

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 18, 1998

ANTHONY SAAB,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 97-286-DM
v.	:	
	:	Dumbarton Quarry
DUMBARTON QUARRY ASSOCIATES,	:	
Respondent	:	Mine I.D. 04-02380

DECISION

Appearances: Paul H. Melbostad, Esq., Goldstein, Gellman, Melbostad, Gibson & Harris, San Francisco, California, for Complainant;
Robert D. Peterson, Esq., Rocklin, California, for Respondent.

Before: Judge Manning

This case is before me on a complaint of discrimination brought by Anthony Saab against Dumbarton Quarry Associates under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 815(c)(3) (the AMine Act@). The complaint alleges that Dumbarton Quarry Associates (ADumbarton@) terminated Mr. Saab from his employment in violation of section 105(c). A hearing in this case was held in Oakland, California. For the reasons set forth below, the complaint of discrimination is dismissed.

I. SUMMARY OF THE EVIDENCE

1. Anthony Saab

Dumbarton operates a gravel pit that makes aggregate and asphalt in Fremont, California. Anthony Saab started working at the Dumbarton Quarry on June 20, 1995. He was hired from Teamsters Local 291 to drive a haul pack and a water truck. Members of the Teamsters union drive haul packs and water trucks at the quarry. Members of the Operating Engineers union operate all other equipment, including the loaders. A haul pack is a large off-road dump truck that is used to transport material from the pit to the crusher. A loader operator dumps blasted rock at the pit into the haul pack and the haul-pack operator drives the

harvested rock up to the crusher. The operators of water trucks drive along the roadways at the quarry spraying water to suppress dust.

Mr. Saab testified that he made a number of safety complaints while he was employed at the quarry. He stated that he made his first complaint in the summer of 1995. (Tr. 10).¹ He complained that a loader operator was playing around by slamming his haul pack with the bucket of the loader. *Id.*

On or about October 22, 1996, Mr. Saab sent a letter to Clay Buckley, the production operations manager at the quarry, complaining about the attitude of one of the loader operators, Steve Hamblin. (Tr. 14; Ex. C-1). Mr. Saab stated that Mr. Hamblin would pick up his haul pack with the bucket of the loader and throw it down. The company's safety officer spoke to everyone at the pit after the letter was sent and told Mr. Saab that it would never happen again. (Tr. 14, 16). Mr. Saab testified that he was concerned about his safety because his shoulder was thrown against the door of the haul pack. He also stated that Mr. Hamblin's actions damaged the haul pack. (Tr. 15, 58).

On March 5, 1997, Mr. Saab called the Department of Labor's Mine Safety and Health Administration (MSHA). Mr. Saab stated that he complained about the highwalls in the pit and the berms along the roads. (Tr. 20). He stated that he was particularly concerned about the lack of berms on some of the haul roads. (Tr. 21, 58). The roads were slippery from the water truck and the brakes on his haul pack would sometimes lock up. He wanted berms to be strong enough and high enough to stop a haul pack from going over the side. (Tr. 24). He testified that because the pit was getting deeper, the highwalls were about 100 feet high and nearly vertical. He believes that he came within ten feet of this highwall when he drove a haul pack. (Tr. 23).

MSHA inspected the quarry on March 10-12, 1997, and the inspection report contains a reference to Mr. Saab's call. (Tr. 25; Ex. C-2). MSHA issued 17 citations at the quarry during this inspection. One citation concerned conditions at the highwall and one citation was issued due to the lack of berms on a particular roadway. (Ex. C-2). Mr. Saab also raised safety issues about mobile equipment at the quarry with the MSHA inspectors at the time of their inspection. (Tr. 31). Some citations were issued for conditions on this equipment, such as inoperable windshield wipers, faulty lights, and inoperable

¹ The two transcript volumes are not numbered sequentially. References to Volume I are indicated by ATr. followed by the page number, references to Volume II are indicated by ATr. II followed by the page number.

horns. Dumbarton abated the highwall citation by building berms along the highwall to keep everyone away and by having an independent contractor clean the benches on the highwall with a clam bucket crane. (Tr. 37).

