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JOSEPH D. CHRISTIAN V. SOUTH HOPKINS COAL
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

JOSEPH D. CHRISTIAN, APPLICANT	Application for Review
	Docket No. BARB 77-184
v.	
	South Hopkins No. 2 Underground Mine
SOUTH HOPKINS COAL COMPANY, INC., RESPONDENT	

DECISION

Appearances: Philip G. Sunderland Esq., Washington, D.C., for Applicant;
Carroll S. Franklin, Byron L. Hobgood, Esqs., Madisonville, Kentucky, for Respondent.

Before: Administrative Law Judge Stewart

FACTUAL AND PROCEDURAL BACKGROUND

On February 16, 1977, Joseph Christian (Applicant) filed an application for review of discriminatory discharge by South Hopkins Coal Company, Inc. This application sought relief under section 110(b) of the Federal Coal Mine Health and Safety Act of 1969 (hereinafter, the Act), 30 U.S.C. 820(b).(FOOTNOTE 1) Service of this application was effected on March 9, 1977. Respondent submitted its answer, a plea of limitations, and a motion to dismiss on May 6, 1977.

On June 28, 1977, the application for review was dismissed pursuant to Respondent's plea of limitations. This order was reversed by the Board of Mine Operations Appeals in light of an intervening decision, Phil Baker v. The North American Coal Company, 8 IBMA 164 (1977), which held that the 30-day filing period in section 110(b)(2) is a statute of limitations, and not a jurisdictional prerequisite. The Board noted that Respondent had raised the issue of late filing in a timely fashion and remanded the case for determination whether Applicant had overcome this affirmative defense.

A hearing on the merits was conducted on March 1 and 2, 1978, and again on April 26, 1978. A total of 11 witnesses were called. Applicant introduced four exhibits and Respondent introduced 12. Applicant filed a posthearing brief on July 3, 1978. Respondent's plea of limitations and posthearing brief were filed on August 7, 1978. Applicant's final posthearing brief and reply to Respondent's plea of

limitations was filed on August 21, 1978. The request for an opportunity to present additional oral arguments contained therein was denied. Applicant filed a supplemental memorandum regarding relief on January 5, 1979. The request contained therein, that Applicant be permitted to file documentation of costs and expenses after the issuance of a decision, was denied. On January 19, 1979, Respondent submitted its memorandum concerning relief. Applicant submitted what was to be its final memorandum on relief on February 5, 1979. Because this memorandum contained a great deal of information relating to fees and expenses which was seen by Respondent for the first time, Respondent was given the opportunity to submit an additional memorandum on relief. This memorandum was filed on March 14, 1979. Applicant submitted a final reply brief on March 23, 1979.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Joseph Christian was discharged from his employment at South Hopkins No. 2 Underground Mine at approximately 8:30 a.m. on November 11, 1976, at the completion of the third shift. He was first employed at the No. 2 Mine in August of 1975 as a bratticeman. Early in the summer of 1976, Applicant began working as a greaser. During his tenure as a greaser, Applicant had three supervisors. His final supervisor, Paul Long, was his superior for approximately 3 months, from mid-September of 1976 until his employment was terminated in November. At that time, Long was the foreman in charge of maintenance employees.

At the start of the third shift on November 10-11, Christian was assigned by Long to hang telephone line along 5,000 feet of the main west belt line. Christian was to start at the "bottom," proceed up through the "high place," down the west supply road to the second crosscut and through a brattice to the main west belt line (Applicant's Exh. No. 1). He was to proceed from there down the main west belt line to the face areas. The line was to be taken off 500-foot reels and spliced into telephones at various places along the route.

