

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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March 18, 2003

CASEY J. MAYBERRY,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 2002-561-D
	:	DENV CD 2002-14
	:	
v.	:	Mine I.D. 05-04452
	:	Sanborn Creek Mine
OXBOW MINING, LLC,	:	
Respondent	:	

**DECISION**

Appearances: Casey J. Mayberry, Hotchkiss, Colorado, pro se;  
James T. Cooper, Oxbow Mining, LLC, Somerset, Colorado, for Respondent.

Before: Judge Manning

This case is before me on a complaint of discrimination brought by Casey J. Mayberry against Oxbow Mining, LLC, (“Oxbow”) 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. Mayberry alleges that he was fired by Oxbow after he called the Department of Labor’s Mine Safety and Health Administration (“MSHA”) to complain about ventilation at the mine. An evidentiary hearing was held in Delta, Colorado. For the reasons set forth below, I find that Mr. Mayberry did not establish that Oxbow discriminated against him in violation of section 105(c) of the Mine Act.

**I. BACKGROUND AND SUMMARY OF THE EVIDENCE**

Oxbow operates the Sanborn Creek Mine, an underground coal mine, in Delta County, Colorado. Although Oxbow employs miners, it also obtains miners through a temporary employment agency called Rocky Mountain Miners (“Rocky Mountain”) when it needs additional miners on a temporary basis. Mr. Mayberry started working at the mine in August 2001 as an employee of Rocky Mountain. Mayberry was not on Oxbow’s payroll but was a temporary contract miner who was paid on an hourly basis by Rocky Mountain. He worked on the graveyard shift, a non-production shift, rock dusting and cleaning up around conveyor belts. (Tr. 8).

Mayberry testified that in mid-October 2001, he called MSHA to complain about ventilation in the longwall section. (Tr. 9). This safety complaint to MSHA is not mentioned in the written discrimination complaint that he filed with MSHA on June 4, 2002. Indeed, I first learned about this allegation at the hearing because there is no mention of a safety complaint in the official Commission file. He testified that he discussed this October safety complaint with the MSHA investigator during her investigation of his discrimination complaint. Mayberry testified that he called MSHA in October to complain about the ventilation curtains in the longwall section. He stated that an MSHA inspector came to the mine to investigate his safety complaint and he believes that MSHA issued a citation. *Id.* He testified that the MSHA inspector did not talk to him when he came to the mine to inspect the ventilation in the longwall section.

On or about October 26, 2001, Mayberry talked to Brad Hanson and Lou Graco at Bowie Resources Limited, another coal mine operator in Delta County, to see if he could get a job there as a permanent employee. Mayberry was offered a position at Bowie Resources and he accepted the job. (Tr. 16). A few days later, Mayberry told James Cooper, Oxbow's vice president of operations, that he had taken a position with Bowie Resources and he gave Cooper notice that he would no longer be working at the Sanborn Creek Mine for Rocky Mountain. He was scheduled to start working for Bowie Resources on November 15, 2001.

At about 2:00 am on November 8, 2001, Mr. Mayberry was injured at the Sanborn Creek Mine when a rock fell from the roof and hit his left foot. (Tr. 12, 25-26). Mayberry was rolling up dust hose at the time. He estimated that the rock weighed between 45 and 65 pounds and measured about 1½ feet by 2 feet. Cameron Rountree, another miner on the crew, attempted to help Mayberry and was struck on the hand by falling rock. (Tr. 26). After Mayberry was removed from the mine, an air cast was put on his leg and he was taken to Delta County Memorial Hospital. The extent of his injuries was not immediately known because his foot was swollen. On November 11, 2001, local physicians could not determine if he was seriously injured. (Tr. 16). He subsequently saw a specialist in Grand Junction, Colorado. Mayberry was eventually diagnosed with "peripheral nerve damage, either severed or beyond repair." (Tr. 14, 20). It was later determined that he "sustained a twelve percent (12%) scheduled impairment to lower left extremity." ("Full and Final Settlement Agreement and Motion for Approval" filed with the Colorado Division of Worker's Compensation; Tr. 14). Mayberry was on crutches for several months as a result of his injury and did not work for Rocky Mountain at the Sanborn Creek Mine after November 8.