On March 18, the day that the crane cleaned the highwall, Mr. Saab and Larry Meyer were laid off for the day. (Tr. 38). Mr. Saab testified that this one-day layoff was in retaliation for his call to MSHA. (Tr. 43). He bases this conclusion on the fact that no other employees were laid off on that day. (Tr. 44, II 52-53). He also testified that his hours were reduced from 10 hours a day to about 8 hours a day when he returned to the quarry. (Tr. 44-47). Mr. Meyer testified that it would have been unsafe for employees to work under that highwall on March 18 because the highwall was being cleaned. (Tr. II 113). Meyer complained about his layoff because he was senior to Randy Huevel, who operated the water truck that day. (Tr. II 114-15).

Buckley replied that he had the authority to determine what equipment each employee operated. Since it was only a one-day layoff, Meyer was not able to bump Huevel.

Mr. Saab alleges that on March 25, Mike Grant, an independent contractor, approached him at the end of the shift and called him a black sheep for contacting MSHA. (Tr. 47). A heated discussion followed. Saab testified that as he walked to his car to leave the quarry, a rock flew by his head. He believes that Mr. Grant threw the rock as a result of his safety complaints to MSHA. (Tr. 47-48, 51). Mr. Saab testified that, although Mr. Grant is an independent contractor who performs maintenance work on equipment at the quarry, his actions should be attributed to Dumbarton management. (Tr. 48, II 30, II 54). He stated that Mr. Grant and Mr. Buckley worked closely together and that Grant was treated as if he were an employee. *Id.* Mr. Saab immediately proceeded to Mr. Buckley's office and asked him to call the police. Buckley refused to do so, but he went outside and talked to Mr. Grant about the incident. Grant denied throwing a rock and stated that a rock must have fallen off a moving truck. (Tr. 49, II 28). Saab testified that there were no trucks around. (Tr. 49). Mr. Buckley prepared an incident report with the safety officer, Mike Oliveira. The report states that due to the lack of eyewitnesses, the event could not be proven as stated by Saab.® (Ex. C-4).

On March 26, Saab videotaped Grant at work to try to get him to admit that he threw the rock. (Tr. 60; Ex. C-5). Grant did not make any statements concerning the incident, but he told Saab that he better start looking for a job. *Id.* Mr. Saab interprets this statement to mean that Grant knew that he was going to be

laid off the following week. He frequently observed Grant going into Buckley's office during this period. (Tr. 61).

The next incident involving Mr. Saab occurred on April 3, 1997. He testified that he was driving a haul pack on that day and someone in a van took pictures of him. (Tr. 53, II 32). This occurred about a week after Mr. Saab videotaped Mike Grant. *Id.* Saab testified that he had never observed anyone taking pictures of employees at the quarry before and he considered it to be harassment in retaliation for his complaints to MSHA. (Tr. 54, II 32).

On April 4, Clay Buckley told Mr. Saab that he was laid off effective that day. At that time, Mr. Saab was driving the haul pack. He was told that Randy Huevel, another Teamster at the quarry, was bumping him off the haul pack onto the water truck.² (Tr. 61). Huevel had more seniority under the Teamsters Agreement than Saab. Saab was told that the water truck had broken down and would not be usable for a few weeks. (Tr. 63). Saab understood that once the water truck was repaired, he would be called back to work. (Tr. 64). The water truck was never repaired and Saab was not called back on a permanent basis. (Tr. 79-80). He was given the opportunity to work a few days in June, but Mr. Saab turned these offers down because he was employed elsewhere. (Tr. 77-81; Exs. C-8, C-9).

