FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 7, 2022

MARIA T. WALKER, Petitioner, v. CAPURRO TRUCKING, Respondent.	DISCRIMINATION PROCEEDING Docket No. WEST 2021-0183 MSHA Case No. WE-MD-21-20 Mine ID: 26-01089 / F732 Mine: Goldstrike Mine

DECISION ON RESPONDENT'S MOTION FOR SUMMARY DECISION

Before: Judge Sullivan

This discrimination proceeding is before the Commission pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(c)(3). Respondent Capurro Trucking ("Capurro"), pursuant to Commission Procedural Rule 67(a)-(c), 29 C.F.R. §2700.67(a)-(c), has filed a Motion for Summary Decision ("Resp't Mot.") on the pro se discrimination complaint brought against it by its former employee, Complainant Maria T. Walker. Complainant opposes the Motion for Summary Decision.

I. GENERAL FACTUAL AND PROCEDURAL BACKGROUND

Capurro, headquartered in Sparks, NV, provides trucking services as a contractor under the Mine Act from its Carlin, NV Mining Division facilities to nearby mines, including the Goldstrike Mine of Nevada Gold Mines LLC. Complainant started as a Capurro ore haul truck driver on November 25, 2019, with approximately three weeks of training.[1] She worked as a Capurro Mining Division driver until her termination on September 3, 2020.

According to the Exit Interview that Complainant attached to her Commission Complaint, (hereinafter "105(c)(3) Compl."), Capurro informed the Complainant that she was being terminated for her "[f]ailure to take direction from supervisors without constant argument" and "[d]isruption of workforce." The Exit Interview further stated that "all communications and directives given from any management or supervision is a debate or argument" and are "very disruptive and time consuming." *Id.*[2]

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[1] Prior to her employment at Capurro, Complainant had six years of truck driving experience. Questionnaire at 2. Complainant's husband, Mr. William Walker, was hired in the same position by Capurro at approximately the same time. Resp't Mot. Ex. 1, ¶ 13.

[2] The Exit Interview cited a specific example of disruption it attributed to the Complainant. According to Capurro, Complainant had recently, in a group text thread, objected to a Covid-19 temperature check protocol, which in turn caused "several others to fear temperature checks and park several pieces of equipment causing hardship to the employer and the employer[']s inability to perform customer needs."

Complainant, pursuant to section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2), subsequently filed a discrimination complaint against Capurro with the Department of Labor's Mine Safety and Health Administration ("MSHA") (hereinafter "MSHA Compl.").[3] However, by letter dated March 19, 2021, MSHA notified Complainant that the Secretary of Labor would not be filing a discrimination complaint on her behalf with the Commission, because "[b]ased on a review of the information gathered during the investigation, MSHA does not believe that there is sufficient evidence to establish, by a preponderance of the evidence, that a violation of Section 105(c) occurred."

Along the lines suggested in MSHA's March 19th letter, and as discussed in further detail below, Complainant filed her own discrimination complaint with the Commission, dated April 13, 2021. Capurro timely filed its Answer, and on June 7, 2021, Chief Administrative Law Judge Glynn F. Voisin assigned me this matter.

On June 15, 2021, I conducted a conference call with the parties. Among the topics discussed was the scope of a Commission discrimination proceeding.[4] I granted Complainant's request that a hearing not be held in the near term, primarily in order to permit her to receive and review documents she had requested from MSHA through the Freedom of Information Act ("FOIA").[5] I explained to both parties that it was unrealistic to expect that any of the materials obtained from MSHA pursuant to a FOIA request would include MSHA's view on the merits of the Complainant's discrimination allegations. However, given the circumstances and that the request was from a pro se Complainant, I viewed it as reasonable one and issued a Notice of Hearing and Prehearing Order for December 2021. *See Ribble v. T & M Dev. Co.*, 22 FMSHRC 593, 595 (May 2000) (holding that pro se complainant who met Commission's minimal section 105(c)(3) proceeding pleading requirements be afforded opportunity to prove discrimination allegations under the Commission's Procedural rules).[6]

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[3] The MSHA complaint includes (1) a completed MSHA Form 2000-123 titled, "Discrimination Complaint," and (2) MSHA Form 2000-124 titled, "Discrimination Report," a one-page narrative dated October 13, 2020, describing the basis for the complaint. While her MSHA Form 2000-123 stated that she would "possibly" seek temporary reinstatement, Complainant later informed MSHA that she was not interested in returning to work for Capurro.

