

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 28, 2006

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2005-489-DM
on behalf of DIANE PALMER,	:	RM-MD-05-04
Complainant	:	
	:	
v.	:	Ray Complex
	:	Mine I.D. 02-00150
ASARCO INC.,	:	
Respondent	:	

DECISION

Appearances: Satoshi Yanai, Esq., Office of the Solicitor, U.S. Department of Labor, Los Angeles, California, for Complainant; Mark N. Savit, Esq., Donna M. Vetrano, Esq., Patton Boggs, Denver, Colorado, for Respondent.

Before: Judge Manning

This case is before me on a complaint of discrimination brought by the Secretary of Labor on behalf of Diane Palmer against Asarco Inc. (“Asarco”) under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(2) (the “Mine Act”). The Secretary and Ms. Palmer contend that Palmer was discriminated against because she was a safety representative for the local Steelworkers union. Asarco contends that it did not discriminate against Palmer and that her discipline did not violate the Mine Act. A hearing was held in Phoenix, Arizona. The parties introduced testimony and documentary evidence and filed post-hearing briefs.

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

Asarco is the operator of the Ray Complex, a large open-pit copper mine in Gila County, Arizona. At all pertinent times, Palmer drove a large 240-ton haul truck for Asarco. As described in more detail below, haul truck drivers transport waste rock and ore-bearing rock from shovels in the pit to either a dump or a crusher. The mine uses a computer program to direct and monitor the activities of the truck drivers. A salaried supervisor, called the “dispatcher,” sits in a control tower at the mine and uses this computer program as an aid to move rock as efficiently as possible. He uses three computer screens to monitor the activities in the pit and he can communicate with haul truck drivers through the computer system or on the mine radio.

At all pertinent times, the dispatcher on Palmer's crew was Bruce Miller. Miller has worked for Asarco for 16 years and he has been a dispatcher for 8 years. Prior to becoming a dispatcher he was a truck driver and heavy equipment operator. The objective of the computerized dispatch system is to increase production. The system tracks each haul truck as it moves about the pit and calculates how long each trip should take based on a running average it calculates. Each haul truck is equipped with a global positioning system ("GPS") device and a dispatch panel that communicates with the central computer. The shovels, the dumping locations, and other positions within the pit are equipped with devices that can sense and record when a truck has arrived at each location and when it leaves. Throughout each shift, the haul truck drivers receive their instructions on the dispatch panel's computer screen in the cab of the truck. The computer sends the drivers text messages and the dispatcher also sends text messages. Drivers can also send text messages to the dispatcher. Some of these messages are pre-programmed so that the driver need only touch a few keys to send the message. As stated above, the dispatcher and the drivers can also communicate via the mine radio.

The dispute in this case concerns the discipline Palmer received when she parked her haul truck near the end of her shift on October 27, 2004, and again on November 5, 2004. Palmer shut down her truck because she did not believe that she had time to take her loaded truck to the dumping location and return to the shovel before the end of the shift. Miller denied Palmer's request to shut down via text messages and the radio. Palmer contends that other haul truck drivers received counseling when they parked their trucks before the end of the shift. She contends that she was singled out for discipline because she had just become an alternate safety representative on her crew for Local 5252 of the United Steelworkers of America ("union"). The discipline on October 27 was a verbal warning and the discipline on November 5 was a written warning. (Ex. S-1 & S-2). Contestant is seeking an order directing that all references to this discipline be expunged from Palmer's employment file and directing that Asarco cease and desist from further harassment of or retaliation against Palmer or other employees for exercising their Mine Act rights.

A brief and simplified description of the work day of haul truck drivers is necessary to understand the dispute between the parties. When haul truck drivers arrive at the beginning of a shift, a bus delivers them to their haul trucks. The trucks may be parked at several different locations at the mine. When a driver arrives at her assigned haul truck, she performs a pre-shift examination. If the truck bed is empty, a text message on the dispatch panel will tell the driver which shovel she should drive to for her first load of the shift. If the truck contains rock, the dispatch panel in the truck will display a text message that tells the driver where to dump the load. Once a shovel loads a truck, the operator of the shovel will punch a button in his cab instructing the driver where to dump the load. This instruction will appear on the dispatch panel's screen. For example, the screen may say, "Truck HT446 assigned from Shovel ES02 to Dump Diversion Dam, Truck HT446 should arrive at Dump Diversion Dam in 13.4 mins." One of the screens monitored by the dispatcher also displays this information along with the exact time that each message was sent. The monitoring devices located throughout the pit track the progress of the truck using the GPS system and record the time. The dispatcher can see this

information in text form and in picture form. The sensing device at the dump also records the time the haul truck arrives at the dump. Once the driver dumps the rock, she will receive another text message that will say, for example, "Truck HT446 assigned from Dump Diversion Dam to shovel ES02, Truck HT446 should arrive at shovel ES02 in 9.6 mins." Very detailed monitoring information is kept in the computer at the mine. Printouts of this detailed information were introduced into evidence in this case.

Every time a truck leaves a shovel or a dumping location, a new assignment appears on the dispatch panel's screen in the cab of the truck. Near the end of the shift, one of two things can occur. A driver can punch in the delay code on the dispatch panel, which is "444." This code tells the dispatcher via a text message that she wants to shut down her truck for the shift change. The dispatcher can accept the delay code and tell the driver via text message where to park her truck. The dispatcher can also deny the request and tell the driver to keep hauling her load to the dump and await further instructions as to where to park ("tie down") at the end of the shift. Under the collective bargaining agreement, if the haul truck operator is directed to keep driving and she ends up working a few minutes beyond the end of the shift, she must be paid for at least 15 minutes of overtime. A driver cannot refuse a request to keep operating. In the alternative, the dispatcher can send a text message to a driver telling her to tie down at a particular location without the driver first punching in the delay code. Using the computer system, the dispatcher knows how long it should take a haul truck operator to get to the specified tie-down location. The bus that transports the incoming haul truck drivers takes the outgoing haul truck drivers back to the mine office.

