FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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February 8, 2001

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2000-75-DM
ON BEHALF OF	:	
JOHN NOAKES,	:	MSHA Case No. MD 99-03
Complainant	:	
	:	Gable Quarry
v.	:	
	:	Mine ID No. 23-02064
GABEL STONE COMPANY, INC.,	:	
Respondent	:	

SUPPLEMENTAL DECISION
AND
FINAL ORDER

Appearances: Jennifer A. Casey, Esq., and Kristi Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Complainant;
Donald W. Jones, Esq., and Jason N. Shaffer, Esq., Hulston, Jones, Gammon & Marsh, Springfield, Missouri, for Respondent.

Before: Judge Hodgdon

On September 28, 2000, a decision was issued in this proceeding determining that the Respondent had discriminated against the Complainant by discharging him in violation of section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). *Secretary on behalf of John Noakes v. Gabel Stone Co., Inc.*, 22 FMSHRC 1160 (September 2000). The parties were given 30 days to agree on the specific relief due Mr. Noakes, or to submit their separate relief proposals with supporting arguments.

The parties failed to agree on anything. In addition, the Respondent objected to an affidavit of the Complainant submitted with his brief and additional discovery was pursued. Accordingly, all unresolved issues will be disposed of in this decision.

Motion for Reconsideration

The Respondent filed a Motion for Reconsideration of the decision on liability on October 13, 2000. The Secretary responded to it on October 19. In the motion, the company argues that the decision improperly allowed negative inferences based on employer business practices,

omitted relevant facts and relied on the largely uncorroborated testimony of the Complainant. While the motion is without merit, I will discuss it briefly.

The Respondent asserts that "the ALJ found negative inferences from perceived failures of the employer in handling the poor performance of John Noakes." (Motion at 2.) What I found was that there was no evidence that Gabel had taken any action whatsoever concerning Noakes' alleged derelictions. Therefore, the evidence did not support Gabel's claim, made long after the fact, that he had always intended to get rid of Noakes for poor performance. To the extent that this lack of action represents an "employer business practice," I made no judgment on it one way or the other.

The Respondent contends that the decision did not consider Mr. Noakes' alleged refusal to work in the quarry after the MSHA inspection. In the first place, the evidence is contradictory as to whether Noakes ever refused to work in the quarry. He says that he did not. Resolution of this issue was not necessary to deciding the case. Even if Noakes had refused to work in the quarry for safety reasons, as Gabel related, it would not change the outcome of the case.

The operator also claims that the decision ignored the deposition testimony of Inspector Allen Studenski that he had never had any problem with Gabel, who had always been cooperative and operated a safe, clean and neat quarry. To the extent that this information is relevant, it would not change the outcome of the case.

Finally, the company maintains that Noakes' testimony is largely uncorroborated and is, therefore, not sufficient to support a finding of discrimination. In the first place, this statement is not the law. The cases cited by Respondent, none of which involve discrimination under the Mine Act, and the most recent of which is a 1971 case, all involve something more than lack of corroboration. In the second place, Noakes' testimony is corroborated by the testimony of Inspector Sturgill and most significantly, as indicated in the decision, by the testimony of Gary Gabel.

Accordingly, the Motion for Reconsideration is **DENIED**.

Damages

As noted above, the parties were unable to arrive at an agreement on any of the remedies to which Mr. Noakes is entitled under the Act. Consequently, both parties filed briefs setting forth their respective positions. The Complainant seeks back wages in the amount of $12,957.50. The Respondent maintains that he is not entitled to anything. Finding that Mr. Noakes will be made whole somewhere between the two extremes, I award back pay of $9,157.50.

The Noakes Affidavit

Attached to the Complainant's brief was his affidavit providing details of his attempts to find a job after his discharge. Since this affidavit contained information not in the record, the Respondent filed a motion to strike the affidavit, or, in the alternative, to reopen the record. Concluding that the affidavit could not be considered unless the record was reopened and the Respondent given an opportunity to cross-examine the Complainant and provide rebuttal evidence, I held a telephone conference call with the parties. They agreed that the Complainant would be deposed rather than holding a supplementary hearing.

Before taking the deposition, the Respondent requested releases from the Complainant to obtain records from the various state, school and employment agencies to which the Complainant claimed to have had dealings. Counsel for the Secretary said that releases would not be necessary as they would furnish all available documentation. This documentation was mailed to the Respondent and the judge on December 19, 2000.

By letter dated December 20, 2000, counsel for the Respondent requested *subpoenas* for two employment agencies, Manpower Staffing and Penmac Personnel, in West Plains, Missouri; for Town Square Internet; the Missouