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WILLIAM HARO V. MAGMA COPPER
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
November 30, 1982
WILLIAM A. HARO

Docket Nos. WEST 79-49-DM
v. WEST 80-116-DM

MAGMA COPPER COMPANY

DECISION

This discrimination case involves a number of alleged violations of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (1976 & Supp. IV 1980). For the reasons that follow, we affirm the administrative law judge's decision in part, and reverse and remand in part. 1/

At the time of the events in this case, the complainant, William Haro, was a journeyman mechanic at Magma Copper Company's underground copper mine in San Manuel, Arizona. Haro asserted below that Magma took discriminatory actions against him in three separate incidents because of his exercise of rights protected by the Mine Act. The first alleged act of discrimination was Haro's transfer in June 1978 from the swing shift to the day shift. The transfer occurred after Haro had refused to remove a railroad car from a production train unless he received assistance and had protested an order to tie a tail light on another railroad car. In the second incident, Haro received a written warning for refusing to change a grease line. In the final incident, Magma required Haro to attend safety training and transferred him to a different job after he was involved in an accident while servicing an airslusher in November 1978. 2/

The administrative law judge concluded that Haro's refusal to cut the railroad car from the train was a protected work refusal and that Magma discriminated against Haro by transferring him after this incident.

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1/ The judge's decision is reported at 3 FMSHRC 2421 (October 1981)(ALJ).

2/ Two complaints of discrimination filed by Haro are consolidated in this case. The first, Docket No. WEST 79-49-DM, involves the grease line and airslusher incidents; the second, Docket No. WEST 80-116-DM, involves the railroad car incident. In addition to these complaints, Haro filed with the Commission two others, which were dismissed after hearings before an administrative law judge. Haro v. Magma Copper Co., 4 FMSHRC 135 (July 1982)(ALJ), and Haro v. Magma Copper Co., WEST 81-365-DM (November 1, 1982)(ALJ). In the former case, the judge concluded that Haro failed to prove that a five day suspension and

reprimand were motivated in any part by protected activity. In the latter, the judge concluded that Haro had not proved that his termination by Magma on February 12, 1981, was motivated in any part by protected activity.
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3 FMSHRC at 2424-25. He determined, however, that Haro's protest over tying a tail light on a railroad car did not involve protected activity. 3 FMSHRC at 2424. The judge held that Haro's refusal to change the grease line was a protected work refusal, and concluded that Magma's issuance of a written warning to Haro violated the Mine Act. 3 FMSHRC at 2425-27. Concerning the airslusher incident, the judge concluded that Haro did not prove that he had engaged in protected activity, and dismissed Haro's complaint as to this incident. 3 FMSHRC at 2427-28. The judge awarded Haro back pay of $3,500 for the time from his transfer after the railroad car incident to the date of the hearing, and additional backpay in an unspecified amount from the hearing until Haro's termination by Magma. 3 FMSHRC at 2430. The judge also ordered that Haro's employment record be expunged of all references to his refusal to change the grease line. 3 FMSHRC at 2427. 3/

Magma raises several issues on review: First, that the judge erred in disregarding its evidence of a legitimate business reason for transferring Haro after the railroad car incident; second, that the judge erred in finding that Haro had a reasonable, good faith belief in a hazard when he refused to change the grease line; and third, that the judge erred in calculating back pay. Finally, although Magma prevailed on the issue of discrimination in the airslusher incident, it objects to the judge's finding that Haro was not responsible for the airslusher accident. Haro did not file a petition for review.

We reverse the judge's finding of a violation regarding the railroad car incident, and remand for further findings of fact and conclusions of law. We affirm his holding that Magma violated section 105(c)(1) of the Mine Act in connection with the grease line incident. While we will not review the merits of the airslusher incident because Haro did not petition for review, we do disapprove the judge's dicta concerning responsibility for the accident.

