FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 24, 2016

SHAWN HIRT, Complainant, v. GARY SERVAES ENTERPRISES, Respondent.	DISCRIMINATION PROCEEDING Docket No. CENT 2015-0598-DM RM MD 15-13 Atchison Quarry Mine Mine ID: 14-01710

DECISION AND ORDER

Appearances: Shawn Hirt, *pro se*, Atchison, Kansas, Complainant;

Allen A. Ternent, Ternent Law Office, Atchison, Kansas, for Respondent.

Before: Judge Miller

This case is before me on a complaint of discrimination brought by Shawn Hirt against Gary Servaes Enterprises pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c). The parties presented testimony and documentary evidence at a hearing on July 6, 2016, in Kansas City, Missouri.

I. FINDINGS OF FACT

The findings of fact detailed below are based on the record as a whole and my careful observation of the witnesses during their testimony. My credibility determinations are based in part on my close observation of the witnesses' demeanors and voice intonations. In this case the witnesses on both sides were neither totally truthful nor presented the entire picture. In resolving any conflicts in testimony, I have taken into consideration the interests of the witnesses, corroboration or the lack thereof, and consistencies and inconsistencies in each witness's testimony and among the testimonies of the various witnesses. Any failure to provide detail on each witness's testimony in this decision should not be deemed a failure on my part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000).

Gary Servaes Enterprises operates the Atchison Quarry Mine in Atchison, Kansas. The quarry mines limestone both underground and on the surface using explosives. Servaes Enterprises is owned by Gary Servaes and is considered a small operator. At the time of Hirt's employment, the company had about ten employees at Atchison. The company is subject to the jurisdiction of the Act.

Shawn Hirt was hired at the mine in November 2014 as a blaster assistant. He primarily worked underground assisting the lead blaster, Josh Tull, in loading holes and blasting. He was also assigned other jobs as needed. Hirt began working for Servaes as a part-time employee while he was doing other independent contract work. He believes he was later given a full-time position, although the mine's records indicate that he did not normally work a 40-hour week. Resp. Ex. E. The records show that he worked overtime hours on five occasions. *Id.* He was paid $11.00 per hour with no benefits. Hirt last worked for Servaes Enterprises on April 9, 2015.

In January 2015, the mine was inspected by MSHA, ATF, and the Kansas Fire Marshal. According to Hirt, management was aware of the upcoming inspection and gathered miners together before the inspection, telling them not to speak to the inspectors or to cooperate in the investigation. However, when the inspectors arrived, management told Hirt to speak with the MSHA inspector. Hirt told the inspector that his job was to help load explosives. According to Hirt, the information he provided to the inspector resulted in a $5,000.00 citation being issued to the mine. He alleges that the mine did not call him back to work in April 2015 because the owners were angry that he had spoken with MSHA.

I take judicial notice that the MSHA data retrieval system confirms that a large number of MSHA citations were issued to the mine on January 12, 2015, and again on January 13, 2015, including a number of Section 104(d) citations and orders and a failure-to-abate order. Although many were assessed $4,000.00 penalties, one flagrant violation involving an explosives magazine that was not locked was assessed a penalty of $96,300.00. Additionally, the MSHA website shows that several more 104(d) orders were issued on January 29, 2015. Two violations involved a vehicle containing explosive material and were assessed penalties of $56,900.00 and $12,563.00. All of these citations and orders are in contest. Hirt did not describe the violation that he allegedly caused to be issued, but vaguely stated that it was related to a truck he was driving. Although Hirt did not say when the citation was issued, the record indicates that the mine received a number of serious, high-penalty citations as a result of the January inspections, at least two of which involved a vehicle, and five of which were unwarrantable violations related to explosives.

In addition, an order was issued to Gary Servaes Enterprises on February 3, 2015, for failing to provide task training for three employees who were handling explosives. One of the listed miners was Shawn Hirt, and the order withdrew him from working with explosives in any way. The order also referenced Mike Tull, presumably the blaster who worked with Hirt, and Patrick Miranda, a miner for whom Hirt filled in during an absence in April. It appears that Miranda did not return to work, though the mine operator claimed not to remember the details at hearing. Darryl Servaes, son of Gary Servaes and superintendent of the mine, testified that all persons at the mine who handled explosives were task trained. Darryl later indicated that the mine had received a citation for failing to provide task training, but that it was vacated ten months after it was received. MSHA records show that the mine did receive a citation involving task training, for both Hirt and Tull, and contrary to Servaes' testimony, the citation has not been vacated. ATF and the Kansas Fire Marshal also found problems with the mine's training. Gary Servaes stated that the law had changed and under previous law MSHA task training satisfied ATF and Kansas requirements. However, there is no evidence that ATF or the Kansas fire marshal had changed their requirements for blasters and blasting assistants.

