FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
721 19TH STREET, SUITE 443
DENVER, CO 80202-2500
TELEPHONE: 303-844-5266 / FAX: 303-844-5268

March 30, 2020

KOMSAN (TROY) WOODEN, Complainant, v. GENESIS ALKALI, LLC, Respondent.	DISCRIMINATION PROCEEDING Docket No. WEST 2018-0306-DM MSHA No. RM-MD-18-06 Mine: Genesis Alkali @ WESTVACO Mine ID: 48-00152

DECISION AND ORDER

Appearances: Komsan (Troy) Wooden, pro se, Rock Springs, Wyoming, Complainant

Erik M. Dullea, Esq., Ephraim Hintz, Esq., Husch Blackwell LLP, Denver, Colorado, for Respondent

Before: Judge L. Zane Gill

I. STATEMENT OF THE CASE

This proceeding arises from section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act"), 30 U.S.C. § 815(c)(3). Komsan (Troy) Wooden alleges that Respondent Genesis Alkali, LLC terminated his employment because he engaged in section 105(c) protected activities. Respondent argues that Wooden has failed to meet his burden to establish a prima facie case because there is no causal nexus between the protected activity and the adverse action taken against him. Respondent argues that Wooden's probation and termination was instead the result of unprotected workplace violations that would have justified adverse action irrespective of Wooden's engagement in protected activities.

For the reasons that follow, I find that Wooden engaged in section 105(c) protected activities and that his probation and termination constitute adverse action. However, I find that there is insufficient evidence to infer a causal nexus between Wooden's protected activities and this adverse action. For this reason, I find that Wooden has failed to state a prima facie case for a section 105(c) discrimination claim. Even if Wooden were to have met his prima facie burden, ultimately, I also find that Respondent provided sufficient evidence to rebut the prima facie case, or, alternatively, presented a credible and sufficient affirmative defense that Wooden's probation and termination were motivated by unprotected activities.

II. FACTUAL AND PROCEDURAL BACKGROUND[1]

Respondent is the operator of the Genesis at Westvaco Mine, an underground trona mine and surface milling facility located in Sweetwater County, Wyoming. (Tr. 38:19-38:21) Complainant Wooden was first employed by Genesis on June 3, 2013. (Wooden Dep. 45:8-45:15) He worked as a maintenance mechanic at Genesis until December, 2017. During the course of his employment, Wooden worked at several different plants at Westvaco. On January 5, 2017, Wooden began working at the Caustic Plant, where he remained until his employment was terminated in December, 2017. (Tr. 11:1-11:15; 13:4-13:6)

Wooden's discharge from employment is the subject of this case. Wooden alleges a series of events which he claims shows that Respondent's management harbored animus against him, animus that he claims led the Respondent to single him out for retaliatory probation and termination. Although Respondent's management was aware that Wooden had participated in some protected activity, it does not agree that all of the instances Wooden claims were protected activity constituted protected activity in fact. In rebuttal, Respondent maintains that Wooden was fired for two instances of misuse of company vehicles. Following the first instance of unauthorized vehicle use, management placed Wooden on Decision Making Leave (DML) and negotiated a Last Chance Agreement (LCA) which provided that further violation of company rules or expectations would result in immediate discharge. (Tr. 454:3-10) Following the second vehicle incident barely four weeks later and after Wooden signed the Last Chance Agreement, management terminated Wooden without reference to any instances of protected activity. (Tr. 481:3-16) Respondent contends that it would have fired Wooden for the unprotected activity alone, irrespective of his involvement in any protected activity.

On January 16, 2018, Wooden filed a discrimination complaint with MSHA relating to his termination. On March 2, 2018, MSHA notified Wooden that there was insufficient evidence to support his section 105(c) allegations. Wooden initiated this case on April 3, 2018. The parties presented testimony and documentary evidence at a hearing in Rock Springs, Wyoming. Respondent submitted a brief, and Wooden submitted a short written statement, both of which were received and considered in preparing this decision. The parties stipulate that the Administrative Law Judge ("ALJ") and the Commission have subject matter jurisdiction over this action pursuant to section 113 of the Mine Act, 30 U.S.C. § 823.

---

[1] The findings of fact here and below are based on the record as a whole and my careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, I have taken into account the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies in each witness's testimony and between the testimonies of other witnesses. In evaluating the testimony of each witness, I have also taken into account his or her demeanor. Any perceived failure to provide detail about any witness's testimony is not a failure on my part to consider it. The fact that some evidence is not discussed does not mean that it was not considered. *See Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000) (ALJ is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered). I have also fully considered the contents of the official file, including the pre- and post-hearing submissions of the parties, and the exhibits admitted into evidence.

III. ANALYSIS

The question before me is whether Wooden's probation and termination were influenced by his involvement in "protected activity." As part of his burden to make a prima facie showing of discriminatory intent, Wooden must show that his probation and termination were motivated, at least partially, by his engagement in protected activity under section 105(c). I must determine whether the evidence in total, including the inferential evidence, has sufficient circumstantial weight to satisfy his prima facie burden to show discrimination.

To establish a prima facie case of discrimination under section 105(c)(1), Wooden must show: (1) that he engaged in a protected activity; and, (2) that the adverse action he complains of was motivated, at least in part, by that activity. *Sec'y of Labor on behalf of Robinette v. United Castle Coal, Co.*, 3 FMSHRC 803 (Apr. 1981); *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds sub nom*. *Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d. Cir. 1981). The operator may rebut the prima facie case by showing "either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity." *Turner v. Nat'l Cement of CA*, 33 FMSHRC 1059, 1064 (May 2011). The operator may also defend affirmatively by proving that, "it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone." *Id.*

Wooden testified about several incidents preceding his probation and termination that created an impression in his mind that Genesis was singling him out. These incidents fall into two groups: Genesis' reaction to Wooden's protected activity, and events that do not relate to protected activity, yet may show animus. In evaluating these events and issues, I am aware that it is possible that the Respondent's actions toward Wooden for unprotected activities may infer malice toward him that could have led to his being singled out for adverse treatment in those incidents that are legitimately considered "protected activity."