[4] The initial pleadings in this case, along with the initial conversation with the parties, indicated that not only the pro se Complainant, but also Capurro's able counsel, viewed this Commission proceeding as an appeal of the Secretary's decision not to pursue the case, rather than the de novo proceeding contemplated by section 105(c)(3). Such an erroneous impression may have resulted from the final instruction in the MSHA form letter concerning the filing of a section 105(c)(3) complaint, which refers to any subsequent Commission case as an "appeal file."

[5] MSHA had indicated that the agency would take approximately three months to fully answer the FOIA request. During this time Complainant was expecting to complete her planned relocation to a town in Idaho approximately 500 miles from Carlin.

[6] In the interim, Commission staff attempted to cure the absence in her section 105(c)(3) Complaint of the relief that Complainant was seeking. *See* Commission Procedural Rule 42, 29 C.F.R. § 2700.42 ("A discrimination complaint shall include . . . a statement of the relief

After both parties conducted discovery, on November 15, 2021, Capurro filed its Motion for Summary Decision, along with a five-page Statement of Undisputed Facts, two affidavits, and approximately 600 additional pages of exhibits ("Resp't Ex.").

In response, Complainant filed a one-page opposition to Capurro's Motion, to which she appended a two-page "response" to Capurro's initial Answer. Complainant also submitted 356 pages of documents she characterized as exhibits ("Walker Ex."). Many of the documents were copies of repetitive instances of the same text conversation, and many documents included Complainant's undated annotations. Also accompanying the exhibits was a four-page "Exhibit Form" in which Complainant tersely summarized the documents and her view of their import. Because the Complainant is pro se, I have liberally construed Commission Rule 67(d), 29 C.F.R. § 2700.67(d), which governs the form of opposition to motions for summary decision.

With the prospect of a hearing that could only be held via Zoom video conferencing,[7] I held a Zoom session with the parties on December 9, 2021. The purpose of the session was to explore their respective abilities to conduct a full video conference hearing, as well as to discuss the issues in the case, including those raised by a voluminous summary decision record.

At that time, Complainant requested a continuance to the hearing so that she could continue with what she represented were ongoing conversations with experienced Mine Act counsel regarding his serving as her attorney in the case. I granted the continuance request, indicating that I had not yet decided how I would rule on the Motion for Summary Decision, but would do so in a written order or decision before ordering further proceedings in the case, if any. I also suggested that Complainant respond in good faith to Capurro's outstanding offer to discuss potential settlement, informing the parties, as I had before, that the Commission could assist these discussions by appointing settlement counsel in the case.

A month later, Complainant has yet to provide a definitive answer on whether she will be retaining the counsel she referenced at the conference (or any other), and recent indications are she is not interested in participating in settlement discussions. Consequently, due process and fairness considerations require that I rule upon Capurro's Motion for Summary Decision now.

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requested."). By e-mail dated September 20, 2021, Complainant responded she was seeking $5,000,000. She also indicated her desire that the case result in Capurro firing or otherwise disciplining various members of its Mining Division management.

Complainant was thereupon informed that such requests far exceeded any remedy conceivably permitted by section 105(c). *See Sec'y on behalf of Rieke v. Akzo Nobel Salt, Inc.*, 19 FMSHRC 1254, 1257-60 (July 1997) (discussing that goal of Mine Act is to make discriminatees whole). In the absence of a serious response from Complainant, I am assuming that her statement to MSHA during its investigation that she was seeking backpay, but not reinstatement, extends to her case before the Commission.

[7] The Commission was not holding in-person hearings through 2021 due to the changing circumstances regarding Covid-19.

