

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 8, 2000

DAVID MORALES,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 99-188-DM
v.	:	
	:	Mission Mine Complex
ASARCO INCORPORATED,	:	
Respondent	:	Mine I.D. 02-02626

DECISION

Appearances: David Morales and Manny A. Rojas, Jr., Legal Researcher, Tucson, Arizona for Complainant; David Farber, Esq., Patton Boggs, Washington, DC, for Respondent.

Before: Judge Manning

This case is before me on a complaint of discrimination brought by David Morales against Asarco Incorporated (“Asarco”) 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”). The complaint alleges that Asarco terminated Mr. Morales on August 13, 1998, in violation of section 105(c). A hearing in this case was held in Tucson, Arizona, and Asarco filed a post-hearing brief. Although Mr. Morales speaks English, a Spanish-English translator was provided by the Commission at the hearing.¹ For the reasons set forth below, I find that Mr. Morales did not establish that he was discriminated against under the Mine Act and I dismiss his complaint of discrimination.

I. FINDINGS OF FACT

Asarco operates the Mission Mine Complex in Pima County, Arizona, south of Tucson. Mr. Morales began working at the mill in April 1995. In August 1996, he transferred to the surface mine as a haul truck driver. Mr. Morales received training on the safe operation of the haul trucks mostly in English but he also received some training in Spanish. He may not have understood everything that he was told in English. The haul trucks are large 240 ton off-road vehicles.

¹ Everything that occurred at the hearing was translated from English into Spanish by the translator. Mr. Morales spoke mostly in Spanish, which was translated into English.

On April 7, 1997, Mr. Morales filed a complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA") alleging that fumes in the cab of his haul truck were making him sick. MSHA investigated the complaint but did not issue any citations as a result of Mr. Morales's complaint. (Exs. R-8, R-9). Mr. Morales told a number of people at the mine that he had called MSHA about the fumes. Prior to filing the complaint with MSHA, Morales told his supervisors that exhaust from a haul truck entered the cab making it hard for him to breathe and giving him headaches. Mr. Morales was examined by the mine's EMT and was taken to a local hospital for examination. He was released to return to work on the same day. Asarco's truck shop could not find any problems with the haul truck and it was returned to service. Mr. Morales filed the complaint with MSHA because he did not believe that Asarco fixed the problem.

Mr. Morales alleges that from April 7, 1997 until he was terminated on August 13, 1998, he was harassed by Asarco management. He contends that the events that are described below all relate back to this health complaint that he filed with MSHA. Mr. Morales alleges disparate treatment because he believes that the disciplinary actions taken against him by Asarco were more severe than discipline given to other similarly situated employees. He believes that because Asarco knew that it could not immediately fire him for the health complaint, mine management carefully monitored his work and charged him with infractions of the company's work rules in situations where other employees were not charged. He alleges that he was under constant pressure to comply with every work rule or face termination. Mr. Morales testified that once Asarco accumulated a sufficient number of infractions against him, it terminated him and used these infractions to hide the fact that he was really terminated for complaining to MSHA.

Mr. Morales relies on a number of factors to establish his case. He testified that Todd Parks, who was the General Mine Supervisor in April 1997, called him into his office after the MSHA inspector left the mine. Morales testified that Parks asked him why he called MSHA. Morales testified that after a short discussion, Parks told him that he was going to be fired for making the health complaint. (Tr. 42). Morales complained to the union but was later told that the company could do what ever it wanted. *Id.* It is Morales's understanding that, although a citation was not issued, Asarco was required to fix the haul truck that was leaking fumes into the cab. Asarco denies this statement. The MSHA report indicates that it tested the cab for carbon monoxide, carbon dioxide, and nitrogen dioxide and determined that the air in the cab did not violate MSHA's health standards. (Ex. R-9).

Morales also testified that other employees at the mine told him that he was being watched very closely by mine supervisors so that he had better be careful. Mr. Morales testified that supervisors were very disrespectful towards him, they cussed at him, and they called him a "wetback." He also stated that when he was involved in any sort of "incident," he was not given a full opportunity to tell his side of the story. The incidents that Morales is referring to are the incidents that Asarco set forth as justification for his termination. Finally, Mr. Morales contends that Asarco unjustly considered the fact that he was frequently absent from work when it terminated him. He states that he was absent from work because of injuries that occurred on and off the job and because his wife was recovering from surgery. (Tr. 44).