At about 7:30 am on November 8, 2001, Mayberry returned to the bath house at the mine to retrieve his belongings and his truck. Mayberry testified that Fred English, the assistant safety director at the mine, approached him. Mayberry testified that English said that he knew that Mayberry made the safety complaint to MSHA and that "Oxbow does not appreciate complaints to MSHA." (Tr. 14, 21-22). Mayberry said that English continued by saying that if "I have a problem with the way they do things, I should take it up with management or seek employment elsewhere." (Tr. 14).

At some point after November 11, 2001, Mayberry called Brad Hanson at Bowie Resources to tell him that he could not start working on November 15 because he was injured and asked if he could start working at a later date. (Tr. 17). Mr. Hanson advised him that Bowie Resources could not hold the position open for more than two weeks, so the offer of employment was withdrawn. Mayberry testified that he then went to see Cooper to tell him “to pull that two-week notice.” (Tr. 18). Mayberry believed that the “two-week notice was revoked automatically once he was injured.” *Id.* Cooper told him that, although he was sorry, Oxbow could not offer him a position. (Tr. 19). Cooper advised Mayberry that he had only been a contractor at Sanborn Creek and “part of being a contractor is running that risk.” *Id.* Mayberry called Cooper several times after that to try to get his old job back without success. Mayberry maintains that he engaged in protected activity when he called MSHA to complain about ventilation in the longwall section. (Tr. 21). He believes that the adverse action was the failure of Oxbow to rehire him after he had revoked his two-weeks notice and the intimidation he received from English on the morning of November 8. (Tr. 21, 71-73).

Mayberry received a medical release to return to work in late March or early April 2002. (Tr. 20). Soon thereafter he started working for Rundle Construction Company, another contractor, which “does earth moving for Oxbow.” *Id.* He worked for Rundle Construction at the Sanborn Creek Mine from April 2002 through October 2002 when he was laid off. (Tr. 23-24). On June 4, 2002, Mayberry filed his discrimination complaint against Oxbow with MSHA. By letter dated August 20, 2002, MSHA advised Mayberry that it determined that Oxbow had not discriminated against him. Mayberry filed this case with the Commission on September 20, 2002.

Cameron Rountree testified for Mayberry. Rountree was in the bath house on the morning of November 8, 2001. Rountree testified that English approached them to find out what happened that shift. (Tr. 27). He took a quick statement from both of them about the accident. Rountree testified that English then looked at Mayberry and said, “this is a small coal mining community . . . and we don’t appreciate you calling MSHA.” (Tr. 27-28). Rountree said that English told Mayberry that “you should talk to your foreman or upper management before you take that action.” (Tr. 28). Rountree stated that English’s tone of voice was firm and he seemed agitated.

Mr. English testified that, although he took a statement from Mayberry about the accident, he did not discuss an MSHA complaint with Mayberry. (Tr. 32). English stated that a number of MSHA complaints have been made at the mine and he does not know who made these complaints. *Id.* English testified that he was not aware that Mayberry phoned in a complaint to MSHA. (Tr. 33). English was adamant that on November 8, 2001, he did not know that Mayberry had complained to MSHA about safety conditions at the mine and that he did not have any discussion with Mayberry about safety complaints to MSHA. (Tr. 38-41, 75). In addition, English testified that, during mine safety and health training, company representatives tell miners that the company has an open door policy to bring safety complaints and that if a miner is not satisfied with management’s response “then by all means contact the Mine Safety and Health

Administration.” (Tr. 40). English further stated that “we do not have a problem with those calls [to MSHA].” *Id.* MSHA inspectors are instructors at the training.

James Cooper testified that he had only two face-to-face contacts with Mayberry. The first meeting was when Mayberry came into his office in late October 2001 to tell him that he would only be working for Rocky Mountain for two more weeks because he was going to work at the Bowie Mine. (Tr. 44). Cooper wished him good luck and called Randy Litwiller, Oxbow’s production superintendent, to tell him that Mayberry was leaving. Oxbow was hiring a few permanent full time employees at that time and so Cooper asked Litwiller if he would be interested in hiring Mayberry as an Oxbow employee. (Tr. 45). A few days later, Litwiller told him that he had talked to a few people who had worked with Mayberry and that he was not interested in hiring him. (Tr. 45; 58-59).