II. SUMMARY OF APPLICABLE LAW

A. Establishing Discrimination Under the Mine Act

The pertinent provision of the Mine Act, section 105(c)(1), provides that "No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner . . . in any coal or other mine subject to this Act because such miner, . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent . . . of an alleged danger or safety or health violation in a coal or other mine." 30 U.S.C. § 815(c)(1). In cases such as this one, that are potentially reviewable by the United States Court of Appeals for the Ninth Circuit under section 106(a)(1) of the Mine Act, 30 U.S.C. § 816(a)(1), the key term in section 105(c)(1) is "*because*." A discrimination complainant must show that (1) she engaged in what is known as "protected activity" (i.e., "the exercise of statutory rights"); and (2) that the adverse action complained (here the Complainant's termination) was "*because*" of that protected activity. In other words, at least in cases ultimately subject to Ninth Circuit review, a Complainant must show that her employer would not have taken the adverse action against her "but for" the protected activity she engaged in. *Thomas v. CalPortland Co.*, 993 F.3d 1204, 1210 (9th Cir. 2021) (remanding 105(c)(3) case for Commission to apply "but-for standard"); Docket No. WEST 2018-0402 (Dec. 2, 2020), at 11 (ALJ) (decision on remand applying but-for standard), pet. for rev. filed Dec. 29, 2021; *see also Sec'y on behalf of Alvaro v. Grimes Rock, Inc.*, 43 FMSHRC 299, 302-03 (June 2021).

The question of whether an employer would not have taken an adverse action "but for" a complainant's protected activity is one of motivation. Motivation can be established either directly or indirectly, through circumstantial evidence. Relevant considerations in determining motivation are the employer's knowledge of the protected activity, its hostility towards the protected activity, the coincidence in time between the protected activity and the adverse action, and disparate treatment of the complainant. *See Sec'y on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981)), *rev'd on other grounds*, 709 F.2d 954 (D.C. Cir. 1983).

B. Summary Decision Standard

Commission Procedural Rule 67(b) provides that a motion for summary decision shall be granted only if "the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows: (1) [t]hat there is no genuine issue as to any material fact; and (2) [t]hat the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.67(b). The Commission analogizes summary decision to Rule 56 of the Federal Rules of Civil Procedure governing summary judgment. *Lakeview Rock Prods., Inc.*, 33 FMSHRC 2985, 2987 (Dec. 2011) (citations omitted). The Supreme Court, as the Commission observes, determined that summary judgment is only appropriate "upon proper showings of the lack of a genuine, triable issue of material fact." *Id.* at 2987-88 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)).

The Supreme Court has also held that both the record and "inferences drawn from the underlying facts" must be viewed in the light most favorable to the party opposing the motion. *Id.* at 2988 (quoting *Poller v. Columbia Broad. Sys.*, 368 U.S. 464, 473 (1962)). However, only such inferences that are "reasonable" may be drawn. *Reeves v. Sanderson Plumbing Prod.*, 530 U.S. 133, 150 (2000); *Tolan v. Cotton*, 572 U.S. 650, 660 (2014). Consequently, in ruling upon motions for summary judgment, courts have refused to indulge inferences from non-movants that are "farfetched or fantastic" (*Int'l Ass'n of Machinists and Aerospace Workers, AFL-CIO v. Winship Green Nursing Ctr.*, 103 F.3d 196, 206 (1st Cir. 1996)), that do not that do not follow rationally from facts presented to the judge (*Iglesias v. Mutual Life Ins. Co. of New York*, 156 F.3d 237, 240 (1st Cir. 1998)), or that require the court to "accept . . . sheer speculation as fact." *Robbins v. Becker*, 794 F.3d 988, 997 (8th Cir. 2015). In short, a non-moving party "cannot rely on conclusory allegations, improbable inferences, acrimonious invective, or rank speculation." *Thompson v. Gold Medal Bakery, Inc.*, 989 F.3d 135, 141 (1st Cir. 2021).

