FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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MAR 19 2014

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of CARLOS LOPEZ, Complainant	:	DISCRIMINATION PROCEEDING Docket No. CENT 2012-237-DM Case No. SC-MD-11-23
v.	:	
SHERWIN ALUMINA, LLC, and its SUCCESSORS, Respondent	:	Mine: Sherwin Alumina Mine ID: 41-00906

DECISION

Appearances: Elizabeth M. Kruse, Esq., Josh Bernstein, Esq., U.S. Department of Labor, Office of the Solicitor, Dallas, Texas, on behalf of Complainant;

Christopher V. Bacon, Esq., Vinson & Elkins, LLP, Houston, Texas, for Respondent.

Before: Judge Bulluck

This case is before me upon a Discrimination Complaint brought by the Secretary of Labor ("Secretary") on behalf of Carlos Lopez ("Lopez") against Sherwin Alumina, LLC, and its Successors ("Sherwin"), pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977 ("Act"), 30 U.S.C. § 815(c). The Secretary contends that Sherwin unlawfully suspended Lopez on or about September 21, 2011, and terminated him on or about October 19, 2011 from its Gregory, Texas Plant, because Lopez engaged in certain activities that were protected under the Act.

On September 28, 2011, Lopez filed a Discrimination Complaint with the Secretary's Mine Safety and Health Administration ("MSHA") under section 105(c)(2) of the Act.[1] MSHA

[1] 30 U.S.C. § 815(c)(2) states, in relevant part:

> Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon

special investigator Jerry Anguiano conducted an investigation and, consequently, the Secretary determined that a violation of section 105(c) had occurred. On December 27, 2011, the Secretary filed a Discrimination Complaint on behalf of Lopez, alleging that Sherwin illegally terminated him for engaging in activities protected under section 105(c) of the Act, including making hazard complaints to MSHA, making safety complaints to Sherwin management, and publically advocating an increased MSHA presence at the Plant. A hearing was held in Ingleside, Texas.

For the reasons set forth below, I conclude that the Secretary has established a *prima facie* case of discrimination under the Act, and that Sherwin has failed to rebut the Secretary's *prima facie* case or defend its actions by proving that it would have terminated Lopez for his unprotected activity alone.

I. Stipulations

The parties stipulated to the following:

1. The Federal Mine Safety and Health Review Commission has jurisdiction over this action, pursuant to section 113 of the Mine Act, 30 U.S.C. § 823.

2. This action is brought by the Secretary pursuant to the authority granted by section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2).

3. At all relevant times, Sherwin Alumina, LLC, Respondent, was an operator as this term is defined by section 3(d) of the Mine Act, 30 U.S.C. § 802(d).

4. At all relevant times, Respondent was also a person within the meaning of sections 3(f) and 105(c) of the Mine Act, 30 U.S.C. §§ 802(f), 815(c).

5. Respondent produces products that enter commerce or has operations or products that affect commerce, all within the meaning of sections 3(b), 3(h) and 4 of the Mine Act, 30 U.S.C. §§ 802(b), 802(h) and 803.

6. At all relevant times, Respondent employed Complainant as a maintenance mechanic at the Sherwin Alumina, LLC, facility.

7. At all relevant times, Complainant was a miner within the meaning of section 3(g) of the Mine Act, 30 U.S.C. § 802(g).

8. At the time of his termination, Lopez was earning $32.55 an hour.

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receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate.

9. Pursuant to the settlement agreement on temporary reinstatement, Lopez was economically reinstated on November 21, 2011, and has been paid as if he had been working 48 hours a week: 40 hours at his regular rate of pay of $32.55 an hour, and eight hours at his over-time rate of $48.33. Lopez has been receiving all employee benefits, including health benefits.

10. Complainant engaged in protected activity within the meaning of section 105(c)(1) of the Mine Act, 30 U.S.C. § 815(c)(1), when he reported safety hazards and violations to agents at the mine on or about September 12, 2011, and when he filed a Complaint with MSHA on September 29, 2011.[2]

11. Respondent was aware of Complainant's protected activity.

12. Complainant's tags were properly placed and visible.

Tr. 48-50.

