

CCASE:
SOL (MSHA) v. PHELPS DODGE
DDATE:
19910409
TTEXT:

Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
The Federal Building
Room 280, 1244 Speer Boulevard
Denver, CO 80204

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
ON BEHALF OF
RICHARD G. ROETHLE,
COMPLAINANT

DISCRIMINATION PROCEEDING

Docket No. CENT 90-124-DM
SC-MD 90-04

Tyrone Mine & Mill

v.

PHELPS DODGE CORPORATION,
RESPONDENT

DECISION

Appearances: Michael H. Olvera, Esq., Office of the Solicitor,
U.S. Department of Labor, Dallas, Texas,
for Complainant;
Charles L. Chester, Esq., RYLEY, CARLOCK & APPLE-
WHITE, Phoenix, Arizona,
for Respondent.

Before: Judge Cetti

STATEMENT OF THE CASE

The Secretary of Labor, Mine Safety and Health Administration (MSHA) ("Complainant") commenced this proceeding on behalf of Richard G. Roethle and against Phelps Dodge Corporation ("Respondent") on June 21, 1990, by filing a complaint alleging that Respondent discriminated against Mr. Roethle in violation of Section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 (the Act) by unjustly suspending him on November 24, 1989, for refusing to work in unsafe conditions on the "B" shift at Respondent's Tyrone, New Mexico, open pit copper mine on November 19, 1989. Respondent denied the allegations.

Complainant issued no citations or orders with respect to this case alleging Respondent violated any provision of the Mine Safety and Health Act or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to MSHA. This proceeding was commenced on the investigation of the February 6, 1990, complaint of Mr. Roethle, which stated:

I was operating Haul Truck No. 204 on November 19, 1989. The steering tires were out of round, causing the vehicle to bounce heavily. This caused the steering wheel to jam, affecting the safe steering. I narrowly missed another truck, and I parked No. 204.

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My foreman told me I had no right to stop the truck. He and another foreman stood on the ground, looked at the truck, and said it was okay. They refused to ride with me or check the truck, and sent me home.

I believe that I was discriminated against and ask to be paid for time lost and to have my record cleared.

Respondent contends (1) that Truck No. 204 (the 204 truck) was safe to operate, at least at slower speeds, (2) that Mr. Roethle knew this, (3) that Mr. Roethle was required to operate the 204 truck at slower speeds if he was concerned about his or others' safety, (4) that he refused to operate the 204 truck though it was his duty to do so, and (5) he was therefore suspended for 10 days.

Complainant seeks back wages for Richard Roethle in the amount of \$1,056.20 plus interest, contending that his 10-day suspension was due to activity which was protected under the Act. In addition, the Secretary seeks an order directing the respondent to expunge the employment records of Mr. Roethle of all reference to the circumstances involved in this action. The Secretary also seeks a civil money penalty for the alleged violation of Section 105(c) of the Act.

Finally, Complainant seeks an additional but unspecified remedy as the Commission sees appropriate for Respondent's alleged ongoing violation of Section 105(c).

ISSUES

Complainant states the issues as follows:

1. Whether Respondent unlawfully discriminated against Richard Roethle by suspending him for ten days.
2. What relief, if any, the Commission should render.
3. Whether Richard Roethle failed to file a timely complaint.

FINDINGS OF FACT AND CONCLUSIONS

1. Respondent, Phelps Dodge, at all relevant times, operates a large open pit copper mine in Tyrone, New Mexico, and its operations substantially affect interstate commerce.

2. Richard G. Roethle, at all relevant times, was and is employed as a haul truck driver by Respondent at its Tyrone Mine. At all relevant times, Mr. Roethle was an experienced truck driver.

3. On November 19, 1989, on the "B" shift at the Tyrone Mine, Mr. Roethle's usual truck was not operating and the dispatcher, Johnny Poe, assigned Mr. Roethle to the 204 muck truck. The 204 truck is an older, large 170-ton unit rig haul truck used to carry mine ore. It has large tires that are 10.5 feet in diameter. The driver of the 204 truck must sit in the driver seat in the cab approximately 14 feet above the ground.

