CCASE:
RONNY BOSWELL v. NATIONAL CEMENT COMPANY
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
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RONNY BOSWELL, COMPLAINANT	DISCRIMINATION PROCEEDING
v.	Docket No. SE 90-112-DM
NATIONAL CEMENT COMPANY, RESPONDENT	SE-MD-90-04 Ragland Plant

DECISION ON DAMAGES

Appearances: Mr. Larry G. Myers, Union Representative, United Paperworkers International Union, Odenville, Alabama, for Complainant;
Thomas F. Campbell, Esq., Lange, Simpson, Robinson & Somerville, Birmingham, Alabama, for Respondent.

Before: Judge Maurer

My Decision Upon Remand, issued on April 3, 1992, found respondent, National Cement Company, in violation of section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., and liable to complainant for damages. Since the parties cannot agree on what the appropriate measure of damages should be, a supplemental hearing was held in Birmingham, Alabama on June 15, 1992.

In the first instance, respondent argues that the "adverse action in this case" and the "damages issue" are not properly before me because I exceeded the scope of the Commission's remand order to me when I revisited those issues in my Decision Upon Remand, and reopened the record to take additional evidence regarding complainant's claimed back pay. Furthermore, respondent disagrees that multiplying the loss in base pay rate by the number of hours Boswell worked is the proper measure of damages in any case. Respondent instead argues that the proper measure of damages would be found by comparing Boswell's actual pay received to the pay of a miner working as a utility laborer over the same period of time. The difference being Boswell's proper measure of damages (assuming of course, that it is a positive number). The problem with taking this tack again at this late stage of the proceedings is that the Commission has already stated otherwise.

The Commission discussed "adverse action in this case" and the "damages issue" at 14 FMSHRC 259-260 and held:

> National Cement argues that no adverse action was taken against Boswell because he earned more in the job to which he transferred than he would have earned as a utility laborer. We disagree. The Report specifically states that Boswell was disqualified as a utility laborer due to unsatisfactory performance and that he was reprimanded. It states further that, in order to avoid discharge, the employee should review his work performance history. This Report clearly constitutes an adverse action subjecting Boswell to discipline or detriment in his employment.
>
> Further, although Boswell earned $920.04 more in his new job than he would have in his previous one, his job transfer from a utility laborer to payloader operator reduced Boswell's base pay by $1.08 per hour. The annual difference in earnings found by the judge was due to additional hours worked by Boswell and premium pay received for Sunday and holiday work, shift differential, and overtime. Thus, the evidence shows that Boswell earned more because he worked more, but that he nevertheless suffered a loss in his base pay rate. We conclude that Boswell suffered an adverse action. (Citations omitted).

The parties at the supplemental hearing corrected the above-referenced $1.08 per hour pay differential between the utility laborer and payloader operator position to $0.945 per hour. This is the only piece of evidence that the parties have stipulated to in this entire case and I eagerly accepted it (Tr. 27). Thus, 94 1/2 cents per hour was the base rate differential that Mr. Boswell used for all his back pay computations admitted into the record as Complainant's Exhibits Nos. 1 and 2. These computations cover the period from January 11, 1990 through May 30, 1992, and take into consideration all the hours Boswell worked including the overtime premiums due Boswell, figured from the base rate differential of 94 1/2 cents per hour. It appears to me to be a diligent and credible effort and I do credit it. For the time period between January 11, 1990, and May 30, 1992, the computations establish that he is due back pay in the amount of $6094.28.

As a result of the testimony adduced at the Supplemental Hearing, I find the complainant's accrued back pay for the period from January 11, 1990 through May 30, 1992, to be $6094.28, based on a base rate differential of $0.945 per hour for each hour he worked. And because complainant has not yet been reinstated to his position of utility laborer, that aspect of his damages will

continue to accrue as well as interest on that award at the appropriate rate until such time as it is finally calculated and paid subsequent to his reinstatement, whenever that might be. Presumably this case will go up on appeal.

ORDER

Respondent IS ORDERED:

1. To pay Ronny Boswell back pay through May 30, 1992, in the amount of $6094.28, within 30 days of the date of this order.

2. To pay Ronny Boswell interest on that amount from the date he would have been entitled to those monies until the date of payment, at the short-term federal rate used by the Internal Revenue Service for the underpayment and overpayment of taxes, plus 3 percentage points, as announced by the Commission in Loc. U. 2274, UMWA v. Clinchfield Coal Co., 10 FMSHRC 1493 (1988), aff'd, 895 F.2d 773 (D.C. Cir. 1990).

3. Within 30 days of this order, to reinstate complainant to the same position, pay, assignment, and with all other conditions and benefits of employment that he would have had if he had not been disqualified from his previous position as a utility laborer on January 11, 1990, with no break in service concerning any employment benefit or purpose.

4. To completely expunge the personnel records maintained on Mr. Boswell of all information relating to the January 11, 1990 "disqualification."

5. To pay Ronny Boswell additional back wages in the amount of $0.945 per hour for every hour he has worked from May 31, 1992, until the date of reinstatement to the utility laborer position, with interest thereon computed in accordance with the Commission's Decision in UMWA v. Clinchfield Coal Co., supra, until the date of payment.

This Decision on Damages together with my prior Decision Upon Remand constitutes my final disposition of this proceeding.

Roy J. Maurer
Administrative Law Judge