I discuss each of these incidents in chronological order. In July 1995, before he made his health complaint with MSHA, Mr. Morales was working in the mill at the Mission Complex. Mr. Morales was disciplined when he broke a fitting on a piece of machinery because he drove the machinery away from a ball mill that he had charged without disconnecting a hose. (Tr. 217-18; Ex R-10). Because Mr. Morales had received earlier verbal counseling, he was given a written warning for this event. Mr. Morales does not dispute that this accident occurred, but contends that he was new at the job and was trying to work a little too fast. He does not believe that he should have been disciplined because he was new at the job.

In June 1996, after Mr. Morales had become a haul truck driver, he backed his truck into the truck shop without having a spotter present. Asarco's safety rules provide that when backing large trucks in congested areas, a second person must be on the ground to make sure the area is clear. (Ex. R-5 at 13). Mr. Morales received a disciplinary write-up for this event. The write-up stated that disciplinary action, including termination, could result from further safety infractions. Mr. Morales testified that he only backed up about 20 meters and he did not know that a spotter was required. (Tr. 343-44). This incident also occurred before he made his health complaint.

On April 5, 1997, Mr. Morales parked his haul truck in the "ready line" in a tight space between two other haul trucks. When he was asked why he parked in such a tight area, he replied that he was in a hurry. (Ex. R-14). When Mr. Morales pulled the truck out of this tight space, his truck struck the adjacent truck's mirror breaking the brace for the mirror. Mr. Morales was given counseling and a disciplinary write-up for this event. (Ex. R-14). Mr. Morales testified that parking close to other haul trucks was a common practice at the mine. He took a photograph in November 1999 of parked haul trucks that shows two trucks parked close together. (Ex. C-4). He also testified that when other truck drivers were in minor accidents that caused only slight damage to company property, they were not disciplined. This accident occurred before he called MSHA with his health complaint.

On August 8, 1997, Mr. Morales parked his haul truck near a dumping point for lunch. He had not placed chock blocks ("chocks") behind the tires of his truck.² Asarco's safety rules provide that anytime a haul truck driver parks his truck and leaves his vehicle, the wheels of the truck must be chocked. Several years earlier, two miners were killed at the Mission Mine when a parked truck that was not chocked rolled forward while they were working on the truck. Morales was written-up for this event. (Ex. R-15). Mr. Morales testified that he was still in the cab of the truck when Harlan Young, a pit supervisor, observed the truck without chocks. (Tr. 354-55, 529). Morales believes that he was not required to chock the truck. Morales stated that he did not really understand the company's rule on chocks at the time of this incident so he simply put chocks under the wheels as Mr. Young requested.

On December 13, 1997, Morales parked his haul truck without putting chocks under the wheels and then proceeded to wash out the cab of his truck with water. Because the truck is

² The word "chocks" was incorrectly transcribed as "chalks" in the transcript.

equipped with rather complex electrical equipment in the cab, including a computer, miners are not permitted to wash out the cab with water. Mr. Morales then attempted to remove the cap on the radiator without turning off the “master switch” as he had been instructed. He could have been severely burned as a result. Indeed, he had been burned by radiator fluid on a previous occasion. Mr. Morales received a disciplinary write-up for these events. (Ex R-16). Morales states that Raymond Bell, another front line supervisor, was very disrespectful to him when Bell saw what he was doing and that Bell used vulgar language with him. (Tr. 357, 530-31). This disrespectful attitude upset Mr. Morales and he discussed it with the general mine operations supervisor, Mark Kalmi. Morales believes that the company “used the thing with the chocks as an excuse to use it against me now.” (Tr. 531). He believes that Asarco did not require trucks to be chocked until after this incident.

On January 26, 1998, Mr. Morales’s truck was observed zig-zagging from side-to-side down a ramp at the pit. (Tr. 454-56; Ex. R-26). Asarco management did not believe that he was maintaining proper control of his truck in violation of company safety rules. Most of the witnesses at the hearing testified that Mr. Morales had a reputation as a rather fast and careless driver, both at the mine and in his own vehicle. Mr. Morales testified that the truck that he was driving was old and was not in good shape.

On February 13, 1998, two Asarco supervisors observed Mr. Morales without his safety glasses while standing on the deck of his truck. Asarco safety rules provide that safety glasses must be worn at all times. He was written-up for this event. (Ex. R-18). Mr. Morales contends that he took off his glasses to look at something and talk to supervisors and that he generally wears them. (Tr. 363).

