

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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February 4, 2008

HUBERT HOENCK,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 2006-495-DM
	:	A.C. NO. WE MD 2006 10
v.	:	
	:	A.R. Wilson Quarry
GRANITE ROCK COMPANY,	:	Mine ID 04-00119
Respondent	:	

DECISION

Appearances: Matthew Rafat, Esq., San Jose, California, **for the Complainant.**
Kevin Jeffery, Esq., Granite Rock Company, Watsonville, California, **for the Respondent.**

Before: Judge Weisberger

Statement of the Case

This case is before me based upon a complaint of discrimination filed by Hubert Hoenck, alleging that Granite Rock Company (“Granite Rock”) discriminated against him by reprimanding him on numerous occasions after his having expressed concerns related to a rented water truck, and subsequently suspending him for three days and eventually “wrongfully terminating” him.

On November 22, 2006, Granite Rock filed a Motion to Dismiss. On January 8, 2007, Hoenck filed a statement in opposition to the Motion to Dismiss. On January 16, 2007, Granite Rock filed a Reply to Hoenck’s Opposition to Motion to Dismiss. On January 18, 2007, an Order Denying Motion to Dismiss, Pre-Hearing Order, and Notice of Hearing was issued, denying the Motion to Dismiss and setting this case for hearing on March 13 – 15, 2007. On March 8, 2007, in a telephone conference call with attorneys for both parties, Hoenck’s counsel, who had just been retained, requested that the hearing dates be rescheduled and the request was not objected to by Granite Rock. This case was rescheduled and heard on May 8 – 9, in San Jose, California. Subsequent to a request for extensions of time, Complainant filed a Post-Trial Brief, and Granite Rock filed Proposed Findings of Fact and a Post-Hearing Brief. On October 20, Granite Rock filed Objections to Complainant’s Proposed Findings of Fact and a Reply to Complainant’s Post-Hearing Brief. On October 19, Complainant filed a Reply to Granite Rock’s Proposed Findings of Fact.

Findings of Fact and Discussion

I. Hoenck's Prima Facie Case

A. Case Law

Section 105(c) of the Mine Safety and Health Act of 1977 ("Mine Act") prohibits the discrimination against or discharge of a miner who made a complaint under or related to the Mine Act, including, "a complaint in notifying the operator or the operator's agent ... of an alleged danger or safety or health violation in a coal or other mine ... or because of the exercise by such miner ... on behalf of himself or others of any statutory right afforded by this act." 30 U.S.C. § 815 (c) (1) (2000).

Under established Commission law, the complainant in a section 105(c) proceeding establishes a prima facie case of a violation of section 105(c) if a preponderance of the evidence proves (1) that he engaged in a protected activity, and (2) that the adverse action was motivated in any part by the protected activity. Sec'y on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2799 (Nov. 1980), rev'd on other grounds sub. nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1121 (3d Cir. 1981). The 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 – 2800. If the operator cannot rebut the prima facie case, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activities and would have taken the adverse action in any event based on the unprotected activities alone. Id. at 2800; Sec'y ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817 – 18 (Apr. 1981).

B. Hoenck's Evidence

1. Protected Activities

Granite Rock operates the A.R. Wilson Quarry. Hoenck was employed by Granite Rock from 1997 to January 2006, and worked primarily as a water truck operator. Hoenck indicated that he was a "safety-minded" employee and that "[he] would tell people don't do things, it was not safe. [sic]" (Tr. 146.)

According to Hoenck, on September 9, 2003, Martin Colmenares, who was being trained to become a manager, told him to drive a rented water truck. Hoenck told him, orally and in writing, that it was not safe. Hoenck indicated that about a week later, he complained to Colmenares about "having a driver that was not trained to drive that water pull. [sic]" (Tr. 166.)

