

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, NW, SUITE 9500
WASHINGTON, DC 20001

April 20, 2011

SUSAN A. LUCERO,	:	DISCRIMINATION PROCEEDING
Complainant,	:	
	:	Docket No. WEST 2010-636-D
v.	:	Case No. DENV-CD-2010-01
	:	
	:	Mine: North Antelope Rochelle Mine
POWDER RIVER COAL, LLC.,	:	Mine ID: 48-01353
Respondent,	:	

DECISION

Appearances: Ms. Susan Lucero, representing herself
Kristen L. Johnson, Esq.; Kristen White, Esq., on behalf of Powder River Coal LLC

Before: Judge David F. Barbour

This case is before me on a complaint of discrimination brought by Susan A. Lucero against Powder River Coal, LLC (“Powder River”) under Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 (“Mine Act”). 30 U.S.C. § 815(c)(3)(2006). Lucero contends that she was “interfered with and bullied” because she reported safety concerns at Powder River’s North Antelope Rochelle Mine, a surface coal mine located in Campbell County, Wyoming. Complt. 4. She also contends that she was not promoted because of her concerns. *Id.* At the time of the alleged discrimination, Lucero primarily operated a coal haul truck and a rubber tired bulldozer (“rubber tired dozer” or “RTD”).

Powder River answers by denying all of Lucero’s allegations and by specifically asserting that Lucero did not suffer any adverse action, or if she did that the adverse action was not motivated in any part by her protected activity. Powder River asserts that any action the Company took with regard to Lucero’s employment was based on “legitimate and nondiscriminatory reasons.” Answer 2.

PROCEDURAL BACKGROUND

Following the receipt of Powder River’s answer, the matter was assigned, and I ordered Lucero to clarify her complaint with respect to her claims of protected activity and adverse action. In her amended complaint, Lucero describes safety complaints she made to her acting supervisor on April 17, 2009. In the early morning of April 17, 2009, she noticed large holes in the road leading to the mine’s Middle Pit (the “pit”). She feared the holes posed a danger to haul trucks. Around 6:00 a.m., Lucero reported the problem over the radio to her acting supervisor, Scott Earnest. Am. Complt. 2. The shift ended at 6:30 a.m. Earnest was highly annoyed with her report and he responded sarcastically and angrily about the timing of Lucero’s concern. *Id.* He said nothing about its substance. Am. Complt. 1-2.

Five days later, on Wednesday, April 22, Powder River conducted a safety meeting for all miners working on Lucero's shift. Am. Compl. 2. At the meeting Lucero described Earnest's reaction to her April 17 safety complaint. *Id.* According to Lucero, when she finished Earnest yelled from the back of the room, "It was 6:00 o'clock." *Id.* Lucero maintains that rather than support her, Charles ("Chuck") Davis, a management official, stated that safety was a "matter of opinion." *Id.*

Lucero was asked to stay after the safety meeting for another meeting with management officials. Am. Compl. 2. At the second meeting Lucero contends that management officials made excuses for Earnest and made it seem as though Lucero was the problem in order "to protect [Earnest]." *Id.* She adds, "Management did not address my concerns in a way that [my] fears reasonably should have been quelled." *Id.* In addition, Lucero further maintains that because of the April events, between May 10, 2009 and December 3, 2009 she was denied a promotion to which she was entitled. *Id.*

In responding to Lucero's amended complaint, Powder River continues to deny all of her allegations. It emphasizes that after hearing Lucero's concern about the condition of the haul road, Earnest contacted other haul truck drives to determine if corrective actions were needed and then ordered the holes in the road filled and the bed leveled. Resp't. Am. Answer 2. It also states that at the second April 22 meeting, management officials explained to Lucero the steps that had been taken to respond to her concerns; that Earnest agreed he had not responded to Lucero "as nicely as he should," that he apologized to Lucero, that Lucero refused to accept the apology and that she angrily left the meeting. *Id.* Powder River maintains that Lucero was in no way the subject of adverse action because she reported the condition of the road, and that although she was denied a promotion subsequently, it was because she failed to demonstrate the necessary skills when she was evaluated by her trainer. *Id.* 4. It further states that it continued to work with Lucero to get her to the point where she could be promoted and that she was promoted in December 2009. *Id.* 4-5. Powder River also claims the decision to promote Lucero was essentially made before the Company received a copy of the discrimination complaint Lucero filed with MSHA.¹ *See id.* 5-6.

The matter was heard in Gillette, Wyoming. Powder River was represented by counsel. Ms. Lucero represented herself.

THE STIPULATIONS

At the start of the hearing counsel for Powder River read the following joint stipulations into the record:

1. [Powder River] is an operator within the meaning of the Mine Act.

¹ Ms. Lucero's complaint to MSHA, a copy of which is attached to the complaint that she filed with the Commission, is dated December 8, 2009.

2. Powder River . . . [and the mine are] subject to the jurisdiction of the [Mine Act].
3. At all times relevant to this proceeding . . . Lucero was a miner within the meanings of Section 3(g) and Section 105(c) of the Mine Act. [30 U.S.C. §§ 802(g), 815(2006).]
4. The Administrative Law Judge has jurisdiction in this matter.
5. Susan Lucero began work at [the mine] on March 10, 2008, as a production technician.
6. Susan Lucero is assigned to Coal Crew [No.] 3 and has been since March 10, 2008.
7. Susan Lucero was recommended for advancement to C-Tech level on June 18, 2008.
8. On April 22, 2009 a meeting was held at [the [m]ine with Don Curtis, [a] coal crew team leader; Chuck Davis[, another] coal crew team leader; Jim Blonigen, [Coal Crew 3 supervisor]; Scott Earnest, [s]tep-up [s]upervisor; and Susan Lucero.[²]
9. Jim Blonigen held an evaluation meeting with Susan Lucero on August 22, 2009.
10. A meeting was held with Jim Blonigen, Don Curtis, Shantel Moore, [an] H.R. representative, and Susan Lucero on October 5, 2009.
11. [Powder River] provided to Ms. Lucero an action plan for Advancement on Rubber Tire Dozer[s] to B-Tech at the October 5, 2009 meeting.
12. Jim Blonigen held an evaluation meeting with Susan Lucero on December 13, 2009.

² There are two coal team leaders at the mine. Coal team leaders are responsible for making sure there is enough coal to fill customers' orders. They also help with personnel evaluations, review promotion recommendations and review reported safety incidents.
Tr. 449-450.

13. On December 13, 2009, Jim Blonigen notified Susan Lucero that she qualified for advancement to [B-]Tech retroactive to November 10, 2009.

14. On or about January 6, 2010, MSHA determined that no discrimination occurred under Section 105(c) of the Mine Act. [30 U.S.C. § 815(c)(2006).]

15. On or about February 1, 2010, Susan Lucero filed a discrimination complaint with the . . . Commission pursuant to [s]ection 105(c)(2) of the Mine Act. [30 U.S.C. § 815(c)(2)(2006).]

Tr. 18-20.

In addition to these 15 stipulations, two more stipulations were added by counsel and Lucero at the hearing:

1. [O]n or about December 8, 2009, Lucero filed a discrimination complaint with MSHA under [s]ection 105(c) of the Mine Act. [30 U.S.C. §815(c)(2006) .]

2. [T]he exhibits to be offered [by] the parties are . . . authentic, but no stipulation is made as to their relevance or to the truth of the matters asserted therein.

Tr. 20-21.

FACTUAL BACKDROP TO THE COMPLAINT

THE MINE AND LUCERO'S JOBS

During the course of her opening statement, counsel for Powder River described the mine, the work schedule at the mine, Lucero's place in that schedule, and the Company's advancement policies. The information was confirmed during the hearing, and counsel's description was a helpful backdrop to the testimony that followed.

