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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

COMPLAINT OF DISCHARGE,
DISCRIMINATION OR INTERFERENCE

v.

DOCKET NO. WEST 81-365-DM

MAGMA COPPER COMPANY,
RESPONDENT

MSHA CASE NO. MD 81-70

MINE: San Manuel

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, alleges in his complaint filed pursuant to provisions of the Federal Mine Safety and Health Act of 1977, (hereinafter the "Act") that respondent, Magma Copper Company, terminated Haro's employment with respondent on February 12, 1981, in violation of section 105(c)(1) of the Act. (FOOTNOTE 1) Haro alleges that he was terminated for reasons other than misconduct, namely, because of his participation in proceedings before the Federal Mine Safety and Health Review Commission.

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Respondent denies the allegations and alleges that Haro's termination was based on his "refusal to follow the directives of management; insubordination."

From conflicting testimony I find the facts to be as follows:

Respondent operates a mine, mill, smelter, refinery, a rod plant, metallurgical facilities, and maintenance facilities for all the maintenance work near the town of San Manuel, Arizona. Since 1974, the claimant, William A. Haro, had been a mechanic employed by the Respondent. In the past Haro had filed three complaints with the Mine Safety and Health Administration alleging discrimination. These complaints had been filed on July 3, 1978, January 4, 1979, and September 10, 1979. Haro had also filed approximately 20 to 30 grievances in 1979.

On February 10, 1981, Haro's supervisor, Rueben Roberts, instructed Haro to assist two electricians who were going to be working on the overhead crane in the car shop. Haro told Roberts at about 9:30 a.m., that the electricians were going to try to move the overhead crane from the middle of the shop to one end of it and that Haro had called for the use of a Grove crane. Roberts decided the overhead crane should be moved by other persons so the Grove crane and operator were not needed.

After lunch on the same day, February 10, 1981, Roberts wanted to have a crane operator move some cars and sought out Sledge, the supervisor who had access to a crane. When Roberts approached Sledge, Sledge was on his way to correct what he considered to be an unsafe practice by his employee, Clifford Kelly, in the way he was moving a suspended load while operating the Grove crane. On a previous occasion, June 12, 1980, Sledge had observed Kelly and Haro moving a load with a crane and had verbally reprimanded Kelly for moving the load without the load being physically restrained to keep the load from swaying. Sledge's instructions were that suspended loads must be physically restrained by a tag chain, rope that is hand held, or the object itself must be hand held. However, Roberts had told his employees, including Haro, that in moving a suspended load, they could either restrain the load or guard it. In the instant case Haro was walking along with the suspended load (a work platform) while it was in transit.

Sledge asked Roberts to walk with him in following the Grove crane. When the crane had parked and the work platform that was being transported was on the ground, Sledge went to Kelly, the crane operator, and told him the load being transported had not been physically restrained as required. Kelly stated that the load had been physically restrained. Sledge then walked over to where Haro and his supervisor, Roberts, were standing and asked Haro if the load had been physically restrained. Haro responded with words to the effect of "are you asking me a direct question?" When Sledge

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said that he was asking a direct question, Haro stated that if Sledge wanted an answer, he could ask Haro's boss, Roberts, to ask the question. Sledge then asked Roberts to repeat Sledge's question to Haro and after Roberts did so, Haro responded to the effect that "I have no comment at this time." This response upset Sledge, and he angrily left the area.

Haro commented to Roberts that Sledge was not as big a supervisor as he thought he was, and that Haro was going to file a grievance against Sledge. After Roberts returned to his regular duties, Haro came to Roberts and said that he wanted to invoke section 6.1.H of the collective bargaining agreement. That section provides:

"In a grievance arising out of complaints of unsafe working conditions, the employee may request the immediate supervisor in his department to make arrangements to relieve the grievance man to handle the grievance with the immediate supervisor. This shall not be construed as permitting any employee to interfere with the employees job assignment."

When Roberts went to obtain a grievance man, the assistant mine superintendent told Roberts to return to Haro and find out what type of grievance Haro wanted to file and what kind of unsafe working conditions Haro wanted to file it against.

When Roberts again contacted Haro, Roberts was informed by Haro that he wanted to file a grievance regarding the procedures on moving materials with the Grove crane. Roberts suggested that since no imminent danger existed, the appropriate time to file the grievance asking for clarification would be at the start of the shift, at lunch time, or at the end of the shift. Haro disagreed and stated that he would not file a grievance if Roberts would get Sledge from his department and have him come over to talk to Haro. Roberts declined and then went to look for a grievance man.