As of October 2004, Ms. Palmer had been driving a haul truck at the pit for seven years. She was a member of the union. It appears that the alternate union safety representative for her shift transferred to another department at the mine sometime in July 2004. (Tr. 125). Palmer agreed to replace the departing alternate safety representative. In addition, she became the chief safety representative on the crew, replacing Charles Berry, soon after he went on medical leave on November 3, 2004. (Tr. 199). The record does not make clear when she became the alternate safety representative, when the union notified management that she had taken this position, or when Mr. Miller became aware of this change. In an interview with MSHA Special Investigator David B. Funkhouser in February 2005, Palmer said that she became the safety representative for the crew on or about November 3, 2004, and that she became the alternate safety representative about a week prior to that date. (Ex. R-38; Tr. 48). At her deposition, also taken in February 2005, Palmer testified that she became the alternate safety representative in "November – October 2004." (Ex. R-39 pp 20-21; Tr. 51-55). At the hearing in this case, Palmer testified that she became the alternate safety representative in mid-September 2004. (Tr. 16-17). George Hunt, a heavy equipment operator at the pit and the safety chairman for the union, testified that Palmer became the alternate safety representative for her crew in late August or early September 2004. (Tr. 125). Robert Manriquez, a heavy equipment operator and president of the union, testified that Palmer became an alternate safety representative sometime between July and October 2004. (Tr. 144).

It is important to understand that Complainant contends that Palmer's protected activity was her selection as the alternate safety representative for her crew and her subsequent selection as the safety representative. Complainant did not offer any evidence about specific safety complaints that Palmer made on behalf of herself or anyone on her crew prior to October 27 or November 5, 2004. Hunt testified that she must have been involved in safety complaints as an alternate safety representative. (Tr. 130). He bases his opinion on nothing more than the fact that he believed that she had been an alternate safety representative for at least a month. Manriquez testified that he believes that Palmer was involved in at least one safety complaint sometime in early October 2004. (Tr. 145-46). As the alternate safety representative, Palmer was a backup for Hunt and became involved in safety issues primarily when he was not available. (Tr. 17). I find that Complainant did not establish that Miller was aware of any specific safety complaints that Palmer made prior to October 27, 2004.

Conflicting evidence was presented at the hearing on when Asarco management was notified by the union that Ms. Palmer had become an alternate safety representative. There is no dispute that the union regularly posts a list of the safety representatives as changes are made. The union does not date these lists as they are updated, however. It is Mr. Hunt's responsibility as the union safety chairman to keep the list of safety representatives up to date. He testified that he first posted the list, which included Ms. Palmer as an alternate safety representative, at various locations at the mine some time before October 27, 2004. (Tr. 127-280; Ex. S-10). Hunt admitted that he is not sure when the updated list was posted or who had a copy of the list. (Tr. 137-38). One of the places that he regularly posted the list is in the dispatcher's area. After the discipline was issued to Palmer for stopping early on her October 27 shift, Hunt, Manriquez, and Palmer were in Miller's work area and Hunt pointed to the list showing that Palmer was an alternate safety representative. Miller said that he had not looked at the updated list and that he did not know that Palmer had been designated as an alternate safety representative.

On October 27, 2004, Palmer was working on the shift that starts at midnight and ends at 8:00 a.m. Palmer was driving her normal truck, which was number 447. Palmer testified that, near the end of her shift, she was loaded with rock from the No. 2 shovel. The dispatch panel in her truck directed her to dump the load at the No. 9 dump. She pulled away from the shovel and parked the vehicle in the tie-down location at the shovel pit. She determined that she did not have time to drive to the dump, empty the bed of her truck, and return to the shovel to tie down. She punched in the delay code and began performing her routine duties. She cleaned out the cab of the truck, cleaned the outside of the windshield, and put chocks under the wheels. As she waited for the bus to pick her up, she believed that she had parked her truck in accordance with company procedures.

Miller testified that, when he received the delay code from Palmer, he looked at the computer screens before him and determined that Palmer had time to dump her load. He pressed the code that rejects the delay code. He could tell from the information on the computer screens that the truck was not moving. The picture of a truck turns a pink color on the screen when it is not moving. He testified that he rejected Palmer's delay code and also called her on the radio

several times but he did not get a response. Palmer testified that she either did not receive the rejection of her delay code or she did not see it. She also testified that Miller did not call her on the radio.

The printout of the text messages provides the following information, in part:

ES02 loaded HT446 with LG SulCure	7:36:40
HT446 assigned from Shovel ES02 to Dump 9D	7:36:40
HT446 should arrive at Dump 9D in 12.7 min.	7:36:40
HT446 Delay rejected by dispatcher	7:44:13
Message "should be dumping load" sent to Truck HT446	7:45:34

(Ex. R-14 p. 2) (programming codes and other irrelevant information omitted). The only message that was generated by Miller is the "delay-rejected" message; the others were generated by the computer system.

Asarco's witnesses testified that, because a delay code appears on a separate screen, it does not show up on the printout. Miller testified that, because he must approve or deny a delay code quickly, he estimates that Palmer punched the delay code within a few minutes before 7:44. Miller testified that the purpose of the computer monitoring program is to increase efficiency. The objective is to keep the haul trucks moving until a few minutes before the end of the shift. It did not matter to Miller whether Palmer had time to return to the shovel before the end of her shift. Once she dumped her load, he would determine where she should tie down. He testified that he could have told her to tie down at the dump or continue driving until she reached a tie down location known as "Bluebird." Bluebird is located about halfway between the dump and the shovel. Complainant's witnesses testified, however, that Bluebird was not a recognized tie down location in 2004. Palmer testified that everyone tied down at the shovels in October 2004. (Tr. 26). Haul trucks cannot tie down on the haulage road. There are established areas in the pit where these large trucks are permitted to tie down. These areas must be large and relatively flat so that trucks can be safely parked and chocked and a bus can safely enter the area.

