CCASE:
SOL (CLAYTON NANTZ) V. NALLY & HAMILTON
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SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 92-259-D
ON BEHALF OF CLAYTON NANTZ,	:	
Complainant	:	BARB CD 91-24
v.	:	
	:	Gray's Ridge Job
NALLY & HAMILTON ENTERPRISES,	:	
INCORPORATED,	:	
Respondent	:	

DECISION

Appearances: MaryBeth Bernui, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Complainant;
David O. Smith, Esq., Marcia A. Smith, Esq., Corbin, Kentucky, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding is before me to determine the relief due the complainant Clayton Nantz based upon my decision of November 19, 1992, finding that the respondent Nally & Hamilton Enterprises, Incorporated, discriminated against the complainant in violation of section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq., 11 FMSHRC 1858.

The parties were afforded thirty (30) days after my decision was issued to agree to the relief due Mr. Nantz or to submit their separate relief proposals with supporting arguments. By letter dated December 4, 1992, the Secretary informed me that the parties were unable to reach an agreement concerning the amount of damages to be awarded to Mr. Nantz, and thereafter, on December 15, 1992, the Secretary submitted a Post-Decision Brief in support of her claim for money damages on behalf of Mr. Nantz. The Secretary stated that pursuant to an earlier stipulation, the medical expenses which would have been covered by Mr. Nantz's health insurance policy had he remained employed with the respondent amounted to $1,426.76, and that the total amount of money damages owed Mr. Nantz for 1991 and 1992, including back wages and medical expenses, through December 31, 1992, is

$33,194.60. The supporting documentation for the Secretary's claim includes the following:

1. Mr. Nantz's pay stubs while employed by the respondent for the payroll weeks ending on August 11, 1990, through April 1991 (Exhibit PT 1).

2. Mr. Nantz's pay stubs while employed with Cloverfork Mining & Excavating, Inc., for the payroll weeks ending September 8, 1991, through December 29, 1991, including a stub for a production bonus for the payroll period ending January 5, 1992. (Exhibit PT 5).

3. Mr. Nantz's W-2 Wage and Tax Statement for 1991, in connection with his employment with Cloverfork Mining & Excavating, Inc. (Exhibit PT 6).

4. A backpay computation calculated by MSHA Special Investigator Ronnie Brock, including Mr. Brock's notes and an affidavit explaining his computations (Exhibits PT 2, PT 4).

5. A statement by C & L Logging Owner Karen Lewis confirming Mr. Nantz's employment from May 6, 1992, to June 30, 1992, with total earnings of $1,340 (Exhibit PT 7).

On December 21, 1992, the respondent filed a motion to compel the Secretary to provide under oath the tax returns of Mr. Nantz for the years 1990, 1991, and 1992, including all income tax W-2 and 1099 forms, and all information concerning Mr. Nantz's income and benefits he received while not employed by the respondent.

On December 22, 1992, the Secretary filed a response in opposition to the respondent's motion to compel and a request that Mr. Nantz be reinstated no later than January 4, 1993.

On January 4, 1993, the respondent filed a response to the Secretary's claim, and it took issue with the Secretary's position with respect to the gross income earned by Mr. Nantz following his termination, the amount of damages that Mr. Nantz is entitled to, and the methodology and computations used by the Secretary in support of her claim on behalf of Mr. Nantz. Following the receipt of the respondent's January 4, 1993, response, I held a telephone conference with the parties that same day, and they were afforded an opportunity to present further arguments in support of their respective positions in this matter, including the motion to compel, and the request for

Mr. Nantz's immediate reinstatement. Thereafter, on January 5, 1993, I issued an order which included the following rulings and directives:

> 1. The Secretary was ordered to produce a copy of Mr. Nantz's 1991 tax return, and the respondent's motion to compel production of Mr. Nantz's 1990 and 1992 tax returns was denied.
>
> 2. The Secretary was ordered to obtain a sworn affidavit from Mr. Nantz concerning any employments held or income received from the date of the hearing of August 12, 1992, to the present.
>
> 3. The Secretary was ordered to obtain an affidavit or a W-2 tax statement from C & L Logging Company, regarding Mr. Nantz's 1992 income.
>
> 4. The Secretary was ordered to obtain from Mr. Nantz statements concerning any unemployment compensation benefit payments received in 1991 and 1992.
>
> 5. The Secretary's request for Mr. Nantz's immediate reinstatement was denied.