II. Factual Background

Sherwin Alumina processes bauxite to produce smelter grade alumina at its Plant in Gregory, Texas. Tr. 551-52; Ex. C-18 at 7. Carlos Lopez worked at the Plant as a maintenance mechanic since 1974, and served on Sherwin's TIDES committee.[3] Tr. 206; Ex. R-30 at 36-37. In 2008, Lopez called MSHA to report a safety hazard involving a displaced valve in the Clarification section. In 2009, he contacted MSHA about an improperly drained tank in the Digestion section and, in 2010, he reported overhead bridge drains in Digestion that had fallen and landed dangerously close to miners. Tr. 207-10. Also in 2010, Lopez warned his supervisor, unit manager Michael Douglas, that he would call MSHA if Sherwin did not fix certain leaking valves. Tr. 211-12, 394-95.

In August 2011, Sherwin held a series of informational meetings in which it delivered a presentation to its workforce entitled the "MSHA Threat." Tr. 370-75; Ex. R-29 at 19. In each of several sessions, eighty to ninety miners were made aware that Sherwin was receiving a high number of citations which, if continued, could place the company in a Potential Pattern of Violations ("PPOV") status. Sherwin was extremely concerned about this situation, since PPOV status is the precursor to substantially increased fines and heightened oversight by MSHA. Tr. 370-71. During the presentation that Lopez attended, Lopez publically voiced a view contrary to the intended message of the meeting, that "it [would] be a good thing for MSHA to be on-site." Tr. 221.

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[2] Lopez filed his Complaint on September 28, and MSHA notified Sherwin on September 29. Ex. C-7 at 1-2.

[3] TIDES is the acronym for Total Involvement Drives Employee Safety. Tr. 51.

On September 12, 2011, Lopez, working in the Digestion department on the B shift, was assigned to blind the valves of the 5-8 heater to prepare it for cleaning. Tr. 223-24; Ex. R-16.[4] Before he began the task, Lopez, in accordance with Sherwin's lockout/tagout policy ("LO/TO"), placed "Do Not Operate, Men Working" tags on the heater's valves at the three levels from which the heater can be accessed. Stip. 12; Tr. 73, 226; Exs. C-5 at 1, C-14. At some point during the job, Lopez advised the team resource coworker, Isaac Jaramillo, that he was encountering difficulty completing the task because vapor valves on top of the heater were leaking. Tr. 224-25. Lopez continued working at ground level, standing on a platform to work on the condensate feed valve, when his immediate supervisor, Larry Mayfield, walked past him and traveled up the stairs to the third level of the heater. Mayfield inserted a homemade air ejector into a vent valve, forcing air into the tagged-out system. Tr. 226, 234, 303; Ex. R-3. The introduction of air into the heater caused condensate to blow out of the flange, spraying Lopez on his back and causing him to jump from the platform. Tr. 228-32.[5] As Mayfield was coming back down to ground level, he saw Lopez get sprayed, and told him that he would get a safety system trainer ("SST") to address the accident.[6] Tr. 234. Thereafter, Mayfield and SST Eugene ("Gene") Carter returned to where Lopez was working, proceeded up to the third level and, again, breaching the tags, Mayfield, at Carter's instruction, re-enacted insertion of the air ejector. Tr. 235, 338, 410. This time, however, no condensate was released. Tr. 236, 338. Thereafter, as a result of the incident, Lopez, Mayfield and Carter went to Carter's office, and Lopez was sent to the medical unit to get checked-out. Tr. 237.

