

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SEP 14 2018

HAROLD NOTAH,	:	DISCRIMINATION PROCEEDINGS
Complainant,	:	
v.	:	Docket No. CENT 2017-0146-DM
	:	Docket No. CENT 2017-0453-DM
	:	
GCC RIO GRANDE INC.,	:	Mine: Tijeras Plant & Quarry
Respondent.	:	Mine ID: 29-00013

INTERIM DECISION ON LIABILITY

Appearances: Harold Notah, Tohatchi, New Mexico, pro se;
Justin M. Winter, Esq., Jackson Lewis, P.C., Reston, Virginia, for Respondent.

Before: Judge Lesnick

This proceeding is before me on a two Complaints of Discrimination filed by Harold Notah against GCC Rio Grande, Incorporated ("GCC"), under section 105(c) of the Federal Mine Safety and Health Act of 1977 ("the Act"), 30 U.S.C. § 815(c). The complaints allege unlawful discipline and discharge from employment in retaliation for having made safety complaints to the Respondent and to the Mine Safety and Health Administration ("MSHA").

Notah filed two Discrimination Complaints with MSHA pursuant to section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2),¹ on November 12, 2016 and May 12, 2017. In letters to Notah dated December 2, 2016 and July 13, 2017, MSHA notified him that, based on its investigation of the allegations contained in the Complaints, it had concluded that there was not "sufficient evidence to establish, by a preponderance of the evidence[,] that a violation of Section 105(c) occurred." Notah initiated the instant proceedings on his own behalf, and without legal counsel, before the Commission on December 27, 2016 and August 4, 2017 under section 105(c)(3) of the

¹ Section 105(c)(2) provides, in pertinent part: "Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against . . . by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination."

Act, 30 U.S.C. § 815(c)(3).²

As a preliminary matter, in an email dated January 30, 2018, Notah stated that GCC had failed to cover medical expenses he incurred as the result of a workplace injury. The injury, which was to Notah’s ankle, occurred during the first week of March 2017. According to Notah, he received a “harassing phone call” about the medical bill from a collection agency, and that he was informed that GCC was not responsible for the bill and would not pay it. Notah asserted that GCC’s alleged refusal to pay the bill constituted a continuing act of discrimination against him. I construed Notah’s email as a motion to amend his complaint.

On March 23, 2018, GCC moved for leave to file an opposition out of time to Notah’s motion to amend his complaint, and an opposition pleading. Exhibit 1 to that pleading is an affidavit made by Jackie McGuire, GCC’s Risk Management Director. McGuire attests that Notah’s medical bill was paid in full on February 16, 2018. In a subsequent phone conference conducted by my counsel with the parties on March 12, 2018 to determine if further evidentiary proceedings were necessary, Notah claimed that he was continuing to receive phone calls from a collection agency, and that he had received such a call that morning. Counsel for GCC stated: “that this claim had not been paid initially was due to inadvertent error on the part of GCC, not based on any purposeful action. . . . The claim was actually paid on February 5th of 2018.” A transcript of the call has been entered into the record. In four emails Notah filed with me after my counsel conducted the phone conference, Notah was not able to substantiate his claim of further contacts made by a collection agency regarding the bill. Attached to one of the emails is a letter dated January 25, 2018 from Concentra Medical Centers informing Notah that a claim he made for workers compensation had been denied, and that he owed Concentra \$510.02. Attached to the three other emails are copies of insurance forms submitted for care he received at Concentra facilities. Notah did not provide any information as to any contacts made by a collection agency.

In light of the above facts, I find that when the outstanding bill for a workplace injury was brought to GCC’s attention, payment of the bill was arranged by GCC, and that this payment was made by February 16, 2018. Accordingly, Notah’s motion to amend his complaint is **DENIED**.

A hearing on Notah’s complaints was held in Albuquerque, New Mexico. The parties presented testimony and documentary evidence, and filed post-hearing briefs. For the reasons set forth below, I conclude that Notah engaged in activity protected by the Act, that GCC retaliated against him, and that Notah’s protected activity served as the basis for his termination by GCC.