Hoenck also testified that a few days prior to March 19, 2004, he complained to Treanor "[t]hat we need a way to check our tires like we used to do. In the past we had an employee that would -- our tire man and he'd check them and make sure we had the right air pressure. [sic]"

(Tr. 157.)

Subsequently, Hoenck told Brian Fortelka, a supervisor at the Quarry, that “there were certain procedures to go by [regarding blocking roads when blasting] and he [Fortelka] didn’t do them all. ... He was doing it the fast way.” (Tr. 162.)

Hoenck also testified that in August 2005, he told Tom Treanor, a preventative maintenance manager, that there was not anyone to check the tires on the water truck. Hoenck also asked Walt Shaw, the shop foreman, for an air gauge for this truck.

A few months later, Hoenck called Mike Herges, whom he described as “our” safety coordinator (Tr. 133.) whom he “assumed ... was the shop foreman.” (Tr. 134.), and talked to him “[a]bout the low tires. About air pressure. Not being checked. [sic]” (Tr. 173.)

On September 19, 2005, the Safety Incident Review Committee¹ (“Safety Committee”) issued a report to Fotelka regarding Hoenck’s hand injury sustained on August 1, 2005. The report indicates that the Safety Committee concluded, *inter alia*, that Hoenck had told “Ray in the shop that he needed the crank installed.” (Plaintiff’s Ex. 6 at 2.)

Hoenck indicated that he also had complained to MSHA, his union, and the National Labor Relations Board as to “what was happening to [him] at Granite Rock[.]” (Tr. 190.)

Within the above context, I find that Hoenck has established that he did engage in protected activities by making safety complaints to various supervisors about a rented water truck, the failure to train the water truck operator, the failure to have an employee to check the tire pressure on the truck, and the failure to follow safety procedures on blocking roads when blasting.

2. Adverse Actions

On October 20, 2003, Treanor issued Hoenck a WRITTEN WARNING - ATTENDANCE 10/20/2003, which alleges that Hoenck had reported to work an hour late on October 27, had not called his supervisor to advise that he would be a half hour late on August 20, 2003, and that on October 18, 2003, he left work at 11:30 a.m. Hoenck was warned that “[t]hese attendance issues are unacceptable” and that “[f]uture similar attendance issues will result in suspension, and finally termination.” (Def. Ex. 2 at 1.)

On October 23, 2003, Treanor issued a FINAL WRITTEN WARNING -

¹The Safety Committee reviews all incidents where an employee is injured. At least one member of the Safety Committee was a Granite Rock manager. The Safety Committee was responsible for implementing safety recommendations.

ATTENDANCE to Hoenck alleging that “[o]n Wednesday morning,” Hoenck did not report to work or call Treanor at the number he had previously provided Hoenck. The warning provided further as follows: “[i]n the future, if you do not notify me of a tardy or absence prior to you [sic] scheduled shift start, you will be suspended. Additional unauthorized tardies or absences will result in termination.” (Def. Ex. 3 at 1.)

Ben Inkster, a team leader at the Quarry and Hoenck’s supervisor, testified that on May 27, 2004, he disciplined Hoenck for not wearing a hard hat and ignoring his supervisor. On February 11, 2005, Inkster informed Hoenck that he was to be suspended for three days, from February 14 to 16, 2005.

On January 11, 2006, Hoenck was suspended for one day pending an investigation of an incident that occurred that day involving a truck bed driven by Hoenck. On January 13, 2006, Henry Ramirez, the Wilson Quarry manager, advised Hoenck that he was being terminated effective January 13, 2006.

Within the above context, I find that Granite Rock took action adverse to Hoenck.