The testimony was confusing and incomplete, but it appears that the three persons who were blasting at the mine had not been trained, did not have ATF or fire marshal certifications, and are no longer working at the mine. A separate 104(g) order was issued to withdraw Michael Hinson from handling explosives because he was not task trained, but the citation indicates that Hinson was no longer working at the mine in February. By April, when Hirt was not called back and Miranda did not come back to work, all of the persons who were withdrawn for violations of task-training requirements in handling explosives were no longer working at the mine.

Darryl Servaes stated that the mine fully cooperated with the inspections and provided records as requested. However, two failure-to-abate orders were issued to the mine in April and May, about the time Hirt was let go. These allege that the mine would not allow MSHA to conduct an inspection without law enforcement present. One of the failure-to-abate orders related to a truck, which may have been the citation Hirt referred to as the one in which the mine held him responsible.

As a result of the inspection by the three agencies, the mine lost its Kansas state blasting license. It also "voluntarily" gave up its ATF license. Subsequently, the mine suspended blasting on the underground level and hired a contractor to conduct blasting work on the surface only. Prior to January 2015, the primary production of limestone was based upon the underground supply. But after the inspections, production was from the surface only. This resulted in a reduction in production and the need for fewer workers. However, the mine continued to have work for its full-time employees. The reduced production status lasted approximately a year until January 2016, when the mine had its permits restored and was able to resume its own blasting work. Darryl Servaes testified that several employees quit during 2015. Tull, the lead blaster, was terminated in April 2015 about the same time that Hirt was not called back to work.

According to the mine's payroll records, Hirt continued to work regularly at the mine after the inspection in January through February 2015, including some overtime hours. Although Darryl Servaes claims Hirt did not work with explosives after the January inspection, Hirt testified that he worked on bringing the explosive boxes, signs, and other items used for blasting out of the mine. He then believes he was laid off, though Darryl Servaes claims he was still on call as needed. In March 2015, the payroll records show that Hirt worked only four days, with none in the second two weeks of March. He then worked six days during the first two weeks of April. Servaes claims that there was no work for Hirt during March, but that he called him in to fill in for a full-time employee, Patrick Miranda, in April. This likely corresponds to Hirt's description of being called back to work as a truck driver for a few weeks.

Hirt's last day of work was April 9, 2015. On that day, Darryl Servaes told Hirt that he would call him if Miranda did not return the following Monday. However, at hearing, Servaes could not remember whether Miranda ever returned to work. Servaes did not call Hirt the following Monday, and so Hirt sent him a text message. Hirt believed Servaes had hired someone to replace him, and conveyed this in his text message to Servaes. Servaes testified that a person was hired that day, but the person was a crusher operator who had specialized experience. No one was hired to replace Hirt. Hirt believes that he was not called back to work because Servaes was angry at him for providing information to MSHA that led to a citation.

I note that much of the testimony of both Darryl and Gary Servaes amounted to yes or no responses and so provides little direct information. The testimony of each is incomplete and contradictory, and I did not find either witness to be credible. When asked if Hirt was terminated because of his involvement with the ATF and MSHA inspections, Darryl Servaes responded "no" to the question, but offered no further explanation. While he admitted that he was aware that Hirt spoke to MSHA during the inspection, he indicated that all of the employees at the mine spoke to MSHA and ATF at some point during the inspections. He acknowledged that the mine received ten or twelve citations during the first day or two of the inspections in January, but claimed that none were related to anything Hirt did. He stated that he was unaware that Hirt had said anything to MSHA that led to a citation. Gary Servaes admitted that he viewed the MSHA file after the January inspection, but said he did not see anything that would have led him to blame Hirt for the company getting cited. However, nearly every citation issued in January and February by MSHA was related to blasting and explosives, work that involved Hirt.

