

CCASE:  
ALBERT DICARO V. U.S. STATES FUEL  
DDATE:  
19831215  
TTEXT:

Federal Mine Safety And Health Review Commission  
Office of Administrative Law Judges

ALBERT J. DICARO,  
COMPLAINANT

COMPLAINT OF DISCRIMINATION

v.

Docket No. WEST 82-113-D

UNITED STATES FUEL COMPANY,  
RESPONDENT

MSHA Case No. DENV CD 82-3

DECISION ON DAMAGES AND OTHER RELIEF

Before: Judge Fauver

Complainant filed his complaint on February 15, 1982, alleging he was discharged on October 23, 1981, for engaging in protected activities in violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq.

The matter was heard on the issue of liability in July, 1982. My decision on liability was entered on May 26, 1983, holding that Complainant was unlawfully discharged on October 23, 1981. The hearing on damages and other relief was held on August 9, 1983.

Counsel for the parties have stipulated:

1. Had Complainant not been discharged, the maximum amount of his wages and overtime in Respondent's employment from October 23, 1981, through August 9, 1983, would have been \$44,613.00.

2. Interest is to be calculated on back pay on a calendar quarter accrual basis.

3. The rate of interest to be applied shall be twelve percent (12%).

4. The instant case is the Complainant's attorney's first case involving the Federal Mine Safety and Health Act.

5. Complainant's attorney's law firm has never represented clients in a matter involving the Federal Mine Safety and Health Act prior to the instant case.

6. Complainant's attorney's law firm has a fee schedule range of \$75.00 per hour to \$125.00 per hour.

Having considered the contentions of the parties and the record as a whole, I find that the preponderance of the reliable, probative, and substantial evidence establishes the following:

FINDINGS OF FACT

1. Complainant attempted to mitigate the damages suffered by him as a result of his wrongful discharge by the Respondent by applying for other employment. The Complainant applied for employment at the following companies:

(a) as a coal miner at Tower Resources on November 9, 1981;

(b) as a coal miner at Price River Coal Company on November 12, 1981;

(c) at Plateau Mining Company on December 2, 15, and 17, 1981;

(d) at Coastal States Mining on December 21, 29, 1981 and January 19, 1982;

(e) as a coal miner at Emery Mining Corporation in March of 1982 and was told he did not get the job because of a recommendation of the Respondent, United States Fuel Company;

(f) as a coal miner with Valley Camp on March 22, 24, 29, April 23, 26, May 3, 7, 12, 1982;

(g) at Dinosaur Tire in Price, Utah on several occasions;

(h) at State Department of Employment Services in Price, Utah;

(i) at Carbon County Sheriff's Department for the position of Deputy Sheriff;

(j) at H & J Supply Company in Price, Utah;

(k) at Gemco Corporation, Price, Utah.

2. Complainant was employed by Terry Fry, a contractor of Plateau Mining during the period at issue. Complainant earned \$1,000 at such employment. He was also employed by One Stop Video Shop on a piecework basis during that period.

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Complainant's duties included cleaning video machines on a piecework basis and he earned a maximum of \$200 from said employment.

3. Complainant also worked for Western States Hydraulics during the same period. The Complainant's earnings were a maximum of \$200 from Western States Hydraulics. The total received by Complainant from employment during the interim period in question was \$1,400.

4. As of the date he was discharged by Respondent, Complainant had a 5% permanent partial disability because of an accident in Respondent's mine. Later Complainant filed a petition with the Industrial Commission of Utah seeking additional permanent partial disability and temporary total disability for a period beginning November 5, 1982. Complainant filed the petition on his own behalf and without the aid of counsel. At the hearing, Complainant testified in response to a question from counsel for Respondent, United States Fuel Company, "I think I can perform as a roof bolter." Complainant's allegation of temporary disability was based upon his doctor's opinion, and in his (Complainant's) opinion, he could have worked.

5. The Industrial Commission of Utah referred Complainant to its medical panel which consisted of Dr. Thomas D. Rosenberg in Salt Lake City, Utah. Dr. Rosenberg examined Complainant and concluded that there was no temporary total disability. He also concluded that the permanent partial disability in Complainant's knee had increased from 5 percent to 15 percent. The Industrial Commission adopted the findings of the medical panel and found:

[T]he applicant (referring to Complainant) was not temporarily totally disabled after November 5, 1982 and the percentage of permanent physical impairment attributable to the applicant's industrial injury is 15 percent of the right lower extremity. This percentage has changed from 5 percent (torn medial meniscus meniscectomy) to 15 percent in view of the significant associated disease of articular cartilage in the medial compartment of the patient's right knee.

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6. In this proceeding, Counsel for Complainant has spent 195 hours representing Complainant.

#### DISCUSSION WITH FURTHER FINDINGS

The general issue is the amount of the recoverable damages sustained by Complainant as a result of his unlawful discharge on October 23, 1981.

In particular, the issues are:

(1) Was Complainant physically able to work for Respondent on and after November 5, 1982? If not, should his back pay award be reduced for any period in which he was unable to work for Respondent?

(2) Should Complainant's back pay award be reduced by an amount representing Complainant's rate of absenteeism while employed by Respondent?

(3) Should the decision on liability be reconsidered and resolved against Complainant because of new evidence on Complainant's credibility introduced at the August 9, 1983, hearing on damages?

(4) What hourly rate should be applied in awarding an attorney's fee for Complainant's legal representation in this proceeding?