Counsel explained that the mine is one of the largest surface coal mines in the United States. Tr. 26. Coal is mined by draglines which are located in the mine's pits. *Id.* Once extracted, coal is loaded into haul trucks and hauled to hoppers at the mine where it is crushed and conveyed to silos for storage. *Id.* It is then loaded into trucks and hauled to railcars for shipping. *Id.*

Miners work 12 hour shifts. Tr. 27. The shifts are rotated between day and night every 28 days. *Id.* There are four coal crews at the mine. *Id.* At all times, Lucero has been assigned to Crew

No. 3, and her primary supervisor has been Jim Blonigen. *Id.*

Ms. Lucero has operated three types of heavy equipment: haul trucks, blades, and rubber tired bulldozers. Tr. 27. Although Lucero has usually operated a haul truck, she was being trained for advancement as an RTD operator. *Id.*

POWDER RIVER'S PROMOTION POLICY AND LUCERO

Miners who work for Powder River begin their employment at an entry level. (This entry-level policy applies to all miners, no matter their prior experience.) Entry level miners are called "technician inductees" or "tech inductees." Tr. 28. During an inductee's first 360 hours of work, the inductee is evaluated by a trainer or supervisor to determine which of three pieces of equipment (haul truck, blade or RTD) he or she can operate. *Id.* Upon completion of the initial 360 hours of work, if the miner is determined by the trainer or supervisor to have the skills necessary to operate one of these pieces of equipment, the miner is recommended for placement at C-Tech level. Tr. 28. This is the highest level at which a miner can be placed after completing his 360-hour period. *Id.*

After a miner is advanced to C-Tech, the miner is not eligible for further advancement to B-Tech until one year after his placement date. Tr. 30. To qualify for B-Tech the miner must demonstrate consistent mastery of the necessary advanced skills. In addition, the miner cannot have experienced a chargeable safety incident during the year. *Id.* If the miner has a chargeable safety incident, there is an automatic 90-day hold placed on the miner's advancement. Tr. 30-31.

Shantel Moore, a human resources ("H.R.") representative at the mine, explained that the Company has adopted a written advancement policy entitled the "Technician Concept." Tr. 509-510; Resp't. Exh. 17. As just noted, every new employee is hired as a tech inductee. There are three types of tech inductees; production techs, maintenance techs, and maintenance support techs. Production technicians are equipment operators who work in the pit or miners who work in the plant. Resp't. Exh. 17 at 61; Tr. 511-512.

Lucero worked as a production tech in the pit. On May 10, 2008, Lucero completed her 360 hours of training. However, her evaluation did not take place until June 18, 2008, at which time Blonigen recommended Lucero for placement at C-Tech level. Tr. 29, *see also* Tr. 233; Resp't. Exh. 11. Her placement date was May 10, 2008. Once she advanced to C-Tech, Lucero received a retroactive pay increase.³ *Id.*

Moore confirmed that all newly hired employees are classified as inductees for their first 360 hours of work. Tr. 512-513; *see also* Tr. 529. Powder River views the induction period as a chance

³ Counsel asserts that it is not unusual for a miner to be evaluated after the date the miner becomes eligible for advancement and that a delayed evaluation does not harm the miner because the pay increase that corresponds with the advancement is always made retroactive to the date the miner became eligible for advancement. Tr. 29-30.

for the inductee to show his skills and abilities on various pieces of equipment. *See* Tr. 294. If an employee is hired as an equipment operator, during the induction period the employee is given an opportunity to demonstrate basic skills on the equipment. *Id.* Further training is given to improve the miner's skills after the employee has qualified. *Id.* At the end of 360 hours the highest level at which a new employee can qualify is C-Tech. Tr. 515. The date the inductee is placed in his first tech level is his "placement date." One year after the placement date the miner is eligible to advance to a higher tech level. Tr. 516. If an employee is evaluated and advanced after his placement date, the employee is paid retroactively to his placement date. *Id.* In other words, once an employee is advanced, he is always paid retroactively to the date he became eligible to advance. Tr. 546. Either a miner's supervisor can evaluate a miner for advancement or the supervisor can request that someone from the training department observe the employee and evaluate the miner for advancement. Tr. 528. If an employee is not recommended for advancement, the employee can be evaluated again in 90 days. Tr. 519. The end of the 90-day period becomes the miner's new placement date if he is advanced.

LUCERO'S MAY 2008 EVALUATION

Lucero testified she began work on March 10, 2008 and was eligible for her initial tech level evaluation on May 10, 2008, 360 hours after March 10. Tr. 232-233. However, it was not until June 18, 2008, that Jim Blonigen, Ms. Lucero's primary supervisor, performed her initial tech level evaluation. *See* Resp't. Ex. 2 at 10-4.⁴ As a result of his observations, Blonigen recommended Lucero for advancement to C-Tech. Tr. 307. He noted many positive things about Lucero's job performance. He found that Lucero was not afraid to ask questions, came to work prepared, accepted job assignments without complaint, did whatever she was asked, got along well with other members of her crew, asked for help when she needed it, had zero safety incidents and perfect attendance. Resp't. Ex. 11 at 3; Tr. 54-55, 298. Blonigen recommended that Lucero work on her skills on RTDs, haul trucks and other equipment. *Id.* He added, "She is a little bit rusty, but things are going well as she spends more time on the equipment." Resp't. Ex. 11 at 3.

Earlier Blonigen had completed a form concerning Lucero's qualification on a blade. *See* Compl. Ex. 2 at 10-4. Eighteen tasks involving operation of the equipment are listed on the form and the person who completes the form must indicate whether or not the employee can perform the tasks. Blonigen checked "yes" for each of the 18 tasks. *See* Compl. Ex. 2. He also hand wrote the following comments in the "Experience & Comments" part of the form: "Susan does a good job of keeping large oversize out of [the] road, keeps drainages open, does not run wind rows across traffic patterns and communicates well with other operators." *Id.*; Tr. 55.

Also on June 12, 2008, Blonigen filled out and signed an RTD Qualification Form for Lucero. He again checked "yes" with regard to the satisfactory performance of each of the 18 tasks

⁴ Blonigen explained that an evaluation can take place after the placement date because of a number of reasons. For example, more important things may be happening or a miner may be scheduled for a vacation. Tr. 296. In addition, before a miner is officially advanced, the evaluation and recommendation must be reviewed by H.R. personnel and higher management officials. *Id.*

in which a dozer operator must show proficiency. He handwrote the following comments in the “Experience and Comments” part of the form: “Susan understands what is expected of her[. She] uses her blade appropriately and keeps a level floor[. She] communicates with shovels and trucks well.” Compl. Ex. 10-5; Tr. 55-56. But Blonigen emphasized that his evaluation was based on an assessment of Lucero’s basic, not advanced skills. Tr. 394-395.

As stated, Lucero’s placement at the C-Tech level was effective as of May 10, 2008 (Tr. 295; Resp’t. Ex. 11) and May 10, 2008 became the start date for her future evaluations. Tr. 95. This meant that Lucero was eligible to be evaluated for B-Tech on May 10, 2009. However, as discussed below, Lucero was not eligible to be advanced in May. Because of a chargeable accident her advancement date was deferred for 90 days, which meant that she did not become eligible for advancement until August 10, 2010. When the evaluation was conducted Lucero was denied advancement. As will be discussed, the Company maintains Lucero was not promoted because she did not consistently exhibit a mastery of the skills required for advancement, but Lucero believes the Company’s reason is pretextual. In Lucero’s view, the real reason she was not promoted in August 2009 is that the Company was retaliating against her for her protected activities of the previous April.

THE INCIDENT OF APRIL 17

On April 16, 2009 -April 17, 2009 Scott Earnest was acting as the night shift’s “step up” supervisor, meaning he was taking the place of regular supervisor, Jim Blonigen, who was elsewhere.⁵ Tr. 95, 100, 104. Lucero, who was operating a haul truck, stated that around 6:00 a.m., she called Earnest to report an unsafe condition where she and other miners were working. Tr. 185. It had been raining a lot that week making the pit road rough, muddy and full of the holes. Tr. 187. Prior to 6:00 a.m., Earnest sent a bulldozer into the pit to smooth out the floor. However, after looking at the conditions, the bulldozer operator left the pit. Tr. 186. Lucero also left. *Id.* She returned around 6:00 a.m. *Id.* While she was gone, the condition of the road deteriorated badly. *Id.* According to Lucero, there was so much water, traffic was down to one lane. *Id.* Fortunately, there were two or three places where coal haul trucks could pull over and let other trucks and equipment pass. Tr. 187. Lucero pulled into one of the places to let a loaded truck that was leaving the pit go by. Tr. 186-187. The truck ran into a deep hole in the road. Tr. 187. As it came out of the hole, the truck’s front tires went into the air and slammed back down. *Id.* It appeared to Lucero that the driver of the truck lost all control. *Id.* She feared she was going to be hit by the out of control truck. *Id.* She called “dispatch” using her truck’s radio and reported the hazardous condition of the road. Tr. 187. Fixing the road would have required shutting it down, which would have the effect of shutting down the pit, and Lucero testified that the miners working in dispatch told her they had no authority to close the pit. *Id.* She therefore called acting supervisor Earnest. *Id.*

It was very near the end of the shift, and Earnest had left the pit and gone to the mine office to do some final paper work before leaving for home. Tr. 106. When Lucero called and reported the

⁵ Lucero described a “step up” as being “like a relief foreman.” Tr. 39. She explained that when Blonigen was absent, “one of the techs steps up to be the foreman that day.” *Id.* The step up foreman serves until the regular foreman returns. Tr. 39-40; *see also* Tr. 101.

hazardous road condition to Earnest and stated that the road needed to be shut down, Earnest was angry. He responded, “Oh, I suppose it just happened.” Tr. 185-186, *see also* Tr. 188. Lucero answered, “No, it just didn’t happen [*sic.*]” Tr. 186. Earnest did not ask her anything about the condition of the road and made no further comment about her complaint. Lucero was upset because Earnest did not ask her about the road and how it could be fixed. Tr. 188. She maintained that two other coal haulage truck drivers came on the radio and “backed [her] up and confirmed that . . . [the road’s condition] was bad.” *Id.* She received no further communication from Earnest.