Analytical Framework

We first established the general principles for analyzing discrimination cases under the Mine Act in Sec. ex rel. 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 (3d Cir. 1981), and Sec. ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). In these cases we held that a complainant, in order to establish a prima facie case of discrimination, bears a burden of production and persuasion to show (1) that he engaged in protected activity and (2) that the adverse action was motivated in any part

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3/ The judge declined to order Haro's reinstatement because Haro's

termination was the subject of a discrimination complaint in WEST 81-365-DM then pending before a different administrative law judge, and he did not wish to "intrude into the issues raised in that case." 3 FMSHRC at 2429. (As noted above (n..2), the judge in that case determined that Haro's termination was in no part motivated by protected activity, and dismissed his complaint.)
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by the protected activity. Pasula, 2 FMSHRC at 2799-2800; Robinette, 3 FMSHRC at 817-18. 4/ In order to rebut a prima facie case, an operator must show either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. Robinette, 3 FMSHRC at 817-18 & n. 20. If an operator cannot rebut the prima facie case in this manner, it may nevertheless defend by proving that (1) it was also motivated by the miner's unprotected activities, and (2) that it would have taken the adverse action in any event for the unprotected activities alone. Pasula, 2 FMSHRC at 2799-2800. The operator bears an intermediate burden of production and persuasion with regard to these elements of defense. Robinette, 3 FMSHRC at 818 n. 20. This further line of defense applies only in "mixed motive" cases, i.e., cases where the adverse action is motivated by both protected and unprotected activity. We made clear in Robinette that the ultimate burden of persuasion does not shift from the complainant in either kind of case. 3 FMSHRC at 818 n. 20. The foregoing Pasula-Robinette test is based in part on the Supreme Court's articulation of similar principles in Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 285-87 (1977).
In Sec. ex rel. Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508 (November 1981), pet. for review filed, No. 81-2300 (D.C. Cir. December 11, 1981), we affirmed our Pasula-Robinette test, and explained the proper criteria for analyzing an operator's business justifications for an adverse action:

> Commission judges must often analyze the merits of an operator's alleged business justification for the challenged adverse action. In appropriate cases, they may conclude that the justification is so weak, so implausible, or so out of line with normal practice that it was a mere pretext seized upon to cloak discriminatory motive. But such inquiries must be restrained.
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> The Commission and its judges have neither the statutory charter nor the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity. Cf. Youngstown Mines Corp., 1 FMSHRC 990, 994 (1979). Once it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate. We and our judges should not substitute for the operator's business judgment our

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4/ As we have recently held, illegal discrimination may also occur in the absence of protected activity where the adverse action is motivated by a suspicion or belief that protected activity has occurred. Moses v. Whitley Development Corp., 4 FMSHRC 1475, 1480 (August 1982). The analysis of such cases closely follows the analytic framework described here. Id.

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views on "good" business practice or on whether a particular adverse action was "just" or "wise." Cf. NLRB v. Eastern Smelting & Refining Corp., 598 F.2d 666, 671 (1st Cir. 1979). The proper focus, pursuant to Pasula. is on whether a credible justification figured into motivation and, if it did, whether it would have led to the adverse action apart from the miner's protected activities. If a proffered justification survives pretext analysis ..., then a limited examination of its substantiality becomes appropriate. The question, however, is not whether such a justification comports with a judge's or our sense of fairness or enlightened business practice. Rather, the narrow statutory question is whether the reason was enough to have legitimately moved that operator to have disciplined the miner. Cf. R-W Service System Inc., 243 NLRB 1202, 1203-04 (1979)(articulating an analogous standard).

3 FMSHRC at 2516-17. Thus, we first approved restrained analysis of an operator's proffered business justification to determine whether it amounts to a pretext. 5/ Second, we held that once it is determined that a business justification is not pretextual, then the judge should determine whether "the reason was enough to have legitimately moved the operator" to take adverse action.

The Secretary misunderstands our holding. He asserts that the formulation of the operator's defense quoted above allows an employer to meet its burden merely by putting forward "any facially plausible reason, other than protected activity, for the adverse action." Br. at 7. To the contrary, the reference in Chacon to a "limited" and "restrained" examination of an operator's business justification defense does not mean that such defenses should be examined superficially or be approved automatically once offered. Rather, we intend that a judge, in carefully analyzing such defenses, should not substitute his business judgment or sense of "industrial justice" for that of the operator. As we recently explained, "Our function is not to pass on the wisdom or fairness of such asserted business justifications, but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed." Bradley v. Belva Coal Co., 4 FMSHRC 982, 993 (June 1982)(emphasis added). 6/