Section 105(c)(2) of the Act states, among other things:

The Commission shall have authority...to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest.

\* \* \*

The legislative history shows a Congressional intent to have section 105(c) interpreted and applied liberally to achieve its broad, remedial purposes. See, e.g., Sen. Rep. No. 95181, reprinted in Leg. Hist. 625, in which the Senate Committee reporting the bill stated as to relief:

It is the Committee's intention that the Secretary propose, and that the Commission require, all relief that is necessary to make the complaining party whole and to remove the deleterious effects of the discriminatory conduct including, but not limited to reinstatement with full seniority rights, back-pay with interest, and recompense for any special damages sustained as a result of the discrimination. The specified relief is only illustrative. Thus, for example, where appropriate, the Commission should issue broad cease and desist orders and include requirements for the posting of notices by the operator.

In Secretary on behalf of Dunmire and Estle v. Northern Coal Company, 4 FMSHRC 126 at 142 (1982), the Commission stated that the "broad remedial charge [of section 105(c) (2)] was designed not only to deter illegal retaliation but also to restore the employee, as nearly as possible, to the situation he would have occupied but for the discrimination" and that "back pay [is] a term of art encompassing not only wages, but also any accompanying fringe benefits, payments, or contributions constituting integral parts of an employer's overall wage-benefit package."

Back pay is "ordinarily the sum equal to the gross pay the employee would have earned but for the discrimination less his actual net interim earnings." Dunmire, above, at 144.

Ability To Work  
Since November 5, 1982

Respondent contends that Complainant's claim before the Utah Industrial Commission establishes that he was not physically able to work for Respondent on and after November 5, 1982. However, the Utah Industrial Commission ruled, after having Complainant medically examined, that Complainant was not entitled to temporary disability and was capable of working on and after November 5, 1982. Before his discharge on October 23, 1981, Complainant had a 5% lower extremity impairment because of a knee injury in Respondent's employment. The Utah Industrial Commission found, based on its medical panel report, that after November 5, 1982, this impairment increased from 5% to 15%. However, there was no finding that he was unable to perform work as a miner in Respondent's employment. I find that the preponderance of the evidence in the instant case does not establish

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that Complainant has been physically unable to work as a miner in Respondent's employment since November 5, 1982.

#### Absenteeism

Respondent proposes that the back pay award be reduced by Complainant's rate of absenteeism while employed by Respondent. I find no precedent for this contention. Use of this extreme and speculative approach to back pay relief would not be consistent with the broad, remedial charge of the statute.

#### Attorney's Fee

I agree with Respondent's contention that Complainant's attorney's fee should be set at \$75 an hour, i.e., the lower rate in the law firm's schedule of fees. In reaching this decision I have considered the following factors, among others:

1. This proceeding is the first case involving the Mine Act that Complainant's attorney has handled as an attorney.
2. Complainant's attorney's law firm has never represented clients in matters involving the Mine Act before this proceeding.
3. Complainant's attorney's law firm has a fee schedule range of \$75 to \$125 an hour.

#### The Motion to Reconsider

Respondent has moved to reconsider my decision on liability (May 26, 1983) based on "serious questions concerning the credibility of the Complainant" which Respondent contends were raised by "new evidence" at the hearing on damages (August 9, 1983). I have fully considered the August 9, 1983, transcript and exhibits and conclude that credibility issues on damages to not warrant reconsideration of the decision on liability.

#### ORDER

WHEREFORE IT IS ORDERED that, within 15 days of the date of this decision:

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1. Respondent shall offer Complainant, in writing, reinstatement in its employment upon Complainant's providing written medical evidence of his physical ability to work as a miner in Respondent's employment, in such position as Complainant would have been employed, with the pay rate and all seniority, shift and overtime rights, employer contributions, and other fringe benefits that Complainant would have obtained had Respondent not discharged Complainant on October 23, 1981. Evidence of his physical ability to work may be satisfied by a written release to work in a coal mine by Thomas D. Rosenberg, M.D.

2. Respondent shall pay Complainant back pay of \$43,213.00 for the period from October 23, 1981, through August 9, 1983 (i.e., \$44,613.00 less \$1,400.00 for interim outside earnings) and an additional amount of back pay based upon the maximum amount of wages and overtime he would have received in Respondent's employment from August 9, 1983, until either (a) his reinstatement under paragraph 1, above, or (b) 15 days from the date of this decision if Complainant does not accept reinstatement or does not medically qualify for reinstatement.

The back pay in the period since August 9, 1983, is subject to reduction by any interim earnings since August 9, 1983. If back pay since August 9, 1983, cannot be stipulated by counsel for the parties, counsel shall submit their respective proposed amounts to the judge not later than 20 days from the date of this decision and for that purpose jurisdiction is retained by the judge for 20 days from this date and until a ruling on any counter-proposals filed in such period. Interest on the total award of back pay shall be at 12%, calculated on a calendar quarter accrual basis.

3. Respondent shall pay Complainant's attorney a fee of \$14,625.00, i.e., 195 hours X \$75 per hour.

4. Respondent shall pay Complainant litigation expenses of \$350.00.

5. Respondent shall post a copy of the decision of May 26, 1983 and a copy of this decision and order at the subject mine, at a place where notices to its miners are normally posted, and keep them so posted, unobstructed and protected from the weather, for a consecutive period of 60 days.

William Fauver  
Administrative Law Judge