Lucero believed that Earnest did not respond appropriately to her safety concern, and that the manner in which he responded to her was discriminatory. Tr. 258. She stated that, “[It] was retaliation or humiliating and discriminatory . . . I didn’t feel confident or I didn’t want to put myself in that position or raise any concerns if I was going to be talked to like that.” Tr. 188.

April 17, 2009 was a Friday. Following her conversation with Earnest, Lucero left the mine for the weekend. Tr. 259. Lucero did not then know, but at the start of the next shift, a bulldozer was sent to smooth the road. Tr. 258. In addition, rock was put down to fill the holes and to improve traction.⁶ Blonigen stated that it was, “the proper thing to do.” Tr. 76. Blonigen believed the actions addressed Lucero’s safety concern. Tr. 76. He also agreed that it was proper for Earnest to call other miners to see how they assessed the situation. Blonigen stated, “I do that all of the time. I verify through other people.” Tr. 77.

Lucero did not return to the mine until Monday, April 20. On both Monday, April 20 and Tuesday, April 21 Lucero participated in pre-shift meetings with her crew. During these meetings she did not raise with Blonigen, who had resumed his role as supervisor, any concerns about the way Earnest responded to her on April 17. Tr. 259-260, 342, 481.

When Earnest finished his shift on the morning of April 17, he went home and did not think any more about Lucero’s call or his response. (“I thought it was done and over[.]” Tr. 115.) He heard nothing further from Lucero about the April 17 incident until the Company safety meeting on April 22. Tr. 116.

THE APRIL 22 SAFETY MEETING

On Wednesday, April 22, the Company conducted a “safety stand down” meeting for all miners on Lucero’s crew. Tr. 117, 343. The miners were asked to think and to talk about safety. Tr. 343. Lucero remembered coal crew team leaders Don Curtis and Chuck Davis telling the pit crew that the Company wanted all safety related conditions reported. Tr. 189. They also urged the reporting of conditions that did not present immediate issues but that might “turn into” safety problems. *Id.* They asked if anyone “had any concerns.” *Id.* According to Blonigen, it was at this point that Lucero asked what miners were supposed to do if they brought a safety concern to a supervisor and the supervisor chastised the miner over the radio or ignored the miner. Tr. 343.

⁶ The road was never shut down, as Ms. Lucero requested. Once the maintenance work was completed on the morning shift, the shift ran normally. *See* Tr. 469-470.

Lucero recalled that Earnest, who was in the back of the room, yelled, “It was 6:00 [a.m.]” Tr. 190; 260. Lucero believed Earnest’s response was hostile. She stated, “Safety doesn’t have a time. It doesn’t matter if it’s the beginning of the shift, the end of the shift, or what.” Tr. 190.

In Lucero’s opinion, Chuck Davis then made matters worse by stating, “It’s totally a matter of opinion.” *Id.*; 260. Lucero believed that Davis’s statement “was like another slap in the face.”⁷ Tr. 191. From the tone of his voice, Lucero was sure that Davis was defending Earnest. Tr. 263. More than that, in Lucero’s opinion, Davis, like Earnest, was showing hostility and animosity toward her for reporting safety conditions. Lucero stated, “I felt that he was making me sorry that I brought . . . up [the April 17 incident] because he was insinuating that it . . . wasn’t unsafe, and [that] would definitely inhibit me from saying anything in front of the crew again.”⁸ Tr. 262. According to Lucero, because upper management believed she had put Earnest “in a bad light” in front of the entire crew, management started retaliating against her. Tr. 191-192.

THE SECOND MEETING ON APRIL 22

At the close of the first meeting on April 22, management officials decided to hold a second smaller meeting involving Lucero, Earnest and other management personnel. Don Curtis suggested the second meeting. Tr. 482. Curtis stated, “I recognized that [Ms. Lucero] had a concern and I requested that we take it . . . [up] after the [first] meeting so the rest of the miners could head to the pit and we could address the situation she was concerned with.” *Id.*

The second meeting was attended by Lucero, Earnest, Blonigen, Davis, Curtis and H.R. representative Shantel Moore.⁹ Tr. 192-193; 456. Davis stated that the purpose of the meeting was to make sure everyone understood that Lucero had expressed a safety concern on April 17 and that the concern had been “looked at and had been taken care of.” Tr. 457. Blonigen testified that he was afraid Lucero would not report unsafe conditions because of what happened on April 17. Tr. 346. He wanted to make sure that she felt secure to reporting things that were not safe. *Id.* Lucero explained that Blonigen “was concerned . . . that I wouldn’t report things, and he wanted to make sure that I felt secure in reporting. And he was encouraging me to report more unsafe conditions, and I assured him that I would.” Tr. 193. Davis also wanted everyone to know that because of the

⁷ Davis describe his response as “talk[ing] about differences of opinion” with regard to safety concerns. Tr. 455. He explained, “One person may see different situations as being unsafe, where others may see it as being fine.” *Id.*

⁸ However, Davis denied that he was demeaning or discrediting Lucero. He said he meant that Lucero “[might] have [seen] one thing, where other people during the same shift had not.” Tr. 460.

⁹ As a H.R. representative, Moore was in charge of recruiting, retention and discipline. Her specific responsibilities were the employees of the coal department, including the coal group in which Ms. Lucero worked. Tr. 507-508. Moore’s immediate supervisor was John Kertesz, the mine’s H.R. manager. Tr. 507.

concern, management officials “went out to the pit, did an investigation, and found out what was going on.”¹⁰ Tr. 457. As Moore understood it, Lucero felt she had not been treated fairly or respectfully after raising a safety concern. Tr. 554-555.

At the second meeting the participants talked about Lucero’s call to Earnest, his response to her and the fact that Lucero felt she had been disrespected. Tr. 483. Davis recalled that those present discussed that Earnest “was maybe short with [Lucero], and maybe demeaned” her. Tr. 461. Earnest admitted that he responded inappropriately and he apologized. Tr. 483. Davis remembered Earnest said that if he had been short with Lucero or demeaned her, it was not his intention. Tr. 461. In Davis’s opinion, “with the apology and/or at least the attempt to apologize . . . there should have been some resolution.” Tr. 461-462. Blonigen recalled reminding Lucero that April 17 had been a long night for Earnest. Tr. 345. He suggested that Earnest felt he was under pressure and therefore said something he normally would not. Tr. 345.

Earnest testified that he apologized to Lucero “for coming across the way I did,” but she remained “upset.” Tr. 119. Earnest agreed he did not respond appropriately to Lucero on April 17. Tr. 121. But he maintained that he tried to explain to her that he was annoyed that she requested a shut down of the road at the very end of the shift. Shutting down the road had the effect of shutting down the pit.¹¹ Tr. 120. Lucero did not accept Earnest’s apology. *Id.* She wanted to leave the meeting, but Davis and Curtis asked her to stay so the situation could be discussed more. Tr. 346. However, when it appeared nothing would be resolved, everyone went back to work. *Id.*

JUNE 11, 2009 INCIDENT

After the meeting on April 22, Lucero’s already tense relations with Blonigen and Earnest deteriorated further. For example, on June 11, 2009, Lucero called Earnest on the radio and told him that the mud was so bad on the pit floor that a hopper needed to be shut down. Tr. 107. Lucero testified that she had tried five or six times to back up to the hopper, but each time, the mud made the truck slide dangerously close to the hopper. Tr. 196. Shawn Palmer, who was working in the pit

¹⁰ Davis stated that as part of his job, he wanted to investigate the conditions that led to Lucero’s complaint and what, if anything, was done about them. Tr. 458. He stated that he asked the day shift supervisor what had happened and the supervisor told him that in response to the condition of the road on the night of April 16-April 17, the scrapers had leveled the road and dumped rock in the low spots. Tr. 458-459. Davis believed this action appropriately addressed Lucero’s concern. Tr. 459.