Upon receiving his assignment from Long, Christian immediately objected, telling Mr. Long that he did not want to work by himself in certain areas through which the phone cable was to be strung because he felt they contained dangerously bad roof conditions. He stated that he was especially concerned with an area of roof located along the main west belt line one crosscut west of the north belt (hereinafter, area #5. See area marked #5 on Applicant's Exhibit No. 1), as well as several other unspecified areas down the main west line. Long replied that the stringing of telephone line was the only job he had for Christian to do and that he did not have anyone to send with Christian. Long also stated that he did not think that the top complained of was bad and that the area was better protected than anywhere else in the mine. In hopes of convincing Christian that the top was safe, Long called James Gardner, the third shift mine foreman

at the No. 2 Mine, to obtain a second opinion. Gardner told Christian that the roof in the belt line area was not particularly unsafe. He told Christian, however, that he would send another man down to him later, if one could be spared. Christian then told Long that he would work in the area rather than lose his job.

Long testified that he would not have fired Christian for the refusal to work, but that he had no other work for him to do that shift. If Mr. Christian had persisted at the beginning of the shift in refusing to carry out his assigned task, he would have been sent home, thereby losing a day's wages.

Long also testified that it was unusual for him to fire a man for doing less than was expected. He had fired three men other than Christian. Only one of these three was discharged for failure to do his job.

Long expected Christian to string between 2,000 and 2,500 feet of line. In his estimation, Christian had 5 or 6 hours in which to accomplish his task. He felt that hanging line in the bottom and in the high place would not be more difficult or time-consuming than doing so along the belt. Along the belt line, the telephone line would be suspended with tape from a nail driven into a prop. In the area from the bottom up through the brattice where props were not continuous, the line could be suspended from roof bolts.

The usual route for miners into the west section of the mine was the supply road, not the belt line. The belt line was regularly traveled by beltmen and rock dusters, who worked in groups of two or three. In addition, the belt was inspected by a foreman every shift.

Neither Long nor Gardner examined the roof along the main west belt line, or, more specifically, in area #5 immediately before assuring Christian that it was safe. Both were familiar with its condition. Long estimated that he was on the belt line every other shift. Gardner testified that he was in area #5 on a daily basis. On the other hand, Applicant had been in the main west belt area only once, and that several months earlier in the summer of 1976.

Long did examine the area in which Christian refused to work later on in the shift. He did so before Christian arrived there and satisfied himself that the roof was safe. He did not inform Christian that he had done so.

Before he proceeded to work, Christian was told by Long to help Richard Ford with the repair of a pinner. When Ford finished this repair work, he was to help Christian string cable. Long told both Ford and Christian that Christian was to help only with the installation of the hydraulic jack on the pinner. This particular repair

could be quickly done and it was the only part of the job that required two men. Christian understood that he was to help Ford on the pinner and Ford was to help him string cable.

Christian began loading cable onto the supply car for transportation into the mine approximately 1 hour and 30 minutes after receiving his assignment. At the beginning of the shift, this supply car is used to bring rock dust and maintenance equipment into the mine. Long testified that ordinarily the transportation of these supplies took no more than 30 minutes. However, he did not know whether the supply car was actually in use for 2 hours that shift and he had no reason to believe that Christian was delaying during this time. Christian performed no work while he was waiting.

After transporting 12 spools of cable into the mine, Christian transferred them to a personnel carrier and took them to an area three crosscuts inby the north belt line just off the west supply road (Applicant's Exh. No. 6; area marked 3a). He proceeded back to the high place looking for Richard Ford to help him repair the pinner. Since Ford was not there, Christian continued on to the bottom and started hanging line by himself. Christian estimated that he began stringing cable at approximnately 2 o'clock in the morning. He strung cable from the bottom until he reached the high place at 2:30 or 3 a.m. He met Richard Ford there and helped him work on a pinner until 3:30 or 3:45 a.m. At that time, Don McGeehan, a third shift welder, called the bottom and requested that somebody bring supplies and equipment which he needed at the west end of the mine. Christian loaded the material on the personnel carrier and transported it as requested. He covered the three-quarters of a mile between the high place and the west end of the mine in 20 minutes, helped unload the carrier and, upon request, agreed to assist McGeehan tack a brace onto the back end of the feeder. Christian arrived back at the high place at 4:30 or 4:45. He and Ford continued to work on the pinner until 5 o'clock when they broke for supper. Supper break lasted until 5:30.