III. DISCUSSION AND ANALYSIS

In its Motion for Summary Decision, Capurro argues that Complainant has not alleged, much less provided any evidence, that she engaged in activity protected by the Mine Act. Resp't Mot. at 11-13. Capurro maintains that the scope of any discrimination complaint before the Commission is strictly circumscribed by matters raised in the initial complaint to MSHA, because only those matters could have been investigated by that agency. *Id.* at 16. Capurro further argues that the evidence it submitted establishes beyond any doubt that Complainant was terminated for cause, and thus, under the "but for" section 105(c) test for discrimination, its Motion should be granted. *Id.* at 13-15.

In opposing the motion, Complainant argues that Capurro still fails to sufficiently document why it terminated her. She further contends that Capurro did not address her section 105(c) complaints and that the "constant absences" of Capurro Mining Division General Manager David Peck "left unknowledgeable and untrained . . . managers/supervisors in his stead."

A. The Permissible Scope of a Section 105(c)(3) Complaint

I first address Capurro's arguments on the scope of the section 105(c)(3) complaint that the Commission can entertain in this case. In *Hatfield v. Colquest Energy, Inc.*, the Commission held that the scope of a section 105(c)(3) proceeding is not defined solely by the original complaint to MSHA but can also include additional matters that were "reported to" MSHA for investigation. 13 FMSHRC 544, 546 (Apr. 1991). A section 105(c) proceeding is not strictly circumscribed by the original complaint to MSHA if, during MSHA's subsequent investigation, additional information relevant to the question of whether discrimination occurred is uncovered. *Hopkins Cty. Coal, LLC*, 38 FMSHRC 1317, 1322-26 (June 2016) (detailing MSHA investigatory process in discrimination cases).

The MSHA investigatory process can hardly be described as transparent when the Secretary declines to file a discrimination complaint with the Commission. Hence why it is difficult for a section 105(c)(3) complainant, especially a pro se one, to establish the actual

extent of matters that MSHA investigated. Here, however, there is no question regarding what matters Complainant "reported to" MSHA during its investigation, and thus provided the agency the opportunity to investigate.

That is because Complainant appended to her Commission Complaint not only the required original discrimination complaint to MSHA and the Capurro Exit Interview previously discussed, but also copies of two other documents detailing the information she provided to MSHA in support of her initial complaint. The first is a six-page document containing answers the Complainant appears to have provided to various MSHA questions on October 29, 2020 (hereinafter "Questionnaire"). The second is a more formal document, the signed "Statement of Maria Walker" that Complainant gave to MSHA Special Investigator Kyle E. Jackson on November 17, 2020 (hereinafter "Complainant Statement").

Consequently, in ruling upon the Motion for Summary Decision, I will review the allegations in the Complaint to the Commission to the extent that they were reported to MSHA in the Complaint to MSHA, the Questionnaire, or the Complainant Statement. I will not address the additional allegations Complainant made to MSHA in the latter two documents that she did not include in either of her complaints. *See Carmichael v. Jim Walters Res., Inc.*, 20 FMSHRC 479, 484 n.9 (May 1998) ("Whatever its value as evidence, the [section 105(c)(3)] complaint to the Commission, much like a complaint in a court proceeding, is a basic pleading that serves to frame the issues to be tried."). Such review will be conducted in accordance with the standard for summary decision.

B. Whether the Section 105(c)(3) Complaint Includes Allegations of Protected Activity Raised in the Complaint to MSHA or the Subsequent Investigation

Much of the Complaint to the Commission is a compendium of accusations against Capurro, many of which are quite serious. For instance, as she had to MSHA, Complainant alleges criminal conduct on the part of Capurro and its agents. Included are allegations of "fraud" carried out by Capurro's agents, "payoffs of mine employees," and theft from the company. While Complainant identifies those she accuses by name, most of those names will not be repeated here, given the Complainant's tendency to cavalierly allege criminal conduct, not only by individuals within Capurro's Mining Division management but outside of it as well.[8] With the exception of one serious accusation, none of the claims will be addressed in this decision because, even if true (which the record indicates there is much reason to doubt), they have nothing to do with workplace safety. Rather they only concern how Capurro carried out other aspects of its business operations.[9]

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[8] In responding to the Motion for Summary Decision, Complainant included a copy of her letter to the superior of a Nevada Highway Patrol Commercial Enforcement Officer, in which she accused the officer of having accepted a bribe from Capurro. Dated October 19, 2021, the letter appears to have been prompted by information Complainant would have then recently learned through the discovery process in this case. *See* Walker Ex. WV-1(a) & (b).