¹¹ Curtis testified that when asked to do something that resulted in shutting down the pit, a supervisor “probably would get a second or third opinion . . . [and] send maybe a more experienced person to look at the conditions.” Tr. 489. He added, “[W]e usually put two or three opinions together before we make the call.” *Id.*; *see also* Tr. 503-504. Moore agreed that not all employees are empowered to shut down the pit. According to Moore, while employees should “feel free and . . . empowered to call safety and say, I’m going to stop this truck, this isn’t safe . . . that doesn’t mean that [management] is going to stop the whole job.” Tr. 558-559. She added, “[I]t’s a fine line.” Tr. 558.

that night and who was called as a witness by Lucero, remembered the problems Lucero was having. Tr. 165. He too found it difficult to back to the hopper. He stated, “it wasn’t ideal conditions.” *Id.* Palmer testified that Lucero called him on the radio and asked if he could tell if she was doing anything wrong and if there was anything different she could do to reach the hopper. Tr. 166. Palmer responded that all of the truck drivers were “having problems.” *Id.* At this point Lucero called Earnest. *Id.* According to Palmer, Earnest responded by shutting down the hopper and sending bulldozers to clean up the area near the hopper so the trucks more easily could back up to the hopper. *See* Tr. 264. But Lucero added that before it happened, Earnest called another haulage truck driver, Mike Dugan, who was “one of his buddies” and asked Dugan if he was having problems backing to the hopper. Tr. 198. Lucero claimed that because Dugan was Earnest’s friend, Dugan replied, “No, No, I’m not. I’m doing just fine.” *Id.*; *See* Tr. 265. Lucero believed that by calling Dugan over the radio where other miners could hear, Earnest was trying to “humiliate” her and “discredit [her] skill.” Tr. 198. Lucero later stopped Blonigen to report Earnest’s reaction to her safety complaint. *Id.* According to Lucero, all Blonigen did was reply, “Some people are more sensitive than others.” Tr. 198-199. When she told Blonigen she believed Earnest was trying to discredit her, Blonigen said that he would look into it, but he never got back to her. Tr. 198-199.

THE MAY 2009 AND AUGUST 2009 EVALUATIONS

Because of his touchy relationship with Lucero, Blonigen consulted with Chuck Davis and then asked Aimee Conner of the Company’s training department to participate in Lucero’s upcoming evaluation. Tr. 321-322. Blonigen explained, “[I]f I got the training department involved, maybe [Lucero] would take their advice and their ideas a little better than coming from me.” Tr. 348. Davis testified that it was not at all unusual to have the training department evaluate employees, that he did it “[a]ll the time.” Tr. 466. Moore agreed, she stated she found nothing out of the ordinary about Conner’s assistance. “[Y]ou can’t supervise 48 people effectively and evaluate all of their skills. That’s what the training department is for.” Tr. 551. Conner stated she did employee evaluations for supervisors five or six times a year. Tr. 409.

Lucero was evaluated in May 2009, even though she was not eligible for advancement until August 10, 2009 due to the chargeable accident. Tr. 239; Resp Ex. 9 at 2; Tr. 240, 300-30, 310; Resp’t. Ex. 14. Blonigen asked Conner to observe how Lucero performed her assigned tasks, especially how she operated an RTD. Tr. 407-408, 416. Therefore, Conner followed Lucero as she performed her job. Tr. 407-408, 416. Although she could not recall the dates and hours she watched Lucero, Conner testified that it was more than once. *Id.* She described herself as being “close enough . . . [to] see what [Lucero] was doing” but far enough away that she did not inhibit Lucero. Tr. 417.

As a result of her observations, Conner gave Blonigen a written evaluation in which she critiqued Lucero’s performance. Tr. 411-412; Resp’t. Ex. 13. Although she praised the manner in which Lucero conducted her walk around examinations, Conner was critical of Lucero’s operational skills. She reported that Lucero needed to use the blade of the RTD more effectively. Tr. 419-420. But Conner believed that Lucero could improve with some guidance from the Company. Resp’t.

Ex. 13 at 13; Tr. 412-413.

A task an RTD operator is expected to accomplish is to quickly clean up around the shovels. *See* Tr. 292, 308, 390. Blonigen thought that Lucero's cleanups could be more efficient and timely. As a result of what he observed and what Conner recommended, Blonigen suggested that Lucero meet with the shovel operators and talk about how they wanted RTDs to cleanup. Tr. 308. He suggested this because although he previously had asked Lucero to meet with shovel operators ("It's something that I ask [all new RTD operators] . . . to do." Tr. 321), up to that time she had only met with one. *Id.* Lucero felt meeting with the operators would put her in a hostile environment. Tr. 309. Therefore, Blonigen offered to have other employees go with Lucero when she spoke with the shovel operators. *Id.*

As a result of Conner's evaluation, Blonigen recommended that Lucero not advance to B-Tech. Tr. 302-303, Resp't. Ex. 13. His reasons were her involvement in a chargeable safety incident and because Lucero did not meet the more advanced skill requirements for RTD operators.¹² Tr. 303; *see also* Tr. 537. Blonigen conveyed the reasons to Ms. Lucero in an evaluation meeting. In notes documenting the meeting, Blonigen stated:

I tried to stress the positive and future. She feels I am putting her in a bad situation asking her to get on [the] shovels. I offered to have . . . [other miners] go with her. . . . [I read her] Amiee Conner's evaluation skills so she understood what was needed, [I]stressed [that] the RTD incident would not affect [the next] B-[T]ech [evaluation] . . . unless she had an another incident.

Resp't. Ex. 19 at 23.

Lucero was next eligible for advancement in August 2009. For consistency, Blonigen asked Conner to again help him assess Lucero's skills. Tr. 322. Conner stated that she therefore observed Lucero on two different days for a few hours each day so she could evaluate Lucero in relation to her normal duties. Tr. 440. Lucero saw things differently. She believed that when Conner and/or Blonigen watched her work they were trying to intimidate her and negatively affect her performance. Tr. 211-212.

As a result of her observations of Lucero, Conner again noted that she did some good

¹² Davis agreed with Blonigen's recommendation that Lucero not advance. He testified, "[S]he's going from C-Tech to . . . B-Tech, which is . . . advanced skills. She had an incident during that period and her skills do not qualify on [RTDs]." Tr. 468.

things, including one of the best walk around examinations of an RTD that Conner had seen.¹³ However, Conner also believed that Lucero needed to use the blade of the RTD more effectively when she moved material. Of the twenty tasks Conner evaluated, she found that Lucero “frequently exceed[ed]” in her performance of nine of the tasks and “consistently exceed[ed]” in her performance of 11. She needed to “consistently exceed” in all 18 skills to be advanced. Tr. 204.

However, Lucero noted that when she was rated in May she “frequently exceed[ed]” in her performance of five of the skills and “consistently exceed[ed]” in her performance of 15. Tr. 204; Compl. Ex. 2 at 10-17, 10-11. Even though Blonigen stated in August that her skills had “improved in the last two months” (Compl. Ex. 2. at 10-17), Lucero observed that if her August rating was to be believed, she had “in fact . . . gone down in [her] performance.” Tr. 204. She added, “[I]f I improved, I should have had less check marks [in the “frequently exceeds” column, because] you have to have all of them [‘]Consistently Exceeds[’] to qualify [for advancement].” *Id.* Therefore, Lucero found her evaluations to be “all bogus and . . . part of [management’s] retaliation.” *Id.*

Conner conducted her evaluation on August 11, 2009. Resp’t. Ex. 14 at 17; Tr. 323. While she stated that “[o]verall [Ms. Lucero did] a good job,” Conner concluded that Lucero was “still learning how to control the blade [of her RTD] . . . to efficiently do the task that’s assigned.” Tr. 419. She also felt that Lucero needed to become better at leveling the pit floor. *Id.*; see Resp’t. Ex. 13 at 13. Conner added, that if Lucero was made “aware of the areas that she needs to improve on she can improve.” *Id.* at 13. Lucero thought that Conner did not recommend her for advancement at Blonigen’s direction. Tr. 235-236.