3. Whether the adverse action was motivated in any part by Hoenck’s protected activities

Commission case law establishes that in evaluating whether the Secretary has proven a causal connection between protected activities and adverse action, the following factors are to be considered: (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. Sec’y on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510 (Nov. 1981), rev’d on other grounds sub nom., Donovan ex rel. Chacon v. Phelps Dodge Corp., 709 F. 2d 86 (D.C. Cir. 1983).

a. Coincidence in time between protected activities and adverse actions

I note that for the first six years of Hoenck’s employment, Granite Rock did not issue any reprimands to Hoenck or take any disciplinary action. It thus is significant to note that the first warning given to Hoenck by Treanor was on October 20, 2003, approximately a month after he (Hoenck) had complained about an unsafe rented water truck and subsequently refused to operate it.² Further, I note that two months after Hoenck complained to Treanor in March 2004 about the need to check the tire pressure and to block roads during blasting, Inkster disciplined him

² According to Hoenck, after he complained to Colmenares on September 9, 2003 that the rented truck he was ordered to drive was unsafe, the latter told him that if he was not going to drive the truck that there was not anything for him to do and he should go home. Hoenck indicated he was not paid for that day.

(Hoenck) in May 2004 for not wearing personal protective equipment (“PPE”).

b. Disparate Treatment

According to Ramirez, during the time that he was the plant manager, from 1998 to 2003, two or three persons other than Hoenck were disciplined for attendance problems, and one of them was terminated for attendance issues.³ However, Ramirez indicated on cross-examination that between 2003 and 2006, he did not terminate any other persons “for reasons in the aggregate involving attendance, PPE and the bed truck incident[.]” (Tr. 239.)

Roland Sanchez, a haul truck driver employed by Granite Rock, testified that he was late for work approximately five times. According to Sanchez, his supervisors discussed these incidents with him, his excuses were accepted, and he was not disciplined. Sanchez also stated that he was involved in two accidents operating equipment on the site, and he was not disciplined for either incident.⁴

According to Sanchez, on one occasion when Hoenck was reprimanded by Inkster for not wearing a hard hat, there were others visible to Inkster who were not wearing hard hats but were not reprimanded by Inkster.

Roy Harrison, a water truck driver employed by Granite Rock who worked with Hoenck, indicated that on two occasions he saw Fortelka single out Hoenck for criticism for not wearing a hard hat or a protective vest.

Harrison also indicated that on one occasion the bed of the truck he was driving hit some power lines, and he was verbally disciplined. He indicated that management asked him to explain the accident. He said that he accepted responsibility for it. As a result he was not suspended, did not suffer any loss of pay, and did not suffer any disciplinary action.

³ Inkster was involved in an accident at the site involving his pickup truck, and Ramirez verbally reprimanded him. According to Ramirez, Inkster did not suffer any loss of pay. However, as a result of this incident, “[h]is pay wasn’t as high as it would have been without the accident.” (Tr. 323-324.) Edward Dotson, a haul truck driver employed by Granite Rock since 1995, testified that in June 1997, while driving a truck, the bed did not come down, causing extensive damage, and he was given a three day suspension.

⁴Edward Dotson, a haul truck driver since 1995, testified that in 1999 a truck driver, Norman Mealer, “rolled one euc and he pulled some power lines down with his bed up” (Tr. 114.), but was not disciplined. However, on cross examination it was elicited that it was determined that Mealer was not at fault.

c. Knowledge

Both Inkster and Ramirez testified, in essence, that they were not aware of Hoenck's safety complaints in September and March 2004 when they took action against him. However, according to Hoenck, in September 2003, he made safety complaints to (1) Colmenares, who was being trained as a manager, and (2) Fortelka, a supervisor. Further, Hoenck testified that in March 2004, he made safety complaints to Treanor, a preventive maintenance manager. It is significant to note that Hoenck's testimony in these regards was not impeached or contradicted.

d. Discussion

Within the above framework, I find that Hoenck has adduced sufficient evidence of coincidence in time between safety complaints he had made in October 2003 and March 2004, and the disciplinary action meted out to him in the nature of warnings or reprimands. Further, Hoenck adduced evidence of disparate action by Granite Rock towards Hoenck by disciplining him for not wearing the proper PPE, whereas others were not disciplined. Also, Hoenck established that disciplinary action was taken against him for damage caused by his truck, whereas other employees were not similarly disciplined. Thus, I conclude that Hoenck has adduced sufficient evidence to establish a causal nexus between adverse action taken against him and protected activities. Accordingly, I find that Hoenck has established that the adverse actions taken against him were motivated, "in any part," on his protected activities. Thus, I find that Hoenck has established a prima facie case.

