

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 25, 2003

HAZEL OLSON,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 2002-443-D
	:	DENV CD 2001-23
	:	
v.	:	Mine I.D. 48-00977
	:	
ARCH MINERAL COMPANY	:	Black Thunder Mine
THUNDER BASIN COAL CO., LLC,	:	
Respondent	:	

DECISION

Appearances: Margaret A. Miller, Esq., Boulder, Colorado, for Complainant;
Laura E. Beverage, Esq., Jackson Kelly, PLLC, Denver, Colorado,
for Respondent.

Before: Judge Manning

This case is before me on a complaint of discrimination brought by Hazel Olson against Thunder Basin Coal Company, a division of Arch Mineral Company (“Thunder Basin”), under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(3) (the “Mine Act”). Ms. Olson alleges that Thunder Basin terminated her from her temporary position at the Black Thunder Mine after management discovered that she had filed safety complaints with Department of Labor’s Mine Safety and Health Administration (“MSHA”) when she was employed by another mine operator and after she complained to Thunder Basin’s safety director about conditions in the pit. An evidentiary hearing was held in Gillette, Wyoming.

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

Thunder Basin operates the Black Thunder Mine, an open pit coal mine, in Campbell County, Wyoming. In August 2001, Thunder Basin employed about 575 individuals. The mine covered about 600 acres and had six active pits. Although Thunder Basin employs its own miners, it also obtains workers through a temporary employment agency. When a position needs to be filled, Jack Kasper, the human resources manager, hires and replaces temporary employees through Adecco, a large world-wide employment agency. (Tr. 236). Adecco screens the applicants and sends one individual for each open position. Ms. Olson

started working at the Black Thunder Mine on August 27, 2001 as an employee of Adecco. She was not on Thunder Basin's payroll but was a temporary contract worker who was paid on an hourly basis by Adecco. She was terminated from her temporary position by Thunder Basin on August 28, 2001.

Ms. Olson previously worked as a miner at the Jacobs Ranch Mine for almost 20 years. (Tr. 16-17). That mine was initially owned by Kerr-McGee but was subsequently bought by Kennecott Energy. Jacobs Ranch is also in Campbell County, Wyoming. At Jacobs Ranch, Olson started out as a laborer but eventually became a truck driver. She drove large, off-road haul trucks and other heavy equipment. Olson was terminated from her employment at Jacobs Ranch on December 4, 1999. Ms. Olson filed a discrimination complaint against Jacobs Ranch Coal Company on February 16, 2001, as a result of her December 4, 1999, termination. When the Secretary determined that Jacobs Ranch did not discriminate against her, she brought an action on her own behalf. By order dated January 14, 2003, I dismissed Olson's complaint of discrimination because it was not timely filed. 25 FMSHRC 9 (Jan. 2003).¹

Ms. Olson applied for work at several temporary employment agencies. Olson went to these employment agencies because she believed that it was the best way to get back into the mining industry as a heavy equipment operator. (Tr. 18). At Adecco, Olson worked with Christina Gilbert, who is the Gillette office supervisor and account representative.² (Tr. 152). Gilbert referred Olson to a temporary position with Washington Group International, a contractor that was removing top soil at the Black Thunder Mine. Olson took the position driving 100-ton Caterpillar trucks. That position lasted about one month. Olson received another referral from Adecco, but she did not take it because she would have had to start the next work day. Ms. Olson's husband has paralysis on his left side as a result of a stroke and Olson has to make arrangements for his care when she is working.

Ms. Gilbert called Olson about a Thunder Basin truck driver position in August 2001. Olson told Gilbert that she was interested. Olson testified that Gilbert told her that although the Thunder Basin job was temporary, it did not have a specific end date. (Tr. 24, 28). Olson referred to the position as a "long-term temporary" job. *Id.* Gilbert testified that the position had no time limit and that it could have lasted only a week or lasted a long period of time. (Tr. 160). Kasper testified that, in any event, it is Thunder Basin's policy to terminate temporary employees after one year of employment. (Tr. 263-64). It was Olson's understanding that Thunder Basin frequently hires a skilled "long-term temporary" worker when it is looking for a permanent employee with the same skills. (Tr. 25). Olson passed the required drug test and reported for work at 6:30 a.m. on Monday, August 27, 2001, at the

¹ The Commission did not grant Olson's petition for discretionary review. The case is currently pending before the United States Court of Appeals for the Tenth Circuit, Case No. 03-9528.

