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BILLIE MARTIN V. GABRIEL MINING
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

BILLIE D. MARTIN,
COMPLAINANT

DISCRIMINATION PROCEEDING

KENT 87-64-D

v.

BARB CD 87-05

GABRIEL MINING COMPANY, INC.,
RESPONDENT

DECISION

Appearances: Billie D. Martin, Evarts, Kentucky, Pro Se.

Before: Judge Weisberger

Statement of the Case

On February 2, 1987, Complainant filed a complaint with the Commission, pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977, alleging, in essence, that he was fired by Respondent because he refused to do electrical and mechanical work for which he was not qualified. The records of the Commission indicate that the Complainant sent Respondent, via certified mail, return receipt requested, a letter containing his complaint. Respondent did not claim the letter and it was returned to the Complainant.

On April 7, 1987, Chief Judge Paul Merlin sent Respondent, via Certified Mail, return receipt requested, an order directing Respondent to answer the Complainant within 30 days. The order further notified Respondent that failure to comply with the order will be deemed cause for the issuance of an order of default. The Respondent did not claim this letter, and it was returned to the Commission. The Respondent did not answer the order dated April 7, 1987.

On July 8, 1987, a notice sent to Respondent, via Certified Mail, return receipt requested and via regular mail, scheduling a hearing in the above matter for July 30, 1987 in Knoxville, Tennessee. The Respondent did not claim the Registered Letter containing the notice of hearing, and it was returned to the Office of Administrative Law Judges. The notice sent regular mail was not returned. At the hearing, on July 30, 1987, the Complainant appeared and testified on his on behalf. The Respondent did not appear.

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On August 6, 1987, an Order was issued finding the Respondent in default.

Inasmuch as the Respondent has been found to have been in default, the only issue presently to be decided is the scope of relief that Complainant is entitled. It was the Complainant's uncontradicted testimony that while employed at Respondent's mine in Bailey's Creek, Kentucky, his salary was \$10 an hour. He further testified that he worked 8 hour a day, and 40 hours a week. It was further his testimony that after he was fired by Respondent on October 1, 1986, he was unemployed until mid December 1986, when he entered into a partnership driving a truck. The Complainant's partner uses the receipts of the partnership to pay all obligations of the partnership and the remainder is split between the Complainant and his partner. It was the Complainant's testimony that in the 32 weeks that he has been involved in this partnership, until July 24, 1986, he has earn \$120 a week. The 32 weeks compute from December 8, through July 24. Inasmuch as the Complainant has not requested reinstatement, it is concluded that Respondent is responsible for payment of the Complainant's back wages only during the time that he was unemployed and presumably available for reemployment by Respondent.

Accordingly, it is ORDERED that, within 30 days of the date of this decision, the Respondent pay the Complainant \$12,800 as back pay for the period between October 1 and December 5, 1986. With interest to be calculated in accordance with the formula in Secretary/Bailey v. Arkansas Carbona, 5 FMSHRC 2042 (1984).

Avram Weisberger
Administrative Law Judge
(703) 756-6210