On February 28, 1998, Mr. Morales was assigned a haul truck that used compressed air to start the engine. A mechanic attached a compressed airline to his haul truck at the ready line. Mr. Morales failed to disconnect this airline before he drove away from the ready line. When he drove away, part of the air hose was ripped from the air compression system. When his truck was inspected later that shift, it was discovered that only one of six tail lights was working. From these two events, the company concluded that Mr. Morales did not do a pre-shift examination of his truck before he drove away from the ready line. Mr. Morales was given a one-day disciplinary layoff for failure to do a proper pre-operational check of the truck and leaving the ready line with the airline attached. (Ex. 19). Mr. Morales believes that the mechanic should have removed the airline. He also states that he did a pre-operational check but that he could not check the lights without assistance from someone else. (Tr. 364-70, 532-33). Morales states that Asarco management abused him after this event by interrogating him about it for over an hour looking for an excuse to blame him. (Tr. 366-67).

On March 20, 1998, Mr. Morales was driving to work on Interstate 19. Morales testified that there was a pickup truck in the left lane driving slowly and a larger truck in the right lane. When Morales attempted to pass the trucks, the driver of the pickup accelerated but he was able to pass between the two trucks. (Tr. 63). The man driving the pickup was Ken Dickey, a fellow miner at the Mission Mine. Apparently, Mr. Dickey thought that Morales cut him off and he

picked up a handgun that he had in his truck and held it up to show Mr. Morales through the truck window. When Mr. Morales arrived at the mine he waited for Mr. Dickey in the parking lot and confronted him about the incident. Dickey and Morales started verbally fighting about the incident as they entered the mine and walked to the change room. At one point Mr. Dickey said something like “this is the West and I can shoot anybody I want.” This angered Morales who told Dickey that he was a good boxer. An altercation ensued and Asarco supervisors had to separate the two men. Morales called the police. Both employees were issued disciplinary letters and were suspended for the remainder of the day with pay.

On March 30, 1998, Mr. Morales drove his haul truck into a berm while turning around and damaged the automatic fire suppression system on the truck. The damage was not significant but it set off the extinguishers. He drove away from the site of the accident but later reported to dispatch that the fire extinguishers had gone off and he felt dizzy. Asarco charged him with a violation of the company’s safety rules by recklessly operating his haul truck and leaving the scene of an accident. (Ex. R-21). Mr. Morales received a two-day disciplinary layoff. Mr. Morales does not believe that he is responsible for the accident. He testified that he left the area to get out of the travelway and that because the truck was old it had malfunctioned. (Tr. 534-37).

On May 11, 1998, Mr. Morales was driving along a two-lane county road on the way to work when he passed Nancy Baca, who also drove trucks in the pit. He was driving very fast, up to 70 mph as he passed her. She apparently made an obscene gesture at him with her hand. She arrived at the mine’s parking lot shortly after he did. When Ms. Baca arrived, he confronted her and, in Spanish, cussed at her and called her obscene names. Later, Mr. Morales apologized to Ms. Baca, but she would not accept his apology and reported the incident to management. Morales received a two-day disciplinary layoff for exhibiting confrontational and threatening behavior to another employee. (Ex. R-22). This discipline was the last step before termination under Asarco’s progressive disciplinary system. Mr. Kalmi was especially concerned because this incident occurred less than two months after the Dickey incident. Mr. Morales testified that Ms Baca did not like him and that she took advantage of this situation to get him into trouble with management. (Tr. 371-76, 538-39). He believes that Ms. Baca should have been disciplined too. In addition, he points out that his supervisors have cussed at him and have called him names.

On August 8, 1998, Mr. Morales drove his haul truck around the blind side of another haul truck and pulled up close to the front of this other truck, nose-to-nose. He apparently pulled up in this manner because he wanted to discuss the possibility of car pooling with the driver of the other haul truck, Gilbert Sanchez. When Mr. Morales backed away, the trucks became entangled causing damage to the other truck. Asarco contends that Morales violated a company safety rule which provides, “[h]aul trucks should not be parked front-end to front-end, parallel, or cab to cab for purposes of conversation.” (Ex. R-5 at 34). Morales testified that as he approached the other truck, Mr. Sanchez assisted him through the use of hand signals. Consequently, Mr. Morales believes that Mr. Sanchez was partly to blame for the damage to the truck. Mr. Sanchez did not

testify at the hearing, but according to the testimony of mine manager Sylvester Lakowski and Messrs. Kalmi and Young, Sanchez was signaling Morales to stay away from his truck.³

Asarco conducted an investigation of this accident. In his summary of this investigation, Mr. Young wrote:

During the meeting [about the accident], Gilbert [Sanchez] said he tried to waive David [Morales] from approaching when he quite unexpectedly saw him pull up to his truck. He further said that David was driving stupidly for most of the night, and driving fast.

