

CCASE:
CLIFFORD MEEK V. ESSROC CORPORATION
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

CLIFFORD MEEK : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. LAKE 90-132-DM
: MSHA Case No. UC-MD-90-06
ESSROC CORPORATION, :
Respondent :

DECISION ON REMAND

Appearances: Robert J. Tscholl, Esq., Canton, OH, for
Complainant;
John C. Ross, Esq., and Monty Donohew, Esq.,
Canton, OH, for Respondent.

Before: Judge Fauver

On April 27, 1993, the Commission affirmed the judge's decision except for the failure to deduct Meek's unemployment compensation from backpay. It remanded for "further findings on the amount of unemployment compensation Meek received during the backpay period" with direction to deduct the sum from Meek's backpay award.

After remand, the parties moved the judge for various forms of relief, with a number of contested issues. A hearing was held at Cleveland, Ohio on June 9, 1993.

The issues were simplified and narrowed to the following, all other issues raised by the parties being withdrawn or abandoned:

1. Does the judge have jurisdiction to award the miscellaneous expenses specified in Paragraph 2 of Exhibit C-1 (Mr. Tscholl's letter to Mr. Ross, dated May 13, 1993)? If so, are the expenses reasonable?

2. Does the judge have jurisdiction to update the backpay award and award of an attorney fee and litigation costs incurred since March 2, 1992? If so, are the sums presented in Exhibit C-1 accurate and reasonable?

3. Should the judge grant Respondent's oral motion to stay his reinstatement and backpay orders pending any appeal to the courts?

After evidence was taken and before oral argument on the above issues, the judge issued a bench provisional order expressing the intention of his reinstatement and backpay orders as to two points, giving an opportunity to the parties to raise any objection or disagreement with the provisional order. With minor editing, these points are:

1. Respondent's liability for backpay, interest, an attorney fee and litigation costs will continue to accrue until Respondent, in writing, offers Complainant reinstatement in compliance with the reinstatement order of December 24, 1991, and either (A) Complainant accepts reinstatement and goes to work or (B) Complainant rejects the offer or within a reasonable period (which the judge would deem to be five business days) after receiving the offer, Complainant fails to accept the offer. Until either event (A) or (B) occurs, Respondent shall continue to be liable for backpay, interest, a reasonable attorney fee, and litigation costs incurred after March 2, 1992, as well as the initial award of backpay, interest, an attorney fee and litigation costs up to March 2, 1992.

2. The intention of the judge's backpay award of March 31, 1992, is that Complainant shall receive all of such award without reduction for any attorney fee (e.g. a contingency fee); and that the only attorney fee allowable in this case will be the attorney fee awarded by the judge.

The parties indicated they had no objection to the above interpretation of the judge's reinstatement and backpay orders. Recognizing this, Respondent moved to stay the orders pending any appeal to the courts.

DISPOSITION OF THE ISSUES

1. A judge's jurisdiction on remand is limited to the issues specifically remanded by the Commission. See generally *Hermann v. Brownell*, 274 F.2d 842, 843 (9th Cir.), cert. denied, 364 U.S. 821 (1960); *Secretary on behalf of Mullins v. Consolidation Coal Co.*, 4 FMSHRC 1622, 1624, n.2 (1982); and *Boswell v. National Cement Company*, 15 FMSHRC (June 7, 1993).

Here, the Commission has directed the judge to determine the amount of unemployment compensation Complainant received in the backpay period and to deduct that sum from the backpay award. The judge's Final Order of March 31, 1992, awarded \$24,000.00 in backpay and interest for the period from February 27, 1990, through March 2, 1992, and an attorney fee and litigation costs of \$17,065.80 for the same period. The order then provided that liability for backpay, interest, an attorney fee and litigation costs incurred after March 2, 1992, would continue to accrue until conclusion of the case including any appeals.

I conclude that my jurisdiction on remand is limited to finding and deducting the unemployment compensation received in the period for the initial backpay award (i.e., from February 27, 1990, through March 2, 1992). The evidence indicates that Meek received \$6,942.00 in unemployment compensation during this period. His net backpay with interest through March 2, 1992, is therefore \$17,058.00 (\$24,000.00 less \$6,942.00).

As to damages incurred after March 2, 1992, I observe that the Commission affirmed the judge's decision in all respects other than the unemployment compensation point, including the provision that:

Respondent's liability for back pay, interest and an attorney fee and litigation costs after March 2, 1992, shall continue to accrue until this case including any appeals is concluded. [Judge's Final Order, March 31, 1992.]

Respondent states that it intends to appeal for judicial review of the Commission's decision. There is therefore no necessity at this time to make findings on damages incurred after March 2, 1992. If the case is appealed, any final order on damages would have to be updated after the appeal. If there is no appeal, Complainant may seek a court injunction to enforce the judge's reinstatement order and order for monetary relief as final orders of the Commission. In such an action, it may be expected that the court will remand the case to the Commission for findings as to the final amounts of backpay, interest, a reasonable attorney fee and litigation costs due to Complainant. In either case, any final computation of backpay incurred after March 2, 1992, will be subject to deduction for unemployment compensation in accordance with the Commission's ruling.

2. Section 106(c) of the Act provides that "The commencement of a [judicial review] proceeding ... shall not, unless specifically ordered by the court, operate as a stay of the order or decision of the Commission" I find that the question of a stay of the judge's reinstatement order and order for monetary relief should be addressed to the court in the event of an appeal, and that no adequate showing has been made for a stay by this judge.

ORDER

WHEREFORE IT IS ORDERED that:

1. The Final Order dated March 31, 1992, is AMENDED to change the backpay award at p. 2, to read: "Backpay and Interest --- \$17,058.00 (after deducting \$6,942.00 for unemployment compensation received in this period)" and to change the total award to read "\$34,123.80" instead of "\$41,065.80" for the period up to March 2, 1992. In all other respects, the Final Order is unchanged.

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2. Complainant's motion to find at this time the amounts of backpay, interest, an attorney fee and litigation costs incurred after March 2, 1992, is DENIED.

3. Respondent's motion to stay the judge's reinstatement order and order for monetary relief is DENIED.

William Fauver
Administrative Law Judge

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