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WILLIAM HARO, v. MAGMA COPPER,
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

WILLIAM A. HARO, COMPLAINANT v.	COMPLAINT OF DISCHARGE, DISCRIMINATION OR INTERFERENCE DOCKET NO. WEST 79-49-DM
MAGMA COPPER COMPANY, RESPONDENT	DOCKET NO. WEST 80-116-DM

Appearances: Paul F. Tosca, Jr. Esq.
100 North Stone Avenue
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For the Complainant

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100 West Clarendon Avenue
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For the Respondent

Before: Judge John J. Morris

DECISION

STATEMENT OF THE CASE

Complainant brings these actions on his own behalf alleging he was discriminated against by his employer, Magma Copper Company (Magma), in violation of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq.

The statutory provision, Section 105(c)(1) of the Act, now codified at 30 U.S.C. 815(c)(1), provides as follows:

105 (c)(1) 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 operators agent, or the representative of the miners at the coal or other mine of an 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 this Act.

After notice to the parties, a hearing on the merits was held in Tucson, Arizona on August 12-13, 1980. The parties filed post trial briefs.

INTRODUCTION TO THE CASES

Four separate factual situations are involved in these cases.

The initial incident occurred(FOOTNOTE.1) when complainant William Haro refused to remove a bad order (B.O.) railroad car from a production train. He refused because there was no supervisor present to assist him.

The second incident occurred on June 14, 1978, when Haro tied a tail light on a production train "under protest." Shortly after these events Haro was removed as dump mechanic and was given a new assignment on a different shift.

On September 25, 1978, Haro was directed to change a bad order (B.O.) grease line. He made three safety related requests. He did not repair the grease line because his supervisors failed to take any action to comply with his requests.

On November 1, 1978, Haro was involved in an incident which occurred when he and fellow worker, Helmer, were working on an AIRSLUSHER. As a result of this incident Haro was required to attend a two day safety seminar and was transferred to a surface crew. He did not lose any wages, but he complains about the seminar, the "Accident Gram" issued by Magma, the transfer, and a letter issued by Magma in connection with the accident.

APPLICABLE CASE LAW

The Commission has ruled that to establish a prima facie case for a violation of 105(c)(1) of the Act a complainant must show by a preponderance of the evidence that (1) he engaged in a protected activity and (2) that the adverse action was motivated in any part by the protected activity. The employer may affirmatively defend, however, by proving by a preponderance of all the evidence that, although part of his motive was unlawful, (1) he was also motivated by the miner's unprotected activities, and (2) that he would have taken adverse action against the miner in any event for the unprotected activities alone. David Pasula v. Consolidation

Coal Company 2 FMSHRC 2786 (1980). Further, in order to support a valid refusal to work the miner's perception of the hazard must be reasonable, Robinette v. United Castle Coal Company 3 FMSHRC 803, (1981).

WEST 80-116-DM
B.O. (BAD ORDER) CAR INCIDENTS

FINDINGS OF FACT

FIRST INCIDENT

1. Dispatcher Lockhart instructed Complainant Haro to replace a B.O. (Bad Order) car with a good order car on the Magma production train (Tr. 15).

2. Since the safety latch on the coupler mechanism was broken it was necessary to replace that car with one having a good safety latch (Tr. 15).

3. Haro did not comply with Lockhart's request because Lockhart would not assign a worker to assist him (Tr. 15).

4. Company policy, evidenced by a written memorandum posted and dated May 8, 1976, requires a supervisor to be present when a B.O. car is cut out (Tr. 15-17, Exhibit C2).

5. Haro told Lockhart he wasn't refusing the assignment but was asking that Magma's policy be enforced (Tr. 17, 18).
SECOND INCIDENT

6. On June 14, 1978, assistant chief foreman Cothern told Haro to tie a light on the last car of the production train (Tr. 19).

7. Haro tied on the light "under protest" because he believed the light should be attached on light brackets (Tr. 19, 20).

8. The company procedure is that if an employee is directed to tie on tail lights he does so and logs that event in the log book for the supervisor's knowledge. The tie on can be made without using special light brackets (Tr. 70, 103, 105, 133).

9. Shortly after both of the above incidents Haro was removed as a dump mechanic and was given a new assignment which placed him on a straight days shift (Tr. 20).