² The other witnesses and the parties often referred to Ms. Gilbert by her maiden name, Chrissi Edwards.

Black Thunder Mine. Olson lives east of Newcastle, Wyoming, near the South Dakota border. It took her about one hour and ten minutes to drive the 73 miles to the mine, which is east of Wright, Wyoming, along Wyoming Route 450. (Tr. 29).

When Olson arrived at the mine office she was a little early because the shift starts at 7 a.m. Kasper talked to her for a moment while she was waiting. Olson testified that when she told Kasper that she had worked at the Jacobs Ranch Mine for about 19 years, he seemed a little surprised.

(Tr. 30). When she was asked why she had left Jacobs Ranch, she told him that “they kind of asked me to leave.” *Id.* Kasper testified that when he asked Olson why she left, she said that her leaving Jacobs Ranch was “kind of a mutual agreement.” (Tr. 239). Kasper testified that he did not contact anyone at Jacobs Ranch about Olson. *Id.* He found her demeanor that morning to be curt and cold, so he offered her coffee and left her alone until the start of the shift. *Id.*

James “Marty” Martens, the safety director at the mine, had her attend safety training with five other people who had reported to work for the first time that day. (Tr. 36; Ex. C-1). Some of these trainees were temporary employees and others were new permanent Thunder Basin employees. (Tr. 32-33). This training consisted of lectures, a review of the company’s safety handbook, and videos. Olson testified that Martens told her that after the trainees took a tour of the mine, she probably would be assigned to ride with a truck driver in the afternoon and, “depending on what that driver said,” she might get to drive a truck later that day or the next day. (Tr. 37-38).

The group went on a lengthy tour of the mine in the late morning. Olson sat in the front seat of the van during the tour and talked to Martens. She was the only trainee who would be operating heavy equipment in the pit so she asked a lot of questions about the work site and safety in the pit. (Tr. 41-42). At one point when the van bounced through a rough spot in the roadway, she asked him if the mine had a blade because the “the roads feel like downtown Bagdad ten years ago.”

(Tr. 43). As they entered the pit where Olson would be working she saw the highwall for the first time. Olson testified that the highwall was “really tall.” (Tr. 44). At that point, Olson testified that she said:

Gosh, look at that highwall, Marty. Look at the water running out of it. Do you guys have any major sloughs, do you guys have any highwall failures?

Id. Olson testified that Martens replied that there had been highwall failures at this particular pit and that a shovel was buried not too long ago. *Id.* She also testified that Martens told her that “some of the older hands call this Death Valley.” (Tr. 45). Olson testified that she would not have felt “very comfortable” working near this highwall because the bench on which the haul trucks travel was narrow and the trucks had to “run right at the toe of this sheer wall.”

(Tr. 47). Olson did not tell Martens or anyone else at Thunder Basin that she did not want to work around that highwall. (Tr. 101-02).

During the final part of this tour, Olson switched places with someone at the back of the van who was getting motion sickness. She sat next to Jim Lewis, who was being hired as a permanent Thunder Basin employee. Olson started talking to Lewis who told her that he was on the C crew. Olson did not know what crew she was assigned, so after the tour she went to the payroll office to find out her crew assignment. She talked to Penny Spidle, the pit operations clerk, who told her that she was on the A crew. Lewis had suggested that Olson try to get on the C crew so that they could commute together from Newcastle. (Tr. 55, 198). According to Olson, she asked Ms. Spidle if there were any openings in the C crew because she knew someone on the C crew who drives by her house on the way to work. (Tr. 58). Olson testified that she was told that there were no openings for drivers on the C crew. Olson testified that in response she said, "okay," and then asked if she could have the names of people on the A crew who live in Newcastle. She was told that the company did not have such a list. Olson testified that she told Ms. Spidle that "I'll be able to find somebody that I can car pool with on the A crew." (Tr. 59). Ms. Olson testified that her demeanor was normal and that she was not rude or demanding. (Tr. 59-60). Olson testified that Spidle had a sarcastic tone when talking to her.

Ms. Spidle testified that Olson was insistent that she be assigned to the C crew. (Tr. 224). Spidle felt that Olson did not want to be on her assigned crew. (Tr. 225). According to Spidle, Olson suggested that someone from the C crew be transferred to the A crew so she could go on the C crew. (Tr. 228-29). Olson denies that she ever made this suggestion. (Tr. 111).