[9] The section 105(c)(3) Complaint also included absurdly false information. It stated that "[m]y Exit interview did not even specify what I was being fired for." As discussed, the Capurro Exit

The Complainant maintains that the reason she was terminated was not related to how she carried out her job duties, but rather because she knew "too much" regarding the criminal conduct at Capurro. 105(c)(3) Compl. at 1. According to the Complainant, she posed a risk to the company's management personnel, in that she could inform Capurro's owner in Reno "of all the going-on's" at the Carlin location. The Complainant further alleges that because she knew "too much," she was treated differently from other drivers by management with respect to enforcement of company rules. Her ultimate request is that, before the Commission, she be permitted to "challenge Capurro, in which to produce true and correct documentation against their falsified and sparse history" of her employment there. *Id.* at 2.

At bottom, Complainant's case revolves around allegations of disparate treatment of her by management. Of course, a Mine Act discrimination case based on disparate treatment must contain some plausible allegation that a miner had engaged in protected activity and was subsequently treated differently than employees who had not engaged in protected activity. *See, e.g., Pero v. Cyprus Plateau Mining Corp.*, 22 FMSHRC 1361, 1364-67 (Dec. 2000).

Keeping in mind that Complainant is pro se, I have thoroughly reviewed her Complaint to the Commission, as supported by her original Complaint to MSHA and the additional MSHA investigation documents she included, to discern any recognizable allegation of protected activity under the Mine Act that may have motivated Capurro to terminate Complainant's employment. My conclusions are as follows:

1. <u>"Stop work" Incident</u>

The closest mention of protected activity in the Complaint to the Commission is what led to what Complainant refers as the "stop work" incident. 105(c)(3) Compl. at 2. Capurro described the incident as a "disruption of [the] work force" and included it as a reason for Complainant's termination.

According to the information Complainant provided to MSHA, on August 3, 2020, she and other drivers on her shift learned that due to a mine's Covid-19 concerns, driver compliance with masking and temperature checks were now conditions of truck entry through the mine's gate. MSHA Compl. at 2; *see also* Walker Ex. WI-6 (L). It is undisputed that the new requirements were the subject of a driver group text involving the Complainant, and she and several other drivers subsequently parked their trucks.[10]

Interview sheet clearly and succinctly provided the reasons Capurro gave Complainant for her termination, doing so under the heading "Reason for Termination." Complainant not only attached this to her Complaint to the Commission, but her very first exhibit submitted is a copy of the Exit Interview (which also indicates that she refused to sign it). Walker Ex. WI-1.

[10] Contrary to the section 105(c)(3) Complaint, the Exit Interview does not state that the Complainant initiated the work stoppage by being the first to park her truck. Rather, the Exit Interview merely states that after the Complainant stated in the group text her refusal to comply with the temperature check, several other drivers also parked their equipment.

While the Mine Act grants miners the right to complain of a safety, health, or danger violation, it does not expressly state that miners have the right to refuse to work under such circumstances. Nevertheless, both the Commission and the courts have recognized the right to refuse to work in the face of such perceived danger. *See Dolan v. F & E Erection Co.*, 22 FMSHRC 171, 177 (Feb. 2000) (citing *Price v. Montery Coal Co.*, 12 FMSHRC 1505, 1514 (Aug. 1990); *Sec'y of Labor on behalf of Cooley v. Ottawa Silica Co.*, 6 FMSHRC 516, 520 (Mar. 1984)). To be considered "protected," work refusals must be based upon a "good faith, reasonable belief in a hazardous condition." *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 812 (Apr. 1981); *accord Gilbert v. FMSHRC*, 866 F.2d 1433, 1439 (D.C. Cir. 1989). Consistent with the requirement that the complainant establish a good faith, reasonable belief in a hazard, "a miner refusing work should ordinarily communicate, or at least attempt to communicate, to some representative of the operator his belief in the safety or health hazard at issue." *Sec'y of Labor on behalf of Dunmire v. N. Coal Co*., 4 FMSHRC 126, 133 (Feb. 1982).