10. As a result of being placed on the straight days shift Haro's pay scale did not change, but he lost in wages a shift differential that he normally received as a dump mechanic. He also lost one additional day's pay for every three week period (Tr. 21).

11. Haro has continued to work straight days, and his lost wages (as of the time of the hearing) were between $3,500 and $3,700 (Tr. 22).

DISCUSSION

Magma asserts that the evidence amply demonstrates that Haro's activities were obfuscatory and dissembling and that they were unrelated to improving any safety conditions on the job. I disagree. While it is true that Haro's activities conflicted with management and could well be considered obstreperous he was, nevertheless, within the protection of the Act at least with respect to the first incident.

Concerning the removal of the B.O. car, a company memorandum dated May 8, 1976 stated in part that "when a B.O. car is cut, a supervisor will be present" (Exhibit C2). Magma's evidence confirms the authenticity of the memorandum. Its supervisor indicated it would have been a violation of company policy not to provide Haro with an assistant (Tr. 90-92). After Lockhart instructed Haro to remove the car, Haro asked for enforcement of this company policy (Fact %57 5). Lockhart denied his request, and, consequently Haro refused to remove the car.

A miner has a right to refuse to undertake a task he reasonably considers to be unsafe. The company memorandum supports the reasonableness of Haro's refusal to cut the B.O. car. I, therefore, conclude Haro's actions in this incident were protected under the Act. Robinette and Pasula, supra.

The second incident involves the tying on of a tail light without using a special tail light bracket. Haro's evidence on this act of alleged discrimination is considerably overblown. He admits that if he is directed by a supervisor to tie on a tail light he is to do so. It is company procedure that he then enters that fact in the company log book. The log book would accordingly reflect, in circumstances such as this, that the lights were being installed without special brackets.

No mandatory standard exists regarding the attachment of tail lights, and I am unable to see that Haro's perception of the safety hazard was a reasonable one. Regardless of whether the light was installed in a proper bracket there would be a light protecting the rear of the train. The record does not show that a "tied on" light is in any manner less safe or in any manner more likely to fall out than a similar light installed in a bracket. I accordingly reject Haro's conclusion that the placement of a light in a bracket was "company policy." Under the Act for a claim of discrimination to prevail the belief that a condition is unsafe must be a reasonable one under the circumstances. Robinette, supra. For the foregoing reasons, I do not find that Haro's complaint concerning the tail light was a protected activity. The claim of discrimination based on the tail light bracket should be vacated.

Respondent contends that Haro's inability to cooperate with

supervisors, as evidenced by these two incidents was the reason for his being transferred from dump mechanic on a rotating shift to a mechanics

position on straight days. I have ruled that Haro's "uncooperative activity" concerning the removal of the B.O. car was protected activity. I also conclude that his transfer to a different shift was motivated in part by this protected activity. The transfer may also have been motivated by Haro's opposition to tying on the light. However, respondent has failed to meet its burden of persuasion that Haro's action in tying on the light under protest would have itself warranted the adverse action. I, therefore, conclude that Magma's transfer of Haro to another shift and position constituted discriminatory conduct in violation of the Act.

WEST 79-49-DM
GREASE LINE REPLACEMENT

FINDINGS OF FACT

1. On September 25, 1978, complainant, William Haro, a journeyman mechanic, was directed to change the grease line at level 3 A 2075 in Magma's underground copper mine (Tr. 13, 25, Cl).

2. The grease line to be serviced was on the front door cylinder on the lip of the loading chute (Tr. 26).

3. Before changing the grease line, Haro requested that his lead man (foreman) spot a skif in front of the loading chute as protection against falling. This was a common practice (Tr. 26-31).

4. Further, Haro requested that the men working on the surface be removed from the top of the shaft. Workers at the top will frequently cause debris, such as burned bolts or nuts, to fall down the shaft. One bolt can cause 50 rocks to fall down the shaft. It is company procedure to remove such men before work is done near the shaft (Tr. 30. 31).

5. Further, in accordance with company procedure Haro asked for a worker to assist him. The lead man, Howard, refused this request. (Tr. 28, 31-32).

6. Haro's requests were never granted, and, therefore, he did not change the grease line. The lead man told Haro he would try to place a skif and he would try to remove the overhead shaft workers but this was never done (Tr. 27, 29, 32).

7. On October 2, 1978, Haro received a written warning from supervisor Torres for his failure to change the grease line. After receiving the notice Haro filed a written grievance (Tr. 34, 35).

8. On October 2 Haro explained to Rudy Navarro (Torres' supervisor) the circumstances concerning the grease line. (Tr. 33).

DISCUSSION

Magma maintains that every credible witness testified that the spotting of a skif is sometimes done, but work is not stopped in its

absence. Magma cites witnesses Torres, Navarro, and Graham in support of its position. I disagree with Magma's construction of the evidence. The issue is not whether the work could be done without a skif, but it is whether Haro's action in not repairing the grease line was reasonable and in good faith. Magma's evidence, as discussed hereafter, supports Haro's position.

Torres, a supervisor, testified that if the skif was available he'd use it in combination with the Sala Block.(FOOTNOTE.2) The skif would serve as a backup (Tr. 345-346). Navarro said if a skif was not available a Sala Block would be used (Tr. 135). Graham indicated a lot of journeymen will spot the main hoist (skif) over the lip of the loading area. If a man fell and the safety hook (Sala Block) failed he'd fall into the skif instead of falling to the bottom of the shaft (Tr. 206). Graham considered the shaft to include an area within two or three feet of the shaft. The grease line to be changed was within an arm's length of the open shaft (Tr. 207). In short, Torres, Navarro, and Graham support the practice of a worker spotting the skif immediately below the area where he is changing the grease line. Such a positioning for obvious reasons is a prudent safety practice.

Magma asserts the Sala Block is a safety device that Haro should have used. I agree. Haro could have used such a device; however, the other remedies sought by Haro were reasonable, particularly in view of Magma's confirming evidence.

Concerning the allegation that the workmen should be cleared from the top of the shaft, Magma contends that Haro's allegations on this issue were an afterthought, manufactured for the grievance hearing and these proceedings. I disagree. Haro testified he asked for worker clearance (Tr. 28). A fellow worker, Zagorsky, confirmed Haro's statements that he (Haro) couldn't replace the grease line because of the lack of a skif, lack of a partner, and the riggers located at the top of the shaft (Tr. 177). Haro says he complained to lead man Howard (Tr. 28). Howard, according to Haro, refused the request for a partner, but he said he'd try to get the skif and would remove the men above (Tr. 28, 29). It may well be that the workers above were clear of the shaft as this was apparently a "down" day but the record is devoid of any evidence that such information was ever communicated to Haro. At the deep level on which Haro was located he would hardly be in a position to know if workers were located near the top of the shaft. Journeyman mechanic Thomas Traynor said that for safety reasons he'd make sure there wasn't anyone working overhead when he repaired the grease line (Tr. 146, 156).

Magma's witness, Howard, stated that he had no personal knowledge of Haro's request for the skif or an assistant. (Tr. 158). Howard's testimony does not refute Haro's testimony that he requested that the workers be

cleared from the top of the shaft. Further, Howard "could not recall" Haro's statement made in front of Zagorsky indicating why he (Haro) couldn't change the grease line. The inability to recall, which permeates Howard's testimony, is far from a denial of a stated fact. In short, I do not find Howard's testimony credible.

Concerning the furnishing of a partner, the thrust of Magma's argument is that the grease line could be safely changed without a partner. However, supervisor Torres indicated that it is company policy to furnish a partner if you are sent in on other than a down day (Tr. 347). This policy, in my view, confirms Haro's reasonable belief that a partner should have been furnished.

Magma argues that Haro is not credible. It's argument here focuses on the fact that four days after this incident, Haro discussed his failure to repair the grease line with his supervisor, Torres. Magma asserts Haro is not to be believed because on that occasion he failed to state his "complete defense." The complete defense, according to Magma, is Haro's testimony that when he raised the safety issues leadman Howard simply told him not to do the work.

I find Haro's explanation reasonable. On Monday, the 29th, he stated he had already been removed as dump mechanic and had been under a certain amount of pressure. He did not feel obliged to try to prove his case to management. He simply stated the facts as they were and if they wanted to accept them fine, but if they didn't, Haro told them to put it in writing. He stated they should stop threatening him with statements such as "I'm going to nail you to the wall." Haro described this meeting as "emotional." (Tr. 244).