Cooper testified that the second meeting he had with Mayberry occurred the day before his accident. (Answer to Discrimination Complaint; Tr. 45, 73). At that time, Mayberry asked Cooper if he could stay on at the Sanborn Creek Mine as an Oxbow employee because he would “just as soon stay at Oxbow.” (Tr. 45). Cooper replied that he did not have a job for him. When Mayberry talked to him, Cooper understood that Mayberry wanted to stay on as a full-time Oxbow employee, not as a Rocky Mountain employee. (Tr. 55-56). Mayberry seemed interested in the benefits that Oxbow offered. (Tr. 58). After Mayberry’s accident on November 8, 2001, Cooper said that he received a voice mail message on his phone from Mayberry that was “very belligerent and loud and rude.” (Tr. 53). Cooper testified that he was not aware of Mayberry’s safety complaint to MSHA until he met with him to discuss settling this case in response to the prehearing order. (Tr. 47, 73-74).

Mr. Litwiller testified that he did not know that Mayberry had filed a safety complaint with MSHA when he discussed with Cooper whether he would be interested in hiring Mayberry as a permanent, full-time employee. (Tr. 60). Litwiller testified that when a Rocky Mountain employee gives notice that he is leaving, Litwiller talks to his supervisor to find out if he is a “real good hand.” (Tr. 62). If the supervisor replies that Oxbow will not be “losing anything” by letting him go, then no job offer is made. *Id.* Litwiller has no specific recollection of his discussions about Mayberry. (Tr. 63). Litwiller also stated that in November 2001 the total workforce at the mine was about 230 people (Tr. 61).

## **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 “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). “Whenever protected activity is in any manner a contributing factor to the retaliatory conduct, a finding of discrimination should be made.” *Id.* at 624.

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).

There can be no question that calling MSHA to complain about safety and health conditions at a mine is an activity protected under the Mine Act. In addition, if a mine operator takes any adverse action against a miner for making such a complaint, a violation of section 105(c) has been established. In this case, however, I find that Mr. Mayberry did not establish that he was discriminated against in violation of the Mine Act, as discussed below.

The discrimination complaint filed by Mayberry does not mention that he made a safety or health complaint to MSHA. The discrimination complaint also does not state that he was denied the opportunity to continue working for Rocky Mountain or Oxbow because he made a safety complaint. Mayberry's discrimination complaint first describes his accident and the fact that he had given Oxbow notice that he was leaving because he obtained a job at Bowie Resources. The complaint then states that Bowie Resources told him that it could not hold the job open for him. The remainder of the discrimination complaint states:

I spoke to Jim Cooper again to revoke my 2 week notice and he told me I was fired. He said that Randy Litwiller told him that I had given my notice and that it was too bad. Neither one of them seemed to care that I was hurt and now unemployed with a family to take care of.

Mr. Cooper testified that Mayberry did not mention that he had called MSHA to complain about safety or health conditions until the end of their settlement discussions prior to the hearing in this case. As stated above, none of the pleadings or documents filed with the Commission mention prior safety or health complaints. At the hearing, I asked Mayberry to describe what conditions he had complained about in October 2001 and his answer was vague and somewhat inconsistent.

First, he testified that he complained because the ventilation curtains “were hung in front of the gob along the longwall” and that they were blocking the methane detectors. (Tr. 10). Then he stated that the curtains “were keeping the gob air in that specific area.” (Tr. 10). Finally, he testified that “they weren’t ventilating anything down there . . . .” *Id.* Mayberry testified that he discussed his prior safety complaint with the MSHA investigator who investigated his discrimination complaint. (Tr. 90). The fact that Mayberry did not refer to a prior safety complaint to MSHA until late in this proceeding raises questions in my mind. Nevertheless, for purposes of this decision, I will assume that in mid-October 2001 Mayberry called MSHA to complain about safety conditions in the mine. Consequently, I find that Mayberry engaged in protected activity.