² Section 105(c)(3) provides, in pertinent part: “If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary’s determination, to file an action in his own behalf before the Commission”

I. Factual Background

GCC operates the Tijeras Plant and Quarry, a cement mine in Tijeras, New Mexico. The mine employs approximately 100 persons, including over 70 miners. GCC Br. at 2. Harold Notah was employed at the Tijeras Plant as an electrician. Notah had 23 years experience as an electrician. Tr.-I 6.³ At the time of his termination on March 16, 2017, Notah had worked at the Tijeras mine for approximately four years, eight months. Tr.-I 15. GCC had its electricians work flexible shifts most days of the week, and by pre-arrangement, could work on Saturdays and take a day off during the week. The electricians were also regularly placed on an “on-call” list, and could be called into the plant at any time when on the list. GCC Br. at 2.

On or around October 8, 2016, Notah observed a deficient splice in an electric cable. This cable was the responsibility of electricians working under the supervision of Jorge Ambriz. R. Ex. 1, Tr.-I 7, 60. By October 19, 2016, the splice had not been repaired. On that day, Notah called MSHA and complained to the agency regarding the potential hazard the deficient splice created. Tr.-I 10-11. Later that day, an MSHA inspector arrived at the plant, found that the splice was in fact deficient, and issued Citation Nos. 8968030 and 8968031. Tr.-I 10-11, R. Ex. 1.

On November 1, 2016, Notah received a three-day suspension for an incident that had occurred three weeks earlier on October 8, 2016. R. Exs. 3,17. Notah alleges his suspension is a retaliatory response to his phone call to MSHA notifying the agency of a workplace hazard.

R. Ex. 2. Notah subsequently filed a discrimination complaint with MSHA, which found insufficient evidence to establish discrimination. R. Ex. 1, 3. On December 20, 2016, Notah filed a complaint with the Commission. R. Ex. 2. Thereafter, Notah received three more disciplinary actions, the final two resulting in his termination on March 16, 2017. R. Exs. 9, 10, 18. Notah subsequently filed another complaint alleging that his termination was a continuing act of discrimination against him. R. Ex. 20.

GCC supervisors document disciplinary actions taken against employees they deem to have performed unsatisfactorily through written reports. These reports are signed and dated and include, among other information, the names of the employee and supervisor, and the nature and date of the alleged poor performance. See R. Exs. 9-18. Three witnesses on the stand testified to Notah’s poor work ethic. Tr.-I 53-4, 68-73, 83, 85. However, Notah received disciplinary actions only twice during a period of nearly two years. R. Exs. 15, 16. Thereafter, Notah

³ Citations to the transcript of the hearing in this matter refer to the two separately paginated volumes covering the first day of the hearing, cited as “Tr.-I”, and the second day, cited as “Tr.-II”. At the hearing, Notah testified that written statements by him titled “Discrimination Report” dated November 7, 2016 and May 8, 2017 were his fair and accurate representations of his recollections. In light of Notah’s status as a pro se complainant, I have used these statements to supplement Notah’s testimony. I also note that GCC had an opportunity to cross examine Notah at the hearing on his written recollections.

received eight disciplinary actions in the ten months leading up to his termination, four of which occurred after his phone call to MSHA. Seven of these disciplinary actions were issued by the same supervisor, Alfonso Stokes. R. Exs. 9-18. Notably, Stokes did not appear at the hearing, nor did he offer any testimony in any fashion.

Disciplinary Action dated November 1, 2016

On October 8, 2016, Notah's usual supervisor, Stokes, was on vacation. Tr.-II 16. Notah was instead working under the supervision of Jorge Ambriz, who instructed Notah to gather and deliver materials necessary to install a new motor for a transport belt. R. Ex. 3. Notah subsequently told maintenance supervisor Andrew Montoya that his shortened shift that day made completing such an installation unlikely. *Id.* Montoya advised Notah to merely disconnect power to the motor instead. *Id.* Occupied with this and other repair-related preparations and safety procedures, Notah testified that he ran out of time to collect and deliver the requested materials as Ambriz instructed. *Id.* Montoya testified that he allowed Notah to leave his shift, unaware of Notah's failure to deliver materials for the motor installation. Tr.-I 56.