Haro received a written warning for his failure to change the grease line (Tr. 34). Inasmuch as Haro's refusal to work was protected activity because his perception of the safety hazards were reasonable, the warning letter constituted discriminatory conduct in violation of the Act. Local Union 1110 v. Consolidated Coal Company, 1 FMSHRC 338 (1979). This portion of the case should be affirmed. The employment record of William Haro is to be completely expunged of all comments and references to the grease line incident of September 25, 1978.

AIRSLUSHER ACCIDENT

FINDINGS OF FACT

1. On November 1, 1978, Haro and fellow worker, Helmer, were servicing an AIRSLUSHER in a spill pocket (Tr. 36, 37).

2. The AIRSLUSHER, actuated by compressed air, hauls loads in underground mines (Tr. 45, C5).

3. The AIRSLUSHER is controlled by a throttle lever which automatically returns to a neutral position when released

(Exhibit C5).

4. The load spring on Magma's throttle lever was defective and after being moved into a straight up position it would fall down. Magma's leadman acknowledged to Haro that the spring was broken (Tr. 38, 51).

5. The throttle control valve operates the controlled movement of the slusher (Tr. 263, 264).

6. As Haro was changing the oil on the AIRSLUSHER the throttle control valve, due to its defective spring, dropped. This movement turned the slusher on (Tr. 37, 179).

7. The force of the slusher movement caused the catwalk grating to come out of its structure and fall to the floor. The return roller struck Helmer in the head (Tr. 37, 38).

8. As a result of this incident Haro was transferred to a surface crew (Tr. 39, 40).

9. An "accident-gram" was issued by the company in November 1978. The document identifies Helmer as the person involved in the incident. It refers to the other person involved in the incident as "Helmer's partner." The document described what happened and why. It indicated "There was a lack of communication between Helmer and his partner.... Helmer's partner exhibited poor judgment when he needlessly engaged the slusher." (Exhibit C-3).

9. Haro received a letter from Magma's superintendent indicating he had been involved in three accidents requiring dispensary attention and seven requiring "attention by the hospital." In addition Haro was identified as being the cause of the Helmer's accident. The letter assigns Haro to a two day safety training course. (Tr. 41, 43, 49, Exhibit C4).

10. After the AIRSLUSHER (Helmer) incident, Haro was transferred to a special two day safety training class. The seminar did not discuss the Helmer incident (Tr. 49).

11. Haro did not incur any loss of pay in attending the safety seminar (Tr. 297, 298).

Based on the above findings of fact I conclude that Haro was not responsible for the injury suffered by Helmer. Magma's actions towards Haro, namely the transfer, the accident-gram, the letter and the assignment of Haro to a two day safety seminar, would therefore appear unjustified. However, the incident concerning the airslusher does not involve any activity on the part of Haro that is protected under the Act. Haro did not make any safety complaint or exercise any other right afforded him under the Act. The actions taken against Haro because of Magma's erroneous belief that Haro was responsible for the incident, therefore, cannot be deemed to be in violation of the Act. Although such actions may have been improper, redress of the damages suffered by Haro as a consequence thereof is not within the authority of the Commission.

Respondent's post trial brief attacks Haro's general credibility asserting that several extrinsic matters reflect poorly on Haro's ability to perceive the events in which he participates. Respondent notes Haro's hospitalization for alcoholism and his alleged use of drugs on the job (Tr. 228, 339). In addition, respondent points to Haro's stressful environment with his co-workers and superiors.

I am not persuaded by respondent's arguments. The record does not reflect that alcoholism and the smoking of marijuana were in any manner factors in the foregoing described events, nor is there a scintilla of evidence to support such a view. Concerning Haro's stressful environment, respondent's brief aptly states the law on this point. The brief states as follows: "The fact that Mr. Haro is profoundly in conflict with most people around him does not mean he is without the protection of the Federal Mine Safety and Health Act."

Respondent's supplemental brief cites Pasula, supra, but the ruling in that case does not cause a different conclusion here.

REINSTATEMENT

Inasmuch as William Haro's complaint of discrimination in WEST 80-116-DM is affirmed he should be reinstated as a dump mechanic. He was removed from that position after the initial incident involving the B.O. car. Ordinarily, a reinstatement order would issue prospectively. However, in a post trial motion filed June 10, 1981, it was indicated that William Haro had been discharged by respondent. Accordingly, rather than reinstatement, I order respondent to pay Haro an amount equal to the wages he lost because he was removed from his position as a dump mechanic from the date of his removal up to and including the last day he worked at the mine. Any order of reinstatement issued in this case would intrude into the issues raised in the cases entitled William A. Haro v. Magma Copper Company, Docket No. WEST 80-482-DM and WEST 81-365-DM." These cases are presently assigned to the Commission Judge Jon D. Boltz, of the Denver Regional Office.