The Secretary was afforded fifteen days to comply with my order, and the respondent was given an opportunity to respond to the Secretary's submissions within fifteen days after the Secretary's filing.

By letter dated January 11, 1993, and received on January 14, 1993, the Secretary filed her response in compliance with my order of January 5, 1993, and submitted Mr. Nantz's 1991 tax return, an affidavit from Mr. Nantz concerning employments since the August 12, 1992, hearing, an affidavit from the owner of C & L Logging Company, and information regarding Mr. Nantz's unemployment compensation payment benefits for 1991 and 1992.

The Secretary's Position

Back Wages

Based on the weekly payroll stubs submitted by Mr. Nantz and the payroll records submitted by the respondent, covering a 32-week period beginning with the pay period ending August 11, 1990, and ending with the week of April 14, 1991, the Secretary calculates that Mr. Nantz worked a total of 1,390.5 hours over this time period, and that his average work week was 43.45 hours. The evidence establishes that while he was employed with the respondent, Mr. Nantz earned $10.50 per hour for up to 40 hours per week, and $15.75 per hour for overtime hours worked in excess of 40 per week. The Secretary's back wage calculations are based

on an average salary of 40 hours per week at $10.50 per hour, plus 3.5 hours of overtime at $15.75 per hour, for a total gross weekly salary of $475.12. The Secretary points out that there are several weeks in 1990 where the pay information submitted is listed as "unknown" because Mr. Nantz did not have pay stubs in his possession for those weeks, and the respondent only submitted payroll information for 1991 at the hearing. These weeks were not included by the Secretary in calculating Mr. Nantz's average weekly pay rate. Further, the Secretary did not use the week of April 20, 1991, in her calculations because this was the week Mr. Nantz was terminated prior to completing the work week.

The Secretary has submitted a back wage computation calculated by Inspector Brock on a quarterly basis with interest computed in accordance with the Commission's decision in Secretary v. Arkansas-Carbona, 5 FMSHRC 2043 (December 1983), and the submission includes Mr. Brock's notes and an affidavit explaining his computations. The Secretary does not dispute the fact that the hourly employees at the subject mine were laid off from August 14, 1991, through September 30, 1991. Under the circumstances, Mr. Brock did not calculate any back wages owed to Mr. Nantz during the layoff period. However, the Secretary points out that Mr. Nantz's interim earnings of $2,565, from his employment at Cloverfork Mining Company during the layoff period were not counted against Mr. Nantz's back wages with the respondent since he would not have been employed by the respondent during that period.

The record reflects that Mr. Nantz had interim work with Cloverfork Mining Company from September through December, 1991. He earned $11,150.53, through the pay period ending December 22, 1991; $186 for the pay period ending December 29, 1991; and he received a production bonus of $115.15, for the pay period ending January 5, 1992. In making his calculations, Inspector Brock added the $186 to Mr. Nantz's 1991 fourth-quarter interim earnings, and included the $115.15, as part of Mr. Nantz's 1992 first-quarter interim earnings.

The record further reflects that Mr. Nantz had interim work with C&L Logging from May 6, 1992 through June 30, 1992, and that he earned $1,340. In making his calculations, Inspector Brock subtracted these interim earnings from the back wages owed Mr. Nantz in the second quarter of 1992.

