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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.

MAGMA COPPER COMPANY,  
RESPONDENT

COMPLAINT OF DISCHARGE,  
DISCRIMINATION OR INTERFERENCE

DOCKET NO. WEST 80-482-DM

MD 80-26

MINE: San Manuel Division

DECISION AND ORDER

Appearances:

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For the Complainant

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For the Respondent

Before: Judge Jon D. Boltz

STATEMENT OF THE CASE

Complainant, William A. Haro, filed a complaint against Respondent, Magma Copper Company alleging that on August 24, 1979, he was suspended for five days for alleged insubordination, and that on November 16, 1979, he received a reprimand when he allegedly left his work area without permission. Haro alleges that the five day suspension and reprimand were administered against him by the respondent in retaliation for Haro having exercised his rights which were protected pursuant to section 105(c)(1) (FOOTNOTE 1) of the Federal Mine Safety and Health Act of 1977 (hereinafter the "Act").

FINDINGS OF FACT

The respondent, Magma Copper Company, operates an underground copper mine, mill, smelter, refinery and rod plant at San Manuel, Arizona. Several years prior to 1979, respondent had initiated a six point safety program. The safety program refers to a six point check list which is to be completed by each employee and his supervisor. After the safety slip is filled out each day by the employee, it is given to his supervisor. Approximately 1500 to 1600 employees fill out the safety slips daily. Six questions must be checked on each slip, however, only the first three questions are relevant in this proceeding. The first three questions are as follows:

YES NO

1. Check entrance to place of work?
2. Are equipment and working area in good order?
3. Is work assignment understood?

On May 19, 1979 when Haro filled out his safety slip, he checked question No. 1 "No" because he had observed that there were splinters in the shower room benches and that the benches should be sanded and painted. Haro's supervisors explained to him that the first question referred to Haro's actual work place, and that for unsafe conditions outside Haro's work area a notation should be made in the "comments" section at the bottom of the safety slip. Haro believed that the entrance to his place of work included the shower room because that was his first entrance to the job where Haro put on his work clothes. Haro informed the mechanical general foreman that unless Haro was allowed "freedom of choice" on filling out the safety slips he would not fill them out any more. He stated that his decision was not subject for negotiation. Haro also felt he was being coerced as to what the meaning of immediate work area meant. Haro's supervisor informed him that he was expected to fill out the safety slips, and no further action was taken in regard to this incident. On May 25, 1979, Haro was informed that the shower room benches had been sanded and painted.

On August 16, 1979, Haro again marked "no" on question No. 1 on the safety slip. Haro testified that in his opinion his entrance to his work place was unsafe because respondent would not allow Haro to apply his craft as a journeyman mechanic with respect to the welding of concrete pots used in the underground mine department. Haro had observed the welding work being done on the concrete pots by certified welders, and Haro believed that it was unsafe. Haro had further concluded that respondent was limiting Haro's abilities to perform his duties, and respondent was not letting Haro comply with his "specified requirements." Haro's supervisor, Mr. Hamilton, later informed Haro that Haro was a mechanic, not a welder, and if Haro did not like how things were being done, to get another job.

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On August 16, 1979, Haro also marked "no" to question No. 2 on the safety slip in regard to whether the equipment in the area was in good working order. Haro marked the slip "no" because the overhead crane in the surface car shop could not be used and had not been repaired. The crane had been taken out of service approximately one month before, on July 24, 1979, and the air lines to it had been disconnected and the control box "tagged out". This action had been taken after an MSHA inspector had inspected the crane on July 24, 1979, at the request of Haro. When questioned by Mr. Hamilton about Haro's mark "no" on the safety slip, Haro acknowledged that the overhead crane was out of service, but Haro stated that he could climb to the roof of the shop, reconnect the air hoses, and thus use the crane. Hamilton told Haro that if Haro did that, he would be in violation of a direct order given to everyone in the shop in that the crane was tagged out of service.

As to question No. 3 on the safety slip, whether the work assignment was understood, Haro had marked it "no" on August 16, 1979, because Haro did not understand the work being done by the welders on the concrete pots. Hamilton explained to Haro that Haro was a mechanic, not a welder, and that there was no need for Haro to understand any weld repairs being done within Haro's shop.

On August 22, 1979, Haro was summoned by Mr. Hamilton, the mechanical general foreman, to discuss the method Haro had used to fill out the safety slip on August 16, 1979. Mr. Hamilton concluded the meeting by explaining to Haro that respondent's expectations in regard to the safety slips had now been explained to Haro and that he could either comply with the program or look for work elsewhere.

On the next day, August 23, 1979, Hamilton discovered that Haro had turned in his safety slip with the first three questions left unanswered. Hamilton sent Haro's immediate supervisor to Haro in order to have him fill it out. The supervisor returned and told Hamilton that Haro had refused to fill it out, and that Haro had said if Hamilton wanted it filled out, then Hamilton could do it himself. At 4:25 p.m., Hamilton ordered Haro brought to his office and when Haro arrived, Hamilton asked Haro why some of the questions on the safety slip had been left unanswered. Haro replied, that it had slipped his mind, or he had forgotten. Haro then took a pencil from his pocket, checked the three unanswered questions "yes", and tossed the safety slip on a chair. Haro left work at 4:30 p.m.

