FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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October 16, 1997

CLYDE W. PERRY,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. WEST 96-64-DM
	:	
PHELPS DODGE MORENCI, INC.,	:	Morenci Branch Mine
Respondent	:	Mine ID No. 02-00024

DECISION ON REMAND

Appearances: Clyde Perry, Silver City, New Mexico, Complainant, pro se;
Laura E. Beverage, Esq., Jackson & Kelly, Denver, Colorado,
for Respondent.

Before: Judge Bulluck

This discrimination proceeding is before me on a Complaint of Discrimination brought by Clyde W. Perry against Phelps Dodge Morenci, Inc., (APhelps Dodge@), under Section 105 (c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 815(c). The complaint alleges unlawful discharge in retaliation for safety complaints raised with Phelps Dodge.

Perry filed his discrimination complaint with the Secretary of Labor=s Mine Safety and Health Administration (AMSHA@) pursuant to Section 105(c)(2) on September 14, 1995 (Ex. R-6).[1] On November 6, 1995, MSHA notified Perry and Phelps Dodge that, based on its investigation of the allegations, it had concluded that a violation of Section 105(c) had not occurred (Ex. R-3). Perry instituted this proceeding before the Commission on November 17, 1995, under Section 105(c)(3), 30 U.S.C. ' 815(c)(3).[2]

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[1] Section 105(c)(2) provides, in pertinent part, that AAny 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.@

[2] Section 105(c)(3) provides, in pertinent part, that AIf 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....@

Former Commission Administrative Law Judge Arthur Amchan issued an Order dated April 26, 1996, dismissing the complaint for failure to state a claim upon which relief may be granted. 18 FMSHRC 643 (April 1996). The Commission vacated the judge=s Order and, noting Perry=s *pro se* status, found that Perry had met his burden of alleging discrimination actionable under Section 105(c), and remanded the case for further evidentiary proceedings, including a determination of whether the instant circumstances warrant a waiver of the time requirements for filing a complaint.[3] On remand, the case was assigned to me.

A hearing was conducted in Tuscon, Arizona, on March 25 and 26, 1997. The parties presented testimony and documentary evidence, and filed post-hearing briefs. For the reasons set forth below, I conclude that while Perry engaged in activity protected under the Act, he was not discharged by Phelps Dodge for engaging in that activity.

Factual Background

Phelps Dodge operates a copper mine in Morenci, Arizona. Perry began employment at Phelps Dodge in May 1984, and was employed at the Morenci facility as a spray attendant, beginning in February 1992 (Tr. 105-106). On February 16, 1993, Perry sustained a crush injury, as a result of a three-ton tire rolling over his right foot during the performance of his job duties

[3] Perry filed his discrimination complaint under the Mine Act 223 days after he was discharged and 38 days after the issuance of the arbitration decision upholding his discharge (Exs. C-2, R-7). Considering Perry=s *pro se* status, his testimony, and given the absence of any allegation of discrimination in his defense throughout the Phelps Dodge appeal process, I conclude that Perry formed the belief that he was discharged for having a lost-time accident and raising a related safety complaint only after he had not prevailed in arbitration. Accordingly, I find Perry=s filing 163 days in excess of the 60-day time limit set forth in section 105(c) excusable and without prejudice to Phelps Dodge, and conclude that he timely filed his complaint within 60 days of exhausting Phelps Dodge=s appeal process (see Adiscrimination complaint designating Aarbitration decision 8/13/95" as date of discriminatory action at Ex. R-6).

(Tr. 108-111). Subsequent to emergency medical treatment, Perry received orthopedic treatment and physical therapy (Tr. 112-113). In March 1993, Perry returned to work and was assigned light duty until October 1993, when he assumed the position of truck driver, into which he had successfully bid in May 1993 (Tr. 107, 120; Ex. C-8). Perry drove 190 and 240 ton trucks on a rotational basis during 8 hour shifts (Tr. 122-123), and on at least one occasion, reported to mine shift foreman, Robert Spoon, that truck driving caused discomfort in his right foot (Tr. 124, 423-424).