Two days after the condensate release, on September 14, Lopez, Mayfield, Carter, their supervisor Douglas, TIDES facilitator John Gomez, safety manager Gus Aguirre, and union president Terry Howard participated in a Root Cause Analysis ("RCA") meeting as part of an investigation of the incident. Tr. 51, 75-77, 144, 404. Douglas and Aguirre asked Lopez, Mayfield, and Carter to give accounts of the incident. Tr. 406-10. While the accounts were similar, Mayfield stated that when he first arrived on the scene, he invited Lopez to accompany him to the third level to install the air ejector, but Lopez told him that using the ejector was a stupid idea that would not work. Tr. 407. Lopez's version of events did not include Mayfield's alleged invitation. Two days later, Douglas, refinery manager David Buick, and administration director John Vazquez, troubled by the discrepancy between Mayfield's and Lopez's versions of the initial breach, decided that they needed to meet with Lopez again to give him "the opportunity to put his . . . story on the table." Tr. 563.

On September 19, Douglas and operations coordinator Joe Contreras met with Lopez and his union representatives Terry Howard and Tim Galvan. Tr. 153, 415, 417. Douglas gave

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[4] Blinding a valve refers to opening up the space between the valve and the pipe flange, and inserting a plate between them to prevent leakage. Tr. 223-24, 228-29.

[5] Condensate is hot water. Tr. 229.

[6] SSTs conduct internal safety investigations, communicate with employees, and assist MSHA with site investigations. Tr. 336.

Lopez, Howard and Galvan unsigned copies of Lopez's, Mayfield's and Carter's written statements. Tr. 415-17; Exs. R-2, R-3, R-4. Douglas and Contreras left the room while Lopez and his representatives reviewed the statements. Tr. 417. When they re-entered, Douglas asked Lopez whether the handwritten statement was, in fact, his, and Lopez replied "can't answer that." Tr. 417-18. Douglas then discussed Mayfield's and Carter's statements with Lopez and his representatives, who underlined the parts of the statements which they believed to be inaccurate. Tr. 421-23; Ex. R-5 at 2-3. Douglas then asked Lopez to submit another written statement. Tr. 424. Howard responded that Lopez was in no shape to give a statement, because he was stressed out from discovering that Sherwin had locked him out of the Plant earlier that morning. Tr. 424. After a short break, Lopez signed the original statement. Ex. R-2.

The next day, Douglas held a meeting with Buick and other managers to discuss the results of the investigation and discipline for Mayfield, Carter and Lopez. Tr. 433-34, 437. Because Douglas was their supervisor, he presented information to the managers about the incident and their disciplinary records. Tr. 434; Ex. R-30 at 76. After Douglas' presentation, the managers agreed to recommend that Mayfield be suspended with a view toward termination, that Carter be suspended only, and that Lopez be suspended pending further investigation which, as in Mayfield's case, was intended to result in termination. Tr. 436, 438, 447. After the meeting, Buick summarized the managers' discussion in an email. Ex. R-31.

On September 21, Sherwin issued to Lopez an Hourly Personnel Action, which notified him that he was suspended for five days pending further discipline for "failing to notify co-workers of the red tag status of 5-8 heater and obstructing an ongoing safety investigation into the 5-8 heater incident." Tr. 472; Ex. R-16. Pursuant to the managers' recommendation that Lopez be terminated, Vazquez reviewed the documentation, including Lopez's personnel file, and concurred with the recommendation; Sherwin terminated Lopez on October 19, 2011. Tr. 564-65, 574.

III. Findings of Fact and Conclusions of Law

In order to establish a *prima facie* case of discrimination under section 105(c) of the Act, a complainant must prove by a preponderance of the evidence "(1) that he engaged in a protected activity, and (2) that the adverse action was motivated in any part by the protected activity."[7]

[7] 30 U.S.C. § 815(c)(1) states, in relevant part:

> No person shall discharge or in any manner discriminate . . . against . . . any miner . . . because such miner . . . has filed or made a complaint under or related to this chapter, 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 . . . or because such miner . . . has instituted or caused to be instituted any proceeding under or related to this chapter . . . or because of the exercise by such miner . . . on behalf of himself or others of any

Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2799-2800 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981). The Commission has noted that "direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev. on other grounds sub nom. Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983). 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. The more that hostility or animus is specifically directed toward the protected activity, the more probative it is of discriminatory intent. *Id.* at 2510.