5/ See, e.g., Moses v. Whitley, 4 FMSHRC at 1481-82, in which we

concluded that evidence of a "business justification" based on poor performance was so weak as to make the defense virtually pretextual. 6/ In Bradley v. Belva, we also mentioned some of the ways in which an operator may attempt to establish that it was motivated by the asserted business reason: "Ordinarily, an operator can attempt to demonstrate this by showing, for example, past discipline consistent with that meted out to the alleged discriminatee, the miner's unsatisfactory past work record, prior warnings to the miner or personnel rules or practices forbidding the conduct in question. 4 FMSHRC at 993.

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Having restated the principles that govern this case, we now apply them to the facts before us. 7/

The Alleged Incidents of Discrimination

The "Bad Order" Railroad Car

On June 13, 1978, Haro was asked by a dispatcher to cut out a bad order ("B.O.") car on a production train. 8/ "Bad order" means in unsafe condition. Haro, relying on a company memorandum, refused to remove the car without assistance. After speaking with the dispatcher, Haro reported to Stonehouse, the shaft foreman and his immediate on-site supervisor. Tr. 62. Haro then called Torres, a supervisor from Haro's

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7/ This case provides an appropriate occasion for noting recent developments in an analogous body of discrimination law developed by the National Labor Relations Board. That agency also took its lead from Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, supra, and established a discrimination case analysis similar to the one we adopted in Pasula and Robinette. Wright Line, a Div. of Wright Line Inc., 251 NLRB 1083, 1086-89 (1980), enf'd sub nom. NLRB v. Wright Line, a Div. of Wright Line Inc., 662 F.2d 899 (1st Cir. 1981), cert. denied, 102 S. Ct. 1612 (1982). A number of Circuit Courts of Appeals have approved the NLRB's Wright Line approach in its entirety. See, for example, Zurn Indus. Inc. v. NLRB, 680 F.2d 683, 686-93 (9th Cir. 1982); NLRB v. Fixtures Mfg. Corp., 669 F.2d 547, 550 & n. 4 (8th Cir. 1982). The First Circuit, in its decision enforcing the NLRB's Wright Line decision, substantially agreed with the NLRB's test, but disagreed on two points: The Court held that a burden of production, but not persuasion, shifts to the employer after a prima facie case is established, and that the employer's burden to produce such evidence "in no way resembles a true affirmative defense." 662 F.2d at 901-07 & n. 9. The First Circuit noted that the Supreme Court announced a similar scheme for allocating burdens of proof in Title VII cases in Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). On November 15, 1982, the Supreme Court granted certiorari in a case involving Wright Line issues to resolve the conflict in the Circuits regarding the Wright Line test, and perhaps to resolve the apparent tension between Mt. Healthy, supra, and Burdine, supra. NLRB v. Transportation Management Corp., 674 F.2d 130 (1st Cir. 1982), cert.

granted. 51 U.S.L.W. 3373 (U.S. November 16, 1982)(No. 82-168). For the present, we will adhere to the allocation of burdens of proof announced in Pasula and Robinette in Mine Act discrimination cases.

8/ At the time of these events, Haro was a dump mechanic working on the swing shift with no supervisors from the mechanical department, which was his own division. Tr. 59, 131, 291. A dump mechanic is one who handles mechanical problems in the dumps (spill pockets, shafts and sumps), and does other assigned tasks. Tr. 59, 68, 131, 292.

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department at Torres' home, and Stonehouse listened on an extension phone. Tr. 62, 92-93, 111, 268. Torres agreed that Haro should not cut the car alone. Tr. 92-93, 111. Haro did not discuss the events with Cothern, the shift boss, and Stonehouse's supervisor. Tr. 66, 316. Torres testified that Haro was acting according to instructions when he called him at home. Tr. 93. He stated that if dump mechanics cannot work out problems with the shaft foreman and shift boss, they are to call him, or his supervisor, Navarro. Id. Navarro also testified that mechanics are to call if they have problems, but are encouraged to try to work out problems with those on the spot. Tr. 132.