Mr. Nantz executed an affidavit on January 7, 1993, stating that he has been unemployed since the August 12, 1992, hearing and has not received any interim earnings during this period of time. Based on all of the evidence and information filed by the Secretary, including the calculations made by Inspector Brock, the Secretary concludes that the total back wages owed to

Mr. Nantz for 1991 through December 31, 1992, including overtime and interest, and subtracting all interim earnings, is $31,767.84.

Medical Expenses

It would appear that the parties are in agreement that the amount of medical expenses that would have been covered under Mr. Nantz's health insurance policy had he remained employed with the respondent is $1,426.76. The Secretary has added this amount to the claimed back wages amount, for a total claim of $33,194.60.

Unemployment Compensation Benefits

The Secretary has submitted statements from the Kentucky Department for Unemployment Services reflecting that Mr. Nantz received unemployment compensation benefits in 1992 amounting to $8,005, and 1991 payments amounting to $2,260. The parties agree that the question of whether or not Mr. Nantz's backpay compensation may be reduced by the amount of unemployment benefits paid to him is a matter within the discretion of the presiding judge, Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983). The respondent takes the position that had Mr. Nantz's employment not been terminated, he would not have received these benefits and he should not be allowed to reap a windfall by receiving backpay in addition to unemployment insurance benefits with no offset. Under the circumstances, the respondent believes that the benefit payments received by Mr. Nantz should be subtracted from any backpay award. The Secretary takes no position on this question other than to stipulate that it is within the discretion of the presiding judge.

Respondent's Position

Gross Income Lost

In response to the Secretary's claims on behalf of Mr. Nantz, the respondent first addresses the gross income that Mr. Nantz would have received had he continued to be employed by the respondent. The respondent takes the position that any award of backpay for Mr. Nantz should be computed on the basis of the evidence it submitted at the hearing which reflects that for the 15-week period from January 5, 1991 through April 13, 1991, Mr. Nantz's average work week was only 39.6 hours. Since this was the tax year immediately preceding Mr. Nantz's termination, the respondent believes that it more accurately reflects its mining activity at the time of the termination as opposed to the Secretary's computation which includes the preceding year (8/11/90 through 4/13/91, for an average of 43.45 hours).

The respondent is in agreement with the Secretary's computation to the extent that the 6.5 weeks from August 14, 1991, through September 30, 1991, should be omitted since no income was lost by Mr. Nantz during this period because of an undisputed layoff which would have affected him.

The respondent asserts that the 13 weeks for the months of October through December 1991, that are totally discounted by the Secretary's computation is erroneous. The respondent disagrees with the Secretary's apparent position that since Mr. Nantz earned more at Cloverfork than he would have earned had he still been employed by the respondent during this period of time, that difference should not be counted in the backpay computation. The respondent believes that it is illogical and unreasonable not to include all income earned by Mr. Nantz from Cloverfork as part of the backpay computation. The respondent further submits that it is likewise not reasonable to disregard gross wages earned by Mr. Nantz at Cloverfork during August 14, 1991 through September 30, 1991, when he would have been laid off by the respondent.

The respondent suggests that the gross income lost by Mr. Nantz can be computed simply as follows:

1) Based on the respondent's 39.6 hour work week computation at $10.50 per hour, Mr. Nantz's gross weekly earnings with the respondent would have been $415.80. For the week of his termination ending April 21, 1991, Mr. Nantz would have had gross income of $315, with a loss of $100.80 that week. The period from April 22, 1991 through December 31, 1992, consists of 88 weeks, and subtracting the 6.5 lay off weeks would leave 81.5 work weeks at the weekly rate of $415.80, or $33,887.70. Adding the $100.80 loss of income during the week of the termination would then result in a total gross income loss of $33,988.50, for the period April 16, 1991 through December 31, 1992.

2) Based on the Secretary's 43.45 hour work week computation, or gross wages of $475.12 per week, Mr. Nantz would have lost $105 for the week ending April 21, 1991, plus 81.5 weeks at $475.12 per week, or $38,722.28, for a total gross income lost for the period April 16, 1991 through December 31, 1992 of $38,827.28.