That night, Ambriz discovered the installation materials were not gathered or delivered as he had instructed Notah to do. Tr.-II 9-10. He and the next electrician on shift spent one hour gathering the materials. Tr.-II 10. Under Ambriz's periodic supervision, the electrician then installed the new motor with an improper splice. Tr.-I 60. Guillermo Manquera, a lead electrician, discovered the improper splice and shared his observations with Notah. Tr.-I 90-91. Manquera brought the splice to management's attention in a morning meeting soon thereafter. *Id.* As noted above, when the condition remained unremedied, Notah contacted MSHA on October 19, 2016. Tr.-I 10-11. Manquera suspected Notah had notified MSHA, but when Manquera questioned Notah, he remained silent. Tr.-I 87. When MSHA personnel arrived at the plant, Stokes told Notah that the MSHA inspectors wished to interview Notah in private. Tr.-II 40-41.

On November 1, 2016, Ambriz suspended Notah for his failure to deliver the motor installation materials as ordered. R. Ex. 1. This action occurred a full 24 days after the incident for which Notah was cited, and 12 days after Notah's call to MSHA. R. Ex. 1, Tr.-I 15. Ambriz testified that his decision was based on company policy for someone with previous disciplinary actions. Tr.-II 11-12. He also testified that he was not aware Notah had notified MSHA of the improper splice until the day of the hearing, testimony I found credible. Tr.-II 12. GCC maintenance manager Dylan Gilbert, who began working indirectly with Notah in January 2017, also testified that he was not aware that Notah notified MSHA of the improper splice until the hearing date. Tr.-II 28.

Disciplinary Action dated March 14, 2017

Notah testified that on Monday, March 6, 2017, Stokes granted Notah's request to work Saturday instead of Friday of that week. R. Ex. 20. On Tuesday, March 7, 2017, Notah

sustained an ankle injury and was placed on restricted duty. *Id.* Because GCC policy does not allow those on restricted duty to work as the sole electricians on a Saturday shift, Notah was ineligible to work Saturday in lieu of Friday. R. Ex. 9, 20. Unaware of the policy, Notah did not arrive to work on Friday and incurred an unauthorized absence. *Id.*

On his return to work, Notah testified that Stokes agreed to consider Notah’s unauthorized absence as paid time off. R. Ex. 20. Apparently, Stokes later denied the existence of any such agreement because he submitted a written disciplinary action against Notah for an unauthorized absence, which was signed and dated on Notah’s termination date, March 16, 2017. R. Ex. 9. Notah’s written statement and the signatures of Notah, Stokes, and the human resources staffer indicate that the disciplinary action was submitted on March 16, 2017, the date of Notah’s termination. The date typed in the header of the disciplinary action report is Tuesday, March 14, 2017. The date Stokes signed the action is unclear. *Id.*

Disciplinary Action dated March 16, 2017

Notah testified that on Monday, March 13, 2017, Stokes verbally confirmed that another electrician was on-call that week. Tr.-I 40-41. Maintenance manager Dylan Gilbert testified that the on-call schedule listed Notah. Tr.-II 21, 27. When Notah received a call from the mine on Wednesday, March 15, 2017, he informed the control room operator that another electrician was on call, but that he (Notah) was available if needed. R. Ex. 20, Tr.-I 41. The operator declined and apologized for the confusion. *Id.* The next day, March 16, the day of Notah’s termination, Stokes confronted Notah, denying the on-call schedule had changed. R. Ex. 18. Notah’s discrimination report indicates Stokes grew heated and warned Notah of an impending disciplinary action. R. Ex. 20.