A. Wooden engaged in protected activity.

To satisfy the first prong of the *Pasula-Robinette* test for a prima facie case of discrimination, Wooden must show that he engaged in protected activity. *Robinette*, 3 FMSHRC at 803; *Pasula*, 2 FMSHRC at 2786. While section 105(c)(1) does not include the term "protected activity", Commission cases have nevertheless found that the section defines certain protected activities. An individual covered by section 105(c)(1) engages in protected activity if (1) he "has filed or made a complaint under or related to this Act, including a complaint . . . of an alleged danger or safety or health violation[;]", (2) he "is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101[;]", (3) he "has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding[;]", or (4) he has exercised "on behalf of himself or others . . . any statutory right afforded by this Act." 30 U.S.C. § 815(c)(1).

When a complainant asserts that he engaged in a protected activity that is not expressly enumerated under the Mine Act, the activity may still be protected if it furthers the purpose of the legislation. The legislative history of the Mine Act states that Congress intended "the scope of the protected activities be *broadly interpreted* by the Secretary." S. Rep. No. 95-181 at 35 (1977) (emphasis added). Moreover, the history notes that "the listing of protected rights

contained in [what eventually became section 105(c)(1)] is intended to be illustrative and not exclusive," and that the section should be "construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation." *Id*. at 36. I find that there is ample evidence to demonstrate that Wooden engaged in a number of protected activities.

1. MSHA Complaint and Racial Slur

From January 2017 to April 2017, Clyde Muir was Wooden's immediate supervisor at the Genesis Caustic Plant. (Tr. 12:19-12:23; 552:1-552:12) On April 3, 2017, MSHA inspector Ben Jones came on site and requested to speak to miners (not management) about some issues, including defective metal ladders. According to Wooden's testimony, Muir wanted to participate in the meeting with the inspector, but Inspector Jones did not allow his involvement. (Tr. 13:24-14:18) A few days later on April 6, 2017, Muir accused Wooden of calling MSHA and making a safety complaint. (Tr. 15:5-11; 279:3-280:4) The accusation related to an earlier incident when Wooden had reported that the steering and suspension on a company truck he had used to drive home a few days prior was defective. Muir raised the issue of the inspector's visit by snidely suggesting to Wooden that if he wanted to complain about the truck, he should take it up with the MSHA inspector. (Tr. 14:19-15:11) During his site visit, Jones had given Wooden his business card with a contact number. Wooden used this number to contact Inspector Jones about Muir's statements regarding the defective truck. In response, Jones returned to the site along with another inspector, Brett Stenson. (Tr. 15:11-17)

Wooden also revealed Muir's hostile reaction to Wooden's report of the defective steering and suspension on a company truck to Genesis Safety Manager Andrea Walton. (Tr. 15:11-17) Walton assured Wooden that he was within his rights to complain about Muir's comments, reminded Muir that all miners have the right to contact MSHA, and then referred the matter to human resources. (Tr. 279:3-280:10) On April 30, 2017, approximately two weeks after Wooden complained about Muir, Genesis terminated Muir for, among other things,[2] accusing Wooden of contacting MSHA and making derogatory comments about Wooden's ethnicity. (Tr. 361:10-364:5; 375:17-376:5; 552:2-23; 579:8-20; 579:13-23; Wooden Dep. 120:13-122:6; Ex. R-43, p.3)

Wooden's interactions with the MSHA investigators, including a possible hazard complaint to MSHA and reporting a defective ladder to an MSHA inspector, constitute protected activity, as does his interaction with the company's safety manager. However, the evidence fails to support a finding that Wooden's probation and ultimate termination for repeated unauthorized use of a company vehicle was in any way connected to this protected activity or to Muir's missteps.

[2] Muir made a statement to a group of miners that implied that a bad odor in the break room was caused by food brought in by Wooden. (Tr. 375:17-376:5) By extension, since it was widely known that Wooden was half Thai (his mother) (Tr. 13:21-22; 20:14-16), those who heard the comment understood it to be racially insulting. (Tr. 361:20-362:10; 363:12-20)

2. Magnet Lift and Management Response

On May 1, 2017, Maintenance Manager Rick Scorcz (Tr. 17:16-25) instructed Wooden and two other miners to lift a 275-lb. magnet into the bed of a pick-up truck. (Tr. 16:5-17) The men knew the magnet was heavy, but decided to lift it without machine help (Tr. 120:4-25), although they did use a length of pipe as a lifting pole. (Tr. 16:20-17:15) As they were lifting, Wooden had trouble because he was shorter than the other two men. (Tr. 121:2-8) The magnet shifted on the lift pole and Wooden strained a muscle in his right shoulder. (Tr. 16:20-17:15) Wooden reported his injury to interim supervisor Dorothy Yacobacci (Tr. 285:12-18) who told Wooden to go to Medcor to get his shoulder checked. (Tr. 18:4-16) Medcor did not treat Wooden's shoulder. He was prescribed over-the-counter pain pills. (Tr. 18:20-19:1) Since there was no treatment given, Wooden's injury was non-reportable. (Tr. 281:3-8) Wooden thought that was the end of it. (Tr. 18:19-19:3)

The Safety Department at Genesis performs Root Cause Analysis meetings to identify the causes of miners' injuries with the intent of preventing the recurrence of similar incidents. (Tr. 267:24-268:4) On May 10, 2017, Wooden was summoned to an RCA meeting held in response to the magnet lift incident. (Tr. 19:4-6; 153:6-16) [3] Maintenance Director Andre Azevedo attended the meeting. Azevedo is a non-native English speaker (Brazilian). At one point, Azevedo attempted to make the point that he believed discipline for Wooden was appropriate, and because of his limited English skill, made an inappropriate analogy to his father's use of corporal punishment accompanied by a gesture to his belt. (Tr. 176:18-176:24) Because of Azevedo's inappropriate and inexcusable outburst, the RCA meeting was abruptly terminated by Scorcz.[4] Management regarded the outburst as a breach of protocol and took prompt and appropriate disciplinary action against Azevedo. Human Resources was directed to investigate the incident. Azevedo was quickly and vigorously reprimanded by the site's vice president and informed that similar actions in the future would be "career limiting." (Tr. 368:24-370:20)

On May 18, 2017, Wooden and union steward, Casey Warne, were called into another meeting relating to the magnet incident. (Tr. 142:13-19) This meeting was not a fact-finding event. The company wanted to inform Wooden that they had looked into the Azevedo incident and taken swift corrective action. (Tr. 149:9-20)