When Mr. Ford and the Applicant had nearly completed their supper, another miner, Earl Massey, arrived at the high place. He told the Applicant that he was supposed to help him string the phone cable. After the Applicant finished his supper, he and Massey decided to use the personnel carrier, which Massey then had with him, to transfer to the first crosscut inby the North belt some of the spools which had been stored by the Applicant earlier in the third crosscut. However, Mr. Massey told the Applicant that first he had to go to the west end of the mine to do an errand. Since they had decided to transfer the spools with the personnel carrier which Mr. Massey was to use to get to the west end of the mine, the Applicant decided to wait until Mr. Massey returned. Applicant was not sure how long Mr. Massey would be gone, but he did not think it would be long. Mr. Massey carried him to the place where the spools had

been stored and Applicant then waited for him to return. Mr. Massey left to do his errand at about 5:45 and returned at approximately 6:15. During this half-hour period, Paul Long saw the applicant sitting on the spools of cable. Mr. Long asked him what he was doing and Applicant replied that he was waiting for Mr. Massey to return from the west part of the mine. Mr. Long said nothing further and went on his way.

When Mr. Massey returned about 6:15, he and the Applicant dropped their previous decision to transfer the spools and decided to hang additional phone line instead. They therefore returned to the point near the high place up to which the cable had already been hung and began hanging more line. They took the line through the high place, down the west supply road, under the north belt, and up to the first crosscut where they spliced it to an existing phone. They then continued with the line to the brattice that lay in the crosscut. They arrived at the brattice about 7:10. At that time, miners on the first shift had started to arrive in the first crosscut. The Applicant spent a few minutes talking with some of those miners and then, around 7:20, proceeded to leave the mine. Cable had been strung up to, but not into, the area of the mine which Applicant had told Paul Long at the start of the shift that he did not want to work in alone.

After leaving the mine on the morning of November 11, 1976, Applicant went to the bathhouse to take a shower. Another miner, David Cotton, approached him in the bathhouse and asked him where he had stored the spools of phone cable. The Applicant told him where the spools had been stored. He also told Cotton that he thought the top was bad in the area in which the cable was to be strung and that he did not think that he, Cotton, should work in that area alone. He also stated that he would not work in that area by himself because he considered the top to be bad. Mr. Cotton subsequently expressed fears about the top to Mr. Long.

After the Applicant had finished his shower, Paul Long came into the bathhouse. He asked the Applicant whether he had told Cotton that he would not work under bad top by himself. Applicant admitted that he had told Cotton that he had done so. Mr. Long testified that he then asked the Applicant why he had not hung more cable during the just-completed shift. According to Mr. Long, the Applicant said it was because he did not want to work in the west belt entry by himself since he felt it was dangerous due to the bad top. Mr. Long then told the Applicant that he was fired.

Immediately after being discharged by Paul Long, the Applicant attempted to talk to Alton Taylor, the mine superintendent. He believed that once Mr. Taylor heard that Mr. Long had fired him for making a complaint about and expressing reluctance to work under unsafe conditions, he would assign him to another job. Applicant

could not reach Mr. Taylor at the mine on the morning of November 11. He eventually talked to Mr. Taylor over the phone during the evening of November 11. Mr. Taylor, however, refused to rehire Christian and said that if Paul Long could not use him, neither could he.

Christian did not attempt to contact the Mining Enforcement and Safety Administration (MESA) office in Madisonville, Kentucky, until the following Monday, 4 days after his discharge. He did not go a mile out of his way to stop at the MESA office on his way home Thursday, because he assumed that he would be rehired that night by Alton. Christian testified that he did not go on Friday because he was shaken up at being fired, nor on the weekend because he assumed the office would be closed.

When Christian arrived at the MESA office on Monday, he spoke with a Federal mine inspector. He told the inspector about the roof conditions at the South Hopkins Mine that he considered to be dangerous and he discussed his discharge. He was informed by the inspector that MESA was not involved with discharges or other personnel actions taken by coal companies. He also made fruitless inquiries at the Kentucky Department of Labor.