Darryl Servaes gave several reasons for why he did not call Hirt back. First, he described the text message he received from Hirt on the Monday Hirt was to return to work as "abrasive" and "agitated." He said he got the impression that Hirt did not want to come back to work, and also thought the message was a sign that Hirt would not be a good person to bring back. Although Servaes at first mentioned messages and conversations in the plural, he later stated that he received just one text message from Hirt the week he was not called back. In addition to the text message, Servaes later learned that Hirt had filed a discrimination complaint. The complaint stated that Hirt was not seeking to return to work.[1] However, Servaes did not find out about Hirt's complaint until July, several months after Hirt was not called back to work. Servaes also indicated that he had no work for Hirt after the mine stopped underground blasting. Finally, Servaes indicated that he could not bring Hirt back to work because during the course of having the mine's blasting license reissued, the fire marshal required that the company not have anyone with a felony record working at the mine. It is unclear when Servaes came to understand the requirement, as the company continued to employ Hirt until April, then without any explanation failed to call him back to work.

Hirt decided to make a discrimination complaint to MSHA on the advice of Tull, who also made a complaint. The mine argues that Hirt falsified his MSHA forms by marking them with the incorrect date. Hirt dated the MSHA documents for April 2, 2015, the day he believed he was terminated. Resp. Exs. A-D. However, he did not submit the documents by fax until July 2015. Hirt explained that he did not understand at the time that he should have returned the documents within 60 days. He also was uncertain about what dates to put on the documents. Hirt indicated on the documents that he worked 40 hours a week, when in fact he typically did not. When questioned repeatedly by the mine operator, Hirt tried to explain that he thought he was a full-time employee and listed 40 hours per week because that is what he expected to work, as well as some overtime. I do not believe he intentionally misled anyone with his statements on the forms, but rather tried to provide the information he thought was necessary to move forward with his MSHA complaint.

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[1] Hirt claims he said in his complaint that he did not wish to return to work with Servaes based upon advice from MSHA. I do not find that argument credible and disregard it.

II. DISCUSSION

A. Late Filing

As a preliminary matter, Respondent argues that Hirt's complaint should be dismissed because it was not timely filed. Section 105(c)(2) of the Act provides that a miner who believes he has been discriminated against must file a complaint with the Secretary "within 60 days after such violation occurs." 30 U.S.C § 815(c)(2). However, the Commission has held that a miner's late filing may be excused on the basis of "justifiable circumstances." *Hollis v. Consol. Coal Co.*, 6 FMSHRC 21, 24 (Jan.1984); *Herman v. Imco Servs.*, 4 FMSHRC 2135, 2137 (Dec. 1982). The Commission's interpretation is based on the legislative history of the Mine Act, which states that

> While this time-limit is necessary to avoid stale claims being brought, it should not be construed strictly where the filing of a complaint is delayed under justifiable circumstances. Circumstances which could warrant the extension of the time-limit would include a case where the miner within the 60–day period brings the complaint to the attention of another agency or to his employer, or the miner fails to meet the time limit because he is misled as to or misunderstands his rights under the Act.

S. Rep. No. 95-181, at 36 (1977). In *Hollis*, the Commission upheld a judge's dismissal of a late-filed claim where the miner's assertion that he did not know about his rights under the Mine Act until after the filing deadline was not credible. 6 FMSHRC at 24. In *Herman*, the Commission upheld a dismissal where the miner's reason for filing late was that he spent several months deciding whether to file a complaint. 4 FMSHRC at 2138.

In this case, I find first, that Hirt did bring his complaint to MSHA within the filing deadline by making a verbal complaint. He did not return the forms he received from MSHA within 60 days, however. I find that Hirt misunderstood his rights under the Act and genuinely did not know there was a 60-day time limit for filing the written forms. Although he dated his complaint for April, he did not intend to deceive anyone in doing so. Rather, he believed he was supposed to date the complaint for the day he believed he was discriminated against. When he faxed the document to MSHA, he was not aware that it should have been done within 60 days of the date he learned of his termination. Further, the complaint would have been due in mid-June but was filed in early July. Because the delay in filing was relatively small, the staleness of the claim is not a serious concern. Accordingly, I find that dismissal of Hirt's complaint on the basis of late filing of the forms he received from MSHA is not warranted.