(Ex. R-23). Sally Koos was operating the shovel in the pit at the time. She did not see the trucks make contact. According to Young's report she related the following:

[S]he noticed that 359 [Sanchez's truck] was waiting at the crossover mat while she cleaned up in front of the shovel, and then saw 357 [Morales's truck] backing up around the side of 359 and to the back of it and then leave the shovel area without loading. She also made mention that 357 had been driving wildly during the night and backing up to the shovel too fast and crooked. One other unsafe action she witnessed was when 357 would pull in at the right hand side of the shovel, he would come in fast, make the turn hard, slamming on the brake and slid quite a few feet in the mud toward the pit edge berm before backing in.

Id.

During the investigation, Mr. Sanchez drew a map showing the position of the trucks. (Ex. R-24). Mr. Morales did not dispute the drawing. Mr. Morales believes that Sanchez was equally responsible for this accident and that Asarco blamed Morales because they wanted to fire him for complaining to MSHA about fumes in his truck cab. He stated that other employees park their trucks front-end to front-end without receiving any discipline.

³ I required the parties to exchange witness and exhibit lists. Both parties complied with my order. Asarco sent its list to Morales via Federal Express. Several days after the close of the hearing, Morales informed my office that he did not receive Asarco's witness list until after the hearing because the FedEx driver left the package at the office for his apartment complex. He stated that he assumed that Asarco would call Mr. Sanchez as a witness. Mr. Morales did not inform me at the hearing that he had not received Asarco's witness list and he could have called Sanchez as a witness. Morales subpoenaed a number of Asarco employees who testified at the hearing.

At the conclusion of its investigation, Asarco terminated Mr. Morales from his employment. It based the termination on the infractions described above and his excessive absenteeism. (Ex. R-23). As stated above, Mr. Morales believes that all of the discipline that he received came about as a result of his health complaint to MSHA.

II. DISCUSSION WITH FURTHER FINDINGS AND CONCLUSIONS

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).

A miner alleging discrimination under the Mine Act establishes a *prima facie* case of prohibited discrimination by proving that he engaged in protected activity and that the adverse action complained of was 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 Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981). 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. *Id.*; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

A. Did David Morales Engage in Protected Activity?

Mr. Morales engaged in protected activity when he complained to Asarco about fumes in the cab of his haul truck and when he called MSHA to complain about these fumes. His complaint to MSHA was made on April 7, 1997

B. Was David Morales’s Discharge from Employment Motivated in any part by his Protected Activity?

In determining whether a mine operator’s adverse action was 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.” *Secretary 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).

Some of the circumstantial indicia of discriminatory intent include (1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; and (3) coincidence in time between the protected activity and the adverse action.

Mr. Morales is claiming disparate treatment. He points to the above events to establish that he was treated more harshly than other employees. He believes that he was watched very closely by management between April 1997 and August 1998 for any mistakes he made no matter how minor. He alleges that supervisors would follow him looking for a chance to discipline him. He alleges that on two occasions he was required to take drug tests in situations where he did not think it was warranted.

I agree with Mr. Morales that it is quite feasible for a mine operator to take the approach that he is suggesting. A sophisticated operator like Asarco can target a miner for discharge and closely monitor his conduct over a lengthy period. It can impose discipline for every violation of company rules in order to create a record on which to base the termination. Many employees could be subject to termination in such a fashion. Indeed, one miner on layoff status testified that Asarco was closely watching everyone because it wanted to reduce the workforce. (Tr. 152).

I find, however, that Mr. Morales failed to show that he was treated differently. Most of the events discussed above are serious violations of Asarco's safety or work rules. Although there is some evidence that these rules were not consistently enforced at the mine, there is nothing to suggest that Mr. Morales was targeted for discharge, that he was being closely watched because of his MSHA complaint, or that his discipline was unusually harsh.