The roof along the main west belt line has more support than other areas of the mine. Roof bolts and props are used along its entire length. Crossbars are used in those areas with particularly bad roof. The props were boards which were 60 inches long, 6 inches wide, and 2 inches thick. Wedges are hammered in at the top and bottom to bring the prop into contact with the roof. There are three rows of props along the belt line. One row of props is situated along the northern rib. Two more rows run down the center of the entry, 4 feet apart. Throughout most of the mine, props are set on 5- to 6-foot centers. Belt-line props, however, are set on 3-foot centers.

The crossbars were 20-foot long, 8- by 12-inch bars which were placed across the top and supported by props. The number and closeness of crossbars is related to the quality of the roof. They are installed at odd intervals along the belt line.

The roof along the main west belt line is comprised of shale. This shale runs in a north-south direction. Any falls in this area would run crosswise, rather than lengthwise. In addition, the roof is very rough. Cracks can exist in this roof up to a depth of one-fourth inch without it being considered bad.

Applicant was particularly concerned with the roof in area #5, just beyond the brattice into the belt line entry. The roof in this area was rough, containing cracks up to an inch in depth. When tested, it was found to be drummy. It was warped and sagging. Roof pressure was great enough to damage prop wedges. The roof was broken

along both ribs for a distance of 50 feet, beginning approximately 5 feet outby the crosscut which contained the brattice. Small pieces of roof had fallen from time to time. The area was roof bolted and contained 10 to 16 props.

There were no major roof falls along the main west belt line as of Applicant's discharge. A minor fall did occur in August of 1977, approximately eight to 10 crosscuts inby area #5. This fall forced a 2-hour shutdown of the belt line. Major falls had occurred prior to November of 1976 in the north belt line. The area affected extended 200 to 300 feet up from a point 60 feet above the intersection of the west and north belts. The north sections had been sealed off and were no longer active at the time Christian was discharged.

South Hopkins was a nonunion mine. Christian was not working pursuant to a written contract. There was no organization at the mine that represented or otherwise acted on behalf of the miners, and there was no formal grievance procedure in effect for handling safety reports or disputes at the No. 2 Mine in November of 1976. The document entitled "South Hopkins Coal Company Health and Safety Policy" (Respondent's Exh. No. 7), which was issued in the summer of 1976 and purported to reflect the company's safety policy, indicated that the president and safety director had responsibility over safety-related matters. It did not establish a formal mechanism for the reporting of safety violations or dangerous conditions. John Campbell, the safety director at South Hopkins, testified that before contacting MESA, miners are expected to report safety problems to their immediate supervisors. Most questions of safety are resolved at this level. If a dispute were to arise and the miner did not receive satisfaction from his foreman, the miner would then contact Mr. Campbell. Mr. Campbell testified that he has never been confronted by a miner who disagreed with management at both levels. He believed that MESA had no role in the resolution of safety disputes until such an impasse was reached. None of the miners who testified at the hearing were aware of the procedure related by Mr. Campbell.

The safety record at the No. 2 Mine appears to be quite good. The rate of fatal and nonfatal injuries at this mine was appreciably lower than the industry as a whole in the last two quarters of 1976 (Respondent's Exh. Nos. 8, 9).

The consensus of those individuals who worked with Christian, both supervisors and fellow workers, was that he had a greater fear of the top than was common. Each of Christian's supervisors felt that his fear was unreasonable. Christian frequently commented on roof conditions. In one of these instances, Christian was asked to pass under top which had cracked overnight to retrieve a grease bucket. He refused to do so, and Long retrieved it himself. On another occasion, Christian was directed to retrieve cable from underneath bad top. He did so protestingly, but only because he was accompanied by another miner.

Marshall Lutz, a foreman on the second shift, was frequently asked by Christian to come and check the roof for him. Justice Uzzle, a timberer, testified that Christian complained about the roof more than anyone else and that these complaints about the roof were not always justified, however, he also testified that Christian's fear of the top was not unreasonable. Two other witnesses for the Applicant--Oats and Littlepage--also testified that Christian's fear of the top was not unreasonable.

The presence of a second miner can be of some value when working under bad top. If a miner is alone and is injured, he might wait several hours before help arrives. It is also useful to have one miner looking at and listening to the top. Before top falls, it may move slightly or make a popping noise, and most falls start with chipping of rock. The condition of the roof at the time of Applicant's discharge did not present an imminent danger nor constitute a violation of mandatory safety standards.