B. Discrimination Claim

Section 105(c)(1) of the Mine Act provides that a miner cannot be discharged, discriminated against, or otherwise interfered with in the exercise of his statutory rights because he "has filed or made a complaint under or related to this Act, including a complaint notifying the operator ... of an alleged danger or safety or health violation" or "because of the exercise by such miner ... of any statutory right afforded by this Act." 30 U.S.C. § 815(c)(1).

In order to establish a prima facie case of discrimination under Section 105(c)(1), a complaining miner must produce evidence sufficient to support a conclusion that (1) he engaged in protected activity, (2) he suffered an adverse action, and (3) the adverse action was motivated at least partially by that activity. *Driessen v. Nev. Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981); *Sec'y of Labor on behalf of Pasula v. Consol. Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds sub nom. Consol. Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981). The burden of proof for a prima facie case is "lower than the ultimate burden of persuasion, which the complainant must sustain as to the overall question of whether section 105(c)(1) has been violated." *Turner v. Nat'l Cement Co. of Cal.*, 33 FMSHRC 1059, 1065 (May 2011).

The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Driessen*, 20 FMSHRC at 328-29; *Robinette*, 3 FMSHRC at 818 n.20. The operator may also defend affirmatively by proving that the adverse action was in part motivated by unprotected activity of the miner, and that it would have taken the adverse action based on the unprotected activity alone. *Driessen*, 20 FMSHRC at 328-29 (citing *Robinette*, 3 FMSHRC at 817; *Pasula*, 2 FMSHRC at 2799-2800). The operator bears the burden of persuasion for the affirmative defense. *Pasula*, 2 FMSHRC at 2800.

i. Protected Activity

The Act's discrimination provisions provide miners with protections against reprisal for certain protected activities in the hope that miners will be willing to aid in the enforcement of the Act and, in turn, improve overall safety. Section 105(c)(1) enumerates four protected activities: (1) filing or making a complaint under or related to the Act, including a complaint of an alleged danger or safety or health violation; (2) being the subject of medical evaluations and potential transfer under a standard published pursuant to Section 101; (3) instituting a proceeding under or related to the Act or testifying in such a proceeding; or (4) exercising "on behalf of himself or others . . . any statutory right afforded by this Act." 30 U.S.C. § 815(c)(1).

The legislative history of the Mine Act states that Congress intended that "the scope of the protected activities be broadly interpreted." S. Rep. No. 95-181 at 35 (1977). The Senate Report notes that "the listing of protected rights contained in [Section 105(c)(1)] is intended to be illustrative and not exclusive" and that the section should be "construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation." *Id.* at 36.

Hirt claims he spoke with an MSHA inspector during the course of an inspection at the mine in January 2015 and discussed various safety issues that resulted in the mine receiving citations. Conversations between a miner and an inspector are considered protected activity if they contain discussions about unsafe conditions at the mine. *Sec'y of Labor on behalf of Knotts v. Tanglewood Energy, Inc.*, 19 FMSHRC 833, 837 (May 1997). The mine does not deny that Hirt spoke to an MSHA inspector. Therefore, I find that Hirt engaged in activity protected by the Mine Act.

ii. Adverse Action

Hirt's last day of employment with the mine was April 9, 2015. Respondent claims that there was no adverse action because Hirt was an intermittent employee and was simply not called back to work because he was no longer needed. I find that the decision not to call Hirt back to work amounts to a discharge from employment and therefore is an adverse action.

iii. Discriminatory Motive

Hirt must next demonstrate that the protected activity, speaking with an MSHA inspector, is connected to the adverse action. A complainant is not required to produce direct evidence of an operator's motive. *Sec'y on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981). More often, the complainant proves motive using circumstantial evidence. *Id.* Facts that may be relevant to establishing motive include the operator's knowledge of the protected activity, the operator's hostility or animus towards the protected activity, the timing of the adverse action in relation to the protected activity, and disparate treatment. *Id.* at 2510-13.

Gary and Darryl Servaes denied knowing that Hirt provided information to MSHA that resulted in a citation. Gary Servaes testified that he reviewed materials from MSHA received through a FOIA request and found no mention of Hirt being involved in a citation. However, Darryl Servaes stated that every employee of the mine spoke with MSHA. Additionally, the fact that the mine received citations relating to Hirt's training and work suggests that the operator had knowledge of Hirt's protected conversations with the inspectors. Hirt worked as a blasting assistant, and the majority of the high-penalty citations dealt with blasting and explosives. The mine also received a high-dollar citation for failing to task-train three miners, including Hirt and Tull. The citation was not vacated as Servaes claimed.