The next day, October 28, 2004, as the haul truck drivers were gathering on the patio outside the mine office to get on their busses, Miller approached Palmer and told her that she parked too early on her previous shift. What happened next is the subject of great dispute in this case. Palmer testified that, in reply, she said that she "didn't feel" that she had parked too early. (Tr. 25). Miller replied, "well, you did," and he became angry, walked into the office and, when he came out, handed her a written copy of a verbal warning. (Tr. 25-26). Palmer testified that she did nothing and said nothing to provoke Miller's anger. *Id.* Daryl Neely, another haul truck driver on Palmer's shift, was on the patio with Palmer and Miller on October 28. He corroborated Palmer's version of the events. He said that Palmer was neither aggressive nor sarcastic toward Miller and that she did not raise her voice. (Tr. 90-91).

Miller testified that, when he told Palmer she had parked too early on her previous shift, she denied that she had parked early. (Tr. 304). Miller testified that he then said, “Diane, I am not here to debate whether you had time to get to the dump or not, because I already know that you had time . . . I pulled up the times [on the computer].” *Id.* He further testified that he said, “I’m not here to write you up. I’m just here to counsel you and let you know that you had time to go to the dump.” *Id.* Miller testified that Palmer continued to argue with him and that she eventually said, “If you don’t like it, put it on paper.” (Tr. 305). Miller said that he responded, “Okay, Diane, if that’s the way you want it, that’s the way we’ll do it.” *Id.* Palmer then asked for a shop steward. Miller testified that he wrote up a verbal warning only after this exchange. Jimmy Powell, another haul truck driver on Palmer’s shift, corroborated Miller’s testimony. He testified that after Palmer denied that she had time to go to the dump, Miller responded “Diane we talked about this before. You had time to go to the dump. I have it in dispatch.” (Tr. 391). When Palmer continued to deny that she had enough time, Miller responded “Well, next time I’m going to have to write you up.” *Id.* Palmer then responded, “Go ahead and write me up. I don’t care.” (Tr. 392). Asarco also relies on the fact that Palmer later apologized to Miller for the way she talked to him on October 28. (Tr. 56, 74, 78, 308, 374).

Under the collective bargaining agreement, a system of progressive discipline is used. The first step is a verbal warning, which is memorialized in a written document. The second step is a written warning. The same form is used for this discipline, but a different box is checked on the form. Managers also use counseling as a way to correct behavior. When counseled, an employee is advised that she made some sort of mistake but a written record is not kept and such counseling is not considered to be discipline. The verbal warning given Palmer states, as follows:

Diane delayed too early at the end of the shift instead of going to the dump. I called her and got no answer. She had 21 minutes to dump and her loads were taking 12 to 13 min. In the future, she needs to work until the end of the shift not past the end of the shift.

(Ex. S-1).

The linchpin of Complainant’s case is that other employees who tied down about the same time as Palmer were merely counseled rather than disciplined. The Secretary contends that this evidence of disparate treatment, along with other evidence of Miller’s hostility toward Palmer, establish that she was disciplined because she had become the alternate safety representative for the union. Asarco contends that she was disciplined because she parked too early and, when Miller tried to counsel her the following day, she refused to acknowledge that she parked early or say that she would park later in the shift in the future.

Several of Complainant’s witnesses testified that they had parked early and had merely been counseled by Miller. Most of these events occurred on other days. Mr. Neely testified that he was accused of parking early on two occasions. (Tr. 91). Miller told him “not to do it again”

but he took no further action. Neely testified that he and two other drivers who had parked early were called into a meeting with Miller and another supervisor and were merely told to “try not to do it [any] more.” (Tr. 93). Lonny McNavage, another haul truck driver, testified that on about six occasions Miller contacted him by radio or dispatch panel to tell him to proceed to the dump. (Tr. 115). Although McNavage testified that he did not proceed to the dump as instructed, he was never disciplined for his actions. (Tr. 116). On October 27, 2004, Sal Hernandez also parked early, yet he was not disciplined. When Miller rejected his delay code, he called Miller on the radio to tell him that he was too tired to drive any further. Miller then gave him permission to tie down at the shovel. Manriquez testified that, based on his review of the records, no other employee at the mine has ever been disciplined for parking early unless that employee had already been counseled about the same problem earlier. (Tr. 158-59).

On November 5, 2004, Palmer was again driving haul truck 446 and was working the shift that starts at 4:00 p.m. and ends at midnight. After being loaded with rock at the No. 2 shovel near the end of her shift, her dispatch panel directed her to dump the load at the dump at the Diversion Dam. Palmer determined that she did not have enough time to dump the load and return to the shovel so she parked her truck at the shovel pit. She testified that it was 11:45 p.m. when she decided to park. (Tr. 30). The computer records provide the following information:

ES02 loaded HT446 with Sulfide Waste	23:39:54
HT446 assigned from ES02 to Dump Diversion Dam	23:39:54
HT446 should arrive at Dump Diversion Dam in 12.9 mins.	23:39:54
HT446 assigned to Dump Diversion Dam by dispatcher	23:46:28
Message “R U at Dump” sent to Truck HT446	23:50:01
Crew 2 worker D Palmer logged off Truck HT466	23:52:09

(Ex. R-17, p. 6) (programming codes and other irrelevant information omitted). The only messages that were generated by Miller are the “assigned to Dump Diversion Dam by dispatcher” and the “R U at Dump” messages; the others were generated by the computer system.

Palmer testified that drivers were parking their haulage trucks at the shovel pits and that she did not believe she had time to dump her load at the Diversion Dam and return to the shovel before the end of the shift. (Tr. 29). Miller testified that Palmer was operating the last truck to be loaded by the shovel that shift and she “had a little bit more time left to go to the dump this time, and she also chose to sit in the pit for a number of minutes and do nothing.” (Tr. 309). Her truck turned pink on his computer screen so he knew that she was just sitting in the pit and not moving. Miller stated that he sent her a text message again assigning her to the Diversion Dam to let her know that he knew that she was not moving. (Tr. 310). Miller testified that he tried without success to reach her on the radio. He then typed the message “R U at Dump” and received no response.

