

CCASE:

EMILIANO ROSA CRUZ V. PUERTO RICAN CEMENT

DDATE:

19850307

TTEXT:

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

EMILIANO ROSA CRUZ,
COMPLAINANT

v.

PUERTO RICAN CEMENT COMPANY,
INC.,

RESPONDENT

DISCRIMINATION PROCEEDING

Docket No. SE 83-62-DM

MSHA Case No. MD-83-44

ORDER

Before: Judge Broderick

On July 19, 1984, I issued a decision on the merits in the above case in which I ordered that Respondent reinstate Complainant to the position from which he was discharged on April 25, 1983, or to a comparable position at the same rate of pay. I also ordered that Respondent pay back wages to Complainant from April 25, 1983 to the date of his reinstatement, together with interest thereon, in accordance with the formula set out in the Arkansas-Carbona case. I also ordered Respondent to pay reasonable attorney's fees and costs of litigation incurred by Complainant.

Subsequent to the decision, Complainant submitted without objection a copy of the Collective Bargaining Agreement between Respondent and the Labor Union representing Complainant. Complainant also submitted a statement of back pay and interest and a statement of attorney's fees and expenses. Respondent submitted a reply to the statement of back pay and interest, and a statement that it did not object to the amount claimed as attorney's fees and legal expenses.

On motion of Respondent, I ordered Complainant to furnish information permitting Respondent to request a statement of interim earnings from the Social Security Administration. I also ordered Complainant to furnish Respondent with a certified copy of his income tax return for 1983 and copies of all job applications made by Complainant since his discharge. Complainant has responded to these orders.

I. BACK PAY AND INTEREST

A. COMPUTATION

On August 17, 1984, Complainant submitted a statement of back pay and interest pursuant to my order. He claimed a total of \$18,059.97, of which \$16,999.28 represented gross back pay and \$1,060.69 represented interest to September 12, 1984. Respondent filed a reply to the statement on September 12, 1984. According to Respondent, Complainant's calculations were in error in that he claimed wage differential for holiday pay, and the differential is paid only when the employee actually works. According to Respondent, Complainant's gross back wage entitlement (assuming liability) would be \$16,539.70. Respondent also objected to the interest rate Complainant used from July 15, 1984 to September 30, 1984. Complainant did not respond to these allegations of Respondent. I accept Respondent's computation of back pay entitlement, and adopt the worksheet submitted as showing Complainant's entitlement to back pay through September 12, 1984, in the gross amount of \$16,539.70. In addition, he is entitled to interest at the rate of 16 percent from January 1, 1983 to June 30, 1983, at the rate of 11 percent from July 1, 1983 to December 31, 1983, at the rate of 11 percent from January 1, 1984 to June 30, 1984, and at the rate of 11 percent (not 13 percent) from July 1, 1984 to September 12, 1984, in accordance with the Arkansas-Carbona formula.

B. INTERIM EARNINGS

Complainant has supplied a copy of his income tax return and has authorized the Social Security Administration to give Respondent a copy of his earning record. Complainant testified in this case on March 30, 1984. The only questions concerning interim earnings or seeking other employment were asked by me. The statement of back wages fails to reflect the earnings testified to. Counsel for Complainant agrees that Complainant's back pay entitlement should be reduced by the interim earnings he

received in January and February 1984. Respondent has sought to depose Complainant on this issue but I denied the motion as being untimely. There is no evidence that Complainant has had interim hearings other than those testified to.

C. CHRONIC ABSENTEEISM

My decision of July 19, 1984, found that Complainant was off work a considerable number of days and that an inordinate number of his absences occurred on the day before and after weekends and holidays. Respondent argues that a record of chronic absenteeism justifies a reduction in the back pay award. The Commission has stated that the purpose of the relief in a section 105(c) case is to "restore the employee to the situation he would have occupied but for the discrimination." Secretary/Dunmire and Estle v. Northern Coal Company, 4 FMSHRC 126, 142 (1982). Secretary/Bailey v. Arkansas-Carbona Company, 5 FMSHRC 2042 (1983). Therefore, I conclude that the back pay may properly be reduced because of Complainant's absenteeism. He was absent 78 days in 1981, 49 days in 1982 and 4 days in 1983. (He worked to April 25). Thus, he averaged approximately 56 days off per year during the 2-1/3 years prior to his discharge. (This seems a more reasonable period than the 3-year period suggested by Respondent). The contract allowed 18 days per year sick leave. Therefore, I will reduce the award by 38 days per year from the date of Complainant's date to the date of my decision. Since I have ordered reinstatement, Respondent's liability for back pay thereafter will not be reduced based on his absentee record. To simplify the computation, a reduction of 9.5 days pay should be taken from the amount due for each quarter as back pay.

ATTORNEYS FEES AND COSTS

Complainant requests reimbursement for attorneys fees in the amount of \$2,340.00 and expenses of litigation in the amount of \$113.16. The fee request is based upon 39 hours at the rate of \$60 per hour. Respondent does not object to the claim for attorneys fees and legal expenses and it will be approved.

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Therefore, within 30 days of the date of this order, Respondent is ORDERED

1. To pay Complainant back wages in the following gross amounts:

(a)	2nd Quarter 1983	\$2,036.35
	3rd Quarter 1983	2,889.86
	4th Quarter 1983	2,912.31
	Christmas bonus 1983	363.76
(b)	1st Quarter 1984	\$2,294.32
	2nd Quarter 1984	3,203.91
	3rd Quarter 1984	2,839.19

From the above amounts, the following should be deducted:

(a) Interim earnings from January 1, 1984 to February 18, 1984, at the rate of \$134 per week (3.35 per hour).

(b) An amount equal to 9.5 days per quarter from April 25, 1983 to July 19, 1984, on account of Complainant's absenteeism.

To the resulting amount, Respondent IS ORDERED TO pay interest at the rate of 16 percent per year (.0004444 per day) from January 1, 1983 to June 30, 1983, at the rate of 11 percent per year (.0003055 per day) from July 1, 1983 to September 30, 1984, in accordance with the formula set out in Arkansas-Carbona.

2. Respondent is FURTHER ORDERED to pay to Complainant's attorney the amount of \$2,453.16 as attorney's fees and expenses of litigation.

James A. Broderick
Administrative Law Judge