In this instance, Complainant has not alleged that the work stoppage arose from concerns regarding potential adverse health or safety impacts associated with the new mine site requirements. Rather, she stated that the basis for her and other drivers' objections was that the policy was understood to have been newly instituted during that shift, and that it was contrary to the policy that previously applied to drivers who would not be exiting their trucks while at the mine. In bringing her complaint to MSHA regarding this incident, Complainant never alleged that concern with health or safety impacts prompted her involvement in it. Rather, her concern was solely regarding how the issue was handled internally by Capurro. *See* MSHA Compl. at 2 ("As it turns out, [Capurro's] acting supervisor was wrong [about the new mine policy] and the whole incident was a waste of time, energy and emotion by her lack of due diligence. . . [O]ur Supervisor then got involved when the issue became too big for our acting supervisor . . . ."[11]

In responding to Capurro's Motion, Complainant provides contemporaneous evidence, in the form of copies of her own texts with General Manager of Mining Division Peck. The texts further establish that she was not objecting to compliance with the mine's new masking and temperature check requirement on safety or health grounds. *See* Walker Ex. WI-6 (c) ("I'm trying to work within the rules but don't [think?] that that was cool to spring [on] us. Was there not a meeting?"); Walker Ex. WI-6 (h) ("Did you guys have a meeting on this with the mine? Feels really weird we were informed on the road like that[.]").

Thus, there is no claim by Complainant that any disparate treatment of her with respect to the August 3rd incident is connected to any activity protected by the Mine Act in which she alleges to have engaged. Instead, this incident is more in line with what appears to be her myriad

[11] The MSHA Complaint goes on to allude to Complainant having, on more than one occasion, "issues with 'Fill-in' supervisors, as my boss was gone on many personal trips." There is no mention of protected activity having prompted any of the "issues."

other general complaints regarding how Capurro Mining Division management carried out day-to-day operations.[12]

Complainant's issues with masks extend beyond requirements imposed by the mine, to also include how Capurro carried out its own masking policy. Again, however, Complainant's issue was not that wearing masks posed any sort of health or safety hazard, either in general or while carrying out her duties. Rather, her objection was that the policy was inconsistently enforced. Walker Ex. WI-6 (x); (a-1). Complainant pointed to when she was asked to wear a mask by management while indoors, and although she proceeded to go outside instead of putting a mask on, management still requested that she put one on. MSHA Compl. at 2 ("made to put on a mas[k]outside just so my safety director could see me, 'Wear one for a few seconds'"); Walker Ex. WI-6 (t). When describing this incident, the Complainant provided no indication that this request impacted her medically, but rather just that she was asked to do so – again, aligning more with a general grievance.

Moreover, Complainant's issues with masks appear to stem from her personal views, as she states in texts with management, that she is an employee who is against masks. Ex. WI-6 (o). While Complainant indicated in texts with management that she could wear a mask while working, she also communicated during the same text exchange that she and her husband will "stand true to beliefs" and "will not bow to our generation of sheeples[s]" if they are asked to wear a mask in a situation that can be "worked around." Walker Ex. WI-6 (R).

2. <u>Speeding Infractions</u>

Complainant also alleges that Capurro treated her differently than other drivers, including her own husband, with respect to discipline for violating Capurro's speeding policies. 105(c)(3) Compl. at 2. As background, in her Complaint to MSHA, Complainant stated that she "spent many days off for speeding and held accountable as I accepted my responsibility for my actions. It was later after checking that others also had speeding infractions but were not given days off and batches were even thrown in the garbage with no time off." MSHA Compl. at 2.