Once the complainant has established a *prima facie* case, "[t]he operator may attempt to rebut [the] *prima facie* case by showing either that the complainant did not engage in protected activity or that the adverse action was in no part motivated by protected activity." *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 818 n.20 (Apr. 1981). The operator may also affirmatively defend its actions by proving, by a preponderance of the evidence, that it was motivated by both the miner's protected and unprotected activities, and would have taken the adverse action for the unprotected activity alone. *Robinette*, 3 FMSHRC at 818. 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 v. Belva Coal Co.*, 4 FMSHRC 982, 993 (June 1982). The Commission has explained that "pretext may be found, for example, where the asserted justification is weak, implausible, or out of line with the operator's normal business practices." *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1534 (Aug. 1990). However, the Commission has also stated that "[its] judges should not substitute for the operator's business judgment [their] views of "good" business practice." *Chacon*, 3 FMSHRC at 2516.

A. Prima Facie Case

For the reasons set forth below, I find that the Secretary has successfully made out a *prima facie* case by showing that Lopez engaged in protected activity and was terminated, at least in part, because of his protected activity.

Sherwin concedes that the following events constitute protected activity: 1) Lopez made three hazard complaints to MSHA between 2008 and 2010; 2) Lopez reported a leaking valve to MSHA in the Fall of 2010; 3) Lopez publically expressed his opinion in the "MSHA Threat" meeting that MSHA's presence at the Plant would be a "good idea;" 4) Lopez reported that

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statutory right afforded by this chapter.

Mayfield had breached his tags on September 12, 2011; and 5) Lopez filed a Discrimination Complaint with MSHA on September 28, 2011. Stip. 10; Resp't Br. at 14-15; Ex. C-7 at 2.

The Secretary relies upon circumstantial evidence to prove that Sherwin discriminatorily terminated Lopez because of his protected activity. As will be discussed fully, I find that the Secretary has established a temporal nexus between Lopez's protected activity and his termination, that Sherwin's management knew of Lopez's protected activity and demonstrated animus, and that Lopez was subjected to disparate treatment.

The Commission has found that a discharge occurring approximately two weeks after protected activity is sufficiently coincidental in time to support a finding of discriminatory motive. *Secretary of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 959 (Sept. 1999). This case presents an even stronger temporal connection, since Sherwin's managers initiated the first step of Lopez's termination on September 20, i.e., recommending that he be suspended pending further investigation, a mere eight days after Lopez had reported the breach of his tags. Tr. 358-59. The recommendation to suspend Lopez also came in the month following the "MSHA Threat" presentation, where his suggestion for increased MSHA oversight fed his plant-wide reputation as a whistleblower. Tr. 59-62, 191-92, 307-08, 333, 394-96, 470. Considering that Sherwin was in a damage-control mode to avoid PPOV status, the impetus to silence an established complainer is evident.

Sherwin has acknowledged that it was aware of Lopez's protected activity. Stip. 11. The Commission has recognized that an operator's knowledge of protected activity "is probably the single most important aspect of a circumstantial case." *Chacon,* 3 FMSHRC at 2510.

CEO Tom Russell's and David Buick's reactions to Lopez's complaints establish Sherwin's hostility toward Lopez's protected activity at the senior management level. In *Morgan v. Arch of Illinois*, the Commission reversed the judge for failing to consider circumstantial evidence indicating the unlikelihood that a lower-level decision maker was oblivious to the animus of an upper-level manager toward a miner who had engaged in protected activity. 21 FMSHRC 1381, 1390-92 (Dec. 1999). Specifically, the upper-level manager's dislike of the miner was so well-known, that it became the subject of jokes by several miners. *Id.* at 1390. I fully credit Howard's testimony that Russell viewed Lopez so negatively, that he believed Lopez to have intentionally created safety hazards to bring MSHA to the Plant. Tr. 148. Since Russell had expressed his disdain for Lopez to hourly workers such as Gomez, it is highly probable that he made disparaging remarks about Lopez to supervisors such as Douglas and Buick. Tr. 59-60. Buick's disdain for Lopez's tendency to contact MSHA rather than address his safety concerns through Sherwin's internal procedures, as well as his public advocacy for MSHA presence at the Plant, also indicate hostility. Tr. 63-65; Ex. R-30 at 44, 60-61, 90. Moreover, the Commission has recently reasoned that presumptively negative characterizations of employees such as "difficult," are indicative of hostility toward protected activity. *Turner v. National Cement*, 33 FMSHRC 1059, 1069 (May 2011). Buick's characterization of Lopez as a "crusty old bloke," given Lopez's reputation as a complainer, takes on a negative connotation. Ex. R-30 at 91.