II. Affirmative Defense

A. Case Law

In Sec'y on behalf of Chacon v. Phelps Dodge Corp., the Commission explained the proper criteria for analyzing an operator's business justifications for an adverse action:

Commission judges must often analyze the merits of an operator's alleged business justification for the challenged adverse action. In appropriate cases, they may conclude that the justification is so weak, so implausible, or so out of line with normal practice that it was a mere pretext seized upon to cloak discriminatory motive. But such inquiries must be restrained. (Emphasis added)

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. Cf. Youngstown Mines Corp., 1 FMSHRC 990, 994 (1979). Once it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate. We and our judges should not substitute for the operator's business judgement our views on "good" business

practice or on whether a particular adverse action was “just” or “wise.” Cf. NLRB v. Eastern Smelting & Refining Corp., 598 F.2d 666, 671 (1st Cir. 1979). The proper focus, pursuant to Pasula, is on whether a credible justification figured into 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. Cf. R-W Service System, Inc., 243 NLRB 1202, 1203-04 (1979) (articulating an analogous standard).

3 FMSHRC 2508, 2516 – 17 (Nov. 1981), rev’d on other grounds sub nom., Donovan ex rel. Chacon v. Phelps Dodge, 709 F.2d 86 (D.C. Cir. 1983).

In Haro v. Magma Copper Co., the Commission further explained its holding in Chacon as follows:

Thus, we first approved restrained analysis of an operator’s proffered business justification to determine whether it amounts to a pretext. Second, we held that once it is determined that a business justification is not pretextual, then the judge should determine whether “the reason was enough to have legitimately moved the operator” to take adverse action.

4 FMSHRC 1935, 1938 (Nov. 1982).

In Haro, the Commission also elaborated on the scope of the judge’s examination of an operator’s business justification response as follows:

[W]e intend that a judge, in carefully analyzing such defenses, should not substitute his business judgement or sense of “industrial justice” for that of the operator. As we recently explained, “Our function is not to pass on 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.” Bradley v. Belva Coal Co., 4 FMSHRC 982, 993 (Jun. 1982) (emphasis added).

Id. at 1938.

B. Granite Rock's Evidence

Treanor, the Quarry plant manager from July 2003 to January 2005, indicated that in September 2003, when Hoenck complained about the truck being unsafe and subsequently refused to operate it, he was sent home because there was nothing else for him to do.

On October 20, 2003, Treanor issued a Written Warning- Attendance 10/20/03, advising Hoenck that it was being issued as a result of his arriving an hour late and failing to call his supervisor to inform him that he would be late on October 20. The warning also alleges that on August 27, 2003, Hoenck was a half hour late, that on October 18, 2003, Hoenck came to work at 4:00 a.m. rather than his scheduled start of 7:00 a.m. and left work at 11:30 a.m., and that as a result, there was excessive dust on the roads, and as a consequence the truck drivers had to be sent home at 1:00 p.m. The warning further advises as follows: "These attendance issues are unacceptable. You must come to work as scheduled. Future similar attendance issues will result in suspension, and finally termination." (Def. Ex. 2 at 1.)

On October 23, 2003, Treanor issued to Hoenck a Final Written Warning- Attendance, in which he informed Hoenck that he had been given a written warning on Tuesday, and on Wednesday morning Hoenck did not report to work and did not call him (Treanor). The warning further provided as follows: "This pattern is unacceptable. In the future, if you do not notify me of a tardy or absence prior to you [sic] scheduled shift start, you will be suspended. Additional unauthorized tardies or absences will result in termination." (Def. Ex. 3 at 1.)