On May 26, 2017, Moeller returned from shoulder surgery (Tr. 130:24:131:2; 734:21-25) and called another meeting to do a full root cause analysis of the magnet incident. (Tr. 739:24-741:3) On July 17, 2017, Wooden received a "first conference," a low level of discipline, for his role in the magnet lift incident based on his failure to communicate to his co-workers that he was struggling to maintain control of the magnet as they lifted it into the bed of the pick-up truck. (Tr. 22:8-16; 255:12-256:24; 379:3-380:2; 592:4-22) His co-workers were not disciplined for their roles in the magnet incident, but received coaching and counseling. (Tr. 133:1-11; 380:3-

[3] A root cause analysis (RCA) is a process that allows the company to investigate workplace accidents in order to learn from them and promote safer conduct going forward. (Tr. 149:21-150:4; 267:24-268:6; 275:10-19; 307:19-308:2; 401:15-402:1)

[4] Scorcz was filling in for Maintenance Area Manager Mike Moeller. (Tr. 21:10-19; 183:5-10)

381:10; 616:7-617:10; Ex. R-19) Wooden believed that Genesis' actions relating to the magnet incident constituted targeted harassment against him. (Tr. 108:10-109:23)

Former Genesis HR Manager Kimberly Huber testified that first conferences were the lowest level of actual discipline that the company could impose and that their issuance was a "regular course of business [when] working to try to correct employee conduct …" even though the union grieved most of the discipline actions. (Tr. 552:15-23; 554:20-555:9) No one in management, including Azevedo, argued that Wooden should be disciplined simply because he reported his shoulder strain or because of the argument with Azevedo during the RCA. (Tr. 380:18-381:10) Even if Wooden had not reported a shoulder strain after lifting the magnet, had the Safety Department learned about the event and the height disparity causing a potential accident separately, Safety still would have conducted an RCA. (Tr. 414:23-415:9) The reason Wooden received a first conference was not because he reported an injury, but rather that he took an unnecessary risk by manually lifting the magnet when he was aware of the substantial weight of the magnet after lifting it onto a cart. (Tr. 746:18-747:6; Ex. R-62, p. 7)

The union filed a grievance on behalf of Wooden in opposition to the first conference. (Tr. 554:7-554:10) The union later abandoned its grievance rather than taking the dispute to arbitration. (Tr. 554:5-554:17) In August 2017, Wooden filed a 105(c) complaint with MSHA. (R-62 pp.17-18) Wooden described the magnet lift incident to MSHA Special Investigator Ken Valentine during a subsequent interview. Wooden admitted the magnet was heavy enough that the miners felt they should use mechanical means to lift it. (Tr. 746:19-747:6; Ex.R-62 p. 7) Wooden's statements to Valentine regarding the miners' behavior and decisions were consistent with Moeller's testimony and supported the issuance of a first conference to Wooden for his risk tolerance based on Wooden's admitted awareness of the magnet's weight. (Tr. 740:2-741:3)[5]

Wooden's disclosure of his shoulder injury and his section 105(c) complaint filed with MSHA over his first conference constitute protected activity. However, the evidence fails to support a finding that Wooden's probation and ultimate termination for repeated unauthorized use of a company vehicle was related to this protected activity in any way.

3. Self-Direct Charter and Inspection Forms

In the fall of 2017, Genesis was preparing to implement and comply with an MSHA revised rule on workplace examinations.[6] This "Self-Direct Charter" expected greater employee engagement and gave participants additional accountability, responsibility, and authority to make decisions in exchange for a wage increase. (Tr. 594:2-594:17) The company emphasized a company-wide policy of completing on-shift shop inspection forms. Wooden interpreted this

[5] In its negative finding for Wooden's 105(c) complaint, MSHA specifically stated that there was insufficient evidence to prove Genesis violated the Mine Act in its response to the magnet lift incident. (Wooden Dep. 188:14-189:4)

[6] See Examinations of Working Places in Metal Non-Metal Mines, 83 Fed. Reg. 15055, 15056 (Apr. 9, 2018) (describing the multiple extensions to the effective date on October 5, 2017, from October 1, 2017 to June 2, 2018).

new policy focus as being directed at him and believed that he would be exposed to a new degree of scrutiny and perhaps discipline. As a result, Wooden was reluctant to sign forms related to the new policy and interpreted management's efforts to get his signature as harassment. Specifically, Wooden believed that anyone participating in the new Self-Direct Charter should have additional training covering the requirements of the on-shift inspections, and that he had not been so trained. (Tr. 118:3-119:17) He was concerned that he might make a mistake in performing the on-shift inspections due to a lack of proper training that would expose him to possible discipline. (Tr. 24:9-24:18) However, Wooden had attended several training events on workplace examinations provided by Genesis in 2017. (Ex. R-1, p.2; Tr. 269:3-270:19)

Further, Wooden placed significant emphasis on the alleged harassment he faced about shop inspection forms, but in his answers to the Court's questions, he admitted he had never been disciplined for missing an item during a shop inspection. (Tr. 190:13-17) Wooden selectively invoked the F Crew Charter's protections at the hearing and testified that he could make management-level decisions, but he did not expect to be held accountable for making these decisions. (Tr. 22:24-23:12; 29:16-30:6; 198:4-199:1)

Wooden's communications with management about the Self-Direct Charter constitute a protected activity. However, there is insufficient evidence to support a finding that Wooden's probation and ultimate termination for repeated unauthorized use of a company vehicle was in response to this activity.

B. Wooden was terminated for misusing company vehicles on two occasions.

Without doubt, some of the incidents Wooden testified about are properly considered protected activities. However, Genesis cites two instances of Wooden's unprotected activity as justification for his probation and termination. Like most MSHA discrimination cases, this dispute centers on the question of motivation. An analysis of Wooden's relevant unprotected activities follows.

