even at a large mine like Kennecott's. Although I make no finding of fact in this regard, it is likely that Casey Kalipetsis was aware of Ondreako's discrimination case. If Lanham had made the statements that Kalipetsis attributes to him, Kalipetsis surely would have told Ondreako and the Secretary would have used that information at the temporary reinstatement hearing.

Operating Engineers representative, on the way to the inspection site. (Tr. 186). Lanham agrees that they talked about safety during the ride. Lanham testified that he asked Kalipetsis why anyone would call MSHA if there is a safety issue because it takes an MSHA inspector several hours to arrive at the site while union and management representatives can address the safety issue immediately. (Tr. 187). Lanham stated that he has no recollection of discussing Ondreako with Kalipetsis in his truck that day. (Tr. 192). He testified that if he had used profanity when referring to Ondreako with Kalipetsis, news of that conversation would likely have quickly spread around the mine. (Tr. 191). I credit that testimony.

Each employee at Kennecott is required to develop a personal safety plan. One of the sections on the Qualifications Assessment worksheet asks the supervisor to rate the employee's personal safety plan and safety participation. Casey Kalipetsis testified that his own personal safety plan was rejected because it mentioned MSHA. (Tr. 151-52). Ondreako cites this rejection as proof of the company's attitude toward MSHA and employee safety. Lanham testified that he required Kalipetsis to rewrite his personal safety plan because it was inadequate. (Tr. 176-78). In part of the plan, employees must describe actions they will start taking and actions they will stop taking to improve personal safety. (*See* TR Ex. R-2). Kalipetsis wrote that he was going to start calling MSHA more and stop letting the company get away with unsafe acts. (Tr. 178). Lanham treated this response as a joke and testified that Kalipetsis readily changed his personal safety plan upon request. *Id.* It is quite obvious that the initial response of Kalipetsis in his plan was not a personal commitment to improve his safety practices. Lanham's rejection of his personal safety plan was not out of line and does not reflect any animosity by Lanham toward employee safety or MSHA.

Although Ondreako believes that all of the supervisors who rated him were biased against his safety activities, he focuses primarily on Lanham, his immediate supervisor at the time of the layoff. The evidence shows that Pearson rated Ondreako lower than Lanham and that if Lanham's Qualifications Assessment worksheet were excluded, Ondreako would still have been included in the reduction in force. (Exs. R-1 through R-15). It also appears that his relatively low seniority had a small negative effect on his rating. (Tr. 288).

Kennecott contends that the process it developed "to determine who would remain in the workforce . . . was essentially a mechanical one, designed and executed with specific safeguards insulating the process against discriminatory animus or other improper motive." (Kennecott Br. 21). Although I do not believe that it is as foolproof as Kennecott maintains, I conclude that Ondreako did not establish that he was chosen for layoff as a result of his safety complaints or that his safety complaints influenced his ratings in the Qualifications Assessment worksheets.

There was certainly a coincidence in time between the protected activities and his layoff. Although mine management may not have known that he called MSHA with respect to the May 23<sup>rd</sup> inspection, it was known that he was not shy about raising safety issues. For the reasons discussed above, I find that Ondreako did not establish disparate treatment. Although Kennecott, like all mine operators, prefers to handle safety matters in house, there has been no showing that



it was hostile to miners who call MSHA or interact with MSHA inspectors. The citations issued following the May 2003 inspection were both designated as not being of a significant and substantial nature. (TR Ex. R-33). The citations were abated by berming off the affected area. Kennecott paid the Secretary's proposed total \$120 penalty for the two citations. (TR Ex. R-34 & R-35). Although Ondreako raised an issue in his brief about the impact of the citations on mine operations, Citation No. 6274591 states that the affected area was "not a normal travel area for access/transportation equipment." (TR Ex. R-33). Thus, it does not appear that abatement had a negative effect on production or Kennecott's operation of the mine.

In conclusion, I find that Ondreako 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. He would have received the same or substantially similar ratings if he had not raised the safety issues outlined above. I do not credit the testimony of Casey Kalipetsis that Lanham described Ondreako in disparaging terms before and after the MSHA inspection of May 23, 2003.

### **III. ORDER**

For the reasons set forth above the discrimination complaint filed by Joseph M. Ondreako 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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