4. At the beginning of this shift, Mr. Roethle, on being assigned the 204 truck, inspected it and found a high front suspension, a 2" -3" gap in the square roller housing, oil all over the left side of the motor, a leak in the left steering ram cylinder, and "raggedy" back tires.

5. Mr. Roethle's job on the November 19, 1989, "B" shift required him to load the 204 haul truck at the No. 12 Shovel near the bottom of the mine, drive from the No. 12 Shovel up a "ramp" to the Crusher slot, through the slot, and across a flat to the Crusher, then return to the No. 12 Shovel for another load. When Mr. Roethle reached a speed of approximately 16 to 18 miles per hour, the truck became so unbearably "bouncy," that he believed he couldn't completely control the truck. The bouncing of the truck made it difficult to hold himself in his seat and resulted in trouble controlling the steering wheel and pedals.

6. Mr. Roethle stopped the truck and dumped the load he was hauling at the crusher. He then notified the dispatcher in the tower that something was wrong with the 204 truck. He asked the dispatcher to send a mechanic to determine what was wrong with the truck.

7. The dispatcher instructed Mr. Roethle to "make another load" while waiting for a mechanic to check on the truck. Mr. Roethle complied with the dispatcher's request. As Mr. Roethle was making a turn going down hill to a lower level, the steering wheel of the truck "jerked" in his hands. When he got to the shovel, Mr. Roethle radioed the dispatch tower and asked that his foreman, Victor Giacoletti, also meet him near the crusher to check out the truck. It felt to Mr. Roethle like the front tires were coming off the ground. He had never felt anything like this bouncing before.

8. Near the crusher slot, Mr. Roethle's foreman Victor Giacoletti, Tom Wilson, the acting mechanic foreman, and two tire

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shop employees met Mr. Roethle and visually observed the truck. Mr. Roethle informed Mr. Giacoletti of his safety concerns, including the bouncing of the truck. All four observed the truck bouncing. Mr. Giacoletti said it had been bouncing for a couple of months.

9. At Mr. Giacoletti's request, Mr. Wilson visually checked the truck's suspension and stated he found nothing wrong except the "suspensions could possibly be a little high. One of the front suspensions was "slightly higher than the other one."

10. At Mr. Giacoletti's request, Mr. Roethle drove the 204 truck across the flat back toward the Crusher slot, so that the four could again observe the bouncing. The four followed Mr. Roethle in another vehicle. At about 16 mph, the empty 204 truck began bouncing again, but not as bad when it was loaded. At the end of the crusher slot, Mr. Roethle got off the truck and requested that one of the four observers get in the truck and ride with him, but no one did. Mr. Giacoletti stated that the problem did not look bad, and that the truck should be run until Tom Wilson could "free someone up."

11. As Mr. Roethle continued driving the truck, it started bouncing again. The shocks were "bottoming out," banging in a manner he had never heard before. At one point, the steering wheel seemed to jump, jerk and momentarily lock out. The truck was hard to control. He just missed hitting another truck.

12. Mr. Roethle called the dispatch tower and told the dispatcher he was parking the 204 truck because it was unsafe. He asked for a "ready line assignment." The dispatcher complied with the request and Mr. Roethle parked the truck.

13. When Mr. Roethle parked the truck at the ready line, Mr. Giacoletti asked Mr. Roethle if he was refusing to drive the 204 truck. Mr. Roethle responded in the affirmative. Mr. Giacoletti then told Mr. Roethle he did not have the right to refuse to drive the 204 truck. At the time Mr. Giacoletti appeared to Mr. Roethle to be agitated. Mr. Roethle told Mr. Giacoletti that he felt the truck was unsafe. As Mr. Giacoletti escorted Mr. Roethle to the office, Mr. Roethle asked Mr. Giacoletti to note his statement that the 204 truck was unsafe. Mr. Roethle was sent home, pending an investigation.

14. The foreman, Mr. Giacoletti, assigned the 204 truck to Mr. Ray Tafoya. He told Mr. Tafoya that the 204 truck "bounced a little, but it was drivable." Mr. Ray Tafoya drove the 204 truck and experienced the bouncing. He drove slowly "due to the bouncing" for the balance of the "B" shift on November 19, 1989.