Each of Christian's supervisors testified that he was a poor worker. Christian did what he was told and the quality of his work was good, but he worked very slowly. Marshall Lutz felt that Christian built brattices at about half the speed of his predecessor, a man who was 55 to 60 years of age. Christian had to be helped on occasion to catch up. Lutz testified that he had considered discharging Christian, but that he had not done so at the request of Alton Taylor, the mine foreman. Long stated that he talked to Christian a couple of times about failure to get work done. Both Long and Lutz thought that Christian's slowness was at least, in part, the result of fear of the top and laziness. Christian testified that he received only one adverse comment on his work while at South Hopkins; in particular, Paul Long never reprimanded him. Witnesses for the Applicant generally conceded that Christian was somewhat slow. Justice Uzzle qualified the observation of Christian's slowness by noting that he never saw him loafing on the job.

Plea of Limitations

Section 110(b)(2) of the Act requires that application to the Secretary for review of alleged discrimination be made within 30 days of the violation. This 30-day period is in the nature of a statute of limitations, rather than a jurisdictional requirement. Therefore, upon a showing of extenuating circumstances, it can be tolled or extended. Baker v. North American Coal Company, 8 IBMA 164 (1977).

Applicant's failure to file within the section 110(b) limitations period is justified by the circumstances in this case. At the time of his discharge, he was not aware that he had any rights under the Act to challenge respondent's action. In addition, he was misled by a MESA inspector as to the existence of those rights.

Applicant approached two organizations which he believed would be able to inform him of his rights--the Mining Enforcement and Safety Administration (MESA) of the Department of the Interior and the Kentucky State Department of Labor. On Monday, November 14, 1976, approximately 4 days after his discharge, he visited the MESA office in Madisonville, Kentucky, where he spoke with a MESA inspector. He explained to the inspector that he believed he had been discharged by the South Hopkins Coal Company because of his safetyrelated complaints. Applicant asked the MESA inspector whether he had any redress for his discharge under Federal law. The inspector stated that the MESA office did not become involved in discharges or other personnel actions taken by coal companies. He did not inform the Applicant of his right to seek a review of his discharge under section 110(b), but suggested that Applicant contact the Kentucky Department of Labor.

On that same day, Applicant contacted by phone the Kentucky Department of Labor in Frankfort, Kentucky. After locating an individual who could respond to his questions, Applicant explained the circumstances of his discharge and asked whether he had any right to challenge Respondent's action. He was informed that the Kentucky Department of Labor had nothing to do with mining matters as they were solely within the jurisdiction of the Federal Government.

Having exhausted the only sources of information he was aware of and not having been informed of any means to challenge Respondent's action, Applicant concluded that he had no right or opportunity to redress his discharge.

Applicant obtained construction work in December 1976. He gradually became friends with a co-worker, Bill Stevens, who had previously been a miner at the Peabody Coal Company's Vogue Mine. In mid- to late January 1977, Applicant discussed his discharge with Mr. Stevens and expressed his frustration at the absence of a means for him to challenge it. Mr. Stevens informed him that a miner with whom he had previously worked at the Peabody Vogue Mine, Ernest Johnston, had challenged a similar adverse action by filing a complaint with the Department of the Interior. He suggested that the Applicant contact Mr. Johnston.

In early February of 1977, the Applicant phoned Mr. Johnston and arranged to meet with him at his home. They met at Mr. Johnston's home on February 10. At that time, Mr. Johnston informed the Applicant of his right to file an application for review under section 110(b) and explained to him what information an application should contain and to whom it should be sent. Applicant personally prepared the application and filed it on February 16, 1977.

It is clear that the Applicant did not unnecessarily delay in the filing of this application for review. The circumstances warrant an extension of the 30-day period.

The purpose of this 30-day limitation period is to prevent unfairness to coal operators by preventing the revival of old claims. There is no indication that Respondent has been prejudiced by the late filing of the application. Respondent's assertion that the application for review was not timely filed is rejected.