Perry continued to perform as a truck driver on the graveyard shift (11 p.m. to 7 a.m.), until January 28, 1995, when the incident giving rise to the instant complaint occurred. At approximately 3:00 a.m., during the lunch break, Perry began to experience severe armpit and chest pain, along with blurred vision, requiring him to be transported by ambulance to the Morenci Clinic (Aclinic@) for emergency medical treatment; Perry was accompanied in the ambulance by assistant shift supervisor, Jimmy Gojkovich (Tr. 146-150; Ex. C-10). In the meantime, safety inspector Robert Zimmermann, who had weekend safety responsibility for the mine facility, was contacted at home and dispatched to the clinic. Upon arrival in the emergency room, in the presence of Gojkovich, attending physician assistant Terry Brooks and nurse Jenny Montano, when asked by Zimmermann whether he had taken any medication, Perry=s response included the word Acrystal@ (Tr. 27-31, 151-152, 176-177, 136, 360, 362, 386-388; see also Ex. C-7). Based on this statement, which created the impression that Perry may have taken an illicit substance (crystal methamphetamine), Gojkovich requested that Zimmermann have Perry submit to a Phelps Dodge sponsored drug and alcohol test (Tr. 32, 388). Perry refused to sign the consent and chain of custody forms which authorize and initiate Phelps Dodge drug and alcohol testing under the administration of the Morenci Clinic (Tr. 33; Ex. C-11). During this same period, Brooks asked Perry for a urine sample, in order to provide appropriate medical treatment, and attempted to flush Perry=s system by administering one liter of intravenous fluid; ultimately, Brooks was unable to prescribe medication because of Perry=s repeated failure to produce a urine sample (Tr. 39, 154, 364-366). Perry left the emergency room after three hours of attention, and returned twice that day, in order to produce a urine sample. It was during his third visit, at approximately 9:30 p.m., that Perry produced a sample for Brooks, which tested negative for illicit drugs, and Brooks prescribed medication for Perry=s then diminished, non life-threatening symptoms (Tr. 368-369).

In the meantime, earlier that morning at about 7:30, with Perry=s consent, Zimmermann drove Perry from the clinic to a meeting with shift foreman Robert Spoon at the old Morenci mine office (Tr. 41, 154, 409-410). Spoon, with Zimmermann present, reviewed Phelps Dodge=s drug and alcohol policy with Perry, explained management=s concern that Perry had taken crystal methamphetamine based on Perry=s own statements, explained the consequences of failure to clear himself by refusing to take a drug and alcohol test, and gave Perry repeated opportunities to return to the clinic for testing; Perry refused and insisted that he be permitted to go home (Tr. 42-46, 159-165, 177, 415; Exs. C-9 and C-11). Consequently, Spoon issued a Notice of Investigation and placed Perry on a 5-day suspension (Tr. 414-415; Ex. C-13). Ultimately, Perry was discharged by Phelps Dodge on February 3, 1995 (Ex. R-17; Tr. 418). Perry, represented by then employee representative John Shock, subsequently presented

management with the negative drug and alcohol test results from his treatment by Brooks at the clinic on the night of January 28th (Tr. 84-85, 98; Ex. C-4), but was unsuccessful in overturning his suspension and discharge through Phelps Dodge=s appeal process (open-door policy, problem solving, and arbitration) (Tr. 92, 445-449, 463-465; Ex. C-2). Thereafter, Perry filed his discrimination complaint under the Act, alleging that he was discharged for having a lost-time accident and raising a safety complaint.

Findings of Fact and Conclusions of Law

In order to establish a *prima facie* case of discrimination under Section 105(c) of the Act, [4] a complaining miner bears the burden of establishing that 1) he engaged in protected activity and 2) the adverse action of which he complained was motivated in any part by the protected activity. *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (October 1980), *rev=d on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981); *Secretary of Labor on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842 (August 1984); *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508 (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 that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Pasula*, 2 FMSHRC at 2799-2800. If the operator cannot rebut the *prima facie* case in this manner, it, nevertheless, may 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. *Id*. at 2800; *Robinette*, 3 FMSHRC at 817-818; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987); *Donovan v. Stafford Const. Co.*, 732 F.2d 954, 958-959 (D. C. Cir. 1984); *Boich v. FMSHRC*, 719 F.2d 194, 195-196 (6th Cir. 1983) (specifically approving the Commission=s *Pasula-Robinette* test).