Treanor admitted that he did not discipline anyone else aside from Hoenck for attendance violations "within a three-day span [.]" (Tr. 281.) However, it is significant to note that on February 20, 2004, only four months after Treanor had issued a warning and a final warning to Hoenck for attendance problems, he issued a WRITTEN WARNING-ATTENDANCE/ PERFORMANCE to Jim Pacillas for repeated early departures and performance issues, i.e. tardy in returning from lunch and talking on the telephone. This warning provided further as follows: "Further similar incidence will result in suspension and termination." (Def. Ex. 10 at 1.)

In his testimony, Inkster also described various problems he had encountered with Hoenck. Inkster indicated that, in general, it was difficult to contact Hoenck when he was driving his water truck, that Hoenck did not wear his PPE on a daily basis, and that Hoenck had a consistent tardiness problem.

On January 27, 2005, Inkster spoke with Hoenck about his tardiness. Also, Inkster expressed his concerns that Hoenck was taking time off for personal business, that he was not wearing his hard hat, and that he was breaking for lunch ten minutes early. On January 31, 2005, Inkster again told Hoenck that he needed to wear his hard hat.

On January 31, 2005, Inkster sent to Ramirez a memorandum of a conversation that he had with Hoenck on January 27, 2005. According to Inkster, in this conversation he informed

Hoenck that he noticed that the latter was not wearing his hard hat, and that he had just walked from his haul truck to a tower without wearing a hard hat. Inkster indicated that he also informed Hoenck that he was breaking for lunch ten minutes early, and that attendance problems and not wearing a hard hat are not expected to continue.

According to Inkster, on January 31, he had another conversation with Hoenck in which he again advised Hoenck of the need to wear his hard hat and that he does not expect the PPE problems to continue to occur. Inkster also advised Hoenck of an ongoing problem with attendance in 2004, citing his late arrivals, thirty minutes or more on five occasions, and his leaving work more than thirty minutes early on seven occasions. He also cited written warning notices issued to Hoenck on October 20 and 23, 2003, and his one-day suspension in March 17, 2004 because of continued absence problems. Inkster advised Hoenck that as a result of all of the above, it was decided to suspend him for three days, from February 14 – 16, 2005.⁵ He was further warned as follows: “if there are any future incidence of this nature, you will be subject to further disciplinary action including possible termination.” (Def. Ex. 23 at 2.)

On February 11, 2005, Inkster wrote to Hoenck referring to conversations he had with him on January 25 and 31, 2005. He also indicated that on February 2, 2005 he had a conversation with Hoenck, which he described as follows:

I first discussed the company safety policy that requires you to wear a hard hat at all times except when in equipment or a building. I had observed you not wearing your hard hat when walking from the haul truck to the Secondary Tower. During our conversation, you were reminded that anytime you are outside your equipment or a building, you must wear your hard hat. This includes when walking from your car in the parking lot to the haul truck at the fuel island.

We also discussed your failure to observe your work schedule. The meeting was prompted because you were not in the haul truck working and it was 10:50 a.m. It was apparent you were breaking for lunch ten minutes early. All the other haul truck drivers were still working. When I questioned you, your response was, “Sometimes I lose track of time”. [sic] You further stated your watch was an hour off “the other day” and you took lunch at 10:00 a.m. You failed to observe that all other members of the crew were still working. When you returned to your truck after your unscheduled lunch break, you sat in the truck because work could not be performed without the operators. In review of your time card, you did not deduct your “additional” lunch period off your time.

In addition we also talked about another incident in which you left work early to attend to personal business, and our on-going problem of you not reporting to work at your scheduled starting time. I reminded you how it was very important for every

⁵ The suspension was without pay.

team member to work their assigned work shift and that I didn't expect the attendance problems or failure to follow policies (i.e. hard hat) to continue.