Senior Mine Supervisor Gary Torres held a meeting with Palmer and Miller to discuss this incident. Torres told Palmer that when the dispatcher gives a direct order to go to the dump, the driver must proceed to the dump. (Tr. 383). The discipline that Palmer received for parking at the shovel states:

D. Palmer had 21 min to go to the dump again and chose not to go. Her loads were taking her 11 min. That gave her 10 min to get back to the shovel. Last week she was also given discipline for not going to the dump at the end of the shift.

(Ex. S-2). The union filed grievances for both disciplinary notices, which have not yet been resolved. (Exs. R-12 & 13). In both grievances the union asks that the discipline be removed from Palmer's record. In the second grievance, the union also asks that Miller be placed in a non-supervisory position.

Asarco previously issued a memo concerning procedures to follow at shift change. The memo was issued because a haul truck driver "barreled" into a tie-down area too fast when a bus was present. This memo, dated April 2, 2004, states, in part:

Our policy remains that all mine equipment operate right up to the end of each shift. However, extenuating circumstances do occur. If you happen to be running late, refrain from entering your designated tie-down until the busses have left the area. Get in touch with control and request a ride. . . . If you don't think you can make the last haul and still be back at a tie-down or shovel pit, request a tie-down assignment. Remember that the dispatcher makes the call, however, it is up to you to communicate your concerns. The control room supervisor knows exactly how long it takes for a particular truck to make any given round-trip to a dump or crusher. If you are having trouble with your truck, you need to inform your supervisor so that allowances can be made. We need to maximize productivity during the first and last hours of any given shift, however, we must do this in a safe manner.

(Ex. R-10).

The Complainant offered other evidence of Miller's hostility toward Palmer's protected activities. Palmer testified that Miller's attitude toward her changed considerably in October 2004. She testified that Miller had previously been friendly with her and jokingly referred to her as his "daughter" before she became an alternate safety representative. (Tr. 40). After she became a safety representative, Miller stopped all friendly interactions with her. Miller also stopped responding to her radio calls. (Tr. 41, 152-53).

On January 3, 2005, Ms. Palmer reported that her truck was overfilled with oil and should not be operated. When she was assigned to another truck, she discovered that it did not have an operable back-up alarm. As a consequence she was assigned a third truck. Palmer testified that, as a result of these reassignments, she had to perform three pre-shift examinations in the pouring rain. She subsequently asked to go to the office because she was soaking wet and did not feel well. She was sent home at her request. Palmer argues that she should have been reassigned to her own truck after the excess oil was removed. Miller testified that she was assigned to the third truck because it was parked on a ramp so it needed to be moved. Complainant contends that there were other qualified haul truck drivers who were not operating haul trucks that night, who could have moved the haul truck that was parked on the road. Complainant cites these events as evidence that Asarco continued to treat her differently than her fellow drivers. Miller testified that these other drivers were being trained on other equipment and were not available for other work.

Sometime in February 2005, Palmer and two other haul truck drivers forgot to chock their truck tires at the end of the shift. Only Palmer was counseled by Gary Torres following the incident. Palmer believes that she was singled out because of her position as a safety representative for the union. Torres testified that he could not recall whether other miners had failed to chock their tires that night and that he would have counseled them as well had he known. (Tr. 384-85).

Finally, Complainant alleges that Miller's discriminatory attitude toward Palmer's protected status can also be inferred from his treatment of Mr. Berry. Berry was the chief safety representative on her crew until he went out on medical leave. Miller admitted that he had told Berry that he should not be assigned to drive water trucks because he was always "complaining of different things." (Tr. 321). Dennis Chroninger, the shift supervisor for Palmer and Miller's crew, testified that he heard that Miller did not want Berry driving water trucks because he was always complaining about the need for more water trucks on the roads. (Tr. 375). When he heard about this controversy, Chroninger told Miller that Berry "will take his turn on the water truck." *Id.* Manriquez testified that he understands that Miller did not want Berry driving water trucks because "he makes too many safety complaints." (Tr. 155). He also testified that Berry had a preference for driving water trucks. Complainant contends that water trucks perform an important function at the mine by controlling dust and fighting fires. (Tr. 377). Consequently, Complainant argues that Miller's refusal to assign Berry to operate water trucks demonstrates Miller's animus toward those who make safety complaints and those who engage in safety related activities. (S. Br. 8-9).

II. DISCUSSION WITH FURTHER FINDINGS AND CONCLUSIONS OF LAW

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

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

A miner alleging discrimination under the Mine Act establishes a *prima facie* case of prohibited discrimination by presenting evidence sufficient to support a conclusion that he engaged in protected activity and suffered adverse action motivated in any part by that activity. *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-800 (October 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981); *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998). The mine operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the mine operator cannot rebut the *prima facie* case in this manner, it nevertheless may defend by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Pasula* at 2800; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

A. Protected Activity

The only credible evidence of Palmer's protected activities as of October 27 and November 5, 2004, is her position as the alternate safety representative and then the safety representative for her crew. In that position, she would become involved in helping resolve safety disputes at the mine for her crew. There is no credible evidence that Miller was aware that she had actually been involved in any significant safety dispute as of October 27 or November 5. Nevertheless, as a newly appointed alternate safety representative she would soon be involved in safety activities on behalf of the union. I find that, although the date of her appointment as alternate safety representative is uncertain, she was the alternate safety representative on or before October 27, 2004. I hold that the Mine Act prohibited Asarco from taking an adverse action against her as a result of her status as a newly appointed alternate safety representative. *See generally, Sec'y of Labor on behalf of Glover v. Consolidation Coal Co.*, 19 FMSHRC 1529, 1533 (Sept. 1997) (miners' representatives are members of a protected class); *Sec'y of Labor on behalf of Sullivan v. 3M Co.*, 24 FMSHRC 1006, 1011 (Nov. 2002) (ALJ) (activity on a union safety committee constitutes substantial evidence of protected activity). Consequently, I find that Diane Palmer engaged in protected activity.