When her lunch break was over, Olson returned to the training room. Nobody else was there and she looked at the work schedule that she had been given. It showed that the A crew worked nights that week.³ Olson went back to Spidle to ask when she should report to work the next day. Spidle told her that she did not know but "surely they don't want you coming out on nights." (Tr. 61). Spidle told Olson that she would find out and let her know. Soon after Olson returned to the training room, Tom Skinner of the safety department came in. When she asked him the same question, he went to get Frank Meyers, a shifter for the truck crew.⁴ Olson told Meyers that she used to drive trucks at Jacobs Ranch. Olson asked Meyers whether she should report to work for the day shift or night shift the next day. Olson also asked Meyers, "When am I going to go out and drive?" (Tr. 65). Olson testified that he responded by saying that Thunder Basin has to "make sure you are trained" and that the company "can't just take your word for it." (Tr. 65). Meyers asked her what kind of trucks she had driven at Jacobs Ranch and after she answered, he left to talk to Spidle. A little later

³ The three crews rotate shifts on an established schedule.

⁴ A "shifter" is a front line supervisor.

Skinner returned to the safety room and told her that she should plan on working day shift the remainder of the week for training. (Tr. 64-65). Olson spent the rest of the shift on August 27 watching safety and truck videos. Olson testified that she was “puzzled” by Skinner’s statement because she thought she would be riding in trucks that afternoon. (Tr. 67). Before her tour of the pit, Olson had signed MSHA’s certificate of training which showed that she had completed experienced miner training. (Tr. 69; Ex. C-4).

Spidle stated that Olson came back into the payroll office sometime that afternoon and said that she was finished with her training and was ready to go on a truck. (Tr. 226). Spidle directed her to Meyers, who happened to be in the office. Spidle overheard Meyers tell Olson that she had to first complete her training before she could get into a truck and that the trainer would decide when that would occur.⁵ (Tr. 227). Spidle testified that Olson came across as a “very self-confident, self-assured person.” *Id.*

On Tuesday, August 28, 2001, Olson got into her son’s truck to go to work. She testified that she left for work at about 5:20 a.m. (Tr. 95). She did not take her Tahoe because it was easier for her husband to get into that vehicle. About five miles from home, before she traveled through Newcastle, she got a flat tire. (Tr. 71). She jacked up the truck and took off the flat tire before she discovered that the spare tire on the truck was also flat. Olson testified that she did not have her cell phone with her so she walked across the countryside to her house. When she got home, she called Mr. Martens at the Black Thunder Mine. She testified that she made this call at about 7:45 a.m. (Tr. 76; Ex. C-5). After she explained what had happened, he transferred her to Mr. Kasper. She told Kasper that it would take her about an hour and fifteen minutes to get to the mine. Kasper responded that he had already called Adecco to get a replacement for her. (Tr. 75). Olson responded by saying that she would make up the time by staying late that day. Olson testified that Kasper then told her “No, the day is screwed up anyway” and that she “wasn’t really satisfied being on that A crew anyway.” *Id.* Olson responded that she did not have any problem with the A crew and that she only asked for the C crew because she knew someone on that crew who lived nearby. Kasper told her that Adecco was already sending someone else out to drive trucks on the A crew. (Tr. 76, 91).

Kasper testified that Olson called him about the flat tire at about 10:00 a.m. on August 28, not at 7:45 a.m. (Tr. 248). He denied that he talked to Olson any earlier that day. (Tr. 249). He testified that Olson asked if she should come in that day or wait until August 29 to return to work. (Tr. 248). Kasper told her that he had already requested a replacement from Adecco. He testified that he had called Adecco at about 9:30 a.m. (Tr. 258). Kasper testified that he told Olson that she was not happy with her crew assignment and that she was late for

⁵ At the hearing, witnesses testified about participating in or overhearing conversations. In several instances, the testimony conflicts as to where these conversations took place or as to who initiated these conversations. I attribute these conflicts to the fading of memories and I do not draw any inferences from these conflicts.

work. *Id.* He testified that he has replaced other temporary workers because they failed to report off, failed to show up for work, and for behavior problems. (Tr. 251, 276).