Based on the aforementioned arguments and computations, the respondent believes that Mr. Nantz's gross income loss for the relevant periods in question would be no more than $33,988.50 rather than $38,827.28.

Gross Income Received

The respondent agrees that the purpose of damages in this case is to make Mr. Nantz whole. However, it takes the position that since Mr. Nantz had a duty to mitigate his damages by seeking employment, all of the gross income, including unemployment insurance income, that he received for the period April 16, 1991, through December 31, 1992, should be subtracted in determining his compensable damages. The respondent points out that had Mr. Nantz's employment with the respondent not been terminated, he would not have had any of the income he subsequently received during the period April 16, 1991, through December 31, 1992, from the following sources:

Source of income	Amount	Time period
Cloverfork Mining & Excavating	$11,451.68	(9/91-1/5/92)
C & L Logging	$ 1,340.00	(5/6/92-6/30/92)
Unemployment insurance	$ 2,260.00	(1991)
Unemployment insurance	$ 8,005.00	(1992)
TOTAL	$ 23,056.68	

The respondent takes issue with the Secretary's discounting of any income earned by Mr. Nantz during the lay off period covering August 14, 1991 through September 30, 1991, simply because he would not have been employed with the respondent during that time. The respondent believes that whatever income Mr. Nantz earned following his termination should be deducted from the gross wages he would have earned with the respondent.

The respondent points out what it believes is an error in the figures submitted by the Secretary with respect to Mr. Nantz's employment with Cloverfork Mining. The respondent asserts that although the Secretary has stated that Mr. Nantz earned $2,565, during the period August 14, 1991, through September 30, 1991, the payroll check stubs submitted by the Secretary (Exhibit PT 5), for the weeks during this period only total $1,707.

The respondent believes that the Secretary's failure to subtract the difference between Mr. Nantz's fourth quarter 1991 earnings with Cloverfork Mining ($8,771.53), and the backpay he would have earned in that quarter ($6,176.56), in computing backpay (Brock affidavit, Exhibit P 4), on the ground that the interim earnings were greater than the backpay, is unreasonable and unfair. The respondent argues that had Mr. Nantz continued in the respondent's employ, he would not have had this additional income and it should therefore be subtracted in full from any backpay award.

The respondent asserts that although the W-2 payroll records submitted by Mr. Nantz establish that he had gross income from

Cloverfork Mining of $11,451.68, the Secretary only subtracted a total of $6,291.71 for gross income from Cloverfork following his termination. The respondent concludes that this is clearly erroneous, and it believes that in determining any compensable damages due Mr. Nantz, the total gross income he received following his termination ($23,056.68), should simply be subtracted from the total gross income he lost. The respondent's calculations in this regard are as follows:

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 $33,988.50 (39.6 hours)
-$23,056.68
 $10,931.82

  $38,827.28 (43.45 hours)
 -$23,056.68
  $15,770.60
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Deductible Weeks

Citing Metric Constructors, Inc., 3 FMSHRC 1260 (February 1984), aff'd, Brock v. Metric Constructors, Inc., 766 F.2d 469 (11th Cir. 1985), the respondent argues that Mr. Nantz's backpay claim should be barred because of his admitted failure to immediately seek other employment, or, in the alternative, that at least two weeks of backpay should be deducted in computing damages.

The respondent maintains that any backpay award in this case should be reduced by a four-month or seventeen-week period because of the Secretary's unreasonable delay in bringing this action within a 120-day period as provided by the Act and the Commission's rules. Conceding that it did not attempt to prove that the delay made any of its witnesses unavailable or its defense to the complaint impossible, the respondent points out that it has never agreed that the delay should not be considered in computing a backpay award.

The respondent asserts that by rejecting foreman Farley's offer to return to work, or Farley's offer to attempt to put him back to work unless he was paid his backpay in full, Mr. Nantz has in effect failed to mitigate his damages by not pursuing this offer pending litigation of his claim for backpay. Since the offer took place sometime in June or July 1991, the respondent argues that Mr. Nantz's rejection of the Farley offer disqualifies him for any backpay weeks after June or July 1991. Giving Mr. Nantz the benefit of assuming that the offer was made at the end of July 1991, the respondent concludes that Mr. Nantz should be entitled to backpay for no more than 15 weeks, from April 16, 1991, through July 31, 1991, less the two (2) weeks he did not seek employment, or a total of 13 weeks.

The respondent agrees that the medical damages are $1,426.76, and that they should be added to any backpay award. The respondent submits that the backpay award with interest and medical damages could range from $17,481.23, based upon a 43.45 hour work week and without subtracting any weeks for the Secretary's delay, Mr. Nantz's delay in seeking employment, or his rejection of reemployment, but including unemployment insurance, to a low figure of $6,237, on the basis of a 39.6 hour work week for only the 13 weeks preceding Mr. Nantz's rejection of the offer of reemployment, but not deducting for any income received since the record fails to establish whether he received any income during that period of time, although he may have received some small amount of unemployment insurance benefits. The various possible calculations submitted by the respondent are included as an attachment to this decision.

Findings and Conclusions

In a discrimination case, the amount of backpay to be awarded as part of the remedial remedy is the difference between what the employee would have earned but for his wrongful termination and his actual interim earnings. OCAW v. NLRB, 547 F.2d 598, 602 D.C. Cir. 1976); cert. denied, 429 U.S. 1078 (1977), cited and followed by the Commission in Northern Coal Company, 4 FMSHRC 126 (February 1982), and Belva Coal Company, 4 FMSHRC 982 (June 1982). Further, the employee must make a reasonably diligent effort to mitigate his loss of income or other damages, and his failure to do so may, in appropriate circumstances, result in a reduction of any backpay award, OCAW v. NLRB, supra; Northern Coal Company, supra.

In the Belva Coal Company case, supra, at 4 FMSHRC 994-995, the Commission stated as follows:

> In Northern Coal Co., 4 FMSHRC 126, 144 (1982), we followed precedent established under the National Labor Relations Act and defined back pay as the sum equal to the gross pay the miner would have earned but for the discrimination, less his "actual net interim earnings." "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 employee's 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 discrimination. To remove any possible confusion, we will henceforth refer to the term as "actual interim earnings." See OCAW v. NLRB, 547 F.2d 598, 602 (D.C. Cir. 1976), cert. denied, 429 U.S. 1078 (1977).

In Secretary/Bailey v. Arkansas Carbona, 5 FMSHRC 2042 (December 1983), the Commission stated as follows:

> Back pay and interest shall be computed by the "quarterly" method. See Florida Steel Corp., 231 NLRB at 652; F.W. Woolworth Co., 90 NLRB 289 (1950), approved NLRB v. Seven-Up Bottling Co., 344 U.S. 344 (1953). Under this method (referred to as the "Woolworth formula," after the NLRB's decision in the case of the same name, supra), computations are made on a quarterly basis corresponding to the four quarters of the calendar year. Separate computations of back pay are made for each of the calendar quarters involved in the back pay period. Thus, in each quarter, the gross back pay, the actual interim earnings, if any, and the net back pay are determined.

Back Wages

The Secretary's back wage calculations are based on an average weekly salary based on a 40-hour week at $10.50 per hour, plus 3.5 weekly hours of overtime at $15.75 per hour, for a total gross weekly salary of $475.12. The Secretary's calculations are based on Mr. Nantz's wage and hour history covering a 32-week period prior to his termination on April 16, 1991, rather than the shorter 15-week period covering only the year 1991, as submitted by the respondent. I take note of the fact that in calculating Mr. Nantz's average weekly pay rate, the Secretary did not include several weeks in 1990 where the pay information was not known or documented, or the week of April 20, 1991, when Mr. Nantz was terminated and did not finish the week.

