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

OTIS M. SCHMOLDT,
COMPLAINANT

DISCRIMINATION PROCEEDING

KENT 87-65-D

v.

BARB CD 87-06

GABRIEL MINING COMPANY,
INC.,
RESPONDENT

DECISION

Appearances: Otis M. Schmoldt, Le Junior, Kentucky, Pro Se.

Before: Judge Weisberger

Statement of the Case

On March 30, 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 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 he was unemployed from the date he was fired by Respondent on October 17, 1986 through July 7, 1987, when he obtained a position driving a truck at \$3.35 an hour and hours working 12 hours a day, 5 days a week. For the first 2 weeks of his job he was paid for 80 hours at \$3.35 an hour and 26 hours at one and half times \$3.35 an hour. It also was the Complainant's testimony that during the period that he was unemployed, from October 17, 1986 to July 7, 1987, the only income that he had consisted of \$2,000 he received as unemployment insurance benefits.

Based upon all of the above it is ORDERED that:

1. The Respondent shall, by August 24, 1987 reinstate the Complainant to the position that he previously held on October 17, 1986, at the previous rate of pay.
2. The Respondent shall, within 30 days from the date of this decision, pay the Complainant the sum of \$13,200 as back pay for the period from October 17, 1986, through July 3, 1987, as reduced by the amount of unemployment insurance benefits received during that period. Interest shall be paid to the Complainant by the Respondent as calculated in accordance with the formula in Secretary/Bailey v. Arkansas Carbona, 5 FMSHRC 2042 (1984).
3. The Respondent shall, within 30 days from the date of the decision, pay the Complainant the sum of \$402 as back pay for the period from July 7, 1987, through July 24, 1987. The Respondent shall continue to pay the Complainant at this rate of pay until the Complainant is reinstated.

Avram Weisberger
Administrative Law Judge
(703) 756-6210