Two hours later, Stokes brought Notah to the plant’s human resources office. There, Notah received the disciplinary action discussed above for an unauthorized absence on Friday, March 10, 2017. *Id.* This disciplinary action was delayed six days and signed on the date of termination; however, in every prior occurrence, Stokes reliably submitted disciplinary actions within 3 days of an incident. R. Ex. 9. The action warned Notah that further disciplinary action would result in discharge. *Id.*

When Notah protested the disciplinary action during his human resources meeting, he stated Stokes grew increasingly agitated. R. Ex. 20. During the afternoon of March 16, Stokes again summoned Notah to the human resources office and presented him with a final disciplinary action for falsely claiming during his conversation with the control room operator that the on-call schedule had changed. R. Ex. 18. Lying to management is an offense that can lead to termination. R. Ex. 8. Notah denies lying to the operator. Tr.-II 42. Gilbert, who was present during the meeting, testified that Notah’s previous disciplinary actions contributed to Notah’s termination. Tr.-II 23. Notah’s employment with GCC was then terminated. R. Exs. 18, 20.

II. Findings of Fact and Conclusions of Law

Section 105(c)(1) of the Mine Act provides, in pertinent part, that a miner cannot be discharged, discriminated against or interfered with in the exercise of his statutory rights because he “has filed or made a complaint under or related to this Act, including a complaint . . . of an alleged danger or safety or health violation.” 30 U.S.C. § 815(c)(1). A complainant alleging discrimination under section 105(c) of the Act, 30 U.S.C. § 815(c), establishes a *prima facie* case of prohibited discrimination by presenting evidence sufficient to support a conclusion that the individual engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *See Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981).

In determining whether a mine operator’s adverse action was motivated by the protected activity, the judge must bear in mind that “direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect.” *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (November 1981), *rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983). “Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence.” *Id.* (citation omitted). In *Chacon*, the Commission listed some of the more common circumstantial indicia of discriminatory intent: (1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. 3 FMSHRC at 2510-12; *see also Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 530 (April 1991). The Commission has also held that an “operator’s knowledge of the miner’s protected activity is probably the single most important aspect of a circumstantial case” and that “knowledge . . . can be proved by circumstantial evidence and reasonable inferences.” *Secretary of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (September 1999) (citing *Chacon*). The operator may rebut a complainant’s *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. *See Robinette*, 3 FMSHRC at 818 n.20.

Here, I find ample un rebutted evidence that Notah engaged in protected activity protected under the Mine Act when he brought safety concerns about what he characterized as an “illegal splice” to the attention of GCC management. Tr.-I 10-11. The splice was done on October 8, 2016 and discovered soon thereafter by Notah and a fellow electrician, Guillermo Maquera. Notah testified that at an electrical department meeting on or around October 17, 2016, Maquera “brought up the issue” of the hazardous splice: “He told our supervisor, Alphonso Stokes, saying that we need to get this fixed, it’s a safety issue. And he didn’t take us seriously; Mr. Stokes didn’t take us seriously. So he didn’t say [any]thing, he just brushed it aside, practically laughing about it.” Tr.-I 10-11. When faced with management’s lack of concern regarding the splice, Notah called MSHA’s Albuquerque office and reported the

hazardous splice. This occurred on October 19, 2016 during Notah's break time. Tr.-I 10-11.

That same day, two MSHA inspectors arrived at the mine and, at approximately 1:00 p.m., interviewed Notah. I find that GCC management, specifically his supervisor Alphonse Stokes, knew that Notah was talking to MSHA because, according to Notah, it was Stokes who told Notah during the October 19th MSHA inspection that the inspectors were at the mine, and it was Stokes who told Notah that the MSHA inspectors wanted to talk to Notah. This emerged in unrebutted testimony by Notah that I find credible. Tr.-II 40, 50 (“MR. NOTAH: Yes, when I was out in the field, Mr. Stokes told me to come to the shop. As I arrived at the electrical department, Mr. Stokes says, that ‘MSHA is here to talk to you. Go see them at the front office in the basement.’”) Reporting an unsafe working condition to MSHA, and discussing the condition with MSHA inspectors, are quintessentially protected activities under the Mine Act.