After careful consideration of the arguments advanced by the parties, I conclude and find that the Secretary's computations are both reasonable and proper and provide a more accurate and realistic base for computing Mr. Nantz's average weekly gross pay for purposes of calculating his damages. I accept and adopt the Secretary's calculation of $475.12, as a reasonably accurate reflection of Mr. Nantz's average gross weekly wages, and I reject the respondent's argument to the contrary.

I take note of the fact that the interim employment information and calculations submitted by the parties basically cover the period beginning the week after Mr. Nantz's termination on April 16, 1991, through December 31, 1992. Any damages due Mr. Nantz will have to be adjusted to account for the subsequent time period before his actual reinstatement or payment of damages.

The parties are in agreement that the 6.5 week mine layoff from August 14, 1991, through September 30, 1991, which would have affected Mr. Nantz, should not be included in calculating the work weeks lost by Mr. Nantz as a result of his termination.

Utilizing the respondent's calculations based on the Secretary's $475.12 weekly gross wage, which I have adopted, I conclude and find that Mr. Nantz would have lost $105 for the week ending April 21, 1991, plus 81.5 weeks at $475.12 per week, or $38,722.28, for a total gross income lost for the period April 16, 1991, through December 31, 1992, of $38,827.28.

Back Wages Adjustments/Deductions

Interim Earnings

The record reflects that Mr. Nantz had gross earnings of $11,451.68, for employment with Cloverfork Mining & Excavating during September, 1991 through February 5, 1992, and gross earnings of $1,340, for employment with C & L Logging during May 6, 1992, through June 30, 1992. I agree with the respondent's position that the sum total of these interim earnings should be deducted from any backpay award to Mr. Nantz. However, I disagree with the respondent's position that the failure by the Secretary to offset $2,565 in Cloverfork Mining earnings by Mr. Nantz during the lay off period was unreasonable. The parties agree that Mr. Nantz would not have been employed during the layoff period, and they have taken this into account by not counting the layoff period as part of their back wage computation. By the same token, if Mr. Nantz had not been terminated, he would have been out of work during the layoff period and could have used that time to either work at another job or stay home. The fact that he worked another job during the time when he would have otherwise been laid off should not be held against him, and he should not be penalized by deducting any wages earned during the layoff from any backpay award. Under the circumstances, the respondent's arguments are rejected, and I conclude and find that the Secretary's discounting of the wages earned during the layoff period was reasonable and proper.

As noted earlier, the amount of any backpay award in a discrimination case is the difference between what the miner would have earned but for the discrimination and his actual interim earnings. Except for my rejection of the respondent's arguments that the $2,565 earned by Mr. Nantz from Cloverfork Mining during the August/September 1991 mine layoff, should be offset from any backpay award, I otherwise agree with the respondent's position that the sum total of Mr. Nantz's interim earnings should be deducted from what he would have otherwise earned had he not been terminated. I reject the Secretary's failure to subtract the difference between Mr. Nantz's fourth quarter 1991 Cloverfork Mining earnings of $8,771.53, and the $6,176.56, backpay he would have earned in that quarter, from his overall backpay award.

I conclude and find that Mr. Nantz's interim earnings of $1,340 with C & L Logging should be deducted from the $38,827.28, income lost for the period April 16, 1991, through December 31, 1992. I further conclude and find that $8,886.68, in interim earnings from Cloverfork Mining ($11,451.68 less $2,565.00) should be deducted from the income lost during this same time period.

Mitigation of Damages

An employee who has been discriminated against by his employer must make a reasonable effort to seek alternative employment following his unlawful termination. Ocaw v. NLRB, 547 F.2d 598, 603 (D.C. Cir. 1976), cert. denied, 429 U.S. 1078 (1977). Any determination as to what constitutes a "reasonable effort" is made on the peculiar facts of the case. NLRB v. Madison Courier Inc., 472 F.2d 1307, 1318 (D.C. Cir. 1972).