While Russell and Buick did not initiate the decision to terminate Lopez, it is highly likely that their negative opinions of Lopez influenced Douglas, their subordinate. Douglas stated that he made the initial decision to terminate Lopez and, since he controlled the information imparted to the other managers about the investigation, it is highly likely that he influenced their recommendation. While Vazquez reviewed and concurred with Lopez's recommended discipline, his paper review was merely cursory. Thus, I find that Douglas was the management official responsible for Lopez's termination. Tr. 448-449, 513, 572; Ex. R-30 at 76. Additionally, despite Lopez's recognition that Douglas is a "gentleman" who has treated him fairly and respectfully, Lopez's thinly veiled threat to contact MSHA about problems at the Plant provides ample motivation for animus on the part of Douglas, as exemplified by Douglas' urging that Lopez give Sherwin an opportunity to fix the problems about which he complained. Tr. 249, 394-95.

Sherwin's discriminatory motivation is also evidenced by its disparate treatment of Lopez in assessing discipline for the three employees involved in the condensate release incident. Mayfield, who was serving a one-year probationary period for performance issues, including concerns that he worked unsafely, was fired, and clearly got his due. Tr. 434-35. Carter, however, is an entirely different matter. Carter, a safety supervisor tasked with training employees in safe work procedures, demonstrated highly egregious conduct. He directed a subordinate supervisor to repeat his breach of Lopez's tags on the 5-8 heater, thereby placing Lopez in harm's way a second time. Alarmingly, Carter did not recognize that his conduct violated Sherwin's LO/TO policy until he was verbally reprimanded by his supervisors. Tr. 345-48. Carter's lack of awareness of the company's LO/TO policy - - a safety policy that he should have been overseeing - - was apparently of little concern to Sherwin, as demonstrated by its amplification of Carter's clean disciplinary record, as well as his contriteness and admission that his breach was the result of a "brain-fade." Indeed, Sherwin gave Carter a slap on the wrist by placing him on a one day suspension and four days administrative leave. Tr. 542; Exs. R-30 at 24-26, R-31. If anything, some of Sherwin's managers believed that the sentence was too heavy-handed, questioning whether Carter should receive any discipline at all, since, after all, he was just investigating the initial breach. Tr. 438-440. On the other hand, Lopez, the non-supervisory employee, was held responsible for his supervisors' lack of safety protocol, and fired.

While Buick testified that Sherwin's expectations of salaried employees, and particularly SSTs, are greater than for hourly workers, Sherwin's respective treatment of Carter and Lopez would seem a reversal of expectations. Ex. R-30 at 84. The operator virtually excused Carter's offense while, on the other hand, blowing out of proportion Lopez's minor, if any, involvement. The only reasonable rationale for such lopsided treatment is Lopez's reputation as a whistleblower, and Carter's as a team player.

Therefore, I find that the Secretary has established that Sherwin's termination of Lopez was motivated by his protected activity. I also find that Sherwin has not proven that it was in no way motivated by Lopez's protected activity in its decision to terminate him and, therefore, that it has failed to rebut the Secretary's *prima facie* case.

B. Affirmative Defense

The Hourly Personnel Action specifies two reasons for suspending Lopez pending further discipline: failure to warn co-workers of the red tag status of the 5-8 heater and obstructing the investigation. Ex. R-16. At hearing, however, Sherwin changed horses in midstream, by abandoning the first charge and shifting its defense exclusively to the second charge, that Lopez was not forthcoming with information and obstructed the investigation. Resp't Br. at 21-23; Tr. 531-32.