[12] Other documents submitted by the Complainant in response to Capurro's Motion indicate that at one time she feared an adverse impact from the use of the specific temperature check device being used by the mine. Complainant's fear, however, had to do with whether she would be able to subsequently continue with her side avocation as a "light worker," not as a driver for Capurro. Walker Ex. WI-6 (C), WII-3(k),(l)). Complainant's documents describe a "light worker" as someone who facilitates "quantum healing hypnosis." Walker Ex. WV-2 (a)-(h). Even then, as her own documents show, Capurro Trucking management sent her pictures and additional information regarding the type of thermometer used for temperature checks and allowed the Complainant to take a day off, at her request, while management "figures out particulars." Walker Ex. WI-6 (g)-(j). This appears to have alleviated Complainants' concern, and she did not subsequently raise with MSHA her concern that the temperature check device would adversely impact her "light worker" capabilities or that the prospect for its use on her prompted her to park her truck.

Again, Complainant fails to suggest in either complaint that there was any protected activity in which she engaged that may have prompted this alleged disparate treatment. At most, during the MSHA investigation Complainant attributed some of the speeding infractions she incurred to the lack of a working speedometer in the first truck she was assigned, Truck 29, and claims that she had earlier alerted Capurro to that fact. Complainant Statement at 2; Questionnaire at 3, 4. Capurro, in its Motion, disputes that Complainant had previously notified it as to the condition of the speedometer. Resp't Mot. at 12-13. This conflict need not be resolved, however, because Capurro provided documentary evidence indicating that Complainant was assigned Truck 29 only during her first month and was soon assigned other trucks to drive for the remaining *eight or so months* while she drove for Capurro. Resp't Mot., Ex. 10 (timecards) & 12 (truck assignments). Complainant does not dispute this, nor has she alleged speedometer problems with those other trucks led to her additional speeding infractions. *Cf. Metz v. Carmeuse Lime, Inc.*, 34 FMSHRC 1820, 1825-26 (Aug. 2012) (finding termination of complainant two to three weeks after his safety-related complaints indicated employer's discriminatory motivation); *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 983, 992-93 (June 1982) (concluding that termination of complainant the same day he had engaged in a protected work refusal was indicia of employer's discriminatory motivation).

Capurro cited Complainant 21 more times for speeding instances during that period. While Complainant took issue with the basis for a few of the later infractions during the MSHA investigation (Complainant Statement at 4-5), consistent with her earlier admission that she accepted responsibility for her speeding infraction record, she does not dispute that she incurred many additional speeding infractions that she did not challenge at the time.[13]

3. Repair Incident

In her complaint to MSHA, the Complainant obliquely referred to another incident that occurred on March 2, 2020—again relatively early in her tenure at Capurro. She described it as her as having been required to wait for truck repairs at a mine site. MSHA Compl. at 2. In her

[13] Absent an allegation of protected activity that prompted the Capurro's alleged disparate treatment of the Complainant with respect to speeding infractions, any further conflicts between the parties' accounts on this issue need not be resolved. I note, however, that in its Motion Capurro documented that Complainant was not the only driver suspended for speeding infractions over the course of her employment. *See* Resp't Mot. at 4 & Ex. 5 (showing documentation of six other drivers suspended). Complainant herself also provided documentation of other drivers receiving suspensions after speeding, contradicting her own complaints. Walker Ex. WI-7 (A)-(B), WI-7 (J), (O), (P), and WI-7 (a) 24, 26 (featuring records of various other drivers who received one-day and three-day suspensions for speeding). Capurro's documents further contradict Complainant's claim to MSHA that "[e]very time I was written up for speeding, I was given 3 days off." Questionnaire at 3. Of the 22 times Capurro cited the Complainant for speeding, the company's records show that only six times was she disciplined, only twice was she suspended, and only once was she suspended for three days. Resp't Mot. at 6-7 & Resp't Ex. 5. Thus, there is evidence in the case that Complainant also benefitted from any tendency on the part of Capurro to not strictly enforce its disciplinary policies with respect to speeding infractions.

statement to MSHA, the Complainant alleged that she "one time red tagged the truck and they cut it off and put it back in service." She subsequently explained, however, that, at that point, the truck had already been repaired at the mine, which permitted her to return to the Capurro truck shop. It was there that she proceeded to red tag the repaired truck out of an admitted fit of pique, stating "I was tired and upset that I was getting told two different things. So that is when I red tagged the truck and told them they can figure it out." Complainant Statement at 3.