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15. Ray Tafoya drove the truck loaded from the ninth shovel to the 409 dump, going about four to six miles per hour. The ride was "real rough, the steering wheel had lot of play to it." He dumped his load and started back. When he got up to 16 miles per hour, the truck "started shaking and bouncing real bad all over the road." He had never experienced any bouncing like his before. He felt it was unsafe, dangerous, and testified "if I lose control of it, I'm gone." When he slowed down to between 12 and 14 miles per hour, the bounce was not as bad and he could control the truck "a little bit."

16. Mr. Tafoya did not "park" the 204 truck because there was no available truck at the ready line and because he was new on the job, a "greenhorn."

17. Before the November 19, 1989, incident, mechanics and truck drivers, including the Complainant, had on occasion B.O.'d trucks and had never been disciplined for doing so.

18. The front suspension of the 204 truck was overcharged at the time it was driven by Mr. Roethle on November 19, 1989. The 10.5 foot diameter steering (front) tires were out of round, 1/2" and 3/8", respectively. This "out of round" condition of the front tires caused the truck to lope and bounce. Prior to Mr. Roethle's suspension on November 19, 1989, no one was aware the front tires were out of round.

19. The out of round front tires on the 204 truck were discovered sometime after the incident of November 19, 1989 which resulted in Mr. Roethle's suspension. The out of round steering tires were then taken off the truck and replaced with new tires that were not out of round. Thereafter the 204 truck did not bounce.

20. If on November 19th when at Mr. Roethle's request the truck was checked (visually) by his foreman, the acting mechanic foreman and the two tire men, it would have been found that the bouncing of the truck was caused by out of round front tires, the truck would have been BOed by management and the truck would have been sent immediately to the tire shop where the out of round tires would have been replaced. (Tr. Vol II p. 228).

21. On November 19, 1989, Richard G. Roethle refused to drive the 204 muck truck because he held a reasonable good faith belief that further driving of the truck was hazardous and unsafe.

22. On November 19, 1989, Richard G. Roethle was suspended, pending investigation for refusing to drive the 204 muck truck.

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23. Mr. Roethle was suspended for a total of 10 days, beginning November 19, 1989.

24. The amount of back wages which accrued during the 10-day suspension is \$1,056.20 (not including interest).

25. Richard G. Roethle filed a complaint with the Mine Safety and Health Administration in February of 1990.

26. Richard G. Roethle first became aware of his discrimination rights under MSHA in February of 1990.

27. Respondent was not prejudiced by Mr. Roethle's filing of the discrimination complaint more than 60 days after the incident, which resulted in his suspension.

DISCUSSION WITH FURTHER FINDINGS

I

Section 105(c) of the Act was enacted to ensure that miners will play an active role in the enforcement of the Act by protecting them against discrimination for exercising any of their rights under the Act. A key protection for this purpose is the prevention of retaliation against a miner who brings to an operator's attention hazardous conditions in the workplace or who refuses to perform work under unsafe conditions. It is well-settled that generally, in order to establish a prima facie case of discrimination under 105(c) of the Mine Act, a miner must prove that (1) he or she engaged in protected activity and (2) the adverse action complained of was motivated in any part by that activity. Secretary on behalf of *Pasula v. Consolidation Coal Company*, 2 FMSHRC 2768 (1980), rev'd on other grounds sub nom. *Consolidation Coal Company v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of *Robinette v. United Castle Coal Company*, 3 FMSHRC 803 (1981); Secretary on behalf of *Jenkins v. Hecla-Day Mines Corporation*, 6 FMSHRC 1842 (1984); Secretary on behalf of *Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510-2511 (November 1981), rev'd on other grounds sub nom. *Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmatively defend by proving that it was also motivated by the miner's unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. *Haro v. Magma Copper Company*, 4 FMSHRC 1935 (1982). The ultimate burden of persuasion does not shift from the complainant. *Robinette*, supra.