The day after the B.O. incident, Haro was directed to tie a tail light onto a railroad car that did not have a special bracket for a light. Haro protested, stating that it was against company policy to tie lights on cars and that a car with brackets should be moved to the end of the train. Haro did, however, attach the light. The judge found that it was company policy to tie on a light if so ordered and to log this for a supervisor's benefit. 3 FMSHRC at 2423.

Shortly after these incidents Haro was removed as a dump mechanic on the swing shift and assigned to work in shafts and dumps on the day shift, when he would be supervised by a foreman from his own department. Haro earned less on the day shift than he had on the swing shift. Tr. 21, 317-18.

In his decision, the judge found Haro's refusal to cut the B.O. car was based on a reasonable, good faith belief in a hazard, and, therefore, that the refusal was protected activity under section 105(c) of the Mine Act. 3 FMSHRC at 2424. The judge found no protected activity in Haro's protest concerning tail lights because he was "unable to see that Haro's perception of a safety hazard was a reasonable one." Id. (Haro did not petition for review of the judge's finding of no protected activity in this incident, and, in any event, the evidence supports the judge's finding.) The judge determined that Haro's transfer to a different shift was motivated in part by the protected activity in the B.O. car incident. He stated that the tied-on lights may also have motivated the operator, but concluded:

[Magma] has failed to meet its burden of persuasion that Haro's action in tying on the light under protest

would have itself warranted the adverse action. I, therefore, conclude that Magma's transfer of Haro to another shift and position constituted discriminatory conduct in violation of the Act.

3 FMSHRC at 2425 (emphasis added).

Magma admits that Haro's refusal to cut the B.O. car was protected activity (Br. at 13), and conceded below that the B.O. car and tail light incidents "were factors 'in some part' in the determination to transfer" Haro. Post-hearing Supp. br. at 3. Thus, Magma concedes a prima facie case as to the B.O. car incident. Magma, however, contends that it successfully defended against that prima facie case by showing it would have transferred Haro in any event for legitimate reasons alone.

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Br. 12-14; Post-hearing Supp. br. at 4, 7. In this regard, Magma does not rely on the tail light incident as a defense (as the judge implied). Rather the operator argues that it legitimately transferred Haro because he was "duplicitous and dissembling" and needed more supervision, which was available on the day shift from supervisors in his own department. Br. at 4-5; Post-hearing Supp. br. at 6-7. In addition, Magma contends that Haro broke the "chain of command" by calling a supervisor off the scene and became involved in a conflict with the supervisor who was at the mine. Br. at 2-5. At the hearing below, Magma presented this business justification for transferring Haro, and it asserts that its presentation satisfied its defensive burden. Magma further contends that the judge's failure to rule on this claimed legitimate business reason for transferring Haro violates the standards for decision in the Administrative Procedure Act.

Magma has not appealed the judge's findings that Haro engaged in protected activity in the B.O. car incident and that his transfer was motivated in part by that protected activity. There is no argument as to whether Haro proved a prima facie case. The precise question before us is whether Magma successfully defended against Haro's prima facie case by showing it would have transferred Haro anyway. Magma's arguments that the judge ignored its defense are well founded. As we have stated:

The APA and our rule require findings of fact, conclusions of law, and supporting reasons in order to prevent arbitrary decisions and to permit meaningful review. ... Without findings of fact and some justification for the conclusions reached by the judge, we cannot perform that function effectively.

The Anaconda Co., 3 FMSHRC 299-300 (February 1981). The judge's decision did not address Magma s defense and thus has made review impossible. For example, the judge did not mention Haro's call to a supervisor off the property; therefore, he did not discuss Magma's argument that Haro was transferred for breaking the "chain of command" at the mine. Nor did he address the operator's evidence of a conflict with the supervisor on the scene as a result of Haro's call off the

property. The judge appears to have believed that Magma's defense was based on the tail light incident, a "defense" Magma did not raise. Accordingly, we remand the case for further findings of fact and conclusions of law on the evidence relevant to Magma's defense. Because we agree that Haro proved a prima facie case, the judge need only analyze whether Magma proved that it would have transferred Haro anyway for legitimate business reasons, regardless of his protected refusal to cut the B.O. car. We express no view on the merits of this issue.

