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JOHNNY HOWARD, v. MARTIN-MARIETTA,
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

JOHNNY HOWARD,
COMPLAINANT
v.

COMPLAINT OF DISCHARGE,
DISCRIMINATION, OR
INTERFERENCE

MARTIN-MARIETTA CORPORATION,
RESPONDENT

Docket No. SE 80-24-DM
MSHA Case No. MD 79-93

SUPPLEMENTAL DECISION

On June 19, 1981, I issued a decision in Complainant's favor on his complaint of discrimination under 105(c) of the Act. The parties were ordered to confer for the purpose of effectuating paragraphs 1 - 6 of the order contained in the decision. It appears that the parties substantially agree on all issues save back pay. While they agree on the figures to be used in computing back pay, they disagree on the formula to be applied to those figures. The formula and award are set forth in this decision, which constitutes my final disposition of the proceedings.

Turning to the provisions of the order of June 19, 1981, reinstatement will not be ordered since Complainant has obtained full-time work elsewhere and does not wish to return to Respondent's employ. Therefore, paragraph 1 of the order is vacated.

Paragraph 2 directs back pay for Complainant. There have been few Commission decisions dealing with the computation of back pay under the Mine Act. In *Bradley v. Belva Coal Co.*, 3 FMSHRC 921 (1981), I concluded that the remedial portions of 105(c) were modeled on 10(c) of the National Labor Relations Act, so the NLRB's approach to back pay computation should be followed. According to the Board,

"Making whole" involves payment to the discriminatee of a sum equal to gross back pay (what the discriminatee would have earned in employment lost through discrimination) less net interim earnings (what was actually earned from other employment during the period less expenses incurred in seeking and holding interim employment), the difference between the two being the net back pay due.

3 NLRB CASEHANDLING MANUAL, 10530 (1977).

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Complainant renounced reinstatement at the hearing, so the period of back pay liability runs from July 31, 1979, to March 26, 1981.

If the general formula were applied and total earnings for the period lumped together, no back pay would be due, since Complainant has earned more elsewhere during this period than he would have earned at Respondent's quarry in Jamestown, South Carolina. However, the NLRB computes back pay by calendar quarters of the year. 3 NLRB CASEHANDLING MANUAL 10534.1 (1977). This policy has been in effect more than 30 years and was adopted because computations based on the entire period of liability fell short of the "make-whole" remedy the Board was attempting to provide. See NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 347 (1953). The Commission should draw on this experience. Therefore, Complainant's back pay award will be computed on a quarterly basis.

The parties have stipulated that Complainant's hourly rate was \$4.76 with time and a half for overtime. Complainant worked 50 hours each week. During periods of unemployment, Howard received unemployment benefits from the State, but these will not be deducted from back pay. Bradley, supra, at 923. The back pay computation is as follows:

7/31/79 - 9/30/79	Lost earnings	
10 weeks	400 hrs. at 4.76	1904.
	100 hrs. at 7.14	714.
		2618.
	Interim earnings	0
	Net back pay	2618.
10/1/79 - 12/31/79	Lost earnings	
13 weeks	520 hrs. at 4.76	2475.20
	130 hrs. at 7.14	928.20
		3403.40
	Interim earnings	0
	Net back pay	3403.40
1/1/80 - 3/31/80	Lost earnings	
13 weeks	520 hrs. at 4.76	2475.20
	130 hrs. at 7.14	928.20
		3403.40
	Interim earnings	
Rogers & Wilson Co.		2253.25
	Net back pay	1150.15

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4/1/80 - 6/30/80	Lost earnings	
13 weeks	520 hrs. at 4.76	2475.20
	130 hrs. at 7.14	928.20
		3403.40
	Interim earnings	
Georgetown Steel	480 hrs. at 8.73	4190.40
	Net back pay	0
(FOOTNOTE.1)	Total back pay	7171.55

A rate of 6% interest per annum will be applied to the back pay award through January 31, 1980. Thereafter, a rate of 12% will be applied. Bradley, supra, at 925. Interest will accrue beginning with the last day of each calendar quarter of the back pay period. 3 NLRB CASEHANDLING MANUAL, 10623.1.

Respondent is responsible for deducting the amounts required by state and Federal law and for any additional contributions which those laws may require.

The parties agree that \$750 is a reasonable attorney's fee for Complainant's counsel.

The notice submitted by Respondent for posting at its Jamestown quarry is acceptable.

ORDER

1. Respondent shall pay to Complainant the sum of \$7,171.55, as back pay with interest thereon at the rate of 6% per annum from July 31, 1979, through January 31, 1980, and at the rate of 12% per annum thereafter.
2. Respondent shall pay to counsel for Complainant the sum of \$750 for legal services rendered to Complainant. Counsel for Complainant shall refund to Complainant so much of that fee as he has already paid.