There is also evidence of the operator's hostility or animus towards the protected activity of providing safety-related information to MSHA. I credit Hirt's statement that management told the employees not to cooperate with the MSHA and ATF investigations or provide information to the inspectors. The mine's animus toward MSHA is also seen in the failure-to-abate orders issued in April, which indicate that the mine would not allow inspectors onto the mine site without law enforcement agents. Finally, the timing of the MSHA citations and Hirt's discharge supports an inference that Hirt was discriminated against. Hirt believed that management was most upset about a citation regarding a truck that had been driven by Hirt. A failure-to-abate order relating to a citation involving a truck was issued in April, around the time Hirt was discharged.[2]

The mine asserts that it did not fire Hirt based on his participation in the MSHA investigation, and instead presents several reasons why he was not called back to work. First, Darryl Servaes testified that Hirt sent him an inappropriate text message on the first day he was

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[2] All references to citations and orders issued to Servaes are from documents found at the MSHA website, and its data retrieval system. I have taken judicial notice of all of the citations and orders discussed in this decision.

not called back. However, it is my interpretation of the evidence that the one text message received by Servaes was not adequate cause to discharge Hirt and Servaes had already decided not to call him back to work. Similarly, I am not persuaded by Respondent's argument that the mine declined to hire Hirt back because of statements in his discrimination complaint saying he was not seeking to return to employment at the mine. Hirt did not file the complaint until July, so it could not have affected Servaes's decision in April not to call him back. The mine also asserts that it had no more work for Hirt to do once it lost its blasting certification. However, the mine hired two new employees after Hirt and Tull were let go, which suggests the mine did have work available. Finally, the mine claims that it could not have anyone with a felony conviction working at the mine because of the fire marshal's rules. However, the witnesses were unclear on when they learned of that requirement.

I find that there is circumstantial evidence of a connection between Hirt's discharge and his protected activity. I am not persuaded by the mine's attempts to refute the allegation that they received a high-dollar citation involving a truck that caused them to terminate Hirt's employment. Thus, Hirt has proven a prima facie case of discrimination.

iv. Affirmative Defenses

Even if Servaes terminated Hirt on the basis of his protected activity, the company may still avoid liability by proving that Hirt was discharged in part because of unprotected activity, and it would have fired him based on the unprotected activity alone. The Commission has articulated several indicia of legitimate non-discriminatory reasons for an employer's adverse action. These include evidence of the miner's unsatisfactory past work record, prior warnings to the miner, past discipline consistent with that meted out to the complainant, and personnel rules or practices forbidding the conduct in question. *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (June 1982). The Commission has explained that an affirmative defense should not be "examined superficially or be approved automatically once offered." *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1938 (Nov. 1982). In reviewing affirmative defenses, the judge must "determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed." *Bradley*, 4 FMSHRC at 993. The Commission has stated that "pretext may be found . . . where the asserted justification is weak, implausible, or out of line with the operator's normal business practices." *Sec'y on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1534 (Aug. 1990).

The mine first argues that Hirt was not called back to work because the mine had no work for him after it lost its blasting license. The mine was not working underground, which was a large part of their production, and blasting at the surface had to be done by a contractor. However, the mine was able to keep its full-time employees working, although a few employees quit. The mine also hired at least two new workers after Hirt was let go. The mine asserts that one of the people hired was an experienced crusher operator for a position that Hirt could not fill. The witnesses did not explain the duties of the others hired. Given that the full-time employees were kept busy and the mine hired at least two employees, I find that the mine's defense of lack of work is pretextual.

The mine next asserts that it could no longer employ Hirt at the mine because he has a

felony conviction and has not applied for a waiver to work around explosives. Darryl Servaes explained that in the course of attempting to get the company's blasting license back from the Kansas Fire Marshal, the fire marshal told them that they could not have anyone employed at the mine who had a felony record. Servaes's testimony was unclear as to when he learned of this rule. However, he discussed the rule as a reason for why he could not hire Hirt back rather than as a reason for why Hirt was discharged. Thus, I find that the mine did not know about the felony rule when Hirt was fired in April. While it may be the case now that Hirt cannot return, the mine has not shown that it fired Hirt in April for that reason.