1. The Camper Incident

The predicate for Wooden's termination occurred on October 25, 2017, when he used a company vehicle to tow his camper from his home in Rock Springs, Wyoming, to a location in the back country where he liked to hunt. (Tr. 30:13-15; 349:19-350:9) Wooden did not have permission to use a company vehicle for personal use. He argued that such personal use was appropriate and in keeping with prior practice and company culture (Tr. 223:18-224:1; 561:17-562:4), claiming that he was justified in using a company truck to tow his personal camper because other employees had used company vehicles for personal purposes in the past. (Tr. 199:18-201:14; 223:18-224:1; 619:6-14; Ex. R-27) The evidence proves otherwise. (Tr. 443:12-17)

Wooden's misuse of the vehicle was discovered when his manager, Mike Moeller, saw the company truck pulling a camper through town on October 26, 2017 (Tr. 440:17-441:21; Ex. R-25) and confirmed that Wooden had signed the truck out by reviewing vehicle check-out records. On November 1, 2017, the company started its normal process of investigating what

had happened. (Tr. 31:2-11) It was confirmed that Wooden had used a company truck to tow his personal camper, that he did not seek permission to do so (Tr. 489:10-21; 500:20-501:4; 645:24-646:5; 654:25-655:13), that there was no company history or practice that would justify such use (Tr. 442:20-443:11), and that Wooden prevaricated during the fact-finding process with the intent to minimize his violation. (Tr. 603:7-25; 606:17-607:4; 607:17-608:11; 618:21-619:5; 622:8-623:7; Ex. R-28)

Genesis did not have a specific policy preventing this type of use by hourly employees (Tr. 201:20-204:3; 225:17-25; 446:14-448:20; 511:16-512:2), but it presented convincing evidence that no such prior practice had ever been tolerated. (Tr. 222:24-223:12; 242:11-25; 243:1-3; 448:21-24; 704:20-24) In fact, another employee, Jarvis Koeven, had been put on Decision Making Leave (DML) probation prior to Wooden's event for a single occurrence of essentially the same violation. (Tr. 471:13-472:2; 473:3-11; 559:23-560:5; Ex. R-44) Further, a supervisor Wooden claimed had previously allowed personal use of a company truck had been fired in part because he agreed to allow an employee to take a piece of company equipment for personal use. (Tr. 620:14-24) Instead of taking care to be certain that using a company vehicle for personal use was permissible, Wooden exhibited a reckless lack of judgment which was repeated weeks later.

During the fact-finding process for this camper-towing incident, there was discussion of simply firing Wooden rather than placing him on DML probation. (Tr. 559:6-19) Some members of management felt that this incident alone justified termination. (Tr. 614:12-19) Wooden was offered a DML instead of termination on November 2, 2017. (Tr. 31:2-11; 614: 9-11) The DML included a Last Chance Agreement (LCA). It was clear under the terms of the LCA that any violation of company expectations after that point in time could result in immediate termination. (Tr. 480:10-19; 531:21-532:3; Ex. R-30) The evidence put forth by Wooden does not support his excuse. However, this first instance of misuse of a company vehicle was resolved by the imposition of the last-chance discipline agreement (DML).

2. The Overtime Event

Wooden was fired for a second incident of unauthorized use of a company vehicle less than a month after being placed in a last-chance status for the unauthorized camper-towing event. (Tr. 481:3-16) On December 13, Wooden and a co-worker, Josh Holloway, were assigned to a project that involved repairing some drain line piping. (Tr. 57:20-58:9) Keith Herren, their supervisor for the project (Tr. 59:2-23), announced that there might be overtime for Wooden and Holloway's project depending on various factors to be determined as the week progressed. (Tr. 707:2-6; 707:24-708:1) By company practice, overtime had to be specifically approved by a supervisor. (Tr. 133:12-19; 501:5-502:11; 683:21-684:21; 689:25-690:14; Ex. R-37) A worker could not assume that there would be overtime. (Tr. 707:7-12) Despite knowing how overtime was announced and the way by which it must either be confirmed or allowed to lapse, Wooden took it upon himself to assume that he could work the pipe project into overtime. (Tr. 33:13-38:1; 500:11-16) Close to the end of the day, Wooden talked to Herren, who asked him how the job was going. Wooden said nothing about working overtime to finish the project. (Tr. 635:12-19; 675:5-14) Wooden testified that he assumed overtime would be approved, but he did not

take advantage of the opportunity to get clarification from Herren when the two of them spoke shortly before shift end.

When compared to coworker Holloway's contrasting reaction to the same situation, Wooden's intemperance is apparent. Holloway understood that overtime had not been approved. (Tr. 491:15-22) Nor did he fault Herren for his getting "whistle-bit" by losing track of the time and working past the end of his shift. (Tr. 660:6-9) Holloway accepted personal responsibility and had no intention of filing a grievance over the overtime issue. (Tr. 639:4-24; 659:5-11; 713:11-17; Ex. R-39) In contrast, Wooden defended his actions by testifying that he expected Herren to state affirmatively that there would be no overtime and that saying nothing was not enough. (Tr. 673:12-20)

After working past the end of his normal shift (Tr. 75:22-24; 659:9-20; 711:11-18), Wooden unilaterally decided to use a company truck to drive home. (Tr. 33:13-38:1; 115:21-116:8; 353:4-354:13; 624:2-6; 645:24-646:13; 716:11-18; 747:24-748:3; Ex. R-31; Ex. R-33) He did not use any of the available options (Tr. 497:15-498:20; 499:11-21; 645:24-646:5; 654:14-655:13; 685:1-6) to get last-minute management approval to drive the company vehicle home, even though he knew of the options and how to proceed. (Tr. 497:15-498:20; 624:2-6; 645:24-646:13; 716:11-18; 747:24-748:3; Wooden Dep. 254:3-11; Ex. R-33; Ex. R-37) Puzzlingly, Wooden placed a call (unanswered) to Andy Martinez, his union president, instead of calling a management official for permission to drive the vehicle home. (Tr. 37:4-18; Tr. 654:25-655:13) He then sent a text message to Herren, not requesting permission to use a vehicle, but instead accusing Herren of dropping the ball by not expressly stating that there would be no overtime for the pipe project. (Tr. 714:10-715:2) Herren texted in reply that overtime was not authorized. Wooden then took Moeller's assigned vehicle, signed it out at the guard station without authorization, and drove it home. (Tr. 498:21-499:4; Tr. 654:14-24; Ex. R-35)

This action violated the last chance agreement from the camper towing incident only a month before. (Tr. 350:24-351:6; 481:3–16; 624:2-6; 645:24-646:13; 716:11-18; 747:24-748:3) Wooden claimed that he believed his supervisor wanted him to work overtime, and under normal overtime practices, would have authorized him to use a company vehicle to get home after the overtime work. But the evidence shows that the supervisor did not authorize overtime and that Wooden took a company vehicle home without permission and without even attempting to either confirm the overtime or obtain permission to use the vehicle.