Mr. Saab believes that, although the pump on the water truck was leaking, it was still serviceable and could have been used at the mine. (Tr. 64, II 48, II 56). He believes that Dumbarton stopped using the water truck so that it could lay him off. (Tr. II 47-50). Dumbarton hired an independent contractor to water the roads starting on April 4. This contractor used his own water truck. This contractor was at the mine on April 4 watering the roadways when Saab arrived at work on April 4 and was advised that he was laid off. (Tr. 65). He was told that the quarry's

² It is Mr. Saab's position that he should have been driving the water truck at that time. He testified that on February 28, 1997, Mr. Buckley advised Saab that he was moving him from the water truck to the haul pack and Mr. Huevel from the haul pack to the water truck for a few days. (Tr. 62, II 57). Apparently, Mr. Grant needed extra help moving equipment around and Huevel was designated to provide this help because Saab had injured his back. *Id.* Although Saab believed that this switch was temporary, he was not moved back to the water truck until he was bumped by Mr. Huevel. Mr. Saab had the least seniority among the Teamsters at the quarry. (Tr. II 40). Mr. Saab testified that because he took better care of the water truck than Mr. Huevel, the water truck would not have broken down on April 3 if he had been driving it. (Tr. II 57).

water truck broke on the afternoon of April 3 and that the contractor was hired at that time.

Mr. Saab believes that Dumbarton overstated the cost of repairing the water truck. He points to the repair estimate prepared by MCG Heavy Equipment, Inc. (Tr. 66-70; Ex. C-6). MCG Heavy Equipment, Inc., is owned by Mike Grant, the independent contractor that maintains equipment at the quarry. The repair estimate states that it would cost almost \$16,000 to repair the water truck. Saab believes that only two of these items relate to the water pump and the estimate for those repairs is \$1,850. *Id.*

Mr. Saab also believes that the cost to the company of using an independent contractor to water the roads was greater than the cost of doing this work with a Dumbarton employee using a company truck or a rental truck. (Tr. 71-72, II 62; Ex. C-7). He testified that the company had another water truck at the quarry that he could have used. (Tr. 74-75). He stated that this truck had been at the quarry for over a year. This truck was shipped from the quarry on April 4, 1997, and taken to the Curtner Quarry. (Tr. II 47). Mr. Saab contends that although this truck leaked water and needed other repairs, he could have used it when the primary water truck broke down. *Id.* He testified that no other equipment was shipped out that day.

Mr. Saab believes that Dumbarton used a provision in the Teamsters= agreement to terminate him from his employment, but that the real reason for his termination was his protected activity. The labor agreement provides that an employer may contract out work if it does not have the equipment available to perform that work. (Tr. II 58; Ex. R-6). He contends that Dumbarton removed the spare water truck from the property and took the main water truck out of service so that it could contract out the work of watering the roadways. (Tr. II 58-59). Because Mr. Buckley knew that Mr. Saab had the least seniority among the Teamsters working at the quarry, Buckley also knew that Saab would no longer have a job at the quarry if it contracted out this work.

B. Dumbarton Quarry Associates

Mr. Buckley has worked at the quarry since 1982 and has been production operations manager since 1992. Mr. Buckley testified that MSHA inspected the quarry March 10-12, 1997, and that the quarry was issued a number of citations, which was unusual. (Tr. II 64-65). One of the citations required the quarry to clean off benches along the highwall. (Tr. 65-75). Since there was no

direct access to the benches, a crane was brought in to clean them. A berm was installed under the highwall so that if any material fell, it would not endanger employees. He made arrangements to have a crane and a crane operator come to the quarry to clean the benches. Mr. Buckley testified that on March 18 he did not want anyone working in the pit while the crane was cleaning the highwall, so the haul pack drivers were laid off for the day and the loader operator worked at the stockpile rather than in the pit. (Tr. II 69). Only the haul pack drivers were not needed that day. The water truck and loader operators were needed, so they were not laid off. Buckley testified that he was not aware that Saab had called MSHA at the time of this layoff. (Tr. II 78).