B. Adverse Action

Complainant contends that Diane Palmer suffered adverse action as a result of her protected activities. The adverse action is (1) her verbal warning issued for parking early on October 27, 2004, (2) her written warning issued for parking early on November 5, 2004, and (3)

Asarco's continued harassment of her through the actions of Bruce Miller. Asarco maintains that Miller did not know that Palmer was an alternate safety representative on October 27, that Palmer's discipline was entirely unrelated to her protected activities, and that Miller did not harass her. As it is difficult to discern what a person is thinking, the Commission has set out some guidelines for determining motivation.

We have acknowledged the difficulty in establishing a motivational nexus between protected activity and the adverse action that is the subject of the complaint. "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.

Sec'y of Labor on behalf of Baier v. Durango Gravel, 21 FMSHRC 953, 957 (Sept. 1999).

The first issue is whether Miller was even aware on October 27 that Palmer was a safety official with the union. Knowledge of the protected activity is a critical element in a discrimination case. As discussed above, Complainant's witnesses could not agree on when Palmer became an alternate safety representative or when the company was notified of her appointment. Palmer told the MSHA special investigator that she became the alternate safety representative about a week prior to November 3, 2004. (Ex. R-38; Tr. 48). That would be on or about October 27. At her deposition she said that she became the alternate in November or October 2004. (Ex. R-39 pp 20-21; Tr. 51-55). At the hearing in this case, she said that it was in mid-September 2004. (Tr. 16-17). Her deposition and MSHA interview were in February 2005, which was more than a year before the hearing in this case. As summarized above, Hunt and Manriquez were also unsure when Palmer became the alternate and when the amended list was posted. Miller testified that he did not know on October 27 that Palmer was an alternate safety representative for his crew. (Tr. 302-03, 307). Miller testified that he first learned that she was the alternate safety representative when the union shop steward advised him of that fact shortly after he handed Palmer the verbal warning notice. (Tr. 303). Later when Hunt, Manriquez, and Palmer came into Miller's work area and pointed to the amended list on the board above his desk, he replied that he had not looked at it. (Tr. 151, 303).

I find that a preponderance of the evidence does not establish that on October 27 Miller knew that Palmer was an alternate safety representative. The undated list does not highlight any

changes made. (Ex. S-10). It is simply a list of 11 names and union positions. It is easy to understand why Miller would not notice the changes in the list, even if it had been recently posted. I also find that the Complainant did not establish that Miller knew of Palmer's status when he issued the verbal warning to her the next day. As a consequence, Complainant did not establish a violation of section 105(c) of the Mine Act with respect to Palmer's verbal warning.

Asarco and Miller clearly knew that Palmer was an alternate safety representative or the chief safety representative on November 5. There was also a coincidence in time between the protected activity, *i.e.*, her appointment as an alternate safety representative and the adverse action. The key is whether there is evidence of hostility or animus toward the protected activity and whether there is evidence of disparate treatment of Palmer.

The record makes clear that Miller pushes truck drivers more than the dispatchers for other crews at the pit. Witnesses for both parties testified that Miller requires drivers to operate their trucks up until a few minutes before shift change. For example, McNavage testified that Miller has a reputation for pushing drivers to go to the end of the shift. (Tr. 120). Powell testified that Miller works drivers until the end of the shift. (Tr. 390). Muetchler, the mine manager, testified that Miller is well respected by upper management because he "pushes his drivers, he pushes his trucks, but he doesn't do so at the expense of safety." (Tr. 203). As a consequence, Miller is "controversial" with some drivers because "he pushes harder than some of our other supervisors and some of our employees don't like that." *Id.* Miller testified that he requires his drivers to run up until the end of the shift. (Tr. 299). Some members of the union, including the current president, believe that Miller is not acting in the best interest of Asarco when he pushes the drivers and the union has asked in grievances filed against Miller that he be moved into a non-supervisory position. (Tr. 168-69).

It is also clear that Miller and Asarco believe that drivers may be required to operate their vehicles to the end of the shift. The drivers who testified stated that, if the dispatch panel in their truck tells them to go to a particular dump or crusher to dump rock, they must do so. Complainant did not argue at the hearing that, by requiring haul truck drivers to operate their vehicles to within a few minutes of the end of the shift, Asarco created a safety or health hazard.¹ The case is based solely on Asarco's treatment of Palmer.

Complainant contends that the evidence establishes that Asarco, acting through Miller, demonstrated hostility toward Palmer's protected activity. Although I have held that Miller did

¹ In the complaint of discrimination, the Complainant alleges that, on October 27 and November 5, Palmer "parked her truck before the end of the shift because she believed that there was insufficient time left in the shift to *safely* perform any further work." (Complaint ¶¶ 7 & 9) (emphasis added). Complainant did not present any evidence at the hearing that it would have been unsafe for her to continue driving to the dump on either date. Palmer testified that she did not believe that she could make it to the dump and back to the shovel in a safe manner. (Tr. 78). She did not explain what her safety concerns were.

not know that Palmer was an alternate safety representative when he disciplined Palmer on October 27, 2004, I analyze both incidents when considering the animus and disparate treatment issues because the evidence and legal arguments are intertwined. Complainant contends that Asarco's reasons for disciplining Palmer are pretext because "Miller could not have believed in good faith that Palmer had sufficient time to complete another run before the end of her shift on either occasion." (S. Br. 14-15). Complainant makes this claim based on a review of the steps Miller used to calculate the time it would take Palmer to travel to the dump and back to the shovel. (S. Br. 14-22). I hold that these arguments are largely irrelevant to this case. Miller credibly testified that he looks primarily at the time it will take a particular truck to get to the dump when reviewing whether that truck should be allowed to tie down at the shovel at the request of the driver. (Tr. 300-01, 319, 323, 334-37, 348-49, 352, 363-64, 366). Miller testified that, at the end of the shift, he is not trying to get the truck back to the shovel; instead he is "trying to get that last load dumped because that's what we do is try to get that last load dumped . . . because that's how we make the money on these loads." (Tr. 366-67). After the driver dumps the rock, Miller determines where she should park. Although it is not a normal tie down location, Miller testified that he can have a truck park at the dump if necessary. (Tr. 363, 367). I find that the evidence does not support Complainant's position that Miller did not have a good faith belief that Palmer could have continued driving her truck until a few minutes before the end of the shift.²