Perry has met the first step in establishing a *prima facie* case of discrimination. It is clear from the record that Perry never engaged in a protected work refusal (Tr. 178), and his testimony of numerous complaints to management, that he couldn=t perform truck driving duties because of pain and that he feared he would hurt somebody, was not supported by the record (Tr. 123-126, 133-137, 178, 231-234). However, I find that Spoon=s testimony established that Perry had

[4] Section 105(c)(1) of the Act provides that a miner cannot be discharged, discriminated against or interfered with in the exercise of his statutory rights because: (1) he Ahas filed or made a complaint under or related to this Act, including a complaint...of an alleged danger or safety or health violation;@ (2) he Ais the subject of medical evaluations and potential transfer under a standard published pursuant to section 101;@ (3) he Ahas instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding;@ or, (4) he has exercised Aon behalf of himself or others...any statutory right afforded by this Act.@

complained to him about foot pain associated with driving trucks, at least once, sometime around late October/early November 1993. Also, I credit Perry=s testimony that he told management he feared hurting somebody and conclude, therefore, that his complaint was raised in a manner sufficient to be protected under the Act. Spoon testified as follows:

> Q. What did he tell you about his foot bothering him and when?
>
> A. He told me that it was uncomfortable for him to drive the truck because of the angle of his foot on the accelerator is the only thing I remember. As far as getting on or off the truck, he didn=t say anything about that bothering him.
>
> Q. Was that just a comment or was it a conversation ? Did he go further and say, ATherefore, I=m not handling this, I want to do something else, I think its hazardous,@ or was it just a comment (Tr. 424)?
>
> A. It was just a comment that I can remember. The only thing he said was it hurt his foot a little bit.
>
> Q. What do you mean thinking about it? I mean he says to you that it hurt his foot to drive [a] truck, what would have been your response?
>
> A. My response would have been that the doctor has more to say about whether or not the guy is able to drive the truck or not and if he has a little bit of discomfort in his ankle it seems like that would go away after awhile. I mean, I didn=t feel it was unsafe for him to drive the truck at all.
>
> Q. Did he tell you this more than one time?
>
> A. No, just once.
>
> Q. Did I ask you if you remember when he told you that?
>
> A. It seemed like just right after he went back on the trucks from his light duty, just after he had been released, so that=s why I didn=t think much about it (Tr. 425).

Perry has failed to establish, a *prima facie* case, however, since he has not met his burden of proving the second step--that Phelps Dodge=s decision to discharge him was motivated in any way by his protected complaint. Perry attempted to establish a causal connection between his protected safety complaint in October/November 1993 and discharge in February 1995 by testifying to a course of harassment by management upon his return to duty from the crush injury

to his foot. Specifically, he alleges that he was forced by Phelps Dodge to return to work in March 1993 (Tr. 114), verbally abused by management when he was on light duty (Tr. 117-121), forced to drive trucks despite his complaints and denied retraining (Tr. 134-137), underpaid while he was on light duty (Tr. 186-189), and discharged in May/June 1994 (Tr. 128-132), in addition to the discharge of February 3, 1995.

The record indicates that Perry was returned to work on light duty upon medical release and instructions from the company physician, Dr. Snyder (Tr. 115-116; Ex. C-8). Aside from his testimony that management officials Spoon, Hill, Davenport and Sanders were giving him a hard time about faking the residual limitations of his foot injury while he was on light duty, Perry did not produce any witnesses who corroborated his testimony of verbal abuse or being forced back to duty before he was physically able, and the record as a whole fails to substantiate these allegations.

By his own testimony, Perry admitted that, while on light duty, he requested that management place him in the truck driver position, after he had obtained medical clearance to drive from his personal physician, Dr. Robertson (Tr. 119-120, 168; Ex. C-8). The evidence further establishes that Perry was properly paid as a spray attendant while in the light duty status, that Phelps Dodge held the truck driver position open for him until he was physically capable of performing those duties, and appropriately paid him at a higher rate after he had assumed the position (Tr. 184-189; Ex. C-5).

Respecting Perry=s allegation that he was denied retraining, there is no evidence of such request except his bare testimony. Moreover, while Dr. Robertson=s September 27, 1994, report of Perry=s final examination and discharge from active medical care mentions that Perry felt he was unable to continue truck driving, Dr. Robertson recommended duties that did not require heavy lifting, prolonged standing, or prolonged heavy use of the right foot (Ex C-8). It is reasonable to conclude, from the record in its entirety, that the truck driving position did meet Dr. Robertson=s vocational limitations for Perry, since Perry not only drove trucks from October 1993 until January 1995, but frequently volunteered to work through his lunch periods, rather than resting his foot (Tr. 178, 235-238, 481, 484-485).

Finally, there is no record of a prior break in duty in 1994. Perry testified that he was not actually discharged by Phelps Dodge in May/June 1994, and his testimony that he was threatened with discharge as another mode of harassment was neither credible nor supported by the record (Tr. 129-133, 346-350; see Ex. C-2).