In Metric Constructors, Inc., 6 FMSHRC 232 (February 1984), aff'd, Brock, ex rel Parker v. Metric Constructors Inc., 766 F.2d 469, 473 (11th Cir. 1985), the Commission affirmed a Commission Judge's denial of one week of back pay for an employee who failed to make a reasonable effort to seek employment during the week following his termination. The Commission also approved the Judge's following and applying NLRB cases under the National Labor Relations Act.

The respondent concludes that Mr. Nantz's failure to look for other work for two or three weeks after his employment termination waiting to see if the respondent would call him back to work was clearly nonsensical. Relying on the decision in Metric Constructors, Inc., supra, the respondent submits that at least three weeks of any back pay award should be deducted because of Mr. Nantz's failure to seek employment during the period immediately following his termination.

Mr. Nantz confirmed that he waited two or three weeks after he was terminated before looking for other work waiting to see if the respondent would call him back to work (Tr. 27). Mr. Nantz explained that he heard nothing further from Mr. Farley after his termination of April 16, 1991, regarding any offers of reemployment, and he stated that "I just kept waiting on him to call, and he never called" (Tr. 82-83).

I take note of the fact that the Secretary did not use the week that Mr. Nantz was terminated in calculating his backpay. However, the Secretary does not address Mr. Nantz's admission that he waited for an additional two weeks before looking for other work, nor does the Secretary address the respondent's arguments with respect to this issue.

After careful consideration of the argument advanced by the respondent, I conclude and find that Mr. Nantz's failure to begin his search for work during the three or four days following his termination was not unreasonable. However, I further conclude and find that it was unreasonable for Mr. Nantz to wait an additional two weeks before looking for work. I find no credible evidence to support any conclusion that Mr. Nantz had any reasonable expectation of being rehired by the respondent following his termination, and he admitted that he made no effort to contact mine management to seek reemployment and stated that he "wouldn't work for a man who did not pay him". Under the circumstances, I conclude and find that two-weeks should be deducted from Mr. Nantz's backpay award. Accordingly, I have deducted $950.24 ($475.12 x 2) from Mr. Nantz's backpay award.

Unemployment Compensation Payments

The parties are in agreement that any reduction of backpay due for unemployment payments is a matter of discretion with the presiding Judge. Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983), affirming in part its prior decision on this issue in Boich v. FMSHRC, 704 F.2d 275 (6th Cir. 1983).

The respondent maintains that all gross income received by Mr. Nantz subsequent to his termination, including unemployment compensation payments, should be subtracted from his compensable damages. The respondent concludes that if Mr. Nantz had not been terminated and remained in its employ, he would not have received any of the 1991 and 1992 income which has been documented in this case.

A backpay award pursuant to the Act is an equitable remedy intended to make the victim of discrimination in violation of section 105(c) of the Act whole and to restore him to his prior economic status absent the discrimination. I find no compelling reason for providing Mr. Nantz additional recovery for his lost wages over and above his backpay with interest by not deducting the unemployment compensation payments he has received.

The respondent has been assessed a civil penalty of $1,000, for its discriminatory conduct which resulted in Mr. Nantz's employment termination on April 16, 1991. Since the penalty assessment is a punitive sanction intended to deter further discriminatory conduct by the respondent, I find no compelling reason or circumstances for imposing an additional sanction against the respondent by not crediting it with the unemployment payments received by Mr. Nantz. Under the circumstances, I conclude and find that any unemployment benefit payments received by Mr. Nantz should be deducted from his compensable damages. Accordingly, I have deducted $10,265.00, in 1991 and 1992 unemployment compensation payments received by Mr. Nantz from his

backpay award covering the period April 16, 1991, through December 31, 1992.