Mine Manager Muetchler put Miller's testimony on this issue into perspective. He testified that the haul trucks are the most important part of the mining process. (Tr. 182). Asarco has calculated that total revenues generated by the pit over a period of time divided by the number of truck loads dumped during the same period of time to be about \$20,000 at current copper prices. Thus, the company views each truck load to be worth \$20,000. About 30 haul trucks are operated on each shift. (Tr. 183). He testified that if the pit loses one load per truck for all three shifts, a significant amount of production is lost. As a consequence, it is company policy to run each haul truck "right up until the end of the shift on the hour." (Tr. 184). At the end of each shift, Asarco strives for a "hot seat change" whereby the driver on the oncoming shift starts her preshift examination of the truck just as the driver from the previous shift is getting off

² Complainant contends that the issue in this case is not whether Palmer had time to go to the dump on either date, but whether she could have parked at the Bluebird tie-down. (S. Reply Br. 14, Tr. 349). Complainant believes that Miller had made an irrevocable decision to have Palmer park at Bluebird if she did not have time to return to the shovel. *Id.* Consequently, Complainant believes that if the evidence shows that the Bluebird tie-down was not available and if the company records show that she did not have time to return to the shovel, then Palmer's decision to park early is vindicated and Miller's discipline was both unwarranted and was given in bad faith. I disagree. Although Miller testified that he was thinking that he would have Palmer park at Bluebird when the dispatch system ordered her to continue toward the dump, it is quite clear that Miller's objective was to get her and the other drivers as far along as possible before the end of the shift. The issue in this case is not whether Palmer could have made it back to the shovel before the end of the shift or whether Bluebird was available as a tie-down location.

the truck. *Id.* Miller's conduct in determining whether Palmer had time to get to the dump rather than time to make a round trip is entirely consistent with Asarco's policy.

The dispatch records show that on October 27, 2004, Palmer was instructed to proceed to the dump at 7:36 a.m. and that it would take a little less than 13 minutes for her to get to the dump. (Ex. R-14 p. 2). That would place her at the dump at about 7:49. Instead, Palmer parked her truck at the shovel. Miller testified that it takes about two minutes for a truck to dump rock. (Tr. 342). After Palmer dumped the rock at the dump, Miller could have ordered Palmer to tie down at the dump or proceed to another location. If he ordered her to proceed to a tie down location and there was not enough time to get there, Palmer would have been entitled to overtime pay. Once a driver requests to tie down, the responsibility is on Miller to direct how that should be accomplished. The dispatch records show that on November 5, 2004, Palmer was instructed to go to the dump at 11:39 p.m. and that it would take her about 13 minutes to get there. Instead, Palmer parked her truck at the shovel. It was reasonable, given Asarco's policy, for Miller to expect Palmer to keep driving. Thus, I find that it was reasonable for Miller to have concluded that Palmer parked too early on each of these dates.

The overriding issue in this case is whether Palmer was treated differently than other drivers who have parked early and, if so, whether this disparate treatment was related to her protected activity. Complainant contends that all other drivers who have parked their trucks early have been given counseling rather than discipline. Manriquez, the union president, testified that it is very unusual for a manager to give a miner a verbal warning without first having counseled her. (Tr. 160). He stated that he was not aware of any counseling given to Palmer on this subject prior to her verbal warning. Palmer testified that prior to October 27, she has never been given any counseling for parking too early. (Tr. 26-27).

As stated above, Daryl Neely testified that Miller has accused him of parking about 25 minutes early. Miller simply told him not to do it again. (Tr. 91). Neely testified that on another occasion, he and two other drivers were told that they parked too early. These drivers were called to a disciplinary meeting with Chroninger and Miller, but they were not issued any formal discipline. (Tr. 92). Lonny McNavage testified that Miller has told him that he parked too early on about six occasions. (Tr. 115). In none of those instances did Miller discipline him. Finally, Complainant points to Sal Hernandez, who parked early on October 27, 2004, without being disciplined or counseled. (Tr. 27-28).

Asarco contends that these instances do not establish disparate treatment. For example, it states that McNavage often discussed whether he had time to dump with Miller over the radio. (Tr. 119-20). When Miller called him on the radio, McNavage always responded and stated his case for parking where he was. McNavage testified that sometimes Miller let him park and other times he did not. *Id.* McNavage acknowledged that Miller, as the supervisor, makes the ultimate decision. (Tr. 120). Miller gave permission for Hernandez to park early on October 27. When Miller rejected his delay code, Hernandez called Miller over the radio and told Miller he was too

tired to continue to operate his rig. Miller then gave Hernandez permission to tie down at the shovel. Palmer, on the other hand, failed to respond to Miller's radio calls and text messages.

Asarco also maintains that there are other important differences in the incidents involving other drivers. The other drivers responded to Miller's order to continue driving by calling him over the radio to ask permission to park early. These drivers also acknowledged that it is Miller, not the drivers, who make the decision as to when and where to park at the end of the shift. In those instances when a driver parked early without permission, the drivers were counseled because they admitted that they were not allowed to park if they were ordered to keep operating. Asarco contends that Palmer was disciplined rather than counseled because of her attitude. First, on October 27, she did not respond to Miller's radio calls or the text messages he sent to her dispatch panel ordering her to keep driving. She simply parked her truck and did not attempt to communicate with Miller about it. Second, the day after the first occasion, she argued with Miller about the incident. She told him that she did not park early. Asarco contends that she received the verbal warning because she continued to argue about the incident.