After the September 20 management meeting, Buick's email, approved by Douglas, stated that Lopez's failure to "take action to prevent his supervisor breaching TOLO [LO/TO] procedures," was his "first offense," and the fact that he "stood by and did not take action to stop area SST breaching tagging procedures," was his "second offense." Ex. R-31; Tr. 540-42. Indeed, Buick testified at his deposition that the managers partially based their recommendation on the fact that Lopez knowingly and willfully allowed others to breach his tags. Ex. R-30 at 28. At hearing, however, Douglas testified that Lopez would not have been terminated and, in fact, no offense would have been committed, if he had just admitted that he had allowed his supervisors to breach his tags. Tr. 531-32. Moreover, in its post-hearing argument, Sherwin abandons the failure to warn defense and relies solely on the obstruction charge to justify Lopez's termination:

> What ultimately drove Douglas to recommend Lopez's termination was his belief that Lopez was untruthful during the investigation, not because he believed that Lopez had knowingly allowed Mayfield to breach his tags. In fact, Douglas agreed that he would not have recommended termination had Lopez admitted that Mayfield's version of events was accurate.

Resp't Br. at 21-22. Sherwin's abandonment of the failure to warn charge is easily explained, given that the charge unreasonably saddles Lopez with the burden of bearing responsibility for his supervisors' unsafe and reckless conduct. Such logic turns the hierarchical structure upside down, such that the student takes on the role of the teacher. I find that the failure to warn charge is simply unworthy of credence and, based on Sherwin's shift from that claim, it appears that the operator has drawn the same conclusion. Consequently, my analysis now focuses on the second charge, that Lopez obstructed the investigation.

Sherwin claims that it was very troubled by Lopez's lack of cooperation in the ensuing investigation. Resp't Br. at 21. It bases its conclusion primarily on the discrepancies between Mayfield's and Carter's accounts on the one hand, and Lopez's account on the other, as well as Lopez's "can't answer that" response to Douglas when presented with a handwritten statement for his verification; Sherwin fully credits the supervisors' accounts that Lopez knew what Mayfield was planning to do. Resp't Br. at 21-23; Tr. 443; Exs. R-3, R-4, R-5. According to Sherwin, it was forced to make a credibility determination as to whether Lopez was lying. Resp't Br. at 22. In support of its argument, it cites *Sec'y of Labor on behalf of Owens v. Drummond*

Co., Inc., a case in which the judge found that the operator affirmatively defended its firing of miners who had engaged in protected activity, because it reasonably believed that they were stealing company property and/or selling drugs. 25 FMSHRC 594, 608-10 (Oct. 2003) (ALJ Weisberger). Similarly, Sherwin reasons, since Douglas' belief that Lopez was untruthful was reasonable, it was justified in terminating him. The reasonableness of Douglas' belief is highly suspect, however, given that the evidence of the alleged pre-breach verbal exchange between Mayfield and Lopez essentially boils down to Mayfield's word against Lopez's. It would seem that it never occurred to Douglas that Mayfield and Carter had reason to modify their accounts of the incident in order to mitigate the egregiousness of their respective breaches; this is especially true of Mayfield, who was already on probation.

In *Turner*, the Commission set forth three ways in which a complainant may challenge the credibility of an operator's affirmative defense. A complainant may establish that the operator's proffered reasons have no basis in fact, i.e., they are factually false. 33 FMSHRC at 1073. A complainant may show that the proffered reasons did not actually motivate the discharge, i.e., a complainant admits the factual basis underlying the employer's proffered reasons and that such conduct could motivate dismissal, but attacks the credibility of the proffered reasons indirectly by showing circumstances which tend to prove that an illegal motivation was more likely than the legitimate business reasons proffered by the employer. *Id.* Finally, a complainant may show that the employer's proffered reasons were insufficient to motivate termination, i.e., other employees were not terminated even though they engaged in conduct substantially similar to the conduct which formed the basis of the complainant's termination. *Id.* The evidence clearly demonstrates that the defense Sherwin elected to advance, that Lopez was untruthful and uncooperative, did not actually motivate his discharge and, under the second *Turner* approach, is unworthy of credence.