Mr. Morales believes that his discipline and discharge were unfair. It is important to understand that I do not have the authority to determine whether this discipline was fair or reasonable. The "Commission does not sit as a super grievance board to judge the industrial merits, fairness, reasonableness, or wisdom of an operator's employment policies except insofar as those policies may conflict with rights granted under section 105(c) of the Mine Act." *Delisio v. Mathies Coal Co.*, 12 FMSHRC 2535, 2544 (December 1990)(citations omitted). The issue is whether the discipline given to Mr. Morales was motivated in any part by his protected activity.

The discipline for three of the incidents discussed above occurred before Mr. Morales engaged in protected activity. These incidents are his accident in the ball mill, parking his truck too close to another truck in the ready line, and backing his truck into the shop without a spotter. As a consequence, the discipline given for these incidents do not support Mr. Morales's case.

The first incident after his complaint occurred in August 1997 when Mr. Morales was cited for failing to chock his truck near the dumping area. Morales testified that he was sitting in his truck with the air conditioning on waiting for clearance to take his lunch break. Under such a circumstance, it does not appear that chocks were required unless he left his truck. Mr. Young's report states that Morales's truck had stopped for lunch and the truck was not chocked. (Ex. R-15). The report states that Young stopped to let Morales know that he must always chock his truck when he is not parked in a designated tie down area. *Id.* Mr. Young testified that he wrote

down his reminder to Morales. (Tr. 449). It does not appear that Morales was seriously disciplined in this instance but he was simply reminded to use chocks. Young's action did not constitute harassment of Morales. There is no showing that he was singled out for this type of write-up. As stated above, two miners were killed in the early 1990s when they failed to chock a truck they were working on. I credit the testimony of Asarco's witnesses that the company attempted to enforce its safety rules requiring the use of chocks. It appears that some supervisors did not consistently enforce this rule, especially on the graveyard shift, but that does not establish that Morales was singled out for harsher discipline under the rule.

In December 1997, Morales parked his truck, washed the cab out with water, got out onto the front of the vehicle, and was attempting to remove the radiator cap so he could add more water. Messrs. Bell and Young saw him there and investigated. Mr. Bell was quite agitated and directed vulgar words and epithets at Mr. Morales. These Asarco managers were upset that he had not chocked his truck, that he washed out the cab with water, and that he was attempting to remove the radiator cap without releasing the pressure with the master switch. Morales was at a water station and chocks were present in the area that he could have used. He had been reminded a few months before to use chocks. In addition, he had been told to release the pressure in the radiator before removing the cap. Indeed, he had been burned before while removing a radiator cap. As discussed above, Morales received a disciplinary write-up for this event.

Morales was particularly concerned about the disrespectful tone and vulgar language used by Bell. The following day there was a meeting in Kalmi's office about this incident. A Spanish speaking union steward was present. Mr. Bell apologized to Mr. Morales for his vulgar language. The reasons for the company's safety rules were explained to Morales in Spanish. Mr. Bell was subsequently disciplined for using vulgar language with Morales.

This incident does not help establish that Asarco was out to get Morales for his MSHA complaint. Morales put himself in danger by failing to chock the truck and attempting to take the cap off the hot radiator. He violated company safety rules. Mr. Bell's conduct when he saw what Morales was doing may have been disrespectful, but there is no indication that he was attempting to use this incident as an excuse to discipline Morales for his health complaint. I find that Bell, Young, and Kalmi were genuinely concerned about the safety violations that Morales committed.

In January 1998, Morales was observed driving down a ramp to the pit. It appeared to Young and Bell that he did not have control of his truck. When Young questioned Morales about it, Morales told him that his truck was functioning correctly. Mr. Lakowski testified that other truck drivers in the pit told supervisors that they were concerned about Morales's driving abilities. (Tr. 211). Morales had a reputation for driving too fast. I find that this event and the write-up that Morales received fails to support Morales position that the charges brought against him were trumped up and that, as a result, he was treated differently than other employees.

In February 1998, Morales was written up for failing to wear his safety glasses. It appears that he did not understand that he must wear safety glasses at all times. This incident was not a

major infraction but Morales was written up for it. In isolation, one could argue that this infraction of the company's safety rules supports Morales's belief that Asarco was closely watching him to catch him violating company rules. However, even if I accept his theory, this event is one of many relied upon by Asarco that are of a more serious nature.