Spidle testified that on the morning of August 28, Martens came to her and told her that the temporary employee had not shown up for work that day. (Tr. 228). It is Spidle's responsibility to "keep the crews up" and to get a replacement if someone is not there. *Id.* She called Kasper at about 7:30 a.m. to advise him that the temporary employee did not show up for work that day. (Tr. 229). She also told Kasper that Olson had tried to change crews on her first day at work. She told Kasper that "maybe she was unhappy that she didn't get that crew and didn't come back." *Id.*

Kasper testified that at about 7:20 a.m. on August 28, 2001, Martens asked him where the temporary employee was. (Tr. 244). Kasper replied that he did not know, but that he would try to find out. When he asked Ms. Spidle about Olson, she replied that she did not know. Spidle also told Kasper that Olson wanted to change crews and that when she was told that she had to stay on her assigned crew, "she was very persistent and negative." (Tr. 245). Kasper talked to Martens again. Martens told Kasper that he felt that Olson had a negative attitude about her crew assignment and that "she was not going to accept it." (Tr. 245-46). Kasper also talked to Meyers who told Kasper that Olson "felt that she had all the training she needed and she wanted to go to work." (Tr. 247). Meyers told Kasper that when he told her that she had not completed her training, Olson responded by saying that with her 18 years of experience she did not need any more training. *Id.* Based on these conversations, Kasper concluded that Olson "was going to be a problem employee, and that she was not wanting to accept directions from her supervisor." *Id.* Kasper testified that he based this conclusion on the information he obtained from Spidle and Martens concerning her persistent demand that she be transferred to the C crew and the fact that she did not seem to want to complete the company's training program. Kasper testified that Martens did not speak to him about Olson's comments during her mine tour. (Tr. 255). Kasper also testified that he was not aware that Olson had raised any safety concerns on August 27, 2001, or that she had previously filed complaints under sections 105(c) and 103 of the Mine Act against Jacobs Ranch Coal Company. (Tr. 250).

Kasper keeps a record in his computer of all temporary employees who work at the mine. (Tr. 251-52, 261; Ex. C-6). This exhibit states that Ms. Olson's employment at the Black Thunder Mine ended on August 28, 2001, because she was "late and expressed a bad attitude about the crew she was assigned." (Tr. 90-91; Ex. C-6).

A new temporary haul truck driver is typically in classroom training about three days. (Tr. 237-38, 254, 265). It would be rare for someone to be put into a truck the first day at work. (Tr. 253). After the classroom training is completed, the trainee rides in a truck with an experienced driver and then the trainee drives the truck with the experienced driver in the passenger seat. The trainee is not assigned her own truck until the trainer is comfortable that

she can handle the haul truck. (Tr. 238). All training is conducted on the day shift. The A crew worked the night shift the week of August 27, 2001.

Thunder Basin fills open permanent positions by posting them for ten days. (Tr. 240, 252-53). A temporary employee must bid on the job to be considered for the position. Thunder Basin often hires temporary employees to fill open positions. (Ex. C-6). Temporary positions are not for any specific term. On August 27, 2001, Thunder Basin needed a temporary haul truck driver on the A crew, but there was no opening for a haul truck driver on the C crew. (Tr. 241).

After Olson was told that she had been replaced at the mine by someone else, she called Judy Peters of MSHA. Peters is a senior special investigator in Denver. She told Peters that she believes she was replaced because she complained about the highwall. On Wednesday, August 29, 2001, Olson had another phone conversation with Peters about the highwall. During this call, Peters asked her a lot of questions about the condition of the highwall on August 27. Olson subsequently learned that a portion of the highwall that she complained about failed on August 29. (Tr. 84; Exs. C-2 & C-3).

Olson had talked to Ms. Peters before August 27, 2001. Olson was familiar with Ms. Peters because Olson had filed four section 105(c) discrimination complaints against Jacobs Ranch. Olson's most recent conversation with her occurred after Adecco told Olson about the Thunder Basin opening. Olson told Peters that she was concerned whether it "was really a true job offer or if it was just a setup, somebody trying to set me up." (Tr. 109). She was concerned that she "would go out there and then have 15, 20 people lie about me. . . ." *Id.* She based her concern on the fact that it has happened in the past, "people lying about me and making me look like a liar." *Id.* Peters told her to take the position and keep a positive attitude.