Based on Conner’s evaluation, Blonigen recommended that Lucero not advance. After he completed the August evaluation, he again met with Lucero. Tr. 326. In his notes of the meeting he stated:

[Lucero] . . . did not get B-Tech because [of the] training department evaluation that she did not meet [the] criteria [for] B-Tech. She feels that she is being held back because of other things that have happened, mainly the meeting on April 22 [Lucero] also feels that it is unfair that I have the training department evaluate her[.]

Resp’t. Ex. 19 at 23-24; Tr. 327.

Later that month when mud again made it difficult to operate an RTD, Lucero was having problems getting close enough to the shovel to clean up. Conner came to the area and got on the RTD, taking over its operation. Tr. 436. Conner cleared some of the mud away. *Id.* After she had

¹³ Other good things were noted in August. Blonigen observed that Lucero “got on the shovels with almost all of the shovel operators as I had asked her to do and [that she] . . . show[ed] a positive attitude towards this process.” Resp’t. Ex. 14 at 16.

finished, Lucero threw up her hands and said she was “done,” “tired,” “frustrated,” and she could not operate the RTD anymore. Tr. 437. Conner responded that Lucero was doing a good job and just needed to keep at it. *Id.*.

Lucero was eligible for another evaluation and possible advancement on November 10, 2009. Tr. 204, 245, 328, 548-549. In the meantime, Lucero told Blonigen that she wanted to speak with someone in HR, someone other than Moore. Blonigen told Lucero he would get back to her about it. When he did not, Lucero contacted John Kertesz, the head of H.R., and he told her they would speak on September 8. Tr. 208-209. When Blonigen learned this, according to Lucero, he “just lost it and started ranting and raving.” Tr. 209.

EVENTS OF OCTOBER, NOVEMBER AND DECEMBER 2009

Before her next evaluation, Powder River’s H.R. department instituted a program that it maintained was designed to help her succeed. Tr. 561. Moore testified an October 5 meeting was scheduled to advise Lucero of the advancement plan. Prior to the meeting Blonigen wrote down some things he believed Lucero needed to work on, and Moore “put [them] in a form that was easy to understand.” Tr. 330; *see also* Tr. 489. The resulting document was titled, “Goal to Acquire Sufficient Advancement Skills on the Rubber Tire [Dozer] To Advance to B-Tech.” Tr. 212-213; Resp’t. Ex. 15. Lucero, Curtis, Blonigen, Moore and Kertesz attended the meeting. Tr. 562. At the meeting Curtis explained to Lucero that management was trying to help her reach B-Tech by providing her with additional training. Tr. 491. Pursuant to the plan, Conner was assigned to spend more time with Lucero and to work with her until November 10, 2009 to help her qualify. Tr. 245-246.

At first, Lucero did not want to participate in the plan. Tr. 490. She told those at the meeting that she no longer wanted to advance on an RTD and that she felt she was being spied on. Tr. 492. Moore testified that Lucero, “stated that we weren’t trying to help her, that we were . . . stalking her, that we were trying to hold her back . . . that we weren’t treating her fairly.” Tr. 563. Lucero stated that she was done with the advancement process and that she did not want further training. Tr. 566. According to Moore, management officials were surprised and asked Lucero to think about the offer before making a final decision. Tr. 566-567. Moore testified that Curtis and Blonigen told Lucero her advancement was “not far off,” provided she improved in the length of time it took to clean up around the shovels, improved how she cut and leveled the floor, and shortened the time it took to work at the hopper. Tr. 567-568. Conner testified that she told Lucero she would do what she could to help and Lucero responded that she was afraid to say “no,” because the Company would think she was negative. Tr. 445. As a result Conner and Lucero briefly worked together.

Conner described some of the further training: “[W]e . . . talk[ed] about what we could do to help her on the [RTD,] different techniques [of] how to utilize the blade to the fullest advantage. We talked about the cut and fill, and I explained a little bit about the [RTD,] the controls . . . and the steering wheel and stuff.” Tr. 429-430.

Conner offered to work with Lucero every day and at first Lucero agreed, but on October 8,

Lucero declined to work again with Conner. Tr. 247-248. Lucero explained, “I was stressed and intimidated, upset, [and] I just couldn’t bear the thought of Aimee [Conner] following me anymore.” Tr 216; *see* Tr. 445.

On November 3, 2009, Lucero had an accident while operating a haulage truck.¹⁴ Tr. 84. As a result, Lucero was out of work on November 4. When she returned on November 5, she was restricted to light duty, which meant that she could not be evaluated because she could not operate the equipment required for evaluation. Tr. 256. Following that she had seven days off as part of her regular schedule. Tr. 255-256. Lucero did not return to the mine until November 20. Tr. 256. According to Lucero, when she returned, she asked Blonigen if her evaluation was completed, and “he started ranting and raving again.” Tr. 219.

Blonigen emphasized that the evaluation was delayed because “in order to remain consistent” (Tr. 337), he wanted Conner to do it, and Conner’s and Lucero’s work schedules had to correspond for the evaluation to take place. Tr. 337-338, *see also* Tr. 354. According to Blonigen, the delay would cause no harm to Lucero because if she was advanced, she would be paid back to the date she became eligible to advance. Tr. 338; *see also* Resp’t. Ex. 19 at 24; Tr. 339. He added that Lucero “was not very happy” about the delay and that she “stated it was all bull and that I should have it done.” Tr. 339. Blonigen maintained that he told Lucero he was sorry, that he would finish the evaluation when the documentation was completed and that “it was not uncommon for them to be late.” *Id.* He did not remember yelling at Lucero. Tr. 339-340.

On December 2, 2009, Lucero was called to another meeting, this one was with Davis, Curtis and Moore in Moore’s office. Moore testified that the purpose of the meeting was to offer Lucero the opportunity to change crews (Tr. 569) because “of the problems [she] was having with [Blonigen] and other[s].” Tr. 221. Davis viewed the offer as a way to alleviate some of Lucero’s dissatisfaction with her work situation. Tr. 463-464. The change would have given Lucero a supervisor different than Blonigen and a step-up different than Earnest. Tr. 470.

Curtis stated that the offer “was not received very well” and Moore agreed. Tr. 495. Moore remembered Lucero telling management officials that they were “trying to get rid of her.” Tr. 572. Moore asked Lucero to think about the offer on her forthcoming days off and let the Company know whether she was interested. Lucero never responded to the offer. Tr. 575, *see also* Tr. 496, 504.

Also, on December 2, Lucero was assigned to clean up at a hopper and a management official commented to Conner about the good job Lucero was doing. Tr. 225. This was after Lucero felt that Blonigen criticized her for not working fast enough. Tr. 226. When Conner repeated the compliment to Lucero, Lucero stated, “[O]ne moment Jim [Blonigen] is insinuating that I’m just sitting there all the time and I was busting my butt. And then . . . a couple of minutes later, Aimee [Conner] told me that [the management official] said I was doing . . . a good job.” *Id.*

¹⁴ Lucero was found not to be responsible for the accident, so a hold was not placed on her advancement. Tr. 272.

LUCERO'S DECEMBER 2009 EVALUATION

In early December, Conner, at Blonigen's request, evaluated Lucero's performance. Tr. 438. Conner testified that she observed Lucero at work for more than one shift. *Id.* As a result of what she saw, Conner found that Lucero "consistently exceeded" in the performance of all 20 of the required skills. Tr. 439. Conner recommended Ms. Lucero for advancement to B-Tech. *Id.* On December 3, Blonigen countersigned Conner's evaluation (Resp't. Ex. 16 at 22; Tr. 439), and on December 10, he signed a recommendation for Lucero's advancement. Resp't. Ex. 16 at 19; Tr. 250, 336. Curtis concurred that Lucero should be advanced, and he signed and dated the recommendation on December 12, 2009. Resp't. Ex. 16 at 10, Tr. 500. On December 13, Blonigen met with Lucero to review the evaluation and to tell her of her promotion. Tr. 336. He told Lucero he knew they had not always seen "eye to eye" and that he "hoped in the future . . . [they would] work better together." Tr. 340. He shook Lucero's hand. *Id.* Blonigen and Lucero signed the evaluation on December 13 and Lucero was promoted to B-Tech retroactive to November 10. Resp't. Ex. 16 at 21.