Before turning to the next incident of alleged discrimination, we must address the judge's award of back pay stemming from the B.O. car incident. The judge found that, after his transfer, Haro's pay was reduced by a shift differential and an extra day's pay every three weeks. He awarded $3,500 and an additional unspecified amount of back ~1942
pay for the period after the hearing and up to Haro's termination by Magma. If the judge upholds Magma's defense on remand, his award cannot stand. If the judge determines that Haro's transfer violated section 105(c), we conclude that he must reconsider the question of the appropriate amount of back pay.

Magma argues that the judge erred in awarding compensation up to the time of the hearing because Haro requested a transfer in October 1978, and was transferred November 2, 1978. 9/ The company asserts that its obligation for back pay, if any, should be tolled as of the time that Haro voluntarily sought a transfer. Magma also argues that the judge's award of back pay was based on unreliable calculations. Finally, Magma contends that the judge failed to explain how he arrived at his figures, and, therefore, a remand is necessary for detailed findings.

The judge's award was based on Haro's estimate at the hearing that he had lost between $3,500 and $3,700. 3 FMSHRC at 2430. The judge noted that Haro's testimony was unrefuted, and commented on the "lack of more specific documentation." Id. Further, the judge also granted Haro an unspecified amount of "back pay plus interest since the hearing of this case, until the date of [Haro's] termination by [Magma]." 3 FMSHRC at 2430. The date of Haro's discharge, February 12, 1981, is a matter of public record. Haro v. Magma Copper Co., Docket No. WEST 81-365-DM (November 1, 1982) (ALJ). We recognize that "unrealistic exactitude" or "mathematical certainty" is not required in ascertaining the award due to a victim of discrimination. See Kaplan v. International Alliance of Theatrical and Stage Employees, 525 F.2d 1354, 1362-63 (9th Cir. 1975)(Award in Title VII cases); NLRB v. Carpenters Union, Local 180, 433 F.2d 934, 935 (9th Cir. 1970)(Award in NLRA cases). Nonetheless, more precision is required than the judge provided in this case. We also recognize that although Magma had the opportunity to present evidence to the judge at the hearing on the correct amount of the award, it did not do so. However, it appears from the record that the judge did not indicate how he was going to proceed on back pay, and the operator may not have

anticipated that an award would be included in the decision. Thus, in the interest of fairness, if Haro prevails on his claim, the judge should solicit the information necessary to make further findings on the relief due to Haro and should address Magma's various arguments on the appropriate amount of back pay. See Moses v. Whitley, 4 FMSHRC at 483-84.

The Grease line Incident

Approximately three months after the events discussed above, on September 25, 1978, Haro was instructed to change a grease line near a

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9/ Haro admits requesting a transfer in September 1978, but claims the request was made because of continuing harassment. Haro further asserts that his transfer in November (after the airslusher accident discussed below) was not related to his request.

shaft in a loading pocket. Before changing the grease line, Haro made several requests: He asked that a skip be spotted in front of the loading chute; that men working on the surface be removed from the top of the shaft; and that a worker be assigned to assist him. Haro testified that he wanted the skip for protection in the event of a fall, and that men on the surface sometimes caused debris to fall down the shaft, which could result in rock falls. Haro's requests were not granted, and he did not change the grease line. On October 2, 1978, Haro received a written warning for failing to change the grease line.

We note initially that the judge's discussion of this incident fulfills the requirements of the APA and our rules. The judge found that Haro's refusal to repair the grease line was a protected work refusal, and that the written warning Haro received over the incident constituted discriminatory action. 3 FMSHRC at 2427. Because the warning was admittedly issued for not changing the line, the only question is whether Haro met the requirements for a protected work refusal--that is, whether he had a good faith, reasonable belief in a hazardous condition. Robinette, 3 FMSHRC at 812. If Haro's work refusal meets this test, then the warning he received was issued in violation of section 105(c).

Magma raises three arguments: First, that Haro was not motivated by a concern for safety but by a desire for "a punctilious adherence to what he felt the work rules were" (Br. at 19); second, that Haro failed to communicate his safety concerns at the time of his work refusal; and, third, that it was safe to change the grease line without having a skip in the area and without a partner.