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See also *Boich v. FMSHRC*, 719 F.2d 194 (6th Cir. 1983); and *Donovan v. Stafford Construction Company*, No. 83-1566 D.C. Cir. (April 20, 1984) (specifically-approving the Commission's Pasaula-Robinette test). See also *NLRB v. Transportation Management Corporation*, 462 U.S. 393, (1983), where the Supreme Court approved the NLRB's virtually identical analysis for discrimination cases arising under the National Labor Relations Act. (Footnote 1)

Applying these principles to this case, I find that Respondent violated 105(c) of the Act by discriminatory adverse action, i.e., suspending Mr. Roethle without pay for 10 days, commencing November 19, 1989 for refusing to drive the 204 truck for the balance of the shift.

It is undisputed that Mr. Roethle was suspended for 10 days for his refusal to continue driving the 204 muck truck on the "B" shift on November 19, 1989. He communicated his safety concerns regarding the 204 truck to management. If Mr. Roethle's refusal to drive the 204 truck at that time was protected activity his

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suspension for this refusal was in violation of Section 105(c)(1) of the Act. In this case, the question of whether Mr. Roethle's refusal was protected activity turns on whether he had a reasonable good faith belief that the continued driving of the 204 truck was hazardous. In determining whether a miner's belief is reasonable, the courts and the Commission consistently has held that the perception of a hazard must be reviewed from the miner's perspective at the time of the work refusal. The miner need not objectively prove that an actual hazard existed. *Gilbert v. Federal Mine Safety and Health Review Commission*, 866 F.2d 1433, 1439 (D.C. Cir. 1989).

In *Robinette*, 3 FMSHRC at 810, the Commission explained that "[g]ood faith belief simply means honest belief that a hazard exists." The burden of proving good faith rests with the complaining miner but he need not demonstrate an absence of bad faith. *Bush v. Union Carbide Corporation*, 5 FMSHRC 993 at 997.

In evaluating the evidence in this case I credited the testimony of Mr. Roethle, even though there are some inconsistencies in his testimony and the testimony of some of the other drivers and mechanics who corroborated his testimony. These inconsistencies were not of such a nature or magnitude as to defeat his claim. As stated by Tenth circuit officials, the Court in *Liggett Industries, Inc. v. Stenson Begag* filed January 9, 1991, "The totality of the evidence is what counts."

In this case Mr. Roethle was concerned with what he perceived to be his inability to safely control the truck. He demonstrated good faith by requesting not only a mechanic but also his foreman to meet him at the job site and check out the truck. After management made only a visual check of the truck, and could not or at least did not find out what was causing the problem, Mr. Roethle asked that one of them ride with him in the 204 truck so they could see first hand the problems he was experiencing in controlling the truck. No one complied with that request. No one even suggested that it would be alright for Mr. Roethle to drive the truck at a speed lower than that normally expected or required for this type of truck. Management did not address his safety concerns in a manner sufficient or adequate to reasonably quell his fears.

Two of Respondent's truck drivers Mr. Gomez and Mr. Tafoya and two of Respondent's mechanics including Mr. Dennis Stailey, testified on Mr. Roethle's behalf. This testimony corroborates at least in some degree Mr. Roethle's testimony.

Respondent would have the Court disbelieve Mr. Roethle and the truck drivers, and mechanics who testified in his behalf with one exception, Mr. Dennis Stailey, the truck shop mechanic who worked on and drove the 204 truck on the November 20th "C" shift. Respondent in his post hearing brief states that Mr. Stailey's candor and testimonial clarity was refreshing. In pertinent part, Mr. Stailey testified as follows. (Tr. starting at page 71 of Vol I).

Q. When did you work on that truck after Mr. Roethle had been sent home?

A. As far as I can remember, it would have been the "C" shift on the 20th.

Q. Okay. And tell me how you came about to work on this truck.

A. My foreman lined me up on that truck that night at the beginning of the shift and said we needed to go by the book on charging the front suspension because we had a problem with it.

Q. Okay. And what did you do?

A. The right suspension had already had the nitrogen charge let off; it was completely collapsed. And we bled the nitrogen off of the left cylinder, drained all the oil out, replaced the oil to the specified inches in height, and then recharged the nitrogen.