Then, on January 31, 2005, I had another conversation with you about the exact same situations – not working the entire scheduled work shift, and not wearing your hard hat. I had observed you driving your haul truck to the fuel island 25 minutes before the quitting time. In addition, you were outside the Truck Shop without your hard hat on. I reminded you of the conversation we had 2 days earlier, and that I did not expect this type of behavior to continue.

On February 2, 2005, I had another conversation with you. During that conversation I observed your hard hat in your hand and instructed you to wear it. After an exchange of comments, I instructed you again to put your hard hat on. You refused to put it on and walked away from me while I was still talking to you.

After a review of your record and the fact that I had recently warned you on three separate occasions about not observing work rules and work schedules, it is evident that you have not changed your behavior. Your most recent actions and refusal to follow Graniterock policies shows that you are not willing to change your behavior.

Def. Ex. 23 at 1 – 2.

Inkster indicated that on May 25, 2005, he had a conversation with Hoenck and told him that haul truck drivers had complained that the roads were too dusty because they had not been sufficiently watered. According to Inkster, Hoenck then over-watered the road up to the ramp, and one of the trucks that subsequently came down the road slid into a berm.

Ramirez indicated that Inkster told him of Hoenck's performance issues relating to his attendance, and his suspension by Fortelka. Also, Ramirez noted that Inkster told him of Hoenck's failure to follow Fortelka's instructions when Hoenck drove on a road in the blast area (1) prior to the blast after Fortelka had told the team not to drive in that area, and (2) subsequent to the blast after Fortelka had announced that the road was closed.

On October 3, 2005, Fortelka advised Hoenck that as a result of an investigation of an incident that had occurred on September 28, 2005, and having met with him (Hoenck), it was concluded that (1) on September 26 and 27, he (Fortelka) had informed all the team members that a road at the bench area was closed, and there was a Do Not Enter sign blocking the entrance, and (2) Hoenck was observed driving his water truck through the area. Fortelka further informed Hoenck that, based on an investigation of the events on September 28, 2005, it was concluded that Fortelka had informed all the team members that the North Rim Road was closed and that, subsequent to that warning, Hoenck drove through that area. It was concluded that Hoenck's actions warranted a three day suspension, effective September 29, 30 and October 1, 2005.

On October 3, 2005, Fortelka sent Hoenck the following letter:

The basis for the suspension also included your pass performance problems. In review of your personnel file, you have received the following discipline in the past two years:

September 20, 2005 – Written warning. Did not report to work or call supervisor.

May 27, 2005 – Verbal warning. Poor judgment of over watering the road on swing shift.

February 11, 2005 – Three-day suspension. Not observing work rules and schedules including PPE, failure to observe work schedule, and attendance.

May 27, 2004 – Verbal warning. Refusal to wear PPE.

March 17, 2004 – One-day suspension. Attendance.

October 31, 2003 – Failure to follow instructions of supervisor.

October 30, 2003 – Talking on personal phone and with co-workers during working hours.

October 20, 2003 – Written warning. Attendance.

Clearly, such performance cannot continue. We have tried to mitigate the issues but we must inform you this will be your last and final warning. We will no longer tolerate any more incidents. You will be subject to possible termination if another incident occurs.

Def. Ex. 14 at 2.

A copy of this letter was sent to Ramirez.

Ramirez, who was the quarry manager at the Wilson Quarry since October 2004, indicated that he was responsible for the firing of Hoenck. He agreed that the accident that Hoenck had with his dump truck on January 11, 2006 was a “substantial factor” in his decision to terminate Hoenck. (Tr. 238 – 239.) He indicated that “[i]t was the final incident that caused his termination. I looked at his history in aggregate.” (Tr. 238.) He was asked why he fired Hoenck and he answered as follows: “Well, after several meetings, several attempts, several write-ups to try to mitigate the actions that Hubie had taken over time, nothing was working.” (Tr. 237.) He also indicated that he did not know that Hoenck had reported safety violations to Granite Rock.