I also find that GCC took several adverse actions against Notah, starting with the suspension that is the basis of Notah's first complaint, and culminating in GCC terminating Notah's employment. What remains for me to determine is whether either of the adverse actions taken by GCC against Notah that serve as the bases for his complaints were motivated by Notah's protected activity.

The first adverse action Notah complained of is the suspension for failure to follow a work order. That occurred on October 8, 2016. But disciplinary action was not taken against Notah for this incident until November 1, 2016, which was 24 days after the incident and 12 days after the MSHA inspection. However, the person supervising that work, and the person who took the disciplinary action against Notah, Jorge Ambriz, credibly testified that when he disciplined Notah, he was not aware of Notah's contacts with MSHA. Tr.-II 18. Ambriz also testified that the delay in taking the disciplinary action was on account of the absence of Notah's direct supervisor Stokes and a human resources staff person. Tr.-II 11.

It may strain credulity that Stokes said nothing to Ambriz about Notah's contacts with MSHA at the time Ambriz disciplined Notah. After all, Ambriz apparently delayed taking action until he could consult with Stokes. Although I find that the suspension given to Notah on November 1 may have been justified, that Ambriz had legitimate grounds for the action, and that the action was not motivated in any way by Notah's protected activity, I find that this adverse action was essentially eclipsed by the later disciplinary action taken against Notah by Stokes, i.e., his termination. I need not reach any conclusion as to Notah's first complaint because I find his second complaint supported by the testimony – and lack thereof.

The missing link in this case is Alfonso Stokes. Despite being given the opportunity to call Stokes to the witness stand to rebut Notah's testimony and to more fully explain Notah's termination, GCC chose not to do so. Nor did GCC offer to have him testify telephonically. Nor did GCC ask for a continuance to allow Stokes to testify at a later date. One question is whether Stokes knew that it was Notah who called MSHA. From all the circumstances of this case, including Stokes's subsequent behavior towards Notah, I am compelled to draw the negative

inference that Stokes knew it was Notah who made the call to MSHA. As I noted above, although several of GCC's witnesses testified to Notah's less than satisfactory performance, only two disciplinary actions were taken against Notah over a nearly two year period, in May 2013 and June 2014. Tr.-I 32-33. Eight disciplinary actions were taken against Notah during the ten months leading up to his termination, seven of which were carried out by the same supervisor, Alfonso Stokes, and four of which were taken after Notah called MSHA. I find that this increase in adverse actions taken against Notah were motivated by the complaint Notah made to MSHA, of which I have already found Stokes (and thus GCC) was fully aware.

Lending credence to my conclusion that Notah's firing was motivated by his protected activity are the circumstances surrounding his firing. According to insurance claim forms proffered by Notah in support of his motion to amend his complaint, he injured his ankle at work on March 7, 2017, and went to an urgent care facility that same day. A doctor placed him on light duty work. Tr.-I 36, 38. He took a personal day off from work March 9 "to let the swelling go down." Tr.-I 36. By prior arrangement with Stokes, Notah took off from work on Friday, March 10, with the intention of working Saturday, March 11. Tr.-I 37. After seeing a doctor on the morning of Monday, March 13, 2016, Notah was released from light duty restrictions. Tr.-I 39. That same day, Stokes inexplicably disciplined Notah for missing work on the previous Friday (Tr.-I 39) – inexplicably because Stokes was not called to provide an explanation for apparently refusing to honor his prior arrangement with Notah to take that day off.