Prior to her advancement Ms. Lucero filed a discrimination complaint with MSHA. MSHA received the complaint on December 8, 2009 and mailed a copy to the Company's office in Gillette, Wyoming. There it was received and signed for by the Company's mail agent on December 11, 2009.¹⁵ Tr. 253. Curtis testified that he was not aware of the complaint when, on December 12, he concurred with Blonigen's recommendation to advance Lucero. Tr. 501. Blonigen testified he too was unaware of the complaint when he met with Lucero on December 13. Tr. 341. Lucero asserts that these claims are not credible, that she was only advanced because management officials knew she had filed the complaint. Tr. 227, 251, 254.

OIL ON THE WIRES INCIDENT OF DECEMBER 2, 2009

Lucero also questioned witnesses about an incident that occurred on December 2, 2009, when she spoke with Company skills trainer, Allan Schaefer, about oil on the electrical wires of a haul truck. Tr. 174. According to Schaefer, the standard procedure at the mine is to shut down the equipment. Tr. 170. It is the responsibility of the person operating the equipment to initiate the shut down. Tr. 173.

Lucero testified that when she noticed oil on the electrical wires of the haul truck, she called Blonigen about the oil, and she asked Blonigen to back her up with the maintenance department. Tr. 222. Lucero recalled that Blonigen reacted angrily to her report. He told her that he did not have time and that he would get to her problem when he could. *Id.* Shortly thereafter, Schaefer drove up. Tr. 222-223. Lucero asked him if equipment with oil dripping on electrical wires was an automatic "down," and Schaefer stated it was. Tr. 223. Just then, Blonigen arrived. Tr. 223. He looked at the equipment and told Lucero to take the truck to the shop and have the maintenance personnel make the decision whether the truck should be taken out of service. *Id.*

¹⁵ Lucero also received a copy of the complaint from MSHA on December 11. Tr. 253.

At the shop, several mechanics told her she should speak with their supervisor. Tr. 223. Lucero claimed it took speaking with three bosses and five mechanics to get the equipment “downed.” Tr. 224. However, Lucero also agreed that as the operator of a haul truck, she had the authority to “down” the truck and take it out of service prior to this. Tr. 268.

Blonigen testified that the question of whether automatically to down equipment with oil on its electrical wires is “kind of . . . tricky.” Tr. 290. He explained that in general a report of oil on electrical wires means an automatic downing of equipment, but “if it’s old oil . . . we might wash it off just to see if there is fresh oil coming on it.” *Id.* He emphasized that when the truck was in route to and in the shop it was out of production and effectively “downed.” Tr. 364.

BACKUP INCIDENT OF JUNE 4, 2010

Finally, Lucero raised an incident that occurred on June 4, 2010, when she was a passenger in a Company van. Tr. 229. Also in the van were Blonigen, miners Travis Ahern and Jody Sisson and another miner identified only as “Jason.” Tr. 139. The group was coming back from a Company safety meeting. Blonigen was driving the van. Tr. 140. He backed up, and did not first honk. *Id.* Lucero commented to all in the van that Blonigen did not honk before he backed up. *Id.* According to Sisson, Blonigen responded that he did not have to honk because the van was a light duty vehicle. Tr. 140. Lucero stated that Blonigen “screamed and yelled” (Tr. 229), but Sisson stated that Blonigen “just spoke up.” Tr. 140. Lucero maintained that Blonigen was “pretty intimidating and I was sorry . . . I brought . . . up” the issue. Tr. 229. She noted that Blonigen’s outburst came after a safety meeting in which the Company encouraged miners to watch out for one another and in which Company officials discussed the proper way to react to safety concerns when they were expressed. *Id.* Later Lucero asked Conner if vans had to honk when they backed up, and Conner told Lucero that it was “courtesy” for light vans, not a requirement. Tr. 231.

THE LAW

The legal principals under which this case must be decided are well known. In order to establish a prima facie case of discrimination under section 105 (c)(1) of the Mine Act, a miner must demonstrate by a preponderance of the evidence “(1) that [the miner] engaged in a protected activity, and (2) that the adverse action of which the miner complains was motivated in any part by the protected activity.”¹⁶ *Sec’y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2

¹⁶ Section 105(c)(1) of the Mine Act provides :

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an

FMSHRC 2786, 2799-2800 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981). Under Section 105(c)(1) safety complaints are specifically mentioned as activity that warrants protection. 30 U.S.C. §820(c)(1) (2006). Generally, an adverse action is an act or omission by the operator that subjects the affected miner to a detriment in his employment relationship or to discipline. *Sec'y of Labor on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842, 1847-1848 (Aug. 1984). Adverse actions include discharge, suspension, demotion, coercive interrogation and harassment over the exercise of protected rights. *Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475, 1478 (Aug. 1982), *aff'd*, 770 F.2d 168 (6th Cir. 1985). They also include the denial of a promotion.

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). The Commission also has noted that while direct evidence of discriminatory motivation is rare, circumstantial evidence of discriminatory intent is not. Circumstantial evidence may include: (1) knowledge of protected activity, (2) hostility or animus toward the protected activity, (3) coincidence in time between the protected activity and the adverse actions and (4) disparate treatment. *Chacon*, 3 FMSHRC at 2510. The more hostility or animus is specifically directed toward the protected activity, the more probative it is of discriminatory intent. *Id.*

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, 825 n.20 (Apr. 1981). The operator may also affirmatively defend by proving by a preponderance of the evidence that he 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.

I conclude that Lucero has failed to establish a prima facie case of discrimination. Therefore, I deny her complaint.

alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to Section 101 or because such miner, representative of miners or applicant for employment 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 because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by the Act. 30 U.S.C. § 815(c)(1) (2006).

PROTECTED ACTIVITY

The parties agree that Lucero complained to Earnest, her step-up supervisor, about the condition of the pit haul road near the end of the shift on the morning of April 17. The also agree that on April 22, she questioned the way the Company, through Earnest, responded to her April 17 complaint. On April 17, her concern was about the hazards posed to herself and others by specific road conditions. On April 22, her concern was about the way Company supervisors responded to employees who reported safety hazards. Both of these concerns directly related to safety, and they were protected. Also, Lucero's December 2 report, of oil on the wires of a haulage truck was protected, as was her June 4 observation about Blonigen's failure to sound the van's horn prior to backing up. Concerns about oil on electrical wires and sounding the van's horn related directly to safety.

In each of these four instances, Lucero established that she engaged in protected activity. The question is whether she suffered adverse action because of the activity, and I find that she did not.

ADVERSE ACTION

I. INCIDENT OF APRIL 17

Although Lucero maintains that Earnest did not address her safety concern about the road, the record indicates otherwise. It supports finding that following her call, Earnest alerted the supervisor of the next shift about the condition of the road and that at the beginning of the next shift the holes in the road were filled and its bed was smoothed. Tr. 75-76, 258, 469-479. This is exactly the kind of functional response the Act envisions when a valid safety complaint is brought to a supervisor's attention.

Lucero's real complaint is that when addressing her on April 17, Earnest did not respond about the substance of her complaint and that the tone of his response was angry. Lucero asserts that as a result she was intimidated and reluctant to again raise a safety concern with a supervisor. Tr. 188. The Commission has recognized that there are situations in which the response of a supervisor to a miner's protected complaint may constitute interference with the exercise of the miner's right to complain. *See Moses v. Whitley Development Corporation*, 4 FMSHRC 1475, 1478-1479 (August, 1982), *aff'd* 770 F.2D 168 (3rd Cir. 1981). The Commission has stated that the question of whether a management official's response constitutes interference proscribed by the Act "must be determined by what is said and done, and by the circumstances surrounding the words and actions." *Secretary on behalf of Mark Gray v. North Star Mining, Inc.*, 27 FMSHRC 1, 8 (January, 2005) (*quoting Moses* at 1479 n.8). The question essentially is whether a reasonable miner in Lucero's position and under the same circumstances would have been reluctant to raise future safety concerns because of Earnest's response. *See Gray*, 27 FMSHRC at 9 (*Quoting American Freightways Co.*, 124 NLRB 146, 147 (1959)). While it is conceivable that a response like Earnest's might in some situations intimidate a complaining reasonable miner, under the particular circumstances of this case, I conclude that it would not.