Wooden was terminated on December 20, 2017. (Ex. X; Ex. R-41) The overtime incident reveals no malice or overreach by management toward Wooden. When Wooden violated the vehicle use practices for a second time within a month, particularly considering that he knew that he was on disciplinary probation and that any disciplinary infraction could result in his immediate firing, the company acted appropriately and justifiably. Any prior friction felt by Wooden between himself and management is not evident in the two vehicle misuse incidents.

C. Wooden's probation and termination were not motivated by his protected activity.

The second prong of the *Pasula-Robinette* test for a prima facie case of discrimination requires a showing that Genesis took an adverse action against Wooden that was motivated, at least in part, by Wooden's protected activity. *Robinette*, 3 FMSHRC at 817–18; *Pasula*, 2 FMSHRC at 2799–800, *rev'd on other grounds sub nom. Consolidation Coal Co.*, 663 F.2d 1211 (3d. Cir. 1981). This second prong of the *Pasula-Robinette* test may be further separated into two sub-questions: (1) whether there was an adverse action; and, if so, (2) whether there was a motivational nexus, at least in part, between the adverse action and the Complainant's protected activity.

1. Wooden's probation and termination constitute adverse employment actions.

The Commission has defined "adverse action" as "an action of commission or omission by the operator subjecting the affected miner to discipline or a detriment in his employment relationship." 601 F.3d at 428 (quoting *Sec'y on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842, 1847–48 (Aug. 1984)). The Commission has recognized that, while "discrimination may manifest itself in subtle or indirect forms of adverse action," at the same time "an adverse action 'does not mean any action which an employee does not like."' *Hecla-Day Mines Corp.*, 6 FMSHRC at 1848 n.2 (quoting *Fucik v. United States*, 655 F.2d 1089, 1096 (Ct. Cl. 1981)). Consequently, where the action alleged to be adverse against the miner is not self-evidently so, such as a discharge or suspension would be, the Commission will closely examine the surrounding circumstances to determine the nature of the action. *Id*. at 1848. "Determinations as to whether an adverse action was taken must be made on a case-by-case basis." *Id*. at 1848 n.2. The Commission has found that a discharge, demotion, or termination is an adverse employment action. *See McKinsey*, 36 FMSHRC at 1186 (citing 30 U.S.C. § 815(c)(1)); *see also Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475, 1478 (Aug. 1982), *aff'd*, 770 F.2d 168 (6th Cir. 1985). Wooden was first placed on probation and ultimately terminated from his employment, and thus has shown that adverse action was taken against him. Genesis does not deny this.

2. There was no motivational nexus between Wooden's protected activity and the adverse action taken against him.

Having established the existence of both a protected activity and an adverse action, Wooden must next show that the adverse action was motivated, at least in part, by the protected activity. *Robinette*, 3 FMSHRC at 817–18; *Pasula*, 2 FMSHRC at 2799–800, *rev'd on other grounds sub nom. Consolidation Coal Co.*, 663 F.2d 1211 (3d. Cir. 1981). It is significant that hostility or animus on a person-to-person level is not enough to show the required motivational nexus. Management's hostility must be shown to arise from the claimant's involvement in protected activity. *Turner* reiterated the clear difference in the quantum of proof a claimant must provide to ultimately prevail in a discrimination case as opposed to the minimal showing required to establish the prima facie case. 33 FMSHRC 1059 (May 2011). "[T]o make out a *prima facie* case of discrimination, the [discriminatee] need only submit enough evidence so that the record *could* support an inference" that the termination resulted, at least in part, from protected safety complaints. *Id.* at 1066 (internal citations omitted) (emphasis in original).

The Commission has noted that "direct evidence of motivation [. . .] is rarely encountered; more typically, the only available evidence is indirect." *Chacon*, 3 FMSHRC at 2510. Such indirect, circumstantial evidence may include: (1) coincidence in time between the protected activity and the adverse action; (2) knowledge of the protected activity; (3) hostility or animus toward the protected activity; and, (4) disparate treatment. *Id; Turner*, 33 FMSHRC at 1066; *Matthew Bane v. Denison Mines (USA) Corp*., now known as *Energy Fuels Resources (USA), Inc.*, 39 FMSHRC 897, 917-18 (ALJ, Apr. 27, 2017). The more that hostility or animus is specifically directed toward the protected activity, the more probative it is of discriminatory intent. *Id.* In *Bradley v. Belva Coal Co.*, with regard to the issue of motivation, the Commission found that "circumstantial evidence […] and reasonable inferences drawn therefrom may be used to sustain a *prima facie* case." 4 FMSHRC 982, 992 (June 1982) (citing *Chacon*, 3 FMSHRC at 2510-12). "Furthermore, inferences drawn by judges are 'permissible provided they are inherently reasonable and there is a logical and rational connection between the evidentiary facts and the ultimate fact inferred."' *Colo. Lava, Inc.*, 24 FMSHRC 350, 354 (Apr. 2002) (citing *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984)).

a. Coincidence in Time

The Commission has stated that "[a]dverse action under circumstances of suspicious timing taken against the employee who is [a] figure in protected activity casts doubt on the legality of the employer's motive […]." *Chacon*, 3 FMSHRC at 2511. The Commission has also stated, "[W]e 'appl[y] no hard and fast criteria in determining coincidence in time between protected activity and subsequent adverse action when assessing an illegal motive. Surrounding factors and circumstances may influence the effect to be given to such coincidence in time."' *Hyles*, 21 FMSHRC at 132 (quoting *Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 531 (Apr. 1991)). Although improper motive has been found in cases with varying periods between the protected activity and the adverse action, improper motivation is often found "where the complainant proved that the operator knew of the protected activities and that only a short period of time elapsed between the protected activity and the discharge." *Sec'y of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 958 (Sept. 1999) (citing *Sec'y of Labor on behalf of Knotts v. Tanglewood Energy, Inc.*, 19 FMSHRC 833, 837 (May 1997)).