When the MSHA Investigator asked Complainant how her reporting of safety issues led to her termination, she responded not with specifics but instead simply claimed that she had become a "pain" on reporting to Capurro issues with trucks and safety procedures not being followed. *Id*. at 4. However, text messages between Complainant and Capurro management, provided by the Complainant herself, include positive management feedback to Complainant's safety suggestions. Walker Ex. WI-6 (p), (w).

4. <u>Down Time for Necessary Truck Washing</u>

Complainant also alleges disparate treatment regarding the discipline she received following instances in which she admitted to taking more time than routinely allotted to wash her assigned truck. While her Complaint can certainly be read to involve a safety matter ("when it is wet and the mag on the mine dries in your sensors, it is like concrete, therefore setting off the ABS"), her claim is not that the discipline she received was for taking too long to clean her truck to fix the problem. Rather, the discipline was for her not obtaining the required prior approval before taking additional time. *See* MSHA Compl. at 2. Complainant does not dispute that Capurro contemplated as a matter of policy that additional truck washing time could be necessary. *See* Resp't Ex. 8 at MSD0110 (noting the Plan for Improvement states "Be in contact with immediate supervisor to inform them of any washing of trucks going longer than 30 mins."). Complainant again raises the issue as one in which allegedly similarly-situated drivers were not disciplined, but also again without alleging that Capurro's disparate treatment towards her was due to her exercise of protected activity. As with the speeding infractions, Capurro documented the imposition of progressive discipline for not obtaining the required prior approval, starting with coaching from her supervisor. *Id.,* Ex. 10 at MSD0551, MSD0574, MSD0533.

5. <u>Falsification of Documents</u>

The final allegation contained in the Complaint to the Commission that bears any resemblance to a claim that the Complainant engaged in an exercise of protected activity is her contention that she could prove that Capurro had "falsified MSHA documents." Specifically, she stated "[p]lease also be aware that I will also be filing [an] MSHA Hazard complaint that will contain actual mine safety documents of falsification by" Capurro's Mine Division management. 105(c)(3) Compl. at 1.

Complainant did not include this falsification allegation in either her Complaint to MSHA or in her formal November 17, 2020 statement to MSHA Special Investigator Jackson. However, because it is a serious allegation, I have endeavored to discern from the documents

provided what the Complainant is referring to, in the context of her relationship with Capurro, during the period of her employment and afterwards.

The Complainant's only mention of "falsification" involving mine safety documents is in her October 29, 2020 answers to questions from MSHA when she stated she was not seeking reinstatement because her "safety information had also been altered and signature forged" by Capurro. Questionnaire at 2. Complainant clearly did not provide to MSHA during its investigation any support for this claim, thus her statement to the Commission almost six months later that she "will be filing" an MSHA Hazard Complaint regarding falsification of mine safety documents.

Just as importantly, if not more so, the Complaint to the Commission does not come close to alleging that Complainant held this belief regarding falsification, in good faith or otherwise, prior to her termination, and that Capurro had any knowledge that Complainant held this view. *Cf. Pero*, 22 FMSHRC at 1364-65 (finding that complainant had engaged in protected activity prior to her discharge when she had informed superiors that she believed company was falsifying lost-day information on MSHA 7000-1 forms). Absent any claim by Complainant that such was the case, her prolonged and mere promise to provide evidence of falsification, now that she no longer works for the company, does not qualify as protected activity that could have motivated the company to terminate her.

Accordingly, I grant Capurro's Motion on the ground that there remains no genuine issue of material fact as to whether Complainant engaged in protected activity as alleged in her Complaint to the Commission. I thus do not reach Capurro's alternative ground for summary decision, which is that it has established as a matter of law that any protected activity on the part of Complainant was not the "but for" cause of her termination.

CONCLUSION

For the foregoing reasons Respondent's Motion for Summary Decision in this proceeding is **GRANTED** and Complainant's section 105(c)(3) proceeding is **DISMISSED**.

John T. Sullivan
Administrative Law Judge

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