In February 1998, Morales drove away from the ready line without disconnecting a compressed air hose. The compressed air hose was damaged as a result. Supervisor Jim Brown reminded Morales when he arrived at the ready line that day to remove the airline before driving away. (Ex. R-19). The evidence also establishes that Morales did not perform a thorough pre-operational check of his truck. Morales testified that it was his belief that the truck should not have been placed on the ready line if it were not ready to operate. It appears that he did not have an appreciation of the requirement that each driver inspect his own truck for defects that could affect safety. Morales was given a one-day disciplinary layoff.

The discipline Morales received for the February 28 incident does not support his case. Truck drivers are required to do pre-operational checks of their equipment and they use another driver when checking the lights. If another driver is not available to help, they call dispatch for assistance. Although Asarco questioned Morales about these events, there is no corroborating evidence that he was abused or interrogated about the incident in order to blame him for something that he did not do. The charges against him were not fabricated.

The two events involving conflicts with other miners also do not support Morales. In each case, these disputes originated off mine property but continued at the mine. I find that it was reasonable for Asarco to discipline Morales for these confrontations. There has been no showing of disparate treatment with respect to these incidents. Mr. Dickey was also disciplined for his behavior at the mine.

With respect to the discharge of the fire suppression system on his truck, Morales contends that it was never established that he caused any damage. He believes that Asarco incorrectly assumed that system was damaged when he drove up against a berm. He testified that it is just as likely that the system malfunctioned. Even if I assume that Morales's argument is supported by the evidence, it does not establish that discipline was an excuse to get back at him for his MSHA complaint. Morales received a two-day disciplinary layoff. There is nothing to indicate that his discipline was motivated in any way by the MSHA complaint. The discipline Morales received was becoming more severe with each infraction under Asarco's progressive disciplinary system because of his prior history of violating company rules.

The event that ultimately led to his termination was fully investigated by Asarco. Morales believes that Mr. Sanchez should also have been disciplined. Asarco did not discipline Sanchez because his truck was stationary and the company credited his rendition of the events. Asarco managers believe that Sanchez did not want Morales to drive up close to his truck and that he was trying to motion Morales away. The company also credited the statements of Sanchez and Ms. Koos that Morales had been driving too fast and in a reckless manner during the shift. I find that the evidence presented at the hearing concerning this accident does not support a conclusion that

Morales's termination from employment was connected to the complaint he filed with MSHA in 1997.

Morales also testified that Asarco managers said that he would be fired for filing the MSHA health complaint. Morales relies on statements made by Mr. Parks to support his case. It must be noted that Parks no longer worked for Asarco when Morales was terminated and he was not involved in that decision. The two conversations that Morales relies upon occurred at the time MSHA investigated his health complaint and in March 1998. Morales testified that Parks told him that he was going to be fired for getting MSHA involved in the health complaint. Mr. Parks, who now works as a salesman, was not available to testify at the hearing. James Coxon, the mine's human resources manager, testified that he called Parks about his conversations with Morales. Coxon testified that Parks told Morales in the first conversation that he would prefer that Morales come to him rather than MSHA if he had safety or health concerns. Parks said that in the second conversation, in March 1998, Morales mentioned that he was thinking about getting a job with the railroad. Parks told Coxon that in response to this statement he told Morales that getting another job was a good idea "because if you continue on with the safety violations you have here, you will be discharged." (Tr. 502). Since Parks did not testify, it is difficult to judge the credibility of Coxon's testimony in this regard. I note, however, that English is not Mr. Morales primary language and it is possible that he misinterpreted Parks's statement of March 1998 to mean that he would be discharged for making safety complaints.

Morales also believes that he was harassed when Asarco treated him like a drug addict. He testified that he never uses illegal drugs. Asarco does not allege that Morales uses drugs. Asarco tested Morales for drugs in accordance with policies agreed to by the unions at the mine. He was tested after his accident on August 8, 1998. Although I can understand why Morales might be offended by these tests, the fact that these tests were taken does not help establish that Asarco was retaliating against him for making the health complaint to MSHA. There has been no showing that the drug tests were taken in contravention of Asarco's standard policies and procedures for drug testing.

Morales also generally alleges that he was disciplined more harshly than others at the mine. Mr. Coxon testified that many Asarco employees have been disciplined for infractions similar to Mr. Morales's. (Tr. 490-91). He stated that during the two years prior to the hearing in this case, Asarco issued about 70 disciplinary letters each year for time off and discharge.