Q. Okay. You mentioned that the right suspension had been bled off. I mean, who had bled the right suspension off?

A. I don't know. It was on "B" shift before I came on.

Q. Okay. So, they were already working on it on "B" shift by the time you got there?

A. They had started working on it and they put it back out on B.O. line. And we had to bring it back in and start on it.

* * * * *

Q. Okay. Okay. After you got the suspension filled, what did you do at that point?

A. Then Mel took the truck and got a load and drove it. And he brought it back and said it still wasn't right; there was still something wrong.

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Q. Mel Marcus told you that?

A. Mel Marcus.

Q. Okay.

A. And so we checked everything, physically, and couldn't find anything wrong. And I took it up on the four leach dump and it seemed to work pretty good going up. But coming back down, when I hit the dynamics, it started really bouncing bad.

* * * * *

Q. And on the way back about how fast were you going?

A. I took it up to 18 miles an hour, which is the required speed going downhill is 18. And as soon as I hit the dynamics then that when--

Q. What is hitting the dynamics? What does that mean?

A. You have electrical braking, dynamic braking, which reverses the field in pull motors.

Q. Okay. What started happening?

A. It was like being on a roller coaster. I could feel it in my stomach, it was bouncing so bad.

Q. The whole cab was bouncing?

A. The whole truck was bouncing.

Q. Was it similar to any other kind of ride you had been on in terms of driving these trucks around?

A. About the only time that I have felt one bounce like this is when I ran over a rock. But it would just be one bounce; it wouldn't be continuous up and down.

Q. How were you able to control the vehicle through the bounce.

A. I was controlling it, yes, but it--I was a little worried about what was going to happen because I had never felt that before.

Q. All right. When it started bouncing what did you do in terms of the dynamics and the speed of the truck?

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A. I backed off a little bit and it eased up a little bit until I could get it slowed down to about 12 miles an hour. That's when it stopped.

Q. Okay. You say that you were able to control the vehicle. Was it any harder to control through the bounce than just normal driving?

A. Well, yes, because you are going up and down and your foot is moving. And, yes, it was harder to control. Yes.

Q. Okay. And when Mel Marcus came back and told you that the truck was--still wasn't right, did he say anything else or did he say something is still wrong with the suspension?

A. As far as I can remember, he just said, we haven't fixed the problem yet.

Q. Did he tell you what the problem was, I mean?

A. The bounce.

Q. Okay. When you were assigned the truck he told you something about a bounce?

A. No. When he assigned me--no, he just told me we need to go through the suspensions, there is something wrong.

Q. Okay. When you said "the bounce" that's sort of in hindsight that you realized what the problem was?

A. Yes. I didn't know what the problem was to begin with.

Q. Okay. Now, what was the suspension--when you were bouncing, did you notice anything in particular about the suspension?

A. No. I was too worried about what it was doing, where it was going to go to really. I knew the--everything was inspected on the suspension so I was trying to figure out what else might be causing it. And it was the end of shift by then; I had worked on it eight hours. I still hadn't found what the problem was.

* * * * *

Q. Now, would you consider this bouncing motion that you encountered, would that, in your opinion, be an unsafe situation?

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A. It was, as far as I was concerned. I wouldn't release the truck, and I didn't release the truck.

Q. Okay. So, at the end of your shift what did you do?

A. I told the foreman it is still B.O.; you are going to have to do some more trouble shooting to find out what the problem is.

* * * * *

Q. Okay. Do you remember anything unusual about this truck other than the fact that that night it was bouncing?

A. I can remember that it was one of the trucks that I think backed over a berm and rolled. That's about the only thing I really remember.

Q. Backed over a berm and rolled?

A. Yes.

Q. About how long ago was that?

A. It seems like it was about three years ago. I'm not sure.

Q. About three years ago. Do you recall what happened?

A. The truck went through the berm.

Q. Driver error or mechanical failure or what?

A. I don't know.

Mr. Stailey's credible testimony (correctly described by Respondent as candid and having a refreshing clarity) clearly shows that Mr. Stailey considered the 204 truck to be in an unsafe driving condition. Mr. Stailey's testimony in this respect corroborates the testimony of the complainant and that of every other driver who drove the truck at or near the time of the November 19 incident.