Likewise, Perry has failed to establish that Phelps Dodge=s decision to discharge him on February 3, 1995, was motivated in any part by his complaint to the company that driving trucks posed a safety hazard to himself and his coworkers. Phelps Dodge=s drug policy is set forth in its Employee Handbook as follows:

> Alcohol and illicit drug use and abuse constitute a significant safety hazard in the work place. An employee who uses illicit drugs or abuses alcohol is a hazard to himself and to his fellow employees. Such a situation cannot be tolerated. In the interests of all concerned, the Company intends to make a vigorous effort to keep alcohol and drugs out of the work place.
>
> An employee who is involved in a property damage accident, or an accident which can be expected to result in lost time will be tested for the presence of alcohol or drugs in his system. An employee who has a prohibited level of alcohol or drugs in his or her system is subject to discipline up to and including discharge. An employee who fails to cooperate with the administration of an alcohol or drug test will be subject to discharge (Ex. R-1, 21-22).

Moreover, the Employee Handbook=s list of Athe more common types of...misconduct@ constituting dischargeable offenses, includes AViolation of the Drug and Alcohol Policy@ at #7 (Ex. R-1, 22).

The record establishes that new employees are given the Employee Handbook, and that the drug and alcohol policy is sent to employees= residences yearly by the company manager, the policy is posted on bulletin boards throughout the mine, and it is discussed in monthly tailgate safety meetings and communications meetings between management and its employees (Tr. 18-20, 408-409). This policy sets forth the prohibited level of drugs and/or alcohol, including any detectable amounts of an illicit drug (including amphetamines), and provides as follows:

> An employee who fails to cooperate with or attempts to undermine the administration of an alcohol or drug test will be subject to discharge. An employee in possession of illicit drugs or alcohol will also be subject to discharge.
>
> In addition, when testing is not mandatory, an employee will be subject to discipline or discharge where the employee=s actions, performance or condition suggest that the employee may have used illicit drugs or abused alcohol or prescribed drugs. If the employee denies the presence of these substances, in his/her system, then he will be given an opportunity to verify the circumstances by providing the required body fluid samples for analysis (Ex. C-16).

Perry testified that he had read the Employee Handbook in May 1994, and that he was familiar with the drug and alcohol policy before the incident on January 28, 1995 (Tr. 208-210, 212; Ex. R-5).

Respecting the events of January 28, 1995, which precipitated Perry=s discharge, Perry admitted, through testimony, that he used the word Acrystal@ during emergency medical treatment, when explaining to Zimmermann and Brooks what he had ingested:

> Q. So the what happened?
>
> A. We are at the hospital. I got down, went to the emergency room there and Mr. Zimmermann was there at the time. He started asking me questions, what kind of medication, your name, occupation. And he asked me had I been taking medication. I said, AI have been taking Darvocet, Percocet for my injuries that I had before.@ And he asked me, AAnything else you have been taking?@ I said AYes.@ I mentioned those ephedrine pills, but I couldn=t remember the name at the time, so I said it was like a speed-like substance. And he said, AWell, explain to me.@ And I go, AA speed-like substance like crystal,@ I said. I never should have said that. He goes, AYou took that?@ And I go, ANo, I didn=t take that. I took ephedrine pills. They are little white tablets.@
>
> Q. You did say Aephedrine?@
>
> A. Yes. And I told that to Mr. Brooks also.
>
> Q. But you also said that you had taken a crystal-like substance?
>
> A. I was trying to describe it, I said speed-like substance.
>
> Q. Did you use the word Acrystal?@
>
> A. Yes.
>
> Q. So you said Aspeed-like@ and Acrystal-like@ substance?
>
> A. Yes. And Mr. Zimmermann then asked me, AWas it like a powder substance?@ I says, ANo, like a regular tablet, A which I bought at a gas station in Silver City (Tr. 151-152).
>
> * * * *
>
> Q. I=m sorry. Did you ever use the word Acrystal@ in the hospital?
>
> A. Yes.
>
> Q. You said you were trying to describe the other substance, ephedrine; is that correct?

A. Yes.

Q. Is there any possibility in your own thinking that since you used the word that you could have been misunderstood to have said that you took crystal meth?

A. Yes (Tr. 176).

Consequently, I conclude that Perry made statements to management officials that created a reasonable belief that he had taken an illicit drug (Tr. 30-32, 387-388).