The evidence of timing does not support a finding or inference of a motivational nexus between Wooden's protected activity and the adverse action taken against him. Genesis did not terminate Wooden until at least four months after the occurrence of Wooden's most recent protected activity, the first MSHA investigation following Wooden's first discrimination complaint. (Ex. R-62) Importantly, following this event, Wooden was not disciplined again until he used the company truck to tow his camper in November. The timing between Wooden's misconduct leading to his November and December disciplinary events was exclusively in his control. The discipline dealt by management was based solely on his actions and involved two intervening incidents of misuse of company vehicles in the span of about a month. There is no evidence of Genesis committing any acts of hostility, animus, or disparate treatment toward the complainant's protected activity during this four-month period. To the contrary, management provided sufficient evidence to show that its reactions to Wooden's actions and behavior during this period resulted in fair and consistent treatment, even in instances where Genesis could have imposed additional discipline.

b. Knowledge of the Protected Activity

The Commission has held that "an operator's knowledge of the miner's protected activity is probably the single most important aspect of a circumstantial case." *Baier*, 21 FMSHRC at 957 (citing *Chacon*, 3 FMSHRC at 2510). Whether the operator had knowledge of the protected activity may be "proved by circumstantial evidence and reasonable inferences." *Id.* The Commission has also held that "discrimination based upon a suspicion or belief that a miner has engaged in protected activity, even though, in fact, he has not, is proscribed by section 105(c)(1)." *Moses*, 4 FMSHRC at 1480. Additionally, the Commission has held that "a supervisor's knowledge of the protected activity may be imputed to the operator where knowledgeable supervisors are consulted regarding the miner's employment." *Sec'y of Labor on behalf of Pappas v. Calportland Co.*, 38 FMSHRC 137, 146 (Feb. 2016); *see also Turner*, 33 FMSHRC at 1067–68 (imputing knowledge and animus of miner's direct supervisors to official making disciplinary decision); *Metric Constructors, Inc.*, 6 FMSHRC 226, 230 n.4 (Feb. 1984) (stating that "[a]n operator may not escape responsibility by pleading ignorance due to the division of company personnel functions.").

The Respondent does not dispute its knowledge of the events listed above. However, management's knowledge of protected activity alone does not prove wrongdoing. Genesis admitted its knowledge of Wooden's protected activity, but Wooden has the burden to prove that Genesis was motivated by this knowledge. Wooden failed to provide convincing evidence that knowledge of his protected activity motivated Genesis to place him on probation or terminate his employment for misuse of company vehicles.

c. Hostility or Animus

The Commission has held that "[h]ostility towards protected activity – sometimes referred to as 'animus' – is another circumstantial factor pointing to discriminatory motivation. The more the animus is specifically directed toward the alleged discriminatee's protected activity, the more probative weight it carrie[s]." *Chacon*, 3 FMSHRC at 2511. Animus can take the form of action or inaction. *Turner*, 33 FMSHRC at 1069. Wooden claimed that Genesis was hostile towards his protected activity. However, there is no evidence of this alleged animosity. The examples Wooden provided at hearing were subjective and unconvincing.

Wooden testified at the outset of the trial that harassment directed at him escalated following his complaint to the safety department about Clyde Muir. (Tr. 14:19-15:20) The testimony and documents related to Wooden's complaints about Muir show that Genesis agreed with Wooden and took prompt corrective action against Muir. Andrea Walton immediately reminded Muir that Wooden had every right to speak to MSHA, and because Walton was troubled by Muir's response, she notified HR, who in turn commenced an investigation into Muir's conduct. (Tr. 15:5-11; 279:3-280:4; 279:3-280:10) Contrary to Wooden's belief, the trial record shows that management did not fault Wooden for Muir's behavior and eventual discharge. (Tr. 552:13-552:23)

Genesis did not show hostility or animus in its response to the magnet lift incident. The Root Cause Analysis process was used to identify risky behavior and minimize the possibility of

injuries from similar events in the future. Genesis did not target Wooden in relation to Azevedo's outburst during the RCA meeting. Rather, Genesis investigated Azevedo's actions and determined that they fell short of what was expected of management personnel. (Tr. 375:6-375:16) Wooden testified that Genesis called him into a fact-finding meeting on May 18, 2017, (Tr. 21:1-21:4), but in truth, the May 18 discussion was intended for Genesis to provide Wooden with feedback about its reaction to Azevedo's outburst during the RCA meeting. (Tr. 368:24-369:3) The testimony and documents related to Wooden's complaints about Azevedo show that Genesis agreed with Wooden and took prompt corrective action against Azevedo.

Wooden placed significant emphasis on the alleged harassment he faced about shop inspection forms, but in his answers to the Court's questions, he admitted he had never been disciplined for missing an item during a shop inspection. (Tr. 190:13-190:17) The documents Genesis produced and the testimony supporting them did not reveal any animosity directed at Wooden. To the contrary, the evidence shows that the company tried to address Wooden's concerns. Wooden's testimony that Keith Herren harassed him, targeted him, and was untruthful is also contradicted by Wooden's statements to MSHA Investigator Valentine during his August 29, 2017 interview, in which Wooden made favorable comments about working with Herren at the time Wooden claimed he was being harassed. (Ex. R-62 pp. 11, 13-14)

Another example of alleged harassment occurred on September 8, 2017, when Rick Skorcz and Andre Azevedo visited the Caustic Maintenance shop to ask about workplace exam forms. Wooden exited the forklift he was operating to get the forms, and Azevedo asked if it was permitted to leave the forklift running while unattended. (Tr. 27:17-28:16) Wooden stated it was an acceptable practice at Genesis to leave a forklift running while unattended as long as the Forklift's tires are chocked. Wooden claimed that this question from Azevedo was harassment, but he failed to mention that he was not disciplined for leaving the forklift running, or that Tamara Fennell returned to tell him that Azevedo had checked the procedures and confirmed that Wooden was correct. (Wooden Dep. 150:8-151:19)

The decision to issue Wooden a first conference letter after the magnet lifting incident was unrelated to any protected activity by Wooden. Wooden's probation and termination were the result of bad judgment and a failure to follow protocols. Wooden knew he could face termination for any disciplinary infraction going forward. (Tr. 349:19-350:9; 461:23-462:11) Irrespective of whether the employer's past actions toward Wooden could be characterized as responses to his protected activity, standing either alone or considered in the context of prior history, the second of these two incidents justifies the firing.