Respondent's argument that the truck would have been safe to operate at a slow speed and that therefore, complainant should have continued driving the 204 truck at a slow speed is not persuasive since neither his foreman or anyone else suggested to complainant prior to the hearing that he could or should drive slower than the normal expected production speed. In the absence

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of evidence to the contrary, and particularly in view of the testimony of the drivers that they had been verbally reprimanded for slow driving, it appears that Mr. Roethle was subjected to the normal production pressures under which the mine operated. The slowing down of one large truck on a mine road often frustrates and slows down production traffic behind it. It is also noted that Mr. Stailey testified that the "required speed going downhill" is 18 miles an hour. (Emphasis added). It does not appear from the record that driving slowly was a viable option to Mr. Roethle. If management believed it was a viable option, Mr. Roethle's foreman should have been mentioned this option to Mr. Roethle on November 19th in conjunction with management's obligation to address the complaining miner's safety fears.

It may be that with hindsight that Mr. Roethle now feels that he might have been able to control the truck now that he knows the bouncing behavior of the truck was caused by out of round tires and that management now assures him that it would have excused driving at a speed slower than normally expected production speed. It must be kept in mind, however, that the reasonableness and honesty of his belief must be based on his perception of the unsafe driving condition of the truck at the time he refused to drive the truck and not as of the time of the hearing.

II

Section 105(c)(2) of the Act provides that a miner who believes that he has been discriminated against may, within 60 days after such violation occurs, file a complaint with the Secretary.

Mr. Roethle's written complaint was not received within 60 days after the suspension occurred and thus was not within the time limits of Section 105(c). The purpose of this time limit is to avoid stale claims, but a late filing may be excused. The time limits in Section 105(c) are not jurisdictional in nature. *Christian v. South Hopkins Coal Company*, 1 FMSHRC 126, 134-136 (April 1979); *Bennett v. Kaiser Aluminum & Chemical Corporation*, 3 FMSHRC 1539 (June 1981); *Secretary v. 4-A Coal Company, Inc.*, 8 FMSHRC 240 (February 1989).

The Commission has indicated that dismissal of a complaint for late filing is justified only if the respondent shows material, legal prejudice attributable to the delay. Cf. *Secretary/Hale v. 4-A Coal Company, Inc.*, supra. No such showing has been made here.

The parties stipulated that Mr. Roethle's damages for the 10-day suspension consist of lost wages in the sum of \$1,056.20 plus interest to be calculated in accordance with *United Mine Workers of America v. Clinchfield Coal Company*, 10 FMSHRC 1943, aff'd, 895 F.2d 773 (10th Cir. 1989) (short-term federal rate applicable to underpayment of taxes).

Mr. Roethle's personnel record should be expunged of all matters relating to the incident of November 19, 1989 as requested in the discrimination complaint filed by the Secretary.
PENALTY ASSESSMENT

Section 110 (a) of the Act provides as follows:

The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty by the Secretary which penalty shall not be more than \$10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense. (Emphasis added).

It is also noted that the last sentence of section 105(c)(3) of the Act states, "Violations by any person of paragraph (1) shall be subject to the provisions of sections 108 and section 110(a)." Thus it is clear that a penalty is to be assessed for discrimination in violation of section 105(c)(1) of the Act.

In a discrimination case the Secretary is required to propose a specific dollar amount supported by relevant information for assessing the appropriate penalty for the alleged violation of section 105(c) of the Act. In the case at bar the Secretary in the discrimination complaint only requested that an appropriate civil money penalty be issued. At the hearing, however, the Secretary on the record proposed that the penalty assessed be between \$2,000 and \$2,500, based upon MSHA's review and analysis of the case.

In addition, the Secretary in her post-hearing brief seeks to impose a monthly civil monetary penalty upon Respondent on the theory that Respondent has a policy with respect to its truck drivers that constitutes an ongoing violation of section 105(c) of the Act. In essence, complaint seems to contend that Respondent has an ongoing policy of requiring its truck drivers to continue driving a truck which Management asserts to be safe even

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though the driver has a reasonable good faith belief that the condition of the truck is such that it would be hazardous to continue to drive the truck. I find no persuasive evidence that Respondent has such a policy. On the contrary, the preponderance of the evidence presented establishes that the Respondent except for its failure in this case has a policy of addressing the safety concerns of its truck drivers. There is no persuasive evidence that it has an ongoing policy of taking adverse action against a driver for work refusal based on the driver's safety concerns if it appears to Management that the driver has a reasonable good faith belief that the condition of the truck is such that it would be hazardous to continue driving it.