Delay in Filing Complaint

The respondent's contention that Mr. Nantz's backpay award should be reduced by a four-month or seventeen-week period because of the Secretary's unreasonable delay in filing the complaint with the Commission IS REJECTED. The respondent has not proved that it has been prejudiced by any delay and in fact concedes that any delay did not make any of its witnesses unavailable, or that it had any adverse impact on its ability to defend the complaint. Further, in my decision of November 2, 1992, I rejected the respondent's arguments with respect to any unreasonable delay by the Secretary, 11 FMSHRC 1882-1883, and my findings and conclusions in this regard are herein incorporated by reference and they are REAFFIRMED. I conclude and find that Mr. Nantz's backpay award should not be reduced because of the asserted delay by the Secretary.

Rejected Reemployment Offer

The respondent's assertion that Mr. Nantz should be disqualified for any backpay subsequent to July 31, 1991, because he failed to mitigate his damages by rejecting foreman William Farley's offer to put him back to work, or to "attempt" to put him back to work, IS REJECTED. This issue was previously raised by the respondent and I rejected its arguments and found no credible evidence to support any conclusion that Mr. Farley made any bona fide offer to rehire Mr. Nantz. Indeed, the evidence reflects that Mr. Nantz's replacement was immediately hired by foreman Wayne Fisher when Mr. Nantz was effectively terminated on April 16, 1991, and that this was done with mine superintendent Louis Hamilton's blessing. Under all of these circumstances, my previous findings and conclusions are herein adopted by reference and REAFFIRMED, and I conclude and find that Mr. Nantz's backpay award should not be reduced because of any purported offer by mine management to reemploy Mr. Nantz, or any rejection of this offer by Mr. Nantz.

ORDER

0n the basis of the foregoing findings and conclusions, including the reductions made for Mr. Nantz's interim earnings with Cloverfork Mining and C & L Logging, his waiting two weeks after his termination to begin looking for work, and his unemployment compensation payments, I conclude and find that the gross backpay award for Mr. Nantz for the period April 16, 1991, through December 31, 1992, less interest, is $17,385.36. I also conclude and find that Mr. Nantz is entitled to an additional sum

of $1,426.76, for medical expenses which the parties agree he would have been entitled to under the respondent's health insurance plan had he remained employed with the respondent.

IT IS ORDERED THAT:

1. My decision in this case, issued on November 19, 1992, is now final.

2. The respondent shall reinstate Mr. Nantz to his former position with full backpay and benefits, with interest, from April 16, 1991, the date of his termination, and adjusted to the date of his reinstatement, at the same rate of pay, on the same shift, and with the same status and classification that he would now hold had he not been unlawfully terminated. The gross backpay award due Mr. Nantz pursuant to this decision shall be subject to the usual and normal withholdings. Backpay and interest will continue to accrue until Mr. Nantz is reinstated and paid.

The interest accrued with respect to Mr. Nantz's backpay award shall be computed in accordance with the Commission's decision in Local Union 2274, UMWA v. Clinchfield Coal Co., 10 FMSHRC 1493 (November 1988), aff'd sub nom. Clinchfield Coal Co. v. FMSHRC, 895 F.2d 773 (D.C. Cir., 1990), and calculated in accordance with the formula in Secretary/Bailey v. Arkansas Carbona, 5 FMSHRC 2042 (December 1983), and at the adjusted prime rate announced semi-annually by the Internal Revenue Service for the underpayment and overpayment of taxes.

3. The respondent shall reimburse and pay to Mr. Nantz $1,426.76, with interest, in medical expenses which would have been covered by his medical insurance had he not been terminated.

4. The respondent shall expunge from Mr. Nantz's personnel file and/or company records all references to the circumstances surrounding his employment termination of April 16, 1991.

5. The respondent shall pay to the Secretary (MSHA), a civil penalty assessment of $1,000, for the discriminatory violation which has been sustained.

The respondent shall comply with this Order within thirty (30) days of the date of this final decision.

George A. Koutras
Administrative Law Judge

Attachment

Distribution:

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