The fact that the termination incident involved a second episode of unauthorized use of a company vehicle was considered an aggravating factor as the company considered its options. (Tr. 349:19-350:9; 356:20-357:12) Wooden did not put on any evidence to show that there was any confusion about what was required of him when he signed the DML. (Tr. 531:2-532: 3) Under the circumstances, one is left in disbelief that Wooden would jeopardize his job by assuming he had permission to work overtime and to use a company vehicle without permission a second time.

The evidence does not convince me that Genesis committed acts of hostility, animus, or disparate treatment in reaction to Wooden's intervening protected activity. I conclude that there was nothing approaching a "continuous escalating series of wrongdoings" against Wooden. *See Sec'y of Labor (MSHA) obo Pappas, v. CalPortland Co*., 39 FMSHRC 718, 751 (ALJ, Mar. 31, 2017) (rejecting the Secretary's assertion that the operator's actions were a continuous event).

d. Disparate Treatment

Disparate or inconsistent treatment is another indirect indicium of discrimination. "Typical forms of disparate treatment are encountered where employees guilty of the same, or more serious, offenses than the alleged discriminatee escape the disciplinary fate which befalls the latter." *Chacon*, 3 FMSHRC at 2512. It has been recognized that "precise equivalence in culpability between employees" is not required in analyzing a claim of disparate treatment under traditional employment discrimination law. *Pero*, 22 FMSHRC at 1361, 1368 (citing *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 283 n.11 (1976)). Rather, the complainant must simply show that the employees were engaged in misconduct of "comparable seriousness." *Id.* at 1368.

Wooden did not present any evidence of disparate treatment by Genesis in connection with the magnet lift incident. The coaching and counseling given to Fausett and Gamper was justified by reasonable mitigating circumstances. The trial record shows that Genesis' treatment of Wooden was consistent with its treatment of other miners in similar situations, before and after Wooden's protected activity. In the eighteen months before Wooden received his first conference, Genesis issued first conferences to twelve other miners for risk-related behaviors. (Exs. R-45; R-79) In fact, the one example that Wooden produced during discovery as evidence of an unpunished injury incident actually resulted in a first conference for risk tolerance similar to Wooden's discipline. (Tr. 434:21-436:14) Wooden received the first conference in reaction to his unsafe behavior, not his protected activity. (Tr. 553:16-554:4) Genesis' actions toward Wooden relating to the magnet lift incident were an attempt to alter his behavior and avoid repeated hazardous conduct in the future.

In the fall of 2017, Genesis was preparing for the effective date of MSHA's revised rule on workplace examinations. When the company issued a new policy on completing shop inspection forms, Wooden interpreted it as being directed at him personally and believed that he would be exposed to a new degree of scrutiny and perhaps discipline. Wooden placed significant emphasis on the alleged harassment he faced about shop inspection forms, but in his answers to the Court's questions, he admitted he had never been disciplined for missing an item during a shop inspection. (Tr. 190:13-190:17) In reality, the policy of completing on-shift shop inspection forms was a company-wide policy and could not have reasonably been adopted for the purpose of disciplining or punishing Wooden or enforced in such a way that would lead to disparate treatment against him. Wooden alleged that Herren harassed him and singled him out. Other witnesses' testimony confirmed that Herren set the same level of expectations for the entire crew, as required by MSHA regulations and company procedures. (Tr. 125:25-126:5; Tr. 727:20-731:16)

Wooden's misuse of a company vehicle does not constitute a protected activity under the Mine Act, but it is telling that management's response to this incident was fair and even-handed. Although Genesis could have immediately terminated Wooden's employment for towing the camper, Tamara Fennell, the HR Business Partner for Maintenance, and Kimberly Huber advocated for issuing a DML to Wooden to maintain consistency with its previous discipline. In 2011, Genesis employee Jarvis Koeven had driven a company truck to Salt Lake City without authorization. Genesis issued Koeven a DML that included an unpaid suspension and a last chance agreement for his misuse of a company vehicle. (Tr. 559:23-560:5)[7] Like Wooden, Koeven did not comply with the terms of his last chance agreement and was discharged. (Tr. 469:15-470:22; 560:6-561:8)

The company's disciplinary records refute Wooden's and his union's (reluctant and unsubstantiated) claims that Wooden was targeted. Wooden failed to provide evidence that he was treated differently than other employees in similar situations. I cannot find that Wooden was the recipient of disparate treatment.

e. Opportunities to Impose Discipline

After Wooden received the first conference for the magnet lifting even, he was not disciplined again until November, when he towed his camper using the company truck. (Tr. 748:8-749:19; 190:1-20) Genesis had additional opportunities to impose formal discipline, but opted for coaching and counseling instead. (Tr. 26:1-22; 563:24-564:16; 696:24-698:6; 190:1-20) [8] Despite Genesis knowing about Wooden's protected activity, when Wooden's subsequent conduct in the second half of 2017 qualified for discipline, including potential termination, Genesis took a different approach. Wooden could have been disciplined for multiple events: (i) failing to properly chock a forklift's tires after he finished operating the forklift; (ii) forgetting to wear rubber boots while working in the caustic area; and, (iii) throwing away an empty plastic tool case for a power tool that had been in a Genesis truck Wooden was assigned to drive home after working overtime. (Tr. 566:15-22; 696:24-697:2; 26:1-27:6; Ex. R-22) Instead of disciplining Wooden for these instances, Keith Herren provided non-disciplinary coaching and counseling in an attempt to improve Wooden's behavior.[9]

Genesis also exercised leniency with Wooden in October, 2017, after he used the company vehicle to tow his personal camper. (Tr. 454:24-455:6; 603:10-23; Ex. R-27) Genesis could have terminated Wooden at that time. (Tr. 465:23-466:15) Firing Wooden would have

[7] Koeven had received another DML in 2009 for taking a company truck home without authorization, but the two-year sunset provision for that DML had expired approximately one month before Koeven drove a second truck to Salt Lake City.

[8] The intervening events were not discipline, as defined by Genesis' policy and practice, even though Wooden and other witnesses perceived them as such. (Tr. 440:1-12) In the final analysis, the intervening events resulted in Wooden being treated in an evenhanded and consistent manner.