Ramirez testified further that as a result of an investigation of the accident on January 11, 2006, it was determined that the accident was caused by Hoenck's inattention. He indicated that as a result of the accident, the plant was shut down for a week and a half while the conveyor was repaired. During this period, the company was not able to produce asphalt. At the conclusion of his review of the accident, Ramirez recommended termination of Hoenck. He was asked what factors he considered in making that determination and he answered as follows:

Well, we over the year and a half that we tried to mitigate all the things that were going on with Hubie. We had meetings with the shop steward, his business agent from the union, with the different supervisors involved, just trying to improve what was going on with Hubie. And nothing seemed to work. And the end result was this damage to the conveyor and just we tried to modify his behavior; just didn't work. Didn't seem like anything we tried to mitigate didn't work. So, this was our final conclusion that we couldn't do anything else.

Tr. 333 – 334.

C. Discussion

In essence, it is Granite Rock's position, as testified to by Treanor and Inkster, that the disciplinary actions taken against Hoenck in the nature of reprimands, warnings, and suspensions, were as a result of Hoenck's repeated attendance problems, PPE violations, and the failure to follow the directives of a supervisor.

In opposition to Granite Rock's affirmative defense, Hoenck argues that Granite Rock's assertion of a business justification for adverse action taken against Hoenck is not credible. In support of his argument, Hoenck refers to his termination on January 13, 2006 because of an accident which resulted in damage to the truck he had been driving. Granite Rock did not discipline other employees who had similar accidents because, as Granite Rock states, those employees took responsibility for their actions whereas Hoenck did not.⁶

Hoenck argues that this is not credible on the ground that no evidence was adduced that Granite Rock had asked Hoenck to take responsibility for his actions. Indeed, Hoenck testified that no one from Granite Rock ever asked him whether he accepted responsibility for any of these incidents. Hoenck also argues that termination predicated upon attendance and PPE violations is not credible, because no one else had been disciplined for these violations.

⁶ For example, Roy Harrison had an accident with a water truck, which caused over five hundred dollars in property damage (Plaintiff Ex. 1 at 1.), but when asked by Granite Rock personnel to explain the incident, Harrison took responsibility for the accident and was only verbally disciplined.

Inferences might be drawn based upon coincidence in time and disparate treatment that the alleged business justifications were pretextual. However, I accord more weight to the testimony of Inkster, Treanor, and Ramirez regarding their motivations in disciplining Hoenck. I observed their demeanor and found them to be credible witnesses. In essence, their testimony and documentary evidence of their communications to Hoenck indicate that the various disciplinary actions taken against Hoenck were based on his attendance problems, PPE violations for more than two years and in spite of numerous warnings, and the truck accident in July 2006.

More specifically, on Monday October 20, 2003, Treanor issued a written warning to Hoenck for his attendance problems, alleging that Hoenck was late on two occasions within the previous three months, and that he left early on October 18. Hoenck was warned that “[f]uture similar attendance issues will result in suspension, and finally termination.” (Def. Ex. 2 at 1.)

On Thursday, October 23, 2003, Treanor issued Hoenck a final written warning, alleging that Hoenck did not report to work on Wednesday, October 22, and that he (Hoenck) failed to notify him (Treanor) of this absence. Treanor advised Hoenck as follows: “[a]dditional unauthorized tardies or absences will result in termination.” (Def. Ex. 3 at 1.)

In an e-mail dated October 30, 2003, Colmenares stated that on October 27, 2003, he saw Hoenck talking on his cell phone during working hours. Colmenares also noted Hoenck’s general “bad attitude and poor performance.” (Plaintiff Ex. 15 at 1.) In another e-mail, dated October 31, 2003 and sent from Inkster to Colmenares, Maryanne Robinson, Dan Slavin, and Treanor, Inkster documented an incident on October 31, 2003 when Hoenck used the water truck to water the roads on a rainy day when the roads were already wet. Inkster indicated that he felt that Hoenck exercised poor judgment.