It is important to emphasize that Earnest's response while an angry one, was not directed at the fact Lucero was reporting a hazard, but rather at the timing of the report. Earnest was getting ready to go home. The shift had been a hard one. It had been raining for days and the condition of the haul road had caused problems. Tr. 121. Now, at the very end of the shift, he was being asked to address the situation. His comment, "Oh, I suppose it just happened," and the angry tone of his voice, reflected his exasperation at the timing of the report. Tr.185-186. But what he did not say is telling. He did not disagree with Lucero's assessment of the hazard. He did not refuse to address the condition. He did not threaten Lucero for raising a valid concern. He simply got "growly" (Tr. 91) and essentially questioned why she raised the issue so late in the shift. He also, all be it unbeknownst to Lucero at the time, addressed the issue so that the hazard was eliminated at the start of the next shift and the haul road never had to be closed. Tr. 76-77, 112, 258. I find that under these circumstances, a reasonable miner in Lucero's position would have understood Earnest's comment and his tone to be directed at the timing of the complaint.

While the record is void of direct evidence on the question, it is reasonable to infer that Lucero became aware the safety issue she raised had been addressed when she next returned to work on April 20 and April 21, 2009. Since closing the road meant shutting down the pit, the record supports finding that the subject road was the primary haul road, and perhaps the only haul road, into and out of the pit. The record also supports finding that at the time, Lucero was primarily operating a haulage truck. I infer from this that either Lucero traveled the road on April 20 and April 21 and therefore knew the road's defects had been remedied, or that one of her co-workers told her the holes had been filled and the road bed smoothed. If this were not the case, it would have been reasonable for Lucero to inquire about the road on April 20 or April 21 during the pre-shift meetings with her crew, which she did not. Tr. 259-260, 342, 481.

In concluding that a reasonable miner in Lucero's situation would not have been intimidated by Earnest's response, I also, find it important that there is no evidence in the record the Company has a history of ignoring safety complaints and retaliating against miners who make them. If Lucero established such a history, her professed intimidation might have appear more reasonable. However, rather that a history of hostility, the record supports finding that Powder River made efforts to be responsive to Lucero's concerns. Its desire to respond is why the second meeting on April 22 was convened.

In addition, Lucero, despite her claimed reluctance to again raise safety concerns (Tr. 188), was far from shy about speaking up at the safety stand down meeting on April 22. Tr. 343. More than that, at the second meeting on April 22, she assured Blonigen that she would continue to raise such concerns. Tr. 193. Lucero stated, "Jim [Blonigen] stated that he was concerned that . . . I wouldn't report things, and he wanted to make sure that I felt secure in reporting. And he was encouraging me to report more unsafe conditions, and I assured him that I would." Tr. 193.

Lucero was as good as her word. The record shows that following the April meetings, on June 11, 2009, December 2, 2009 and June 4, 2010, Lucero continued to raise concerns and Powder River responded to them.

For all of these reasons I conclude that a reasonable miner in Lucero's circumstances would not have been deterred from raising future safety concerns by Earnest's April 17 response. Moreover, I find that in fact, Lucero was not so intimidated. Therefore, I conclude Earnest's April 17 response did not constitute an adverse action and that Lucero has failed to establish a *prima facie* case of discrimination with regard to it.

Of course, I recognize that it would have been far preferable for Earnest to address the substance of her concern on April 17, but his failure to do so does not under the particular circumstances of this case constitute an adverse action. Moreover, while a professional, courteous response would also have been desirable, as will be noted later in this decision, the Act does not necessarily protect a miner from a supervisor's ill-tempered, even angry retorts.

II. MEETINGS OF APRIL 22

At the first meeting, on April 22, Lucero raised the issue of Earnest's "growly" reply of April 17. She did so in response to management's question about whether miners had safety-related concerns. She asked what miners were supposed to do if they brought a safety concern to a supervisor and the supervisor ignored and/or chastised the miner. Tr. 71; Tr. 343. Blonigen believed that after Lucero asked her question Curtis asked her to whom she was referring, and she replied Scott Earnest. Tr. 344. Earnest then yelled, "It was 6:00 [a.m.]" (Tr. 190) and Davis interjected that safety was a matter of opinion. Tr. 191, 455.

I have found that Lucero's inquiry was protected, but I do not view Earnest's gratuitous statement that "It was 6:00 [a.m.]" as constituting an adverse action. Tr. 190, 260. If anything, the statement makes even more clear the fact that Earnest's response on April 17 was motivated by the timing of Lucero's report, not by hostility to its substance, something a reasonable miner would have apprehended. In addition, although Lucero believed that Davis's observation that safety was a matter of opinion would "inhibit [her] and anyone else from bring up safety concerns," her belief was not well founded. Tr. 191, *see also* Tr. 262. On the contrary, I find that in the context of the meeting, a logical interpretation of Davis's statement is that he was simply expressing the truism that a supervisor must evaluate whether a safety concern is reasonable given all the circumstances. *See* Tr. 262, 455. Davis's observation would not have inhibited a reasonable miner under similar circumstances. As cases that arise under the Mine Act repeatedly show, what is or is not safe often is a "matter of opinion," and reasonable minds can, and frequently do, differ. Further, and as already noted, the comment did not, in fact, inhibit Lucero from raising subsequent concerns.

For these reasons I find that Lucero did not suffer an adverse action as result of the events that occurred in the first meeting on April 22.

In addition, I find nothing in the second meeting on April 22 constituted an adverse action on the Company's part. Unlike Earnest's response on April 17, on April 22 management officials moved quickly to address the substance of Lucero's concern in a manner that would have satisfied a reasonable miner. They immediately convening the second meeting. Tr. 192, 482. They agreed with Lucero that Earnest's April 17 response was inappropriate, and they directed Earnest to apologize, which Earnest did. More than that, Blonigen expressly stated that he was concerned that Ms. Lucero

would feel reluctant to report safety issues. Tr. 193. He wanted to make sure she felt “secure in reporting.” *Id.* Lucero testified she told Blonigen that she would continue to raise concerns. Tr. 193. Her response was the response of a reasonable miner. The facts do not demonstrate that Lucero was intimidated by the statements made at the meeting nor would a reasonable miner in Lucero’s position be intimidated by the statements. Accordingly, I find no adverse action was suffered by Lucero as a result of remarks made at the second meeting.

III. OIL ON THE WIRES INCIDENT OF DECEMBER 2, 2009

On December 2, 2009, Lucero observed oil on a haul truck’s electrical wires. Tr. 222. Lucero reported the problem to Blonigen over the radio. In so doing, she engaged in protected activity. Blonigen responded angrily that she would have to wait until he could come to the scene and look at the truck. Tr. 222. Although Blonigen testified that he did not recall the incident in any detail (Tr. 389), I accept Lucero’s testimony that he came to the site, looked at the truck’s wires and told her to take the truck to the maintenance shop where the mechanics could look at it. Tr. 222-223. Lucero did this and the truck was taken out of service. Tr. 224.

I do not find that Ms. Lucero suffered any adverse action as a result of her reported safety concern. Blonigen responded to her complaint by taking timely action to correct the problem. Lucero credibly testified that Blonigen was angry when she spoke with him over the radio. Tr. 222. However, he also responded in a fashion that squarely addressed her concern. Tr. 222-223. Moreover, because he responded by addressing her concern, his angry response prior to arriving on the scene would not have reasonably hindered Lucero or other miners from reporting future safety concerns.

IV. BACK UP INCIDENT OF JUNE 4, 2010

On June 4, 2010, Lucero asked whether Blonigen, who was driving a Company van in which Lucero and other miners were riding, should have honked before he backed up. Tr. 131. Blonigen responded that honking was not required because the van was a light duty vehicle. Tr. 229. Lucero testified that in making his response Blonigen “screamed and yelled.” *Id.* However, miner Jody Sisson, who was a passenger in the van, stated that Blonigen, “just spoke up”. Tr. 140. Conner later told Lucero that honking before backing up a light van was a courtesy, not a requirement. Tr. 231.

I find that Lucero did not experience an adverse action due to Blonigen’s response. Blonigen addressed Lucero’s protected concern with information that was corroborated by Conner. Lucero did not like how he did it. She testified that she felt “pretty intimidat[ed].” Tr. 229. Although I find it more probable than not that Blonigen in fact yelled at Lucero, the fact he raised his voice in response to her valid, but misinformed safety concern, should not have intimidated Lucero and would not have intimidated a similarly situated reasonable miner from engaging in future protected activity. Mining is a rough business in which the “niceties” of work place communication are frequently honored in the breach. The Mine Act is not so fastidious as to per se outlaw an angry outburst by a supervisor who is responding to a valid, but misinformed safety complaint.