Morales called a number of witnesses on his behalf, but none of these witnesses testified that Morales was terminated because of his health complaint to MSHA. Ben Barela, an officer with the Steelworkers Union at the mine, testified. When he was asked if he had reason to believe that Morales was terminated for his health complaint to MSHA, he replied "[n]ot to my knowledge." (Tr. 123). Lennis Hunnicutt, chief steward for the Steelworkers, testified that he is not sure that Morales had a sufficient understanding of English to safely work at the mine or to understand Asarco's safety rules. (Tr.134). He does not believe that Morales should have been terminated for driving up to Sanchez's truck. (Tr. 136). Frank Urbano, a truck driver at the mine who was on layoff status, testified that drivers did not always chock their trucks and that some

drivers have been in accidents without receiving any discipline. (Tr 149). He also testified that Morales had a reputation in the pit of being an unsafe driver. (Tr. 156). Jerry Peña, who had been a truck driver in the pit, testified that management kept a close eye on Morales starting in April 1997, but he did not know if that was because Morales had called MSHA or because Morales was involved in a number safety infractions. (Tr. 162, 177). He stated that drivers sometimes do not chock their trucks, especially on the graveyard shift. (Tr. 171). Miguel Moreno, a former truck driver at the pit, testified that he did not believe that Morales was treated differently by management than other truck drivers. (Tr. 192).

Randall Groce, another truck driver at the pit, testified that Morales had the reputation of being an aggressive driver. (Tr. 304). He stated that some drivers thought Morales was unsafe and wild when he drove his haul truck. (Tr. 309). Allen Auguello, who also works in the pit, testified that drivers do not always put chocks under the wheels of haul trucks when they park them. (Tr. 315). He also stated that Morales brought attention to himself because he was an aggressive driver. (Tr. 320). He further stated that front line supervisors are not always consistent when they discipline employees. (Tr. 325).

Although the testimony of Mr. Morales's witnesses generally supports his position that he was closely watched by supervisors, it does not establish that he was closely watched because he made his health complaint to MSHA. There is insufficient evidence on which to draw such an inference. This testimony also establishes that discipline is not always consistent and that some miners violate safety rules without being caught. But this evidence does not advance Morales's case. I cannot infer from this evidence that there was a connection between Morales's MSHA complaint and the enforcement of safety rules at the mine.

If I review the evidence presented in this case against the indicia of discriminatory intent frequently relied upon by the Commission, I find that Mr. Morales did not establish that his discharge was motivated in any part by his protected activity. It is clear that Mr. Parks had knowledge of Mr. Morales's protected activity. The mine manager, Mr. Lakowski, testified that he did not become aware that Morales had called MSHA with a health complaint until after he was terminated from his employment at Asarco. (Tr. 214). Mr. Kalmi testified that he did not know about Morales's health complaint to MSHA until the MSHA investigator arrived at the mine to investigate Morales's discrimination complaint after he was discharged. (Tr. 387-88). I accept their testimony, although I find that it was widely known among employees in the pit that Mr. Morales called MSHA. Because Mr. Parks and front line supervisors in the pit had knowledge of the complaint, I find that Asarco had knowledge of the protected activity.

Although Morales testified that Asarco supervisors displayed strong animosity towards his protected activity, there is little other evidence to support his claim. The fact that individual managers may have been annoyed with Morales is not sufficient to establish animosity towards the protected activity. I dare say that every mine operator is annoyed when MSHA shows up. I cannot draw an inference that Asarco went to the lengths described above to terminate Morales because he made a health complaint to MSHA especially since MSHA did not issue any citations

as a result of his complaint. It is important to recognize that Morales had a lengthy disciplinary record that started well before he made his complaint to MSHA.

Finally, there is little coincidence in time between the protected activity and the adverse action. As stated above, I believe that it is possible for a mine operator to bide its time so it can get rid of a miner who complains about safety or health conditions without leaving tracks. In this case, however, there is insufficient evidence on which to draw such an inference. The two events do not appear to be related. In any event, even if his health complaint to MSHA played some part in Asarco's decision to terminate Morales, I find that Asarco established that it would have terminated Morales for his unprotected activity alone based on his violations of the company's safety and work rules, his accidents, and his absenteeism.

III. ORDER

For the reasons set forth above, the complaint of discrimination filed by David Morales against Asarco, Inc. under section 105(c) of the Mine Act is **DISMISSED**.

Richard W. Manning
Administrative Law Judge

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