II. DISCUSSION WITH FURTHER FINDINGS AND CONCLUSIONS OF LAW

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners "to play an active part in the enforcement of the [Mine] Act" recognizing that, "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 181, 95th Cong., 1st Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 623 (1978). "Whenever protected activity is in any manner a contributing factor to the retaliatory conduct, a finding of discrimination should be made." *Id.* at 624.

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

A. Protected Activity

Olson engaged in protected activity on several occasions. On August 8, 1994, she filed a complaint under section 103(g) of the Mine Act at the Jacobs Ranch Mine. 25 FMSHRC 9. She also filed four section 105(c) complaints at Jacobs Ranch, one dated October 5, 1994, one dated May 25, 1995, one dated June 4, 1999, and another dated February 16, 2001. In addition, Ms. Olson complained or at least commented about safety conditions at the Black Thunder Mine during her tour on August 27, 2001. In her complaint of discrimination in this case, Olson merely states "I feel I have been discriminated against because of 103s & 105s in the past and safety complaints." I construe her complaint to include all of the complaints discussed above. I find that Olson established that she engaged in protected activity.

B. Adverse action

In determining whether a mine operator's adverse action is motivated by the miner's protected activity, the judge must bear in mind 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 (November 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir 1983). "Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence." *Id.* (citation omitted). In *Chacon*, the Commission listed some of the more common circumstantial indicia of discriminatory intent: (1) knowledge of the protected activity; (2) hostility or animus toward the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. *See also Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 530 (April 1991).

1. Summary of the Parties' Arguments

Olson contends that after the mine tour, Skinner and Martens went into the mine office for about 30 minutes and everything changed for her from that point on. Olson argues that Martens, who was not called to testify, concluded that Olson had complained about safety conditions too much during the tour. As a consequence, she was not trained by an experienced truck driver that afternoon but was told to watch videos. Although Thunder Basin's witnesses stressed the fact that she kept asking to be transferred to the C crew, it was the fact that she complained about the conditions in the pit that drove Thunder Basin to begin treating her differently after lunch. She points to the fact that none of the other new employees watched videos that afternoon and that Martens never came back to see her after the tour.

Olson characterizes Kasper's concern about her tardiness on August 28 and her request to change crews as a pretext for firing her for protected activity. Her version of the facts is supported by her telephone bill which shows that she called the mine at 7:46 a.m. that morning. (Ex. C-5). Her telephone bill also supports her conversations with Ms. Peters. Thus, it is clear that Kasper talked to Olson at 7:46 a.m. and then subsequently talked to Ms. Gilbert at Adecco.

Olson also relies on Ex. C-6 which shows that the mine hired Travis Elliot as a temporary haul truck driver on September 1, 2001, for the C shift. Mr. Elliot was in that position for a full year, a position that Olson would have had if she had not complained about safety.

Thunder Basin argues that Olson was memorable in the minds of the people who met her that first day at work because of the way she came across. Olson was concerned that she was being set up and that is the attitude she carried with her to work on August 27. At best Olson was very aggressive in demanding that she be transferred to the C shift and in insisting that she did not need any more training. It was rather arrogant and unusual for a temporary employee to make such demands on her first day of work.

Thunder Basin also maintains that there was no change in the company's attitude toward Olson in the afternoon of August 27. New employees do not ride in or drive trucks on the first day of work. Skinner, her trainer, was new at the job, so any uncertainty he might have displayed was a result of his inexperience, not any hesitation toward Olson as a temporary haul truck driver. Thunder Basin provides new truck drivers with more extensive training than MSHA requires.

When Olson talked about the highwall at the mine, Martens' demeanor was not hostile. In fact, he noted that some employees call the area "Death Valley." When she complained about the condition of the roadways, Martens merely grinned. There was no showing of hostility to her comments. In addition, Kasper credibly testified that he did not call the Jacobs

Ranch mine when he learned that she had worked there. He had no knowledge of her prior safety complaints.

There can be no dispute that Olson did not show up for work on August 28. Whether she called the mine at 7:46 a.m. or 10:00 a.m. is not crucial. Until she called, management assumed that Olson did not show up because she was dissatisfied with her crew assignment. Thunder Basin had already told Ms. Gilbert to select another driver when Olson called. There is nothing in the record to link Olson's safety complaints with management's decision to hire another temporary driver.