Any adverse conclusion that Sherwin drew respecting Lopez's behavior is based on a sham investigation that amounted to a witch hunt designed to fire Lopez. Starting with the RCA Meeting on September 14, Sherwin demonstrated to Lopez that it was skewing the facts against him, despite management's claim of wanting to give him opportunities to tell his side of the story. Tr. 78, 411, 563. In fact, Sherwin had already decided to fire Lopez before meeting with him again on September 19. Sherwin had locked Lopez out of the Plant prior to that meeting. Moreover, I credit Howard's testimony that he observed Douglas and Contreras in possession of the Hourly Personnel Action in that meeting, which leads to a reasonable conclusion that the document officially terminating Lopez had been written up prior to the conclusion of the investigation. Tr. 153, 156, 158-59, 424; Ex. R-16. That document, itself, is telling. Douglas mischaracterized Lopez's suspension as "pending further *discipline*" rather than "pending further *investigation*" and, again, he made the same mistake at hearing, then corrected his terminology. Ex. R-16, Tr. 447-48. Barring Lopez's access to the Plant on the morning of September 19, in conjunction with credible evidence that the written disciplinary action existed, at least, as of that date, is compelling evidence that Sherwin had already settled on its course of action and Lopez's fate had been pre-determined. In light of Sherwin's obvious attempt to transfer the lion's share of the blame from the offenders, Mayfield and Carter, to Lopez, the victim of the condensate

release, Lopez's reticence during the so-called investigation is not only explainable, but reasonable; any cooperation on his part would have amounted to ammunition for his undoing.

Beginning with the September 20 management meeting, Sherwin was unconcerned with objectively assessing discipline, and was solely focused on crafting rationales for salvaging Carter, while terminating Lopez. Despite Carter's role as a safety supervisor and his obvious LO/TO breach, the managers were slow to recognize that he had done anything wrong at all, and made much ado about his clean record and service to Douglas' as his "right-hand safety man." Tr. 438, Ex. R-30 at 24. Moreover, Sherwin's management as a whole was largely dismissive of Carter's lack of awareness of safety protocol and endangerment of Lopez. Regarding Lopez, however, the company glossed over his good work record and, appreciating the flimsiness of requiring him to supervise his supervisors, put all its weight behind characterizing him as a liar in its sham investigation. Given that Lopez was essentially being railroaded, I find that his behavior was prudent rather than uncooperative.

Douglas elected to bypass Sherwin's progressive discipline policy to fast-track Lopez's firing, ostensibly based on the severity of Lopez's misconduct. However, not only was Lopez's responsibility for the condensate release, an event that could have seriously injured him, negligible, but it would have been very difficult to fire him utilizing progressive discipline, given his admittedly clean disciplinary record. Tr. 521-23.

Despite Sherwin's attempt to abandon its "failure to warn" charge during the course of this proceeding, it was, nevertheless, officially documented as one of the two reasons for Lopez's termination. I find, similarly, that it fails, but under the third *Turner* approach. Carter not only failed to warn Mayfield against breaching Lopez's tags but, in fact, directed him to do so; for this infraction, Carter was afforded the utmost leniency.

If Douglas really believed either or both of the charges, that Lopez had a duty to warn his supervisors and that he was being untruthful and uncooperative, it was unreasonable to forego progressive discipline and terminate him based upon those beliefs. Lopez's infractions, under any reasonable standard, could not have been more egregious than the actual breaches, themselves.

Therefore, based on my finding that the reasons Sherwin gives for terminating Lopez, that he failed to warn his supervisors against breaching his tags and that he lied during the ensuing investigation, are unworthy of credence, Sherwin has failed to establish an affirmative defense for firing Lopez. The sheer weight of the circumstantial evidence makes it far more likely than not that Sherwin's reasons for terminating Lopez were pretextual.