Discriminatory Discharge

The central issues presented herein are whether Christian engaged in protected activity and whether this activity was a motivating factor in the management's decision to discharge him. Section 110(b) of the Act, in pertinent part, provides a remedy for any discriminatory act against a miner by reason of the fact that such miner either (a) notified the Secretary or his authorized representative of any alleged violation or danger, or (b) filed, instituted, or caused to be filed or instituted, any proceedings under the Act. If he invoked the protection of 110(b), and if his discharge was improperly motivated, Christian is entitled to reinstatement to his former position with back pay.

In Phillips v. Interior Board of Mine Operations Appeals, 500 F.2d 772 (D.C. Cir. 1974), the court held that a miner's

> [N]otification to the foreman of possible dangers is an essential preliminary stage in both (A) the notification to the Secretary and (B) the institution of proceedings and consequently brings the act into play.

Notification of a foreman does not automatically bring the miner under the protection of the Act. Examination in each instance must be made of "the overall remedial purpose of the statute; the practicalities of the situation * * * and particularly (of) the procedure implementing the statute actually in effect at the (mine)" in each instance.

As noted above, notification of the foreman was recognized as the first step in the safety report or dispute procedure in effect at the No. 2 Mine. It was also the most practical means of registering a safety complaint in that mine at that time. Even though this safety complaint procedure was informal, Christian's initation of a complaint with Long was sufficient to bring the Act into play.

In Baker v. U.S. Department of the Interior Board of Mine Operations Appeals, ____ F.2d ___ (D.C. 1978), the court held that "a miner who makes a safety complaint is protected from employer retaliation whether or not the miner intended the complaint to reach federal officials at the time it was made." Whether Christian intended to notify Federal officials is, therefore, no longer an issue.

In Munsey v. Federal Mine Safety and Health Review Commission, ____ F.2d __ (D.C. 1978), the court held that it was error to impose a good faith and not frivolous test for section 110(b) reports. In this case it is clear that Christian's complaint was not frivolous.

The Act provides recourse for a miner who has been discharged by reason of the fact of his participation in protected activities. That is, the miner's participation in protected activity must be an underlying factor in the discharge. By "underlying" is meant "the moving force but for which the discharge would not have occurred." Shapiro v. Bishop Coal Company, 6 IBMA 28 at 59 (1976).

The discharge by Paul Long was motivated by a combination of protected and unprotected activities on the Applicant's part. It is clear that the immediate precipitating factor was Christian's failure to complete his assigned task. However, the failure to do so was inextricably bound up with his refusal to work in certain areas along the main west belt line for what he perceived to be safety-related reasons. Foreman Long had been told by Christian that he did not complete his work because of his fear of the top. Long did not regard this as a legitimate fear, and, therefore, discharged Christian.

Long had a number of grounds for refusing to accept Christian's excuse of fear of the top. Among these, were Christian's reputation for excessive fear of top, his substandard work and Long's personal examination of the top early in the shift.

Most of those who testified at the meeting agreed that Christian was a poor worker. The quality of his work was up to par, but his speed was substandard. Prior to November 11, the day of the discharge, Long was dissatisfied with Christian's work. His observation of Christian on the day of discharge bore out this dissatisfaction. Not only did Christian string far less than was expected of him, but he was observed at one point lying atop the spools of cable.

Long also believed that Christian had an excessive, unreasonable fear of top. He felt that this fear contributed in part to Christian's slowness. He suspected that Christian might be using his expressed fear of top as a cover for his slowness or laziness.

Finally, Long gave little or no weight to Christian's safety complaints on the day of discharge. He believed the top was safe at the beginning of the shift, and a personal examination of the area reinforced this belief.

Because of these considerations, Long failed to treat Christian as if a legitimate safety dispute was at issue when, in fact, one was. This was evident not only in the discharge, but also in Long's earlier activities as well. When Christian complained at the beginning of

the shift that the roof was bad, Long properly sought the opinion of a more experienced foreman to alleviate Christian's fears. At the same time, however, he also stated that he had no other work for Christian to do, thereby inferring that Christian would be sent home with loss of a day's pay if he persisted. The threat and subsequent discharge were discriminatory acts improperly motivated by the Applicant's refusal to work under what he considered to be bad roof.