[9] Wooden saw this counseling as a form of harassment. (Tr. 26:1-27:5)

arguably been in compliance with the company's Positive Performance Program,[10] particularly since Wooden initially lied about his misuse until he realized Genesis already knew the truck had been seen pulling a camper. (Tr. 602:22-603:9; Ex. R-27) Although some members of management considered this a termination-level offense, management elected to issue him a DML. (Tr. 615:5-616:6)

IV. RESPONDENT'S REBUTTAL

Under section 105(c), 30 U.S.C. § 815(c), the operator may rebut the miner's 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; *Turner*, 33 FMSHRC at 1064. Genesis denies that Wooden was terminated in violation of the Mine Act, and argues instead that any adverse action was not motivated in any part by protected activity. While I have already found that Wooden failed to provide sufficient evidence to meet his prima facie burden, I will nevertheless address the Respondent's rebuttal.

Wooden engaged in several instances of protected activity. The Respondent argues that Wooden was terminated, not for any reason related to that protected activity, but for his misuse of a company vehicle on two occasions. Based on the evidence available to me, I find that Wooden has failed to demonstrate that his probationary status and the termination of his employment were related to his protected activity. Wooden alleged that the discipline he received was not fair (Tr. 507:18-25), but that is not an element of a section 105(c) claim. The company's decisions were valid business decisions, consistent with long-standing policies and the collective bargaining agreement with the union.

In analyzing a mine operator's asserted justification for taking adverse action under the *Pasula-Robinette* framework, the inquiry is limited to whether the reasons are based in fact, whether they actually motivated the operator's actions, and whether they would have led the operator to act even if the miner had not engaged in protected activity. *Turner*, 33 FMSHRC at 1073. The ALJ may not impose his own business judgment as to an operator's actions, *Chacon*, 3 FMSHRC at 2516-517, and he may not substitute his own justification for disciplining a miner over that offered by the operator. *Sec'y of Labor on behalf of McGill v. U.S. Steel Mining Co.*, 23 FMSHRC 981, 989 (Sep. 2001). While the intermediate steps of the *Pasula-Robinette* test include shifting burdens, the ultimate burden of persuasion on the question of discrimination remains with the complainant. *Robinette*, 3 FMSHRC at 818 n.20.

Respondent's stated reason for terminating Wooden was plausible and not pretextual for the following reasons. First, Genesis made the business decision to terminate Wooden for misusing a Genesis truck twice in four weeks. Second, Wooden could have been discharged for the first misuse alone. (Tr. Tr. 606:24-607:4; 216:17-216:23; Ex. R-27) Wooden knew the Last Chance Agreement came with a probationary period in which Genesis could terminate him for

[10] Genesis has a progressive disciplinary system, known as the Positive Performance Policy ("PPP"). (Tr. 341:10-341:22) As an alternative to the PPP, Genesis supervisors may engage in coaching and counseling of their employees to encourage them to alter subpar behaviors without resorting to formal discipline. (Tr. 339:13-339:21)

any misconduct that would normally result in discipline. Third, only four weeks after agreeing to the LCA, Wooden used another truck without authorization. Not only was this unprotected activity, it was substantially similar to his previous misconduct. The proximity in time between his two instances of vehicle misuse stunned Genesis' HR team, which could not believe Wooden committed the same unprotected activity he engaged in to receive his DML a second time. (Tr. 624:7-13) Given these facts, I find that Genesis' reason for terminating Wooden is plausible and not pretextual.

V. RESPONDENT'S AFFIRMATIVE DEFENSE

If the operator cannot rebut the prima facie case, it may nevertheless defend affirmatively by proving that it was motivated by the miner's unprotected activity alone. It is not enough under section 105(c) for the operator to show that the miner deserved to be fired for engaging in the unprotected activity. The operator must show that it did, in fact, consider the miner deserving of discipline for engaging in the unprotected activity alone and that it would have disciplined him in any event. *See Robinette*, 3 FMSHRC at 817–18; *Pasula*, 2 FMSHRC at 2799–800; *see also E. Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642–43 (4th Cir. 1987) (applying *Pasula-Robinette* test).

The Commission has articulated several indicia of legitimate non-discriminatory reasons for an employer's adverse action. These include evidence of the miner's unsatisfactory past work record, prior warnings to the miner, past discipline consistent with that meted out to the complainant, and personnel rules or practices forbidding the conduct in question. *Bradley*, 4 FMSHRC at 993. The Commission has explained that an affirmative defense should not be "examined superficially or be approved automatically once offered." *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1938 (Nov. 1982). In reviewing affirmative defenses, the judge must "determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed." *Bradley*, 4 FMSHRC at 993. The Commission has stated that, "pretext may be found . . . where the asserted justification is weak, implausible, or out of line with the operator's normal business practices." *Sec'y on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1534 (Aug. 1990).

As discussed above, I find that Genesis discharged Wooden in response to Wooden's unprotected activities. However, even assuming that Wooden's protected activity partially motivated Genesis to issue the DML for towing his camper, and then discharge Wooden for once again using a company truck without authorization four weeks later, Genesis still did not violate section 105(c) of the Mine Act because it proved each element of its affirmative defense. As previously discussed, there is sufficient evidence to find that: (i) Genesis would have issued Wooden a DML and invoked the provisions of the Last Chance Agreement in the absence of his protected activity; (ii) Genesis was motivated by Wooden's repeated misuse of company vehicles; and (iii) these actions alone supported the discipline he received. I find that it is reasonable to terminate an employee under these circumstances.

VI. CONCLUSIONS OF LAW

Wooden failed to establish a prima facie case of discrimination under section 105(c) of the Mine Act. The operator's stated reasons for discharging Wooden were plausible and not pretextual. Genesis affirmatively defended its decision to place Wooden on probation and ultimately terminate his employment. Therefore, based on a thorough review of the record, I conclude that Wooden failed to prove by a preponderance of the evidence that either the probation or the termination constituted discrimination in violation of section 105(c) of the Act.

VII. ORDER

Komsan (Troy) Wooden's complaint and this proceeding are **DISMISSED**.

L. Zane Gill
Administrative Law Judge

Distribution:

Komsan (Troy) Wooden, 14 Greve Circle, Rock Springs, WY 82901
komsanwooden@yahoo.com

Erik Dullea, Esq., Ephraim Hintz, Esq., Husch Blackwell LLP, 1801 Wewatta St, Ste 1000, Denver, CO 80202 erik.dullea@huschblackwell.com ephraim.hintz@huschblackwell.com

/kb