In conclusion, I find that the Secretary has established a *prima facie* case of discrimination under section 105(c) of the Act. I also find that Sherwin has failed to either rebut the Secretary's *prima facie* case or affirmatively defend its termination of Lopez. Therefore, based on a thorough review of the record, I conclude that the Secretary has proven, by a

preponderance of the evidence, that Sherwin discriminatorily terminated Lopez, and that Lopez is entitled to relief.

IV. Penalty

While the Secretary has proposed a civil penalty of $30,000.00 for this violation, the judge must independently assess the appropriate penalty based on the statutory penalty criteria. *Sellersburg Co.*, 5 FMSHRC 287, 291-92 (Mar. 1983), *aff'd* 736 F.2d 1147 (7th Cir. 1984). Sherwin is a large operator and, absent any contention by the operator to the contrary, I find that the proposed penalty will not affect its ability to continue in business. Sherwin's relevant history of violations contains no charges under section 105(c) of the Act and, therefore is not an aggravating factor in assessing an appropriate penalty. The willful decision to terminate Lopez, a well-known safety advocate who had a history of reporting safety concerns to management and contacting MSHA, was blatant and influenced by the highest levels of Sherwin's management. Therefore, the violation was very serious, since it not only deprived an otherwise good worker of employment, but also served as a chilling effect on other miners who would consider raising safety concerns within the company or with MSHA. Therefore, based on the seriousness and willfulness of Sherwin's unlawful treatment of Lopez, I find that a penalty of $45,000.00 is appropriate.

ORDER

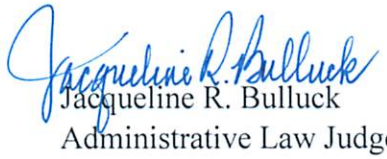
Based on my conclusion that Sherwin Alumina, LLC, and its Successors discriminated against Carlos Lopez when he was suspended on September 21, 2011, and terminated on October 19, 2011, the Discrimination Complaint is **GRANTED**. Sherwin Alumina, LLC, and its Successors are **ORDERED TO REINSTATE** Carlos Lopez to the same position he held prior to his discharge or to a similar position at the same rate of pay and with the same or equivalent duties assigned to him. Additionally, within ten days of the date of this Decision, counsels for the Secretary and Sherwin Alumina, LLC, and its Successors are **ORDERED TO CONFER** to determine the appropriate back pay and interest to be awarded to Carlos Lopez for any days lost due to his suspension and termination. The parties shall also confer and agree regarding any other appropriate relief required to make Carlos Lopez whole for the period that he was illegally suspended and terminated. Within 15 days of the date of this Decision, counsels shall report to me jointly in writing the results of their discussions, which shall result in a Final Decision and Order awarding the agreed-upon relief. If counsels are unable to agree, they shall advise me jointly in writing within 15 days of the date of this Decision, which shall result in issuance of an Order regarding submission of additional evidence on the issue of relief.

Further, and effective immediately, Sherwin Alumina, LLC, and its Successors are **ORDERED TO CEASE AND DESIST** from interfering with the section 105(c) rights of Carlos Lopez while he remains in their employ, expunge from Carlos Lopez's employment

records all references to the circumstances giving rise to his unlawful discharge, and provide a neutral employment reference for Carlos Lopez, if requested.

Further, within 30 days of the date of this Decision, Sherwin Alumina, LLC, and its Successors are **ORDERED TO PAY** a civil penalty of $45,000.00 for the violation of section 105(c) of the Act.[8]

Carlos Lopez's **TEMPORARY REINSTATEMENT SHALL REMAIN IN EFFECT** until a **FINAL DECISION ON RELIEF** is issued.



Jacqueline R. Bulluck
Administrative Law Judge

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Carlos Lopez, 6821 South Heaven, Corpus Christi, TX 78412

/ss

[8] Payment should be sent to: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket number and case number.