In this case, however, Mr. Roethle was subjected to disparate treatment for his work refusal. The foreman negligently misjudged the situation and thus management did not adequately address Mr. Roethle's safety concerns. Management may have had a sincere but nevertheless mistaken belief that Mr. Roethle did not have a reasonable good faith belief in the safety hazard involved in continuing to drive the truck. Such a sincere but mistaken belief by management is no defense to a violation of Section 105(c) of the Act. In my opinion, the sincerity and reasonableness of such a belief on the part of management is one factor that can be considered in determining the appropriate penalty, along with the statutory criteria in Section 110(c) of the Act. I do find, however, that management was negligent in sending Mr. Roethle home on November 19th before having a mechanic or supervisor drive the 204 truck or ride in the cab of the 204 truck with Mr. Roethle, as Mr. Roethle requested before taking adverse action against him. Management was negligent in failing to adequately address Mr. Roethle's safety concerns. Mere visual inspection of the 204 truck under the circumstances of this case did not adequately address Mr. Roethle's safety concerns.

With respect to history, Complainant's Exhibit C-1 is a printout of Respondent's violations from November 19, 1987, through November 18, 1989, at the Tyrone Mine and Mill. It shows a total of 88 paid violations of which 66 were of the single penalty type.

Respondent is a large operator. The Tyrone Mine includes a number of divisions. It has a concentrator, an XSEW Plant (which is another means of processing copper ore), a mechanical and electrical division, and various miscellaneous divisions such as leaching and security.

Respondent objected to the violations printout (Ex. C-1) on the basis that the exhibit does not purport to focus on the fines

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or assessments relate to the mining operation which is the division in which Mr. Roethle is and was employed, nor to citations that might relate to the operation of alleged defective equipment. These objections were noted and correctly overruled.

On balance, everything considered, I concluded that a civil penalty of \$500 is the appropriate civil penalty for Respondent's violation of 105(c) of the Act.

CONCLUSIONS OF LAW

1. Jurisdiction over this action is conferred upon the Federal Mine Safety and Health Review Commission under Section 105(c)(2) and Section 113 of the Act.

2. Respondent's Tyrone Mine and Mill is a mine, as defined in Section 3(b) of the Act, and the products of which affect commerce under Section 4 of the Act.

3. Respondent was an operator at all relevant times within the meaning of Section 3(d) of the Act.

4. Richard G. Roethle was a miner at all relevant times within the meaning of Section 3(g) of the Act.

5. Mr. Roethle engaged in protected activity when on November 19, 1989, he refused to drive the 204 muck truck which he believed to be unsafe. His belief was a good faith, reasonable belief.

6. Mr. Roethle's suspension was directly motivated at least to a large extent by his refusal to operate the 204 truck on November 19, 1989.

7. Mr. Roethle's claim is not barred by his failure to file a written complaint within 60 days of the November 19, 1989, incident.

ORDER

Based on the above findings of fact and conclusions of law, it is ORDERED:

1. Respondent shall pay to Complainant Richard G. Roethle within 30 days of the date of this decision the sum of \$1,056.20 representing lost wages during the 10-day suspension beginning November 19, 1989, with interest thereon in accordance with the

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Commission decision in Local Union 2274, UMWA v. Clinchfield Coal Co., 10 FMSHRC 1493 (1988) calculate proximate to the time payment is actually made.

2. Respondent shall expunge from its personnel records all references to the suspension of Richard G. Roethle that commenced on November 19, 1989.

3. Respondent shall pay a civil penalty of \$500 to the Secretary of Labor for its violation of 105(c) of the Act.

August F. Cetti
Administrative Law Judge

Footnote start here:-

1. Section 105(c)(1) provides:

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 operator's 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 or miners or applicant 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.