The back pay award is necessarily limited because later events not in issue here may indicate further discriminatory and retaliatory conduct by Magma against Haro; or, in the alternative, such later events may establish that Magma justifiably terminated William A. Haro. In any event such issues are not framed in this decision.

CIVIL PENALTIES

In this case the Secretary of Labor did not represent complainant. However, the Act provides that any violation of the discrimination section shall "be subject to the provisions of section 108 and 110(a)." [30 U.S.C. 818, 820]. The statute authorizes the imposition of a penalty in an amount not to exceed $10,000.00. (30 U.S.C. 820(a)).

Considering the pertinent statute and in view of the facts as stated above, I deem a penalty of $500.00 to be an appropriate civil penalty for each instance of discrimination.

BACK PAY, COSTS, AND EXPENSES

Section 105(c)(3) of the Act authorizes an award for back pay and interest, as well as all costs and attorneys fees in the event a claim of discrimination is sustained. The uncontroverted evidence shows that complainant's back pay loss includes a loss of the shift differential as well as one additional day's pay for every three week period (Tr. 21)

Haro at the time of the trial estimated his wage loss at $3,500.00 to $3,700.00. Due to the lack of more specific documentation on his back pay, I rule Haro is entitled to back pay in the amount of $3,500.00 plus interest. In addition to said amount, William Haro is entitled to back pay plus interest since the hearing in this case, until the date of his termination by respondent.

The parties stipulated that complainant Haro incurred $3,896.00 in attorneys fees and $585.86 in costs. (Respondent's letter of June 30, 1981 and complainant's partially signed stipulation filed July 2, 1981). Complainant should accordingly be awarded that amount for attorneys fees and costs.

Based on the foregoing findings of fact and conclusions of law I enter the following:

ORDER

CASE NO. WEST 80-116-DM

1. Complainant's claim of discrimination concerning the removal and replacement of the bad order car on respondent's production train is sustained.

2. Complainant's claim on discrimination concerning the placement of a light in a light bracket on the end of the production train is vacated.

3. A civil penalty of $500.00 is assessed against respondent for violating Section 105(c) of the Act. Said amount is payable 40 days after the decision of the Commission becomes a final order. Said civil penalties shall be paid in accordance with Section 110(j) [30 U.S.C. 820(j)].

4. The employment record of William A. Haro is to be completely expunged of all comments and references involved in his refusal to remove and replace the bad order car.

5. Respondent is ordered to pay William A. Haro the sum of $3,500.00

as back pay with interest at 12 1/2% per annum.(footnote.3) Additional back pay shall also continue to accrue after the date of hearing until the date William A. Haro was terminated by respondent. Respondent is directed to pay Haro an additional amount plus interest which complies with this order.

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6. Complainant's claim of discrimination in connection with the grease line repair is affirmed.

7. Complainant's claim of discrimination in connection with the AIRSLUSHER is vacated.

8. The employment record of William A. Haro is to be completely expunged of all comments and references involved in his refusal to repair the grease line.

9. A civil penalty of $500.00 is assessed against respondent for violating Section 105(c) of the Act. Said amount is payable 40 days after the decision of the Commission becomes a final order. Said civil penalties shall be paid in accordance with Section 110(j) [30 U.S.C. 820(j)] of the Act.

10. Complainant is awarded the sum of $3,896.00 as and for attorney fees and $585.86 in costs incurred in both of the above cases for a total of $4,481.86.

John J. Morris
Administrative Law Judge

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~FOOTNOTE_ONE
The transcript is silent as to the date of this event, but it was apparently a day or so before the subsequent incident.

~FOOTNOTE_TWO
A Sala Block is a device that can be worn by a workman. If working properly it will arrest the fall of a workman.

~FOOTNOTE_THREE
Interest rate used by Internal Revenue Service for underpayments and overpayments of tax Rev Ruling 79-366. Cf Florida Steel Corporation, 231 N.L.R.B. No. 117, 1977-78, CCH, N.L.R.B. Para 18,484; Bradley v. Belva Coal Company WEVA 80-708-D (April 1981).