2. Analysis of the Case

The resolution of this case depends entirely on an examination of the evidence and an analysis of the motivation of management. As stated above, "direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." *Chacon*, 3 FMSHRC at 2510. I discuss below the key facts upon which I base my conclusion that Thunder Basin did not discriminate against Hazel Olson.

a. Change in Attitude Toward Olson - August 27, 2001

One of the key elements in Olson's case is that management's attitude about her changed in the afternoon of August 27 once the company learned about her protected activities. Olson maintains that I should infer, from indirect or circumstantial evidence, that Thunder Basin's hostile reaction to her safety activities was a contributing factor in her termination on August 28. The safety activities include Olson's complaints about the conditions in the mine during her tour and her previous safety complaints at Jacobs Ranch. A change in the company's treatment of Ms. Olson that afternoon would help support her contention that her termination was motivated, at least in part, by her protected activity.

Olson testified that Martens indicated during her training on the morning of August 17 that she would probably be going out in a truck that first day of work. Olson testified that he told the man who would be delivering propane to the mine that after the tour "you'll probably be done for the day." (Tr. 37). She testified that Martens told the woman who was being hired to work in the lab that she would be done after the mine tour. (Tr. 37). Olson testified that Martens then told her: "after lunch . . . I would probably be put on a truck with . . . another driver out there and I would ride around with that driver. . . ." *Id.* During the tour, Olson testified that she kept asking questions like, "how am I going to know which pit to go to?" and "how am I going to know where [the] crushers are at?" (Tr. 40). Olson testified that in response, Martens said that he would show her where everything is during the tour. Consequently, Olson had a strong impression that she would be in a truck later that very afternoon.

During the tour, Olson made numerous comments about the conditions in the mine. In addition to her comments about the highwall and the roadways, she asked questions about safety procedures. During her morning training session she was taught to obey all traffic signals at the mine. During the mine tour, Martens told her that if the project manager just sees you waiting at a red light, “he’ll motion for you to come on through even when . . . the light’s red.” (Tr. 42). She raised concerns about this practice to Martens. At another point on the tour, Olson saw a sign that prohibited entry to an area near a dragline. She raised concerns when the project manager’s vehicle ignored the sign. (Tr. 54).

Olson testified that when the tour concluded, Martens and Skinner went into the mine office. Olson maintains that from that point on, she was treated differently than she was treated before the tour. (Tr. 66). Olson said that she was “really puzzled” when Skinner told her that she would be in training all week. (Tr. 67). Olson testified as follows:

[B]efore we went on the tour . . . it was like Marty [Martens] . . . had the day planned . . . like they had a place for me. After the pit tour and after lunch it was like they didn’t know what to do with me.

Id. Olson watched truck videos with Skinner for the remainder of her shift. She contends that this change was a direct result of the safety concerns she raised with Martens. Olson also believes that someone may have called the Jacobs Ranch Mine and learned that she was a safety advocate.

Olson’s belief that the company changed its attitude toward her that afternoon is somewhat irrational because it is based solely on her mistaken belief that Martens virtually guaranteed that she would be in a truck that day. Martens did not testify at the hearing, but Olson stated that Martens told her that she would “probably” be able to ride in a truck that afternoon.⁶ There are many reasons why she may not have ridden in a truck that afternoon. There may have been a scheduling problem, for example. The company may have planned to let her ride in a truck as soon as there was a qualified truck-trainer available. Kasper testified that a new truck driver is usually given at least three days of classroom training before she is taken out in a truck. The scheduling of classroom training and on-the-job training by a truck driver may vary depending on the resources available. Skinner was the “operations trainer” who provides classroom training to new miners like Olson. (Tr. 242-43). He was a new

⁶ Olson argues that Martens was “conspicuously absent” at the hearing. (Tr. 282). I draw no inference from the fact that Thunder Basin did not call him to testify. *See Eagle Energy, Inc.*, 23 FMSHRC 1107, 1119-20 (Oct. 2001). Both parties listed him as a witness in their prehearing submissions. He apparently still works at the mine, but he is no longer in the safety department. Although his testimony may have been helpful, I am crediting Olson’s testimony as to what he told her.

employee in the safety department and may have been proceeding at a slower pace than Martens anticipated. In addition, Meyers told Olson that the company has to make sure that she is trained so it cannot take her “word for it.” (Tr. 65). Given that the haul trucks that she would be driving are extremely large, off-road vehicles, the company’s caution is self-evident. Olson was being paid whether she rode in a haul truck or continued her training.