The only plausible defense raised by the mine is that after seeing a text message from Hirt, Darryl Servaes did not believe that he had the attitude of a good employee or that he really wanted to come back to work. However, Hirt sent the text message when he was not called back to work on Monday, after Servaes had decided on Thursday or Friday April 9 or 10 to fire him based on the MSHA citation. NLRB case law indicates that "when a company wrongfully fires an employee, . . . there is 'some leeway for impulsive behavior.'" *Precision Window Mfg., Inc. v. NLRB*, 963 F.2d 1105, 1108 (8th Cir. 1992) (quoting *Trustees of Boston Univ. v. NLRB*, 548 F.2d 391, 393 (1st Cir. 1977)). Hirt's single angry text message to his boss was within the bounds of reasonable behavior in response to a wrongful discharge, and should not cause him to lose his remedial rights. Nevertheless, by the time the mine saw the discrimination complaint in July, it was clear that Hirt did not wish to return. Although the timing is not clear, the mine would have learned shortly after this time that Hirt could not return to work because of his felony conviction. Accordingly, I find that the mine had no plausible business reason to fire Hirt in April, but that by July, the mine had a legitimate business reason not to hire Hirt back.

III. PENALTY

Hirt has brought this case individually without the assistance of the Secretary and thus no penalty has been proposed by the Secretary. Pursuant to Commission Procedural Rule 44(b), 29 C.F.R. § 2700.44(b), a copy of this decision is being sent to the Secretary for the assessment of a civil penalty against Gary Servaes Enterprises.

IV. DAMAGES

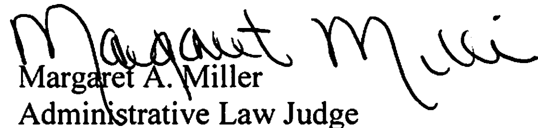
Hirt earned $11.00 per hour and worked an average of 29 hours per week while employed with Servaes. I find that he is due back pay from April 10 through the end of July. By the time Hirt submitted his claim for discrimination in July, the company had a legitimate reason not to re-hire him, since the complaint stated that Hirt was not seeking reinstatement. Additionally, Hirt made little effort to find other employment after he was discharged. "[A] discriminatee is not entitled to back pay to the extent that he fails to remain in the labor market, refuses to accept substantially equivalent employment, fails diligently to search for alternative work, or voluntarily quits without good reason." *Sec'y of Labor on behalf of Jackson v. Mountain Top Trucking Co.*, 21 FMSHRC 1207, 1212 (Nov. 1999) (emphasis omitted) (quoting *NLRB v. Madison Courier, Inc.*, 472 F.2d 1307, 1317 (D.C. Cir. 1972)). The burden of proof is on the operator to show that the complainant failed to seek employment. *Id.* at 1214. Hirt could recall only two places where he submitted job applications after he was fired. I find that had Hirt been diligent in searching for work, he would have obtained a new position by July of 2015.

Consistent with these findings, Hirt is due back pay in the amount of $319.00 per week for 16 weeks, a total of $5,104.00. Given that Hirt has resumed working at his own business and has a felony that prevents him from working at the mine, I do not find reinstatement or front pay to be appropriate remedies in this case.

The Commission has held that awards of back pay should include interest from the date the amount should have been paid through when it is actually paid. *See Local Union 2274, Dist. 28, United Mine Workers of Am. v. Clinchfield Coal Co.*, 10 FMSHRC 1493, 1503 (Nov. 1988). Interest is to be assessed on a quarterly basis at the short-term Federal underpayment rate established by the IRS. *Id.* at 1505.

V. ORDER

Gary Servaes Enterprises is **ORDERED** to pay back pay to Shawn Hirt in the amount of $5,104.00 plus quarterly interest at the Federal underpayment rate through the date of payment, to be calculated by the parties. *See Sec'y of Labor on behalf of Bailey v. Ark.-Carbona Co.*, 5 FMSHRC 2042, 2053 n.15 (Dec. 1983). Such payments shall be made within forty days of the date of this order. The case is referred to MSHA for assessment of a civil penalty.



Margaret A. Miller
Administrative Law Judge

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