Complainant maintains that if Miller were concerned about Palmer's attitude and her argumentative behavior, she should have been disciplined for her failure to follow orders or for insubordination. Complainant notes that neither the verbal warning nor the written warning state that the discipline was given because of Palmer's recalcitrance or because she challenged Miller's authority to dispatch trucks. Consequently, Palmer contends that the discipline she actually received is inconsistent with Asarco's claim that she was disciplined because she argued with Miller about parking early.

As stated above, I hold that Miller was not aware of Palmer's status as an alternate safety representative when she was given the verbal warning on October 27, 2004. Thus, if Miller treated Palmer differently than other drivers, it was not because of her protected status. The focus, therefore, is on events of November 5, 2004. Palmer testified at the hearing that she never received any radio or text messages from Miller on this occasion ordering her to proceed to the Diversion Dam dump. (Tr. 47). Palmer's contemporaneous handwritten notes, however, state that she had radio conversations with Miller that night about whether she had time to take her final truckload to the dump and return to the shovel. (Tr. 60-61). The notes reflect that Miller ordered her to proceed to the dump. *Id.* Palmer stated that these notes are likely to be more accurate than her testimony. *Id.* McNavage testified that he heard Palmer and Miller on the radio "having a dispute about whether she had time to take the load to the dump or not." (Tr. 112). Palmer's recollection of important events was quite hazy at the hearing.

Miller testified that he gave Palmer a direct order to proceed to the dump on November 5 and that she refused to do so. (Tr. 310). He gave her the written warning for her conduct because she had already received the verbal warning. *Id.* Miller testified that if Palmer had not received a verbal warning on October 27, he would not have issued a written warning for November 5. (Tr. 310-11). Miller further testified that he chose not to include allegations of insubordination in the written warning because the sanctions for insubordination are more severe,

up to and including termination. (Tr. 311). He stated that he wanted to “just use the progressive discipline route.” *Id.* He testified that Palmer’s position as a safety representative played no part in his decision to issue the written warning. *Id.*

I find that the Complainant did not establish disparate treatment. The evidence establishes that Palmer was ordered to proceed to the Diversion Dam dump on November 5, 2005, and that she refused to follow this direct order. Although other drivers have received counseling rather than formal discipline, these other drivers were contrite about their failure to follow company procedures. These drivers acknowledged that they can be required to operate their equipment until the end of the shift. It is important to recognize that the end of the shift is a busy time for the dispatcher. As a consequence, drivers have sometimes parked their trucks earlier than Miller wanted them to and, as a consequence, he counseled them that they must keep operating until they are given a tie-down designation. I credit Miller’s testimony that he was only going to counsel Palmer on October 27 for parking early until she argued with him in front of the crew on October 28 that she did not park early. Although McNavage and other drivers may have discussed whether there was sufficient time to proceed to the dump over the radio, there has been no showing that other drivers have directly challenged Miller’s judgment and authority. It is significant that Palmer later apologized for the way she talked to Miller. (Tr. 56, 74, 78, 308, 374). This indicates that she was hostile to his oral admonition not to park so early. The written warning issued for parking early on November 5 flowed directly from the previous verbal warning. I also credit Miller’s explanation that he did not include allegations of insubordination in Palmer’s discipline because he did not want to escalate the situation. The written warning was issued in accordance with the system of progressive discipline set forth in the collective bargaining agreement.

In addition to the verbal and written discipline, discussed above, Complainant relies on other evidence of harassment. First, Palmer contends that after she became a safety representative, Miller frequently failed to respond to her radio calls. (Tr. 40). Manriquez testified that he also noticed this trend. (Tr. 152-53). In response, Asarco contends that the evidence shows that Miller continued to answer Palmer’s radio calls, contrary to Palmer’s assertions. (Tr. 35-37).

I find that Complainant did not establish that Miller deliberately stopped answering Palmer’s radio calls. He obviously continued to communicate with her with respect to her job duties. The evidence reveals that about 30 haul trucks operate in the pit on any given shift. (Tr. 178, 183). The dispatcher must keep in contact with these trucks as well as other equipment operating in the pit. Complainant did not introduce any evidence of specific instances where Palmer attempted to contact Miller and he never responded.

Complainant also avers that Palmer was harassed by Miller on January 3, 2005, when she was assigned three different trucks during a single shift. She contends that she should have been reassigned back to her truck once it was repaired because there were other qualified haul truck drivers available to drive the other trucks that shift. Specifically, Palmer testified that at least

four other drivers had not been assigned trucks that night because of mechanical problems. (Tr. 39). Miller testified that the other drivers were training each other to operate busses and water trucks. (Tr. 312). Palmer and Hunt believed that rainy days are not good days to provide training. Complainant argues that “Miller failed to explain what sense it made to have the bus take the time to pick up Ms. Palmer from one downed truck and transport her by bus to truck No. 438, when the bus or water truck could have proceeded directly to truck No. 438 with a spare driver [to operate that truck].” (S. Br. 13). Complainant also points out that after Palmer went home, it does not appear that Miller had any other driver proceed directly to truck 438 to move it out of harm’s way.

Asarco argues that the events of January 3, 2005, do not indicate animus toward Palmer’s protected activities. It contends that drivers sometimes have to operate multiple trucks during a single shift. (Tr. 393). It is also common knowledge that when it rains, electrical problems develop on the trucks. (Tr. 315). When Palmer first reported a problem with her truck, she was allowed to sit in her truck for about an hour and a half while she was waiting for her truck to be worked on. (Tr. 314). When truck 406 became available, Palmer was assigned to that truck. *Id.* Her preshift examination revealed that the backup alarm was not operational on truck 406. She was told that she could sit in that truck until mechanics arrived to fix the backup alarm. When the mechanics never arrived, Palmer was assigned to truck 438 because it was parked in a bad location. In addition, Palmer’s truck was not available at the time she was assigned to truck 438. (Tr. 316). The driver of the bus who was taking Palmer to that truck told Miller via the radio that Palmer was tired and wet and that she wanted to go home sick. Miller gave Palmer permission to go home. (Tr. 315). Miller testified that another driver moved truck 438 after Palmer left to go home. (Tr. 316).