Mr. Hamilton did not believe that Haro had forgotten to fill out the safety slip, but that Haro had refused a direct order as to how to fill it out. Hamilton contacted his supervisor, explained what had occurred, and recommended that Haro be fired for insubordination. However, the final decision was that Haro be given a five day disciplinary layoff commencing August 24, 1979, for insubordination. The notice to Haro gave the explanation that the layoff was for "failure to comply with a direct order concerning six point safety slip." Mr. Hamilton's

supervisor testified that Haro was the only employee who had refused to fill out a safety slip in compliance with instructions.

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Haro filed a grievance pursuant to the union contract on August 16, 1979, alleging that "Mr. Hamilton was forcing me against my will in filling out safety slips and was doing it through coercion." On August 22, 1979, Haro filed a grievance because Haro concluded that he was unable to leave his work area during lunch hour and felt that he should, therefore, be paid for his lunch hour.

On November 16, 1979, Haro received a written warning for being away from his work area. During the lunch period Haro had left his work area to file a second step proceeding in a grievance that Haro and another miner had filed previously. Allegedly, Haro had not asked the permission of his supervisor in order to leave his authorized work area during the lunch period to make the filing at the Administration Building.

During the three years prior to August, 1979, Haro had filed approximately 20 grievances against respondent and had also filed two "discrimination" complaints against respondent for alleged violations of section 105(c)(1) of the Act. These complaints were pending at the time Haro was suspended for insubordination.

#### ISSUES

The issues in this proceeding as agreed to by counsel for Haro and counsel for the respondent were whether or not the discipline which was administered to Haro regarding the five day disciplinary layoff on August 24, 1979, for insubordination and the subsequent reprimand on November 16, 1979, for leaving the work place were done in accordance with legitimate company policies, or whether these disciplines were pretextual and contrary to section 105(c)(1) of the Act.

#### DISCUSSION

Haro has the burden of showing that he engaged in protected activity and that his suspension and reprimand were motivated in part by such protected activity. The Secretary of Labor, on behalf of David Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980).

Was Haro suspended for five days commencing August 24, 1979, because he had made complaints in regard to alleged dangers or safety or health violations, and did Haro receive the reprimand on November 16, 1979, for the same reasons?

Counsel for Haro contends that because of Haro's complaints to MSHA in July 1979, which resulted in the inspection of the overhead crane on July 24, 1979, and Haro's history of resorting to MSHA assistance, respondent took revenge and discriminated against Haro by suspending him for five days for alleged insubordination; and, that for the same reasons respondent reprimanded Haro for leaving his work area on November 16, 1979, without permission, in order to file a second step of a grievance. Thus, Haro

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claims that the protected activity in which he engaged consisted of having made safety complaints to MSHA and that because of that activity protected by the Act, respondent retaliated against Haro. The facts do not bear out this contention.

According to the testimony of Haro he was in disagreement as to the manner in which the respondent required him to fill out safety slips. On May 19, 1979, Haro marked "no" to question No. 1 which stated "Check entrance to place of work?" Because he disagreed with respondent's interpretation as to the location of his "place of work." Although Haro may have believed that the splinters on the shower room benches were a danger or health or safety violation, the point he raised was that he was coerced into filling out the safety slips to show that the entrance to "place of work" was the immediate work place of the miner, whereas Haro believed it to be the entrance to the mine property where he was first subject to orders by a supervisor. Thus, there was no protected activity involved in this occurrence.

On August 16, 1979, when Haro again marked "no" to question No. 1 on the safety slip there was no showing by Haro that he was complaining of an alleged danger or safety or health violation. Haro testified that his entrance to his work place was unsafe because respondent would not allow Haro to apply his craft as a journeyman mechanic with respect to the welding of concrete pots.

At the request of Haro an MSHA inspector inspected the overhead crane in the car shop on July 24, 1979. As a result of that inspection, the crane was taken out of service due to certain deficiencies. A supervisor "disabled" the crane so that it could not be operated. He had the crane moved to the end of the building, parked, and unhooked it from its air supply, and the controlling mechanism was "tagged". The crane was not put back into operation until February 25, 1981, according to Haro's testimony. Although the evidence was unclear as to what the alleged danger consisted of, Haro's action in calling MSHA was protected activity. However, there is no inference from the evidence that the suspension of Haro on August 24, 1979, or the reprimand on November 16, 1979, was motivated in any part by that protected activity.

On August 16, 1979, Haro marked "no" to question No. 2 on the safety slip. The question was "Are equipment and working area in good order?" Haro testified that he had been marking "no" to that question because he was unable to obtain an answer from management as to when the overhead crane would be repaired. This complaint was not activity protected by the Act. Since the crane had already been "tagged out" of service for approximately a month, its presence could hardly be called a possible danger or safety or health violation.

On the same date, August 16, 1979, there was no protected activity in regard to Haro's answering question No. 3 "no", that the work assignment