Mr. Buckley testified that he investigated the alleged rock throwing incident described above and he did not receive any confirmation that a rock was thrown. He testified that Mr. Huevel told him that he was in the water truck at the time and saw Saab get out of the truck, shake his finger at Huevel, flip Huevel off, and get into his car. (Tr. II 77). Huevel told Buckley that he did not see Grant throw a rock. *Id.*

Mr. Buckley testified that the quarry operates under a conditional use permit issued by the City of Fremont. On April 2, 1997, Buckley received a memorandum from Dumbarton's parent company, DeSilva Gates, that contained a checklist of items that were to be completed in order to comply with the quarry's renewed conditional use permit. (Tr. II 95). One of the items in the memorandum states that all excess equipment will be removed from the site by August 1. (Tr. II 82; Ex. R-5). Buckley stated that when he received this fax, he immediately made arrangements to have the extra water truck moved to the Curtner Quarry, owned by DeSilva Gates. (Tr. II 82). The extra water truck was owned by DeSilva Gates and had originally been at the Curtner Quarry. It was shipped out on April 4. Buckley tried to ship a third water truck that had a cracked frame to the Curtner Quarry, but that quarry did not want it and so it was junked.

Mr. Buckley testified that at about noon on April 3, Huevel told him that the water truck was not operating properly and he did not know if he could use it much longer. Buckley immediately called a broker to see if he could get another water truck. At about 3:00 p.m., the water truck just seized [up] and wouldn't operate any more. (Tr. II 85). He made arrangements with an independent contractor to provide watering services starting on April 4. He obtained the name of the contractor from DeSilva Gates, who used the same contractor. *Id.*

Mr. Buckley then asked Mr. Grant to look at the truck the next morning to see what was needed to return it to service. He also advised Mr. Huevel that there would be no work for him at the quarry at least until the water truck was repaired. *Id.* Huevel exercised his right under the Teamsters Agreement to bump Mr. Saab from a haul pack to the water truck. (Tr. II 107). Saab was not at the quarry at this time.

Mr. Grant prepared an estimate of the cost of returning the water truck to service. (Ex. C-6). Buckley testified that Grant advised him that there were a number of problems with the water truck, including a frame that was starting to crack. (Tr. II 87). During the MSHA inspection, Dumbarton was advised that cracked frames would be cited and that anything that was installed by the manufacturer of equipment had to be operational. *Id.* He testified that many items on the water truck were not operational. The estimate prepared by Mr. Grant indicated that it would cost about \$16,000 to repair the truck and bring it into compliance with MSHA standards. (Tr. II 127-28; Ex. C-6). Buckley testified that he called DeSilva Gates= chief financial officer about the cost and was advised not to repair the water truck. (Tr. II 88). From that time on Dumbarton used an independent contractor to water the roads in the quarry. All of Dumbarton's sister companies were already using independent contractors to wet down roadways. (Tr. II 91, II 112).

Buckley also testified that he did not recognize the van in which Saab saw someone taking pictures of his truck at the quarry on April 3. (Tr. II 93-94). He does not know who took the pictures, but he testified that a representative of a tire manufacturing company was on the property around that time and that city and state officials often come on the property. He stated that any one of these people may have taken pictures. *Id.*

Finally, Mr. Buckley testified that Dumbarton did not take any retaliatory actions against Mr. Saab. (Tr. II 111-12). He stated that Saab was laid off because he had the least seniority.

Buckley stated that if AMr. Saab had been one step up on the seniority ladder we wouldn't be [at this hearing.]@ *Id.*

II. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners Ato play an active part in the enforcement of the [Mine] Act@ recognizing that, Aif miners are to be encouraged to be active in

matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation.@ S. Rep. No. 181, 95th Cong., 1st Sess. 35 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 623 (1978).