V. DENIAL OF ADVANCEMENT

_____ Lucero established that following her protected activities of April 17 and April 22 she was denied advancement to B-Tech.¹⁷ Clearly, Lucero suffered an adverse action when she was denied a promotion. I conclude, however, that Ms. Lucero did not establish that the Company's failure to advance her was motivated by her protected activities and therefore did not establish a *prima facie* case of discrimination in this regard. *Pasula*, 2 FMSHRC at 2799-2800. Rather, I find that she was not promoted until December 13, 2009, because she did not until then consistently exercise the skills required for advancement.

Lucero began working at the mine on March 10, 2008. Tr. 232. As Moore explained, Lucero, like all other employees, was hired as a "production tech". Tr. 509-511. Under the Company's "Technician Concept" policy, Lucero, became eligible for advancement upon the completion of her first 360 hours of work, that is on May 10, 2008. Tr. 512-513, 515. Blonigen recommended her for advancement on June 18, 2008 [¹⁸], and she was advanced effective May 10, 2008. Tr. 298; Tr. 534, 536. Under the Company's personnel policy, May 10, 2008, became Lucero's "placement date." Tr. 45, 51-52, 95. Under the same policy, Lucero became eligible for advancement to B-Tech one year from her placement date, May 10, 2009. Tr. 29, 233; Resp't. Ex. 11. Lucero was not advanced on or effective that date, and the reason is clear. In July 2008, Lucero was involved in an accident for which she was held to be at fault. Tr. 293-294. When an "at fault" accident happens to an employee, Company policy is to hold up any advancement recommended for the employee for a corrective period. In her case, Lucero had a 90-day hold placed on her advancement, which means that even if she had been recommended for advancement, she would not have been advanced until August 10, 2009. Tr. 301-302, 310; Tr. 539-540.

In fact, however, Lucero was not recommended for advancement on or effective May 10. Rather than finding her failure to advance was caused by her safety concerns of April 17 and April 22, I find that her lack of advancement was caused by her supervisors' conclusion that she did not consistently exhibit the skills necessary to advance. This was Blonigen's consistent testimony, and it was credible. It also was the credible testimony of Moore. Tr. 538.

The record further reveals that Blonigen, realizing that Lucero did not fully trust him to give her an honest evaluation, sought to shield himself from charges of bias by having an "outside" person help him evaluate Lucero's skills. Conner was asked to do the job. Tr. 407-408; 416. I accept Conner's testimony that there was nothing out of the ordinary in what she was asked to do and that she did such evaluations for supervisors five or six times a year. Tr. 409. There is no basis in the record to conclude that Conner evaluated Lucero in anything other than an objective, fair way.

¹⁷ Lucero does not assert that her protected activity of December 2, 2009 played a part in her failure to advance.

¹⁸ I find nothing contrary to the Mine Act in the fact that decisions regarding Ms. Lucero's advancement were made on dates later than those on which she became eligible to advance. I accept Blonigen's common sense testimony that evaluations for advancement are frequently delayed for any number of more important business reasons. Tr. 296.

The evidence fully supports finding that Conner's May and August 2009 evaluations of Lucero were solely motivated by her assessment of Lucero's performance. Lucero was trying to qualify for B-Tech on an RTD. Conner was knowledgeable in the proper operation of RTDs. She watched Lucero perform her assigned tasks. Tr.416- 417, 440. Based on what she observed, Conner found that Lucero did not display the skills necessary for advancement. Tr. 412-412, 419, 435-436; Resp't. Ex. 13 at 13. Blonigen accepted Conner's analysis of Lucero's performance, and denied Lucero a promotion to B-Tech. Tr. 321-322, 326.

From all that appears on the record I find that Blonigen based his denial of advancement on Conner's evaluation, and I accept as a fact that when Lucero was not recommended for advancement in August 2009, it was because Lucero needed to improve her skills when operating an RTD, just as Conner found and just as Conner testified. Tr. 412-413; Resp't. Ex. 13 at 13. In short, I conclude that the Company's failure to advance Lucero in August 2009 was motivated by Lucero's job performance, not by her protected activity of the previous April.

Of course, Lucero believed Conner's evaluations and Blonigen's decision not to recommend her for promotion were motivated by the Company's hostility to her expressions of her reported safety concerns. *See e.g.*, Tr. 235-236. However, I detect almost nothing in the evaluations and Blonigen's failure to recommend her that supports her suspicion.¹⁹

In fact, the record leads to the conclusion that Company officials went out of their way to help Lucero succeed by offering her additional training and even, later in the year, by offering her the opportunity for a "fresh start." In October 2009, the Company presented Lucero with a plan – the "action plan" – to help improve her skills on the RTD and to advance. Resp't. Ex. 15; Tr. 329-330; 489-491, 560-561. In addition, in early December Company officials offered her the opportunity to change work crews and supervisors. Tr. 221; Tr. 463-464, 569.

Lucero was next eligible to advance on November 10, 2009. Tr. 245, Tr. 328. Again, Blonigen asked Conner to evaluate Lucero, which Conner apparently did either late in November or in early December. (Conner completed the check list on which she recommended Lucero for advancement on December 3. Resp't. Ex. 16, Tr. 334-336, 437-439.) I accept the credible testimony of Blonigen that Lucero was not fully evaluated until December because Lucero was out of work in early November and because of difficulties in coordinating Lucero's and Conner's schedules. Resp't. Ex. 19; Tr. 336-340. Nothing supports finding that the delay was intended to punish Lucero for her protected activity.

¹⁹ While Conner's August finding that Lucero "consistently exceeded" in her performance of four less tasks than in May could be interpreted as inconsistent with Conner's May finding and hence as evidence that the August evaluation was skewed against Lucero (*see* Tr. 204), it could equally be interpreted as simply reflecting the state of Lucero's performance at the times Conner watched Lucero work. For this reason and because there is nothing else in the record that supports it, I reject Lucero's argument that the two evaluations are evidence the evaluation process was "bogus." Tr. 204.

Moreover, I accept as a fact that on December 3, 2009, Conner found that Lucero consistently exceeded in her performance of the skills required to advance to B-Tech and that based on Conner's assessment, on December 10, 2009, Blonigen recommended Lucero be promoted. Tr. 250, 336, 439; Resp't. Ex. 16. She was, in fact advanced to B-Tech on December 12, when Blonigen's supervisor, Curtis concurred with Conner's and Blonigen's recommendation. Tr. 500; Resp't. Ex. 16 at 19. She was advised of her promotion on December 13. Her December advancement is not surprising. Since August, Lucero had acquired additional experience and received additional training. It is reasonable to assume that with her added experience and training her skills in fact improved, just as Conner found. Tr. 439.

Nor do I find that the Company's motives in denying Lucero advancement until December 12, 2009 are made suspect by the fact that Lucero filed a discrimination complaint with MSHA on December 8, 2009. In fact, Lucero filed her complaint with MSHA five days after Conner found that Lucero should be advanced. Resp't. Ex. 16 at 22. While it is true that Blonigen recommended Lucero for advancement on December 10, this was a day before a copy of the complaint was received in the Company's Gillette office.

Curtis credibly testified he did not know of Lucero's complaint when he concurred with Blonigen's recommendation, and there is no evidence in the record to establish that the copy received in Gillette on December 11 reached the mine or was otherwise brought to Curtis's attention before that date. However, even if Curtis knew of Lucero's complaint when he agreed to her promotion on December 12, I would not find his knowledge to cast significant doubt on why Powder River advanced Lucero. Curtis's approval of her advancement was based on his acceptance of Conner's and Blonigen's recommendations. The recommendations were made before the complaint copy reached the mine's Gillette office, and it was upper management's practice to accept the promotion recommendations of immediate supervisors and evaluators.

ORDER

Having concluded that Lucero has not established that she was unlawfully discriminated against, **DISMISS** this her complaint and this proceeding.

David F. Barbour
Administrative Law Judge

Distribution: (Certified Mail)

Kristin R. B. White, Esq.; Karen L. Johnston, Esq., Jackson Kelly PLLC, 1099 18th Street, Suite 2150, Denver, CO 80202

Susan Lucero, 2301 South Emerson Avenue, Apt. #3, Gillette, WY 82718

/sa