Because his complaint gave use to the protection of section 110(b) and his discharge was improperly motivated, Christian is entitled to the relief provided for in the Act.

Relief Due

Under the provisions of 110(b)(2), the Applicant is entitled to an order requiring Respondent "to take such affirmative action to abate the violation as the Secretary deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay."

At the time he was fired, Applicant was the greaser on the third shift at Respondent's mine. There are no circumstances in this case which would warrant denial of reinstatement to this position.

The back pay due Applicant is the difference between the income he would have received if he had not been discharged by Respondent, but had continued working as a third shift greaser until February 2, 1979, offset by the income he actually received in that same period from other sources. The cut-off date of February 2, 1979, is appropriate because the hourly wage rate received by Applicant in his current job exceeds the hourly wage rate he would be receiving were he still employed by Respondent. In its supplemental memorandum regarding relief, filed on January 19, 1979, the Respondent advanced the figure of $48,746.37 as the amount Respondent would have earned as a greaser from November 10, 1976 to February 2, 1979. The Applicant had no objections to this figure.

In the period from November 10, 1976, to February 2, 1979, the Applicant received $41,523.97 in income and unemployment benefits. Applicant has argued that two elements of the income and benefits included in the figure should be excluded. The first of these elements is $470 in unemployment compensation benefits received by Christian in February and March of 1978. After he had received these benefits, the Kentucky Department of Human Resources determined that he was ineligible for them and that he was obligated to return this sum to the State. This sum is, therefore, properly excluded from the computation of back pay. The second of these elements is the $2,951.36 earned by the Applicant in February and March of 1978. During this period, Respondent had closed down its coal mining operations because of a strike by the United Mine Workers of America. The

Applicant argued that because of this closure, he would have been free to earn this income even if he had been one of Respondent's employees. As a consequence, this $2,931.35 should not be offset against the income he would have earned from Respondent. Because of the absence of any indication on the record that Applicant would not have been free to earn this income if he had remained in Respondent's employ, this argument is accepted.

The exclusion of these two elements lowers the amount by which Applicant's recovery of back pay is offset to $38,103.01. Applicant is, therefore, entitled to a recovery of back pay in the amount of $10,643.36.

Interest

In theory, interest on each dollar of back pay should be calculated from the date on which the Applicant would have received it if he had been employed by Respondent. Because of the great difficulty of such a calculation, Applicant suggested a formula by which interest would be computed on the entire back pay award from a date approximately midway between the date of discharge and the date of this decision. Respondent did not object and did not propose an alternative. The formula proposed by the Applicant is, therefore, accepted.

Using this formula, The Applicant is entitled to interest of $751.42. This figure represents 6 percent of the total back pay owed, calculated from January 1, 1978, through February 28, 1979.

Medical Expenses

In its "Second Supplemental Memorandum on Relief," filed on February 5, 1979, the Applicant asserted for the first time that he was entitled to reimbursement for certain medical expenses incurred since his discharge. As a result of the discharge, the Applicant lost the medical insurance which Respondent provided to all its employees. This insurance covered and paid for all medical expenses incurred by Respondent's employee and his dependents.

The medical expenses and insurance premiums incurred by Applicant since the date of his discharge amount to a total of $441.99. Applicant is entitled to reimbursement of these premiums and expenses because they constitute expenses which he would not have incurred if he had not been discharged in November, 1976.

Costs and Expenses of Litigation

Under the provisions of section 110(b)(3) of the Act, the Applicant is entitled to "a sum equal to the aggregate amount of all costs and expenses (including the attorney's fees) as determined by the Secretary to have been reasonably incurred by the applicant for, or

in connection with, the institution and prosecution" of these 110(b) proceedings. Applicant is entitled, in the instant case, to the recovery of the following three categories of expenses: attorney's fees, the costs incurred by Applicant's attorneys and the costs incurred directly by the Applicant.