I agree with the Complainant that the scope of an adverse action is not limited to terminations, demotions, and formal discipline, but rather extends to “more subtle forms of discrimination.” (S. Br. 5 quoting, *Sec’y on behalf of Long v. Island Creek Coal Co.*, 2 FMSHRC 1529, 1543 (June 1980) (ALJ)). I hold that it would violate section 105(c) to assign a miner onerous tasks or subject a miner to other harassment in retaliation for protected activities. Complainant contends that “Miller’s assignment of Ms. Palmer alone to conduct the pre-operational inspections on three separate trucks in the pouring rain clearly constitutes adverse action.” (S. Br. 5). I find that complainant’s reconstruction of the events is speculative and illogical. Because it was raining, many trucks were down. Four drivers were assigned to train or be trained on other equipment at the start of the shift. I cannot draw an inference that Miller kept assigning Palmer new trucks for the purpose of harassing her by getting her wet. Miller could not have known that her truck would have a problem or that truck No. 406 would have an inoperable backup alarm. He had already scheduled the other four drivers to specific training tasks so having Palmer get started hauling rock by assigning her to truck 438 is not illogical. The truck was parked on a ramp. I find that Asarco’s proffered business justification for keeping Palmer operating a truck is not plainly incredible or implausible. *See, Chacon*, 3 FMSHRC 2508, 2520 (Nov. 1981). I find that the evidence does not establish any nexus between the events of January 5, 2005, and Palmer’s protected activities.

Complainant also relies on the counseling Palmer received when she forgot to chock the wheels on her truck after she parked it at the end of shift sometime in February 2005. Palmer believes that she was singled out for counseling because she was a safety representative. Asarco argues that, because the supervisor who counseled Palmer was not aware that other drivers had likewise neglected to chock their truck wheels, this incident does not establish disparate treatment. In addition, Palmer was not disciplined in any way for this event. I find that the Secretary did not establish that Palmer was singled out in this instance. Asarco requires drivers to chock the wheels of haul trucks for safety reasons. Torres, the senior mine supervisor, credibly testified that if he had noticed that other drivers did not chock their trucks, he would have counseled them as well. (Tr. 384-85).

Complainant also argues that Miller demonstrated hostility toward protected activity when he refused to allow another union safety representative, Charles Berry, to operate water trucks. As stated above, Complainant asserts that Miller would not assign Berry to a water truck because Berry complained too much. Asarco argues that it is not uncommon for an employee to be utilized on a particular piece of equipment more than others. It also contends that the Secretary did not establish any nexus between Miller's preference to assign Berry to haul trucks and Berry's protected actions as a safety representative. It is not necessary for me to resolve this issue because Berry did not file a discrimination complaint. Berry did not testify at the hearing. Complainant's point is not that Miller refused to assign Berry to water trucks because he was a safety representative; rather, the issue is whether he would not assign Berry to water trucks because Berry complained that the roads were not kept wet enough to keep down the dust. There is no question that dusty roads can create a safety and health hazard. Nevertheless, the evidence is too vague and the events are too far removed from the issues in this case for me to draw any substantive conclusions.³

To summarize, I find that Diane Palmer engaged in protected activity as a result of her status as an alternate safety representative and then as a safety representative for her crew. I find that the dispatcher on her crew, Bruce Miller, did not know that she was an alternate safety representative until after he issued her a verbal warning on October 28, 2004. I find that Miller

³ Palmer also testified that about a week before the hearing in this case she was hauling rock to a crusher. She was in line to dump at the crusher when Miller reassigned her to dump the rock at another crusher. She testified that there was a truck in line in front of her and two trucks behind her, so it would have been difficult to get out of line. When she called Miller on the radio to tell him, he told her to stay where she was. (Tr. 36-37). Palmer testified that Miller originally ordered her to pull out of line just to harass her. He knew where she was in the line and he should have asked the truck at the back of the line to go to the other crusher. She believes that Miller can see the crusher area from his control tower. (Tr. 36). Miller testified that he can tell when a truck is at a crusher by looking at the computer screen but he cannot always determine the order of the trucks in the line waiting to dump. (Tr. 317). He believed that Palmer was last in line, but when she called him to tell him that she was in the middle of the line, he immediately told her to stay there. I find that this event does not demonstrate any animus or hostility toward Palmer's safety activities.

had a reasonable good faith belief that Palmer had time to dump the rock from her truck one last time before the end of her shift on October 27 and November 5, 2004, and that she could have tied down at an appropriate location before shift change. I also find that Miller issued Palmer the verbal warning on October 28 because she shut down her truck about 21 minutes before the end of her shift in violation of the directive on her dispatch panel, in violation of his text and radio messages, and in violation of company policy and because she continued to maintain, in an argumentative fashion, that she did not shut down early. I find that Miller issued Palmer the written warning on November 5 because she shut down her truck about 21 minutes before the end of her shift in violation of the directive on her dispatch panel, in violation of his text and radio messages, and in violation of company policy and because she had already received a verbal warning. In addition, I find that Complainant did not establish disparate treatment of Palmer by Miller or Asarco. Consequently, I conclude that a preponderance of the evidence establishes that Asarco disciplined Palmer for reasons unrelated to her protected status or her protected activities. Finally, I find that the other examples of alleged harassment or animus presented by Complainant do not help to establish that Asarco discriminated against her in violation of section 105(c) of the Mine Act. Of course, my findings in this case do not relieve Asarco from its obligation to comply with the provisions of section 105(c) of the Mine Act. Asarco may not retaliate or discriminate against Palmer or any miner for exercising any of their statutory rights.⁴

III. ORDER

For the reasons set forth above, the discrimination complaint filed the Secretary of Labor on behalf of Diane Palmer against Asarco, Inc., under section 105(c) of the Mine Act is **DISMISSED**.

Richard W. Manning
Administrative Law Judge

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⁴ According to Muetchler, the discipline Palmer received in 2004 can no longer be considered in any future discipline against her under the terms of the collective bargaining agreement because it was issued more than a year ago. (Tr. 237).