In an e-mail from Inkster to Ramirez dated January 31, 2005, Inkster documented a conversation he had with Hoenck on January 27, 2005, in which he told Hoenck that he must wear his hard hat. Inkster also told Hoenck that he was breaking for lunch too early, and he also pointed out to Hoenck that he was leaving work too early to attend to personal business. While acknowledging that unforeseen circumstances do arise at times, Inkster informed Hoenck that he must give one day of notice if he will not be able to work his shift. Inkster said that he would give Hoenck the benefit of the doubt this time.

On January 31, 2005, Inkster had another conversation with Hoenck about Hoenck’s failure to wear his hard hat on that day and his leaving twenty-five minutes early. Inkster informed Hoenck that he “[doesn’t] expect these kind of things to keep occurring.” (Def. Ex. 22 at 2.)

On January 27, 2005, Inkster suspended Hoenck for three days, from February 11 to February 16, based on Hoenck’s ongoing attendance problems and failure to observe work rules and policies. Hoenck was informed that, “if there are any future incidents of this nature, [he] will be subject to further disciplinary action including possible termination.” (Def. Ex. 23 at 2.)

On September 20, 2005, Hoenck received a written warning for failure to report to work and failure to notify a supervisor of the absence.

On September 28, 2005, Fortelka suspended Hoenck pending the completion of an internal investigation of an incident involving Hoenck's perceived failure to follow supervisor's instructions. On October 3, 2005, at the conclusion of the investigation, that suspension was formalized for the dates of September 29, 30, and October 1, 2005, because it was determined that Hoenck failed to follow instructions and subsequently put himself and company property in danger. Fortelka informed Hoenck that "[he] will be subject to possible termination if another incident occurs." (Def. Ex. 14 at 2.)

On January 11, 2006, Hoenck was suspended by Ramirez because of a truck accident in which Hoenck was involved. In a meeting after the accident with Hoenck, Ramirez told him that he would contact Hoenck but that "the outcome would not be good." (Def. Ex. 16 at 2.) Subsequently, on January 13, 2006, Ramirez sent Hoenck a letter informing him that he was terminated. Ramirez wrote that, "[c]learly your actions cannot be mitigated and termination is our only recourse." (Def. Ex. 18 at 1.)

In this connection, I note that Hoenck, in the main, did not impeach or contradict evidence adduced by Granite Rock relating to his tardiness, PPE violations, and the truck accident in July 2006. I thus find that the asserted business justifications for the disciplinary actions taken against Hoenck were not "plainly incredible or implausible" Sec'y on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2516 (Nov. 1981) (emphasis added).

I am guided by the principles established in Phelps Dodge, that since the business justification has survived pretext analysis, only "a limited examination of its substantiality" is appropriate. Id. In making this examination, I note that the judge's function is not to pass on the wisdom or fairness of the asserted business justification. See Haro, 4 FMSHRC at 1938. Rather, it must be determined that the alleged justification would have motivated Granite Rock. Id. I find based on the testimony of Inkster, Treanor and Ramirez, as well as supporting documentation, that the reasons given by Granite Rock for the termination were "enough to have legitimately moved that operator to have disciplined the miner." Id.

Therefore, for all of the above reasons, I find that Hoenck adduced sufficient evidence to establish a prima facie case. However, I find that Granite Rock prevailed in its affirmative defense. Therefore, I find that Hoenck has failed to establish that Granite Rock discriminated against him in violation of section 105(c) of the Mine Act.

ORDER

It is **Ordered** that this Complaint of discrimination be dismissed. It is further **Ordered** that this case be **Dismissed**.

Avram Weisberger
Administrative Law Judge

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