Olson also testified that Martens joked with her about her comments. Martens told her that experienced miners often call the area near the highwall “Death Valley.” When she complained about the condition of the roadways, he grinned at her. (Tr. 43-44). There is no evidence that Martens was hostile or angry about her comments.

Although it is possible that Martens discussed Olson’s safety activities with upper management during the lunch break, nothing in the record suggests that she was required to watch safety and training videos rather than ride in a truck because of her protected activities. Watching videos about work-related matters cannot be considered to be an adverse action. There is no indication that this training was a preliminary step towards dismissal or other discipline.

I conclude that Olson failed to establish that she was treated differently by mine management after she returned from the mine tour. She was the only person coming on board that week, as either a temporary worker or permanent employee, who would be operating heavy equipment in the pit. As a consequence, her training was more extensive than the other five individuals.⁷ Although Olson believed that she was ready to drive a truck, the company wanted her to continue her training. I cannot infer that this alleged delay in allowing Olson to ride in a truck reflected a change in the company’s attitude toward Olson or that her protected activities contributed to this alleged delay.

b. Failure to Report to Work on Time - August 28, 2001

There is no dispute that Olson did not show up for work on time at the Thunder Basin Mine on August 28, 2001. Olson claimed that she called the mine as quickly as she could. Her telephone records show that a call was made to the mine from her house at 7:46 a.m. that morning, about 45 minutes after the start of her shift. Kasper, who is now retired, testified that he remembers getting a call from her at about 10:00 a.m. These events occurred about 20 months before the hearing in this case. Memories about precise times are more likely to fade than memories of the sequence of events or the personalities of the people involved. I credit the testimony of Ms. Olson that she called the mine at about 7:45 a.m. This time is consistent

⁷ Lewis, who attended the morning training session and tour but did not watch videos in the afternoon, was hired by Thunder Basin as a blaster. He had worked for Adecco as a blaster at the mine for some time and was continuing the same work as a full-time employee. Thus, Thunder Basin was fully familiar with his experience and qualifications for the job.

with her phone bill and with her rendition of the events that morning. She testified that she left her home at about 5:20 a.m., drove about five miles, and then had a flat. She jacked up the truck before she realized that the spare was also flat. She walked home and called the mine soon thereafter. Assuming that these events occurred as she described them, she would have arrived back home long before 10:00 a.m.

Although I credit Olson's testimony as to the time of the call, I credit Kasper that he called Gilbert to get a replacement before Olson called the mine that morning. Gilbert could not remember when Kasper called her to obtain another haul truck driver, but he may have called early. (Tr. 165). She remembers that Kasper told her that Olson had not shown up for work that morning. *Id.* Olson testified that Kasper told her during her call that he had already talked to Gilbert about getting a new driver. (Tr. 75). Kasper talked to a number of people at the mine before he called Gilbert that morning. He talked to Spidle who told him that Olson had tried to change crews the first day of work and that she was unhappy that she was not reassigned to the C crew. Spidle also told Kasper that Olson was rather persistent in her request for a crew change and that her attitude was negative. Kasper testified that Martens told him that Olson was unhappy with her crew assignment and believed that she might not accept her assignment. Based on these conversations, Kasper concluded that Olson would be a difficult person to supervise. Because Olson had not reported to work by 7:00 a.m., he called Adecco to obtain another haul truck driver.

Kasper testified that he was never told that Olson had made comments about safety in the pit during her tour. He also stated that he did not know that she had filed safety and discrimination complaints when she worked for Jacobs Ranch. I credit his testimony in this respect.

I conclude that Thunder Basin's termination of Olson was not motivated in any part by her protected activities. I reach this conclusion based on the above analysis, after consideration of the factors set forth in *Chacon*. It is clear that Thunder Basin had knowledge of the safety concerns Olson raised on the tour of the pit. There is no evidence that it had knowledge of her previous MSHA complaints. There is no evidence that Thunder Basin demonstrated any hostility or animus toward her protected activity. As stated above, I find that Olson was not treated any differently on the afternoon of August 27 than she had been before the pit tour. There was a coincidence in time between the protected activity and the adverse action. Olson did not establish disparate treatment. Olson had only worked at the mine one day, expressed dissatisfaction with her crew assignment, and did not report to work on time the following day.