In our view, Haro was motivated not only by a good faith concern for safety, but also communicated that concern at the time. Haro's testimony, corroborated by that of another witness, indicates that he made several specific requests to the lead man at the time of the grease line incident: He requested that a skip be spotted, that persons be cleared from the shaft area, and that he be assigned a partner. In their testimony, Haro and the corroborating witness explained that the skip was to prevent falling (Tr. 27, 170-71), and

that men should be removed from above to prevent discarded objects from causing rocks to fall down the shaft. Tr. 30, 171. A third witness testified that mechanics often spot a skip where it would stop their fall (Tr. 206), that workers should be cleared to avoid debris falling down the shaft and ricocheting off its side (Tr. 217), and that a partner "observes in case of a malfunction or fall." Tr. 210-11. We are satisfied from this testimony that Haro's requests were made in good faith and that their focus was safety. Magma also attacks the judge's crediting of Haro's testimony on the grease line incident, but nothing presented on review persuades us to take the unusual step of overturning the judge's credibility resolution.

We also affirm the judge's conclusion that Haro's belief in a hazard was a reasonable one. Magma argues that, from an objective standpoint, it was safe to change the line without the safety measures Haro requested. We have expressly rejected a requirement that miners

who have refused to work must objectively prove that hazards existed. Robinette, 3 FMSHRC at 811-12. Rather, we adopted "a simple requirement that the miner's honest perception be a reasonable one under the circumstances." 3 FMSHRC at 812. Magma has only demonstrated that perhaps reasonable minds could differ as to the validity of Haro's safety beliefs. As the judge correctly stated, "The issue is not whether the work could be done without a ski[p], but it is whether Haro's action in not repairing the grease line was reasonable and in good faith." 3 FMSHRC at 2426. He found that it was, and the testimony outlined above supports his conclusion.

In sum, Haro articulated a safety concern and had a reasonable basis for refusing to work. Magma's warning to Haro over this exercise of protected activity therefore violated section 105(c)(1) of the Mine Act. Accordingly, we affirm the judge on this issue.

The Airslusher Incident

On November 1, 1978, Haro and another miner were assigned to service an airslusher in a spill pocket. In the course of their work, Haro turned on the air to the machine and an accident occurred resulting in injury to his partner. Haro received a letter dated November 2, 1978, which identified him as the cause of the accident and required him to attend two days of safety training. He suffered no loss of pay for attending the safety training. Haro was also transferred to a position on the surface.

The judge opined that Haro was not responsible for the injury to his partner, and that the company's actions toward Haro "appear unjustified." 3 FMSHRC at 2428. The judge, however, found no protected activity and dismissed the complaint as to this allegation of discrimination. He concluded:

> Haro did not make any safety complaint or exercise any other right afforded him under the Act. The actions taken against Haro because of Magma's erroneous belief that Haro was responsible for the incident, therefore, cannot be deemed to be in

violation of the Act. Although such action may have been improper, redress of the damages suffered by Haro as a consequence thereof is not within the authority of the Commission.
Id.
Although it prevailed on this incident, Magma argues that the judge erroneously found that Haro was not responsible for the accident. Haro did not seek review in this case, and we need not address the merits of the judge's dismissal of this aspect of Haro's complaint. We wish to note, however, that once the judge found that Haro had not engaged in protected activity and thus had not proved a prima facie case, any speculation as to the cause of the accident and the "fairness" of Magma's discipline was irrelevant.
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For the foregoing reasons, we affirm the judge's decision regarding the grease line incident and his order expunging all references to the matter from Haro's employment record. While affirming the judge's dismissal of the discrimination complaint concerning the airslusher incident, we disapprove his dicta on the cause of the accident. We reverse and remand for further findings of fact and conclusions of law on the railroad car incident and, if necessary, for determination of what award is due to Haro. The judge's present award of back pay with respect to this incident is vacated. 10/

10/ Commissioner Nelson assumed office after this case had been considered at a Commission decisional meeting and took no part in the decision of the case. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary and is not required for the Commission to take official action. The other Commissioners voted on the disposition of the case prior to Commissioner Nelson's assumption of office. Accordingly, in the interest of efficient decision-making, Commissioner Nelson elects not to participate in this case.
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