Sledge contacted his supervisor, Bud Vogt, the section foreman of the mechanical division, in order to find out if it would be proper to suspend Kelly for a safety infraction and Haro for insubordination. Vogt conferred with the general foreman, Lino Gonzales. The mine superintendent, Bob Zerga was then contacted and after some discussion, Zerga decided to have a meeting of those persons in his office in regard to the conduct of Haro. After the information was discussed in Zerga's office, he telephoned Tom Hearon, the assistant general manager, for advice because Zerga knew there already was "litigation outstanding involving Mr. Haro" and that Zerga had been accused of being prejudiced against Haro. Fifteen to twenty minutes later Bob Skiba, manager of personnel services, called Zerga recommending that Haro be suspended pending investigation of the charges against him.

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Although it was unusual to have higher levels of management involved in the discharge of a miner for insubordination, Zerga "pushed it there" because the miner involved was Haro.

At approximately 3:00 p.m. on February 10, 1981, in the presence of Haro and his grievance man, a suspension hearing was conducted by Tim Acton, the assistant mine superintendent. Lorenzo Chavez, the senior personnel administrator was also present. Haro was given a suspension notice stating that he was suspended until 8:00 a.m., February 11, 1981, pending investigation of poor performance of duties and insubordination. The grievance man for Haro asked Acton who Haro was allegedly insubordinate to. Acton replied that the insubordination was with respect to Sledge and Roberts. Haro said that the suspension notice did not conform to the collective bargaining agreement, that the notice contained no explanation, and that it was unsigned. Roberts signed the notice, and it was given to Haro. Haro put the suspension notice on the desk and stated that he had not been given a full reason and explanation in writing and was going back to work. He also stated that Roberts had trumped up this action and that it was different than "what had happened an hour ago". Haro was informed that unless he accompanied the guards and left with them, Chavez would call "law enforcement". Haro voluntarily left the premises.

At approximately 4:00 p.m., February 10, 1981, several management personnel met to review the events involving Haro. It was decided that the electricians who were present with Haro that morning and who would know whether the work platform was supposed to have been moved by Haro should be interviewed the next morning on February 11, 1981. It was their opinion that "if the balance of the investigation confirmed what we already knew about the situation, that Mr. Haro would be discharged for insubordination." The points discussed at the 4 o'clock meeting were (1) that Roberts had told Haro not to move the work platform or use the Grove crane, (2) that Haro had refused to answer Sledge and Roberts in their direct questions; and (3) Haro had refused to be suspended. Since further investigation was to take place on February 11, 1981, Haro was contacted by telephone and told not to come in on February 11, 1981, as he had been instructed, but to appear on February 12, 1981 at 9:00 a.m. Acting on the advice of his union, Haro did appear on February 11, 1981. Haro gave Roberts two grievances which alleged (1) the company was in violation of the collective bargaining agreement in that the supervisor failed to contact the grievance man on Haro's request and that on Haro's persistence that the supervisor contact the grievance man, Haro was suspended on unfounded charges, and (2) the company was in violation of the collective bargaining agreement in that it did not explain the reason for the suspension for insubordination and that the company would not explain "who Mr. Haro was insubordinate towards." Since Haro's hearing date had been changed by management to February 12, 1981, Haro was then escorted from the property.

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On February 11, 1981, at 4:00 p.m. Sledge held a disciplinary conference with Kelly, the Grove crane operator, and his grievance man. Kelly acknowledged having been instructed in the proper way to move a suspended load by Sledge. Kelly was then given a three day disciplinary layoff.

On February 12, 1981, Tim Acton, the assistant mine superintendent, held the termination hearing with Haro and his grievance man present. Acton told Haro he had some questions he wanted to ask Haro and that after the questions were answered, Haro could state his own defense. The first question was why he had not followed Roberts instruction about using the Grove crane and moving the work platform. Haro's response was that he did not have to answer Acton's question. Haro then replied that Roberts had not told him not to move the work platform. Acton then asked a second question concerning why Haro had refused to answer Sledge's and Roberts' questions about holding onto the load. Haro refused to answer the question and said that he was being denied due process, and that he wanted a full trial where witnesses could be called. Acton then asked Haro why he had refused to be suspended on February 10th. Haro then said that the company was in violation of the collective bargaining agreement. He stated that he had not been given a full explanation and generally objected that he had not been given due process of law. After Haro's refusals to answer the questions, Chavez, the senior personnel administrator, indicated that Haro would have to be terminated. Haro was given a termination slip. He refused to sign it, but his grievance man did sign it.

Haro filed a grievance regarding his termination alleging that respondent had violated the collective bargaining agreement in its termination of him. The parties stipulated in this proceeding before the Administrative Law Judge that the record be expanded to include the subsequent determination of the arbitrator that there had been no violation of the collective bargaining agreement in the discharge of Haro by the respondent.

ISSUE

The issue is whether or not the termination of Haro's employment with the respondent was contrary to section 105(c)(1) of the Act.