c. Mixed Motive Analysis

Because several Thunder Basin employees discussed their negative impression of Olson with Kasper before he called Adecco to get a new truck driver, it is possible that her safety complaints contributed to their negative impression and that Kasper, therefore,

unwittingly considered her protected activity. As a consequence, I have chosen to also apply a mixed motive analysis to the facts in this case. If a mine operator cannot establish that the protected activity played no part in its decision to terminate the complainant, it may nevertheless defend by proving that (1) it was also motivated by the miner's unprotected activities, and (2) that it would have taken the adverse action in any event for the unprotected activities alone. In a mixed-motive case:

It is not sufficient for the employer to show that the miner deserved to have been fired for engaging in unprotected activity; if the unprotected conduct did not originally concern the employer enough to have resulted in the same adverse action, we will not consider it. The employer must show that he did in fact consider the employee deserving of discipline for engaging in unprotected activity alone and that he *would* have disciplined him in any event.

Pasula, 2 FMSHRC at 2800 (emphasis in original). An operator can try to establish this defense "by showing, for example, past discipline consistent with that meted out to the alleged discriminatee, the miner's unsatisfactory past work record, prior warnings to the miner, or personnel rules or practices forbidding the conduct in question." *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (June 1982).

Kasper, acting for Thunder Basin, considered two events that were not protected when he decided to replace Olson with a different temporary haul truck driver. First and foremost was the fact that she did not show up at work on August 28, 2001, her second day at the job. Olson called the mine at 7:46 a.m. that morning to advise management that she would not be arriving at the mine until about 9:00 a.m. because she had a flat tire on the way to work. As stated above, I find that Kasper had already called Ms. Gilbert to get a new truck driver when Olson called the mine.

In addition, Olson expressed dissatisfaction with her crew assignment on the first day at work. Although Olson testified that she was simply making inquiries, Spidle interpreted her actions differently. (Tr. 225). Spidle testified that Olson told her that she did not want to be on the C crew. *Id.* By the end of the day, Spidle had a mostly "negative impression" of Olson because of her persistent requests. (Tr. 225-26). Spidle said that temporary employees are usually less demanding on their first day at work. When Spidle learned that Olson did not report for work on August 28, she told Kasper that Olson might not have returned to the mine because she was unhappy with her crew assignment. (Tr. 229). Kasper considered Spidle's assessment when he decided to call Adecco for a new driver. Thus, when Kasper called Adecco, he believed that Olson might have already quit. Olson's persistent request that she be assigned to a different crew is not protected.

Olson argues that Kasper's decision to terminate Olson because she was late one morning violated the company's personnel policies. Olson maintains that the company was looking for any excuse to get rid of her because of her protected activity. In making this argument, Olson relies on company practices as evidenced by the employee handbook. (Ex. C-7). A Thunder Basin employee is required to call in at least an hour in advance if she is going to be late for work. (Tr. 204-05). If a company employee is late for work without providing any advance notice, she is given a "step." *Id.* Although the details of the company's progressive discipline policy are not in the record, it is clear that a non-probationary Thunder Basin employee without any prior disciplinary problems would not ordinarily be terminated for arriving late to work because of a flat tire so long as she called the mine as quickly as she could. Olson, however, was not a Thunder Basin employee. Thunder Basin did not violate its employment policies and practices when it replaced Olson with another Adecco driver because these practices and policies do not apply to temporary employees.⁸

Two additional factors that are often considered by the Commission when analyzing mixed-motive cases are a miner's unsatisfactory past work record and prior warnings to the miner. Olson obviously did not have a "work record" at Thunder Basin because she had only worked one day. She had not been given any "prior warnings." I find that Kasper would have taken the same steps with respect to Ms. Olson on August 28 if she had not engaged in any protected activity.

In conclusion, I find that Olson engaged in protected activity but that Thunder Basin terminated her from her temporary employment with Adecco solely for her unprotected activities. In addition, I find that, if Thunder Basin did consider her protected activities when it let her go, it was also motivated by her unprotected activities and it would have terminated her for the unprotected activities alone.

III. ORDER

For the reasons set forth above, the discrimination complaint filed by Hazel Olson against Arch Mineral Company's Thunder Basin Coal Company, LLC, under section 105(c) of the Mine Act is **DISMISSED**.

Richard W. Manning
Administrative Law Judge

⁸ I reject Olson's arguments regarding her belief that Travis Elliot was hired to replace her because her belief is too speculative and it is not supported by credible facts.

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