A miner alleging discrimination under the Mine Act establishes a *prima facie* case of prohibited discrimination by proving that he engaged in protected activity and that the adverse action complained of was 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). The mine operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the mine operator cannot rebut the *prima facie* case in this manner, it nevertheless may defend by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.*; *Robinette*, 3 FMSHRC at 817-18; see also *Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

2. Did Anthony Saab engage in protected activity?

I find that Mr. Saab engaged in activity that is protected by section 105(c) of the Mine Act when he called MSHA on March 5, 1997, and when he spoke with MSHA inspectors during their inspection. A miner has a protected right to call MSHA to report safety problems and, in general, to talk to MSHA inspectors during their inspection.

C. Did Anthony Saab present evidence that his termination was motivated in any part by the protected activity?

In determining whether a mine operator's adverse action was motivated by the miner's protected activity, the judge must bear in mind that direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect.@ *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (November 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir 1983). Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence.@ *Id.* (citation omitted). Anthony Saab

presented evidence that his termination was motivated at least in part by his protected activity.

A mine operator's knowledge of the protected activity is one factor to evaluate when determining whether an adverse action was motivated by protected activity. Mr. Saab presented evidence that employees at the mine knew that he called MSHA and precipitated the March inspection. Mr. Saab presented evidence that an inference should be drawn that Dumbarton management knew that he complained to MSHA about safety conditions at the mine and that the March inspection was a direct result of his complaints.

Another factor is the mine operator's hostility toward the protected activity, often referred to as *animus*.⁶ It is clear some hostility was shown by Mr. Grant and other hourly employees.

Mr. Saab did not present any direct evidence of animus by management toward employees who raise safety concerns with MSHA.

Mr. Saab presented evidence that Dumbarton management took actions against him because of his discussions with management. These actions are described above in the summary of Mr. Saab's testimony. Thus, I find that Saab presented sufficient evidence of animus to warrant further analysis.

The proximity in time between the protected activity and the adverse action is another factor to be considered. There is no dispute that the termination of Mr. Saab occurred shortly after the March 1997 MSHA inspection. Accordingly, I find that Mr. Saab presented evidence that his termination was motivated at least in part by his protected activity.

D. Did Dumbarton rebut Anthony Saab's prima facie case? - Analysis of the issues.

As stated above, a 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. I find that Dumbarton presented sufficient evidence to rebut Mr. Saab's case. The preponderance of the evidence presented at the hearing shows that Mr. Saab engaged in protected activity but that his termination was not motivated by that activity, in any part.

First, I find that Mr. Saab's lay-off for one day on March 18 was not in retaliation for his safety complaints. I credit Mr. Buckley's testimony that he did not want anyone working in the pit that day. Since Saab was a haul-pack operator at that time, there was no work for him and he was laid off along with

the other haul-pack operator. I find no connection between his complaint to MSHA and the one day layoff except that Dumbarton had to bring a crane to the quarry in order to abate a citation issued during the MSHA inspection. Mr. Saab was not chosen for layoff because he complained to MSHA but because he was a haul-pack operator. As stated above, Saab argues that he should have been the water-truck operator on March 18. (Tr. II 18). Mr. Buckley has the right to choose which employees operate particular pieces of equipment. His decision to switch Mr. Huevel to the water truck in February was unrelated to Mr. Saab's safety complaints. Saab's contention that he should have been allowed to bump Huevel off the water truck is without merit. Huevel had more seniority than Saab and there is no evidence that the Teamsters Agreement grants employees that right.

The events that transpired between Messrs. Saab and Grant do not help establish that Saab's termination was the result of his protected activity. I find that although Buckley and Grant had a close working relationship, there has been no showing that they acted in collusion to harass Saab or discharge him from employment. (Tr. II 101). If Mr. Grant did throw a rock at Saab, he was not encouraged to do so by Mr. Buckley and Dumbarton did not condone such conduct. Moreover, the credible evidence casts doubt that Grant threw a rock at Saab. Saab did not see Grant throw a rock and Huevel told Buckley that he did not see Grant throw a rock. Under those circumstances, it was reasonable for Buckley to refuse to call the police or take any action against Grant.