I find, however, that Mayberry did not establish that Oxbow’s decision not to hire him was motivated in any part by his protected activity. First, it must be noted that section 105(c) protects applicants for employment as well as miners. An applicant for employment establishes a violation of section 105(c) if he proves that a mine operator did not hire him because he had complained to MSHA about safety conditions while employed at another mine. I find that Mayberry was not “fired” from his temporary job at the mine with Rocky Mountain because he gave notice to Cooper that he was leaving for another job. He voluntarily quit his job with Rocky Mountain. The issue is whether Oxbow’s decision not to consider him for a permanent full-time job with the company was motivated in any part by the fact the he called MSHA to complain about ventilation in October 2001.\*

Mayberry testified that English confronted him about his call to MSHA on the morning of November 8, 2001 and that he felt intimidated by English. Mr. Rountree also testified that English told Mayberry that Oxbow did not appreciate his call to MSHA. English, on the other hand, denied making such statements and denied that he even knew that Mayberry had made a safety complaint. I credit the testimony of Mr. English for a number of reasons. As noted above, Mayberry did not include this allegation or any assertion that he had made a safety complaint to MSHA in his discrimination complaint that he filed with MSHA on June 4, 2002. Although Mayberry testified that he raised this issue with the MSHA investigator, neither Cooper nor English knew anything about it. Indeed, Cooper credibly testified that he did not become aware that Mayberry was predicating this discrimination case on a prior safety complaint to MSHA until he discussed settlement with Mayberry after he received the prehearing order issued in this proceeding. I did not become aware of this claim until the hearing because it was not included in any of Mayberry’s filings.

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\* Mayberry argues that when he asked to have his “two-weeks notice” revoked he wanted to continue working at the mine as a Rocky Mountain contract employee or as an Oxbow employee. Since his work as a contract employee was by the hour for time worked, he could not have returned as a Rocky Mountain employee as a result of his injury. As discussed above, he was not given a medical release to return to work until late March 2002. Oxbow may not have had an underground position available at that time. Nevertheless, my holding in this case would also apply if the adverse action was Oxbow’s refusal to take him back as a temporary Rocky Mountain contract employee.

English testified that he has worked for Oxbow for eleven years. He denied that he had ever discussed an MSHA safety complaint with Mayberry. It is highly unlikely that English would have approached Mayberry about an MSHA safety complaint the morning of November 8 because Mayberry was leaving the mine as a result of an injury. Mayberry was a contract employee from Rocky Mountain, not a permanent Oxbow employee, who would not be working at the Sanborn Creek Mine for at least a few weeks, if ever again, because he had been injured. Mayberry was on crutches for a considerable length of time and was paid for hours that he actually worked. There would have been no reason for English to raise this issue at that time. I observed Mr. English's demeanor at the hearing and he impressed me as someone who chooses his words quite carefully. In addition, as the assistant safety manager, he knew that such statements would set the company up for a discrimination suit if any adverse action were taken against Mayberry. English's testimony at the hearing, including his description of MSHA-required safety training, demonstrates that he has a rather sophisticated understanding of the requirements of the Mine Act including the anti-discrimination provisions of section 105(c). I find that English did not confront Mayberry on the morning of November 8 about Mayberry's call to MSHA. I also credit English's testimony that he did not know about Mayberry's call to MSHA.

I credit the testimony of Cooper that he did not know that Mayberry had called MSHA in October 2001 until Mayberry told him about it after their settlement efforts failed a few months prior to the hearing. Finally, I credit the testimony of Litwiller that he did not know about Mayberry's safety complaint when he discussed Mayberry's employment status with Cooper.

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

The alleged adverse action in this case is Oxbow's failure to hire him as a permanent Oxbow employee in November 2001. I find that Mayberry did not establish that Oxbow's failure to take him back was motivated in any part by protected activity, taking into consideration circumstantial evidence of discriminatory intent. Considering the factors set forth in *Chacon*, for example, I find that Oxbow management did not have knowledge of the protected activity and did not display any hostility or animus toward the protected activity. Mayberry worked at the Sanborn Creek Mine for Rundle Construction from April 2002 through October 2002. In addition, there has been no showing that Mayberry was treated differently from other Rocky

Mountain employees who gave notice that they were leaving. I find that Oxbow's failure to "revoke" Mayberry's notice that he was leaving his job with Rocky Mountain and its failure to hire Mayberry as a permanent employee were not motivated in any part by Mayberry's protected activity.

### **III. ORDER**

For the reasons set forth above, the discrimination complaint filed by Casey J. Mayberry against Oxbow Mining, LLC, under section 105(c) of the Mine Act is **DISMISSED**.

Richard W. Manning  
Administrative Law Judge

Distribution:

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