DISCUSSION

The complainant establishes a prima facie case if:

". . . . A preponderance of the evidence proves (1) that (the miner) engaged in a protected activity, and (2) that the adverse action was motivated in any part by the protected activity." *Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (1980) at 2799.

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The complainant claims two protected activities:

1. "The incident on February 10th, for which he was initially suspended and later terminated, involved his calling for a safety grievance and a grievance man on his job site pursuant to section 6.1.H of his union contract."

2. "His testifying in engaging in administrative law appeals against Magma Copper Company on at least two prior occasions involving three different complaints."

In addition, Haro introduced evidence of filing numerous grievances, an indeterminate number of which were connected with safety. These activities are protected by the Federal Mine Safety and Health Act of 1977, and may not be the motivation in taking adverse personnel action against an employee. *Pasula v. Consolidation Coal Co.*, supra; *Robinette v. United Castle Co.*, 3 FMSHRC 803 (1981). Thus, the complainant established by a preponderance of the evidence that he did engage in protected activities by filing complaints with the Mine Safety and Health Administration in 1978 and 1979 and then filing safety grievances in 1979.

The second element of Haro's prima facie case must be a showing that adverse action was taken and was motivated in any part by the protected activity. In *Secretary of Labor, Mine Safety and Health Administration, Ex Rel. Johnny N. Chacon v. Phelps Dodge Corporation*, 2 FMSHRC 2508 (1981), the Review Commission utilized four criteria in analyzing the operators motivation with regard to an adverse personnel action:

- "1. Knowledge of the protected activity;
- "2. Hostility toward protected activity;
- "3. Coincidence in time between the protected activity and the adverse action; and
- "4. Disparate treatment of (the complainant)."

A reasonable inference to be drawn from the activities of Haro in filing three different complaints under the jurisdiction of a Federal Mine Safety and Health Act of 1977, as well as the filing of numerous grievances against the respondent is that management had knowledge of Haro's protected activities. Bud Vogt, the section foreman, mechanical division, testified that he was aware that Haro had filed MSHA complaints and "a tremendous amount of grievances". He also testified that he was aware that MSHA or the State Mine Inspector had come out to the property on one occasion in response to Haro's complaint. Bob Zerga, the mine superintendent, also had knowledge of Haro's protected activity. He had been involved in the MSHA charges brought by Haro and was also involved in his safety grievances.

However, there was no evidence from which to draw an inference that management was in any way hostile toward protected activity on the part of Haro. When Zerga was notified of the facts concerning the alleged in

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subordination of Haro, he contacted the assistant general manager, Tom Hearon, in order to obtain an objective opinion in regard to the action to be taken involving Haro. Although Hearon's advise was ordinarily to terminate the miner involved, he recommended that a careful evaluation of the case be made because of the legal matters already pending involving Haro. Thus, management took extra precautions in this particular case because Haro was involved.

As further evidence that respondent did not bear any hostility toward protected activity, it was shown that between October 30, 1980 and January 15, 1982 the seven Unions involved at the company had filed a total of 135 grievances related to safety. Of the employees who had filed these grievances, there were several who "quit for personal reasons", one was terminated for being absent without leave, but other than Haro, the rest of the personnel who filed safety grievances were still employed with the respondent. The manager of personnel services, Bob Skiba, testified that his impression of Haro was that he was not a "reasonable person" and that he was "very arrogant, challenged authority of supervision, very testy, a difficult personality to supervise" This impression was formed in a grievance hearing in December, 1979, when Haro's supervisor was making his presentation. Mr. Skiba testified as follows:

"and as I recall, in the course of his explanation, he was interrupted by Bill Haro. This was after there had been some, I think, bantering back and forth. It was not a quiet meeting. Generally, the the meetings with Mr. Haro were not quiet type meetings. The general maintenance foreman, Hamilton, was making his presentation and Mr. Haro had interrupted him, and he said words to this effect that "We can have you replaced."

At this point, Skiba told Haro that if he did not change his attitude toward supervision, he would probably lose his job.

There was no coincidence in time between the protected activity and the adverse action taken against Haro. All of the MSHA complaints had been filed by September, 1979. The only dates given for the "protected activity" related to safety grievances were also filed in 1979. MSHA discrimination charges involving Haro had been "pending" since July 3, 1978. It is unlikely that the respondent would wait over 31 months to terminate Haro for filing such charges. Thus, the conclusion is that there was no coincidence in time between the protected activity and the adverse action.

There was no disparate treatment of Haro. One of Haro's witnesses testified that Haro's suspension hearing, termination hearing, and second step grievance hearing were handled differently than other individuals in

1 Section 105(c)(1) reads in pertinent part "No person shall discharge or discriminate against any miner because such miner has filed or made a complaint under or related to this Act, including a complaint notifying the operator of an alleged danger or safety or health violation in a mine"