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SOL (MSHA) V. SUGARTREE, TERCO & LAWSON
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APPENDIX B

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

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
ON BEHALF OF
JAMES CORBIN, ROBERT CORBIN,
AND A.C. TAYLOR,
COMPLAINANTS

DISCRIMINATION PROCEEDING

Docket No. KENT 84-255-D
MSHA Case No. BARB 84-35

Sugartree No. 1 Mine

v.

SUGARTREE CORPORATION,
TERCO, INCORPORATED, AND
RANDAL LAWSON,
RESPONDENTS

DECISION

Appearances: Carole M. Fernandez, Esq., Office of the
Solicitor, U.S. Department of Labor, Nashville,
Tennessee, for Complainants;
Guy E. Millward, Jr., Esq., and D. Randall
Jewell, Esq., Barbourville, Kentucky, for
Sugartree Corporation and Randal Lawson, and
Carlos R. Morris, Esq., Barbourville, Kentucky,
for Terco Incorporated.

DECISION

Before: Judge Melick

By decision dated December 10, 1985, the Respondents herein were found jointly and severally liable for costs and damages resulting from the unlawful discharge of the named Complainants under section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et. seq., the "Act". Hearings were thereafter held on the issue of costs and damages on January 2, 1986, in London, Kentucky.

A backpay damage award is the sum equal to the gross pay the miner would have earned but for the unlawful discharge, less his actual "net interim earnings.". Bradley v. Belva Coal Company, 4 FMSHRC 982 (1982); Secretary ex. rel. Dunmire and Estle v. Northern Coal Company, 4 FMSHRC 126(1982). "Net interim earnings" is an accepted term of art which does not refer to net earnings in the usual sense (gross pay minus various withholdings). Rather, the term describes the employees gross interim earnings less those expenses (if any) incurred in seeking and holding the interim

employment-expenses that the employee would not have incurred had he not suffered the unlawful discharge. Belva Coal Company, supra.

It is undisputed that at the time of their unlawful discharge from Sugartree Corporation (Sugartree), each of the individual Complainants regularly worked 9 hours a day, 5 days a week. They earned \$9.50 per hour for the first 40 hours a week and \$14.75 an hour for the additional 5 hours a week overtime. They also worked one Saturday a month in return for major medical insurance coverage under a Blue Cross and Blue Shield policy. According to former Sugartree president Randal Lawson this coverage cost \$200 per month for each employee. This amount is to be included in the backpay award as a fringe benefit that was an integral part of the Complainants wage-benefit package at Sugartree. Northern Coal Co., supra.

The backpay computation based upon the stated earnings and fringe benefits should commence on July 6, 1984, the date the Complainants were unlawfully discharged and should terminate but not include the date of reinstatement or waiver of reinstatement i.e., January 6, 1986. At hearings on January 2, 1986, James and Robert Corbin accepted reinstatement to successor mine operator Terco, Incorporated commencing January 6, 1986. At the same proceedings A.C. Taylor waived his right to reinstatement because he had obtained preferable alternative employment.

Robert Corbin also suffered specific losses from his unlawful discharge because he was thereafter required to twice refinance a jeep automobile because of his inability to make the higher monthly payments. According to the Bank of Williamsburg Mr. Corbin will be required to pay \$1,240.84 in additional finance charges because of this refinancing. That amount is properly chargeable as damages in these proceedings and interest should be charged on that amount in accordance with the costs noted in Exhibit D-G-6. See Secretary ex. rel. Noland v. Luck Quarries, Inc., 1 FMSHRC 2426 (1980).

Respondents have the burden of proving mitigation of damages including interim earnings. N.L.R.B. v. Izzi, 395 F.2d 241 (1st Cir., 1968); and N.L.R.B. v. Mastro Plastics Corp., 354 F.2d 170 (2nd Cir.1965), cert. denied 384 U.S. 972 (1966). In this case the Secretary produced each of the Complainants as witnesses who testified concerning their interim earnings. While some of this testimony is vague and imprecise, Respondents have produced no contradictory evidence. Accordingly I accept the testimony of the individual Complainants as to their interim earnings as best as can be reconstructed. Where there is any uncertainty I have accepted the larger amount of interim earnings thereby reducing the liability of Respondents. There is also evidence in this case that the Complainants had received various

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amounts of unemployment compensation and food stamps. These amounts are not however generally considered to be "earnings" to be deducted from backpay awards. *Boitch v. FMSHRC and Neal*, 704 F.2d 275 (6th Cir.1983); *N.L.R.B. v. Marshall Field and Company*, 318 U.S. 253, 255 (1943); *N.L.R.B. v. Gullett Gin Company*, 340 U.S. 361, 369 (1951).

JAMES CORBIN

\$1,000 should be deducted as interim earnings for amounts James Corbin received in 1984 from Dick Hall who was apparently superintendent of a now defunct coal mine operator. Although Corbin concedes that this amount was paid for work performed during 1984 he maintains that it was a "loan" from Dick Hall to cover a "cold check" issued by the mine operator. Since the "loan" finally makes good on his check to Corbin and since there is no formal evidence of debt I consider this amount as interim earnings to be deducted from the backpay award.

During the first quarter of 1985, James Corbin earned \$1,800 from the Girdner Mining Company. During the second quarter of 1985 he earned \$500 at the A.A. Coal Company and \$600 at the Fair Lady Coal Company. He earned \$2,400 at the Big Fanny Coal Company during the third quarter of 1985, and during the fourth quarter of 1985 he received \$560 for work performed for Junior Helton. As of the date of hearing he continued to work for Junior Helton and presumably continued to earn a maximum of \$350 per week.

ROBERT CORBIN

It is not disputed that Robert Corbin had no interim earnings during 1984. The evidence shows that in the first quarter of 1985 he earned \$1,449 from the Girdner Mining Company and that during the second quarter 1985 he earned \$1,466 from the Fair Lady Coal Company. Thereafter, and presumably during the third quarter of 1985, Robert Corbin worked part time at the Ellison Funeral Home as a grave digger earning \$1,500. During the fourth quarter of 1985 he earned \$1,800 from the H & R Coal Company and as of the date of hearing continued to work for this company at \$300 per week.

A.C. TAYLOR

According to check stubs in evidence, Mr. Taylor had net interim earnings from the Girdner Mining Company during the fourth quarter of 1984 of \$792 (Exhibit D-G-5). These check stubs show that Mr. Taylor had net interim earnings from the Girdner Mining Company during the first quarter of 1985 of \$288. Since he testified to earning \$380.27 from the Girdner

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Mining Company (Exhibit D-G-4) for that same period. I accept this larger amount as correct. Taylor also earned \$627.47 from the G & S Mining Company during the first quarter of 1985. He had no earnings during the second and third quarters of 1985. During the fourth quarter of 1985 commencing October 21, 1985, he was earning \$350 per week. He continued to earn that amount through the date of the hearing.

ORDER

Within the framework of the findings in this decision the Secretary is directed to compute the total amount of damages and interest through January 31, 1986, to be awarded the individual Complainants in this proceeding. Those computations shall be filed with the undersigned on or before January 25, 1986. The Secretary is also directed to file a status report on or before January 25, 1986, concerning the reinstatement of James and Robert Corbin. This decision is not a final disposition of these proceedings and such a disposition will not be made until the issues of costs, damages, interest, reinstatement and the amount of civil penalty are finally resolved.

Gary Melick
Administrative Law Judge