Notah also testified that Stokes told him on Monday, March 13, that Manquera was on call that week. Tr.-I 40. Stokes was responsible for keeping the on call list up to date, but apparently did not make this change to the list. Tr.-I 41-42. As a result of this oversight, more problems arose later that week when, at approximately 1 a.m. on Wednesday, March 15, the control room operator called Notah and told him to report to the plant. Tr.-I 41. Notah testified that "I told him that . . . the schedule has changed, and [Stokes] told me Monday that [Manquera] was on call. . . . And then . . . he apologized to me and . . . I said I'm willing to come in, Brian. Do you want me to come in? He goes, no, wait. Wait, if I need to call you, I'll call you back." Tr.-I 41. The control room operator did not testify at the hearing. I credit Notah's testimony as to these circumstances, especially in light of the absence of any testimony from Stokes offered either in rebuttal or corroboration.

When Notah reported for work the next day, Thursday, March 16, he was terminated for "insubordination and lying to management on March 15." R. Ex. 18. In light of Notah's testimony as to his firing, I find that this action taken against Notah by Stokes to be transparently pretextual, and further find that it was motivated by Notah's protected activity.

In conclusion, I find that Mr. Notah engaged in clearly protected activity of which the operator was fully aware, and that GCC took adverse action against him in retaliation for his protected activity.⁴

ORDER

Accordingly, inasmuch as Notah has established, by a preponderance of the evidence, that he was discharged for engaging in activity protected under the Act, it is **ORDERED** that the Complaint of Discrimination under Docket No. CENT 2017-0453-DM of Harold Notah against GCC Rio Grande, Incorporated under section 105(c) of the Mine Act is **GRANTED**.

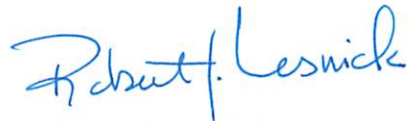
Within ten days of the date of this interim decision the parties **ARE ORDERED** to confer to determine the appropriate back pay and interest to be awarded Notah for the days he missed work as a result of his illegal termination, and any other relief required to make Notah whole, including reinstatement.⁵ Within 20 days of the date of this interim decision, the parties shall report the results of their discussions to me jointly in writing, and I will issue a final decision and order ruling on the agreed-upon relief. If the parties are unable to agree, they shall jointly advise me in writing within 20 days of the date of this decision, and I will issue an order regarding the issue of relief.

⁴ If the operator cannot rebut a *prima facie* case under section 105 by proving that there was no protected activity, no adverse action, or no adverse action motivated by a miner's protected activity, it may nevertheless defend affirmatively by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. See *Robinette*, 3 FMSHRC at 817-18; *Pasula*, 2 FMSHRC at 2799-800. However, I am limited to considering defenses raised by the operator, *U.S. Steel Mining Co.*, 23 FMSHRC 981, 989 (2001) ("... the judge's inquiry is limited to an examination for the reasons given by the operator for the adverse action."), and here, GCC raised no such defense.

⁵ Section 105(c)(3) of the Mine Act provides, in pertinent part: "The Commission shall afford an opportunity for a hearing . . . and thereafter shall issue an order . . . dismissing or sustaining the complainant's charges and, if the charges are sustained, granting such relief as it deems appropriate . . . Whenever an order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner . . . for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation." 30 U.S.C. § 815(c)(3).

Also within 15 days of the date of this decision, the parties **ARE ORDERED** to separately address the civil penalty criteria set forth in section 110(i) of the Mine Act.⁶ In addition, the parties are hereby notified that, pursuant to Commission Procedural Rule 44(b), 29 C.F.R. § 2700.44(b), upon issuance of this decision sustaining Harold Notah's discrimination complaint brought pursuant to section 105(c)(3), 30 U.S.C. § 815(c)(3), I shall notify the Secretary of such determination by service upon the Department of Labor's Office of the Solicitor. As stated in Rule 44(b), "The Secretary shall file with the Commission a petition for assessment of civil penalty within 45 days of such notice."

SO ORDERED.



Robert J. Lesnick
Chief Administrative Law Judge

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⁶ Section 110(i) of the Act provides, in pertinent part: "The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation." 30 U.S.C. § 820(i).