With respect to attorney's fees, counsel for Applicant submitted the following hourly totals, hourly rates and proposed fees:

	Hours	Hourly Rate	Fees
Sunderland	373.50	$60	$23,640.00
Terris	4.50	85	382.50
Paralegals	36.00	20	720.00

Given the experience and ability of Mr. Sunderland, the novelty of the legal issues presented, and the quality of the services rendered, the $60 hourly rate he proposes for his services is reasonable and appropriate. Moreover, the amount of time which he devoted to the case was well documented. The number of hours, the hourly rates, and the fees proposed for the services of Mr. Terris and the paralegals, also seem reasonable and well documented. The total fee proposed by Applicant's counsel of $24,742.50 is, therefore, accepted.

The 50-percent bonus factor proposed by Applicant is inappropriate. Its application would result in an unjustifiably high, unreasonable award for attorney's fees. The hourly fees proposed by Applicant and accepted here adequately compensate his attorneys for any risks they may have taken in pressing his claim, as well as for the quality of their representation.

The expenses incurred by Applicant's attorneys in connection with this case are also reasonable and well documented. They include amounts for xeroxing, court and reporting services, messengers, telephone calls, postage, airline and local transportation, lodging and food during long distance traveling, and secretarial overtime. These expenses amounted to a total of $1,488.82.

The costs incurred directly by the Applicant amounted to a total of $235.76. This figure includes the costs of transportation at $.10 per mile and telephone calls.

In summary, the relief due the Applicant, is as follows:

Back pay	$ 10,643.36
Interest on back pay	751.42
Medical Expenses	441.99
Attorney's fees	24,742.50
Costs incurred by attorneys	1,488.82
Costs incurred directly by Applicant	235.76
	$ 38,303.85

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All findings of fact and conclusions of law inconsistent with this decision are hereby rejected.

ORDER

It is hereby ORDERED that Respondent reinstate the Applicant to the position of greaser if he still desires to be reinstated.

It is FURTHER ORDERED that Respondent pay to the Applicant the sum of $38,303.85 within 30 days of the date of this decision.

Forrest E. Stewart
Administrative Law Judge

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FOOTNOTES START HERE

~FOOTNOTE_ONE

1. Section 110(b) provides as follows:

"(1) No person shall discharge or in any other way discriminate against or cause to be discharged or discriminated against any miner or any authorized representative of miners by reason of the fact that such miner or representative (a) has notified the Secretary or his authorized representative of any alleged violation or danger, (b) has filed, instituted, or caused to be filed or instituted any proceeding under this Act, or (c) has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this Act.

"(2) Any miner or representative of miners who believes that he has been discharged or otherwise discriminated against by any person in violation of paragraph (1) of this subsection may, within thirty days after such violation occurs, apply to the Secretary for a review of such alleged discharge or discrimination. A copy of the application shall be sent to such person who shall be the respondent. Upon receipt of such application, the Secretary shall cause such investigation to be made, as he deems appropriate. Such investigation shall provide an opportunity for a public hearing at the request of any party to enable the parties to present information relating to such violation. The parties shall be given written notice of the time and place of the hearing at least five days prior to the hearing. Any such hearing shall be of record and shall be subject to section 554 of title 5 of the United States Code. Upon receiving the report of such investigation, the Secretary shall make findings of fact. If he finds that such violation did occur, he shall issue a decision, incorporating an order therein, requiring the person committing such violation to take such affirmative action to abate the violation as the Secretary deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner or representative of miners to his former position with back pay. If he finds that there was no such violation, he shall issue an order denying the application. Such order shall incorporate the Secretary's findings therein. Any order issued by the Secretary under this paragraph shall be subject to judicial

review in accordance with section 106 of this Act. Violations by any person of paragraph (1) of this subsection shall be subject to the provisions of sections 108 and 109(a) of this title.

"(3) Whenever an order is issued under this subsection, at the request of the applicant, a sum equal to the aggregate amount of all costs and expenses (including the attorney's fees) as determined by the Secretary to have been reasonably incurred by the applicant for, or in connection with, the institution and prosecution of such proceedings, shall be assessed against the person committing such violation."