Saab testified that he was intimidated by the fact that someone took pictures of him on April 3. I reviewed the videotape that Saab took of the incident. (Ex. C-5). I credit the testimony of Buckley that he did not know about this incident and that the pictures were probably being taken by an outsider. There has been no showing that the picture taking had anything to do with Saab's complaint to MSHA. Mr. Saab also alleged that his hours were significantly reduced after he complained to MSHA. I find that the evidence does not substantiate this claim. (Tr. II 24-25).

The primary focus of this case concerns the layoff of Mr. Saab on April 4, 1997. Mr. Saab believes that Dumbarton orchestrated events so that he would be laid off. He contends that Dumbarton removed the spare water truck from the quarry, took the primary water truck out of service, and inflated the cost of repairing the primary water truck to justify its decision to contract out the road-watering function. Saab believes that Buckley and others at Dumbarton planned these events in

retaliation for his complaints to MSHA knowing that he had the least seniority under the union contract. He also contends that if he had been allowed to drive the water truck in March and April, the truck would not have broken down because he took better care of it than Huevel did.

I find that Saab's explanation of the events is not very plausible. Saab sincerely believes that Dumbarton planned the events in order to terminate him from his employment because of his discussions with MSHA. Even if I construe all of Mr. Saab's evidence in his favor, he does not paint a very convincing picture. Such a scenario would require careful planning and coordination among a number of persons including Buckley, Grant, and Huevel. Buckley's testimony on the events of April 3 and 4 is more persuasive.

Buckley testified that Huevel was having significant problems with the water truck on April 3, he asked the mechanic to check it out, and the mechanic estimated that it would cost about \$16,000 to fix the truck and bring it into compliance with MSHA standards. Buckley was aware that a number of citations had been issued during the March inspection concerning mobile equipment defects. The chief financial officer of the company did not want to authorize such a large expenditure on an old truck. The other water truck also needed significant repairs and Buckley had been given instructions to remove excess equipment from the property. Other quarries affiliated with Dumbarton were using independent contractors to water the roads. Accordingly, Buckley decided to use an independent contractor. Saab was let go, not because he called MSHA, but because he had the least seniority of the three Teamster employees at the quarry. Indeed, Buckley testified that he did not know that Mr. Saab called MSHA until Saab filed a grievance after his discharge. (Tr. II 78). Buckley testified that if Saab had been senior to any other Teamster employee, he would not have been terminated. I credit Mr. Buckley's testimony as to the events of April 3 and 4, 1997.³

Saab also tried to establish that Dumbarton's decision to use independent contractors to water the roads did not make any economic sense. He testified as to his rate of pay and compared it to the payments made to the contractors that were used. His testimony was not very convincing because it was rather

³ I also find that Mr. Saab's complaint to Mr. Buckley about loader operator Hamblin in 1996 played no part in Mr. Saab's termination.

simplistic and did not consider all of the costs borne by an employer.

Based on the above, I find that the Dumbarton rebutted Mr. Saab's *prima facie* case. Although the termination occurred within a month of the MSHA inspection and at least some Dumbarton employees knew that Saab complained to MSHA, I conclude that Dumbarton terminated Saab from his employment for reasons that are unrelated to his safety complaints. Mr. Saab was not terminated for cause. He was laid off due to the lack of work. Only two of the three Teamsters were required at the quarry after Dumbarton decided to use a contractor to water the roads. The Teamsters Agreement did not prohibit Dumbarton from using an independent contractor for this function. As the employee with the least seniority, Mr. Saab was subject to layoff.

III. ORDER

For the reasons set forth above, the complaint filed by Anthony Saab against Dumbarton Quarry Associates under section 105(c) of the Mine Act is **DISMISSED**.

Richard W. Manning
Administrative Law Judge

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