Phelps Dodge asserts that it discharged Perry for failure to prove his innocence by submitting to Phelps Dodge sponsored drug and alcohol testing (Tr. 87, 418, 445-447; Ex. R-4). Zimmermann testified that during emergency treatment at the clinic (also where Phelps Dodge sponsored drug and alcohol testing is administered), when he requested that Perry take the test, Perry refused and would not sign the Consent and Chain of Custody forms (Tr. 33-38). Moreover, both Zimmermann and Spoon testified that, during the meeting at the mine office, Spoon explained the company=s drug and alcohol policy, explained the consequences of refusal to take the test, and gave Perry several additional opportunities to return to the clinic for testing (Tr. 41-44, 413-415). Perry gave inconsistent and contradictory testimony as to whether he had consented to be tested while in the emergency room, by asserting that he was unaware that he was being asked by Phelps Dodge to do so (Tr. 158-159), and that he had agreed to be tested but was unable to urinate (Tr. 153, 156-158); on cross-examination, he conceded that he did not want to be tested because he had ingested a caffeinated substance (Tr. 250-251). However, despite any incoherence or confusion at the clinic, which may have been caused by Perry=s medical condition, Perry admitted, through testimony, that he refused to take the test when given opportunities later that morning:

Q. When you got to the mine office with Mr. Spoon and Mr. Zimmermann--

A. Yes.

Q. -- did you agree to take it then?

A. No.

Q. Why not?

A. I felt he was being harassed. Since my injury I just--ever since my injury I have been harassed and I felt that I was on my own time.
Q. Okay. You didn=t feel as though you had to take a test on your own time?

A. Right.

Q. When you got issued the notice of suspension did you still have the same feeling that you were on your own time and you weren=t going to take the test?
A. Yes (Tr. 177).

Therefore, I credit the testimony of Zimmerman and Spoon that Perry refused to consent to drug and alcohol testing at the clinic and at the old Morenci mine office.

Phelps Dodge views non-compliance with its drug and alcohol policy as a serious offense that jeopardizes the safety of its workforce. The company is committed to a drug and alcohol-free work environment and, without exception, discharges employees who fail to cooperate or undermine the administration of its testing program (Tr. 24-24, 438-440, 459, 472-473). Perry=s attempt to prove otherwise by citing for comparison similarly situated employees treated more favorably than he (Bobby Kuykendall, Marty Allen and Ricardo Gonzalez) has failed, because he has not produced any evidence to show that these employees were involved in similar circumstances (Tr. 180-183, 272-273). Moreover, the record establishes that Frank Cordova, cited by Perry as proof that Phelps Dodge harasses and discharges employees who have been involved in lost-time accidents, was discharged for excessive AWOLs (absences without leave) and failure to pass the company=s drug and alcohol test (Tr. 314, 451, 427-428; see also Exs. R-7 to 17).

Finally, Perry=s reliance on the negative drug and alcohol test that he ultimately submitted to Hill during his 5-day suspension is misplaced (Tr. 98), since the test was not sponsored by Phelps Dodge in accordance with its drug and alcohol policy (Tr. 97, 254, 368-369, 419, 422). Furthermore, Spoon testified credibly that had Perry consented to testing immediately upon request, either at the clinic or the mine office, the company would have waited as long as necessary for Perry to have produced a urine sample (Tr. 103,422).

Overall, Perry=s inconsistent, illogical, and often unresponsive testimony appeared disingenuous and highly suggestive of Acutting the pattern to fit the cloth,@ i.e., constructing his case in retrospect. While I have given him the benefit of the doubt in finding his complaint timely filed and that he had engaged in protected activity, the combination of his testimony with the fact that he never discussed his lost-time accident, his safety complaint, nor harassment with his representative, John Shock, or with management during Phelps Dodge=s appeal process, seriously undermines his credibility (Tr. 84-85, 103, 458, 467-468, 475, 478; Ex.C-6). In short, Perry never convinced me that he held a good faith belief that he was discharged for discriminatory reasons.

Assuming, *arguendo*, that Perry had established a *prima facie* case of discrimination under Section 105(c), Phelps Dodge has clearly rebutted his case by proving that Perry was discharged for a legitimate, business-related reason, all employees who violate Phelps Dodge=s drug and alcohol policy are discharged, and therefore, Perry would have been discharged for violating that policy, irrespective of his complaint that his driving trucks posed a safety hazard.

ORDER

Accordingly, inasmuch as the Complainant has failed to establish, 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 Clyde W. Perry against Phelps Dodge Morenci, Inc., under Section 105(c) of the Act, is **DISMISSED**.

Jacqueline R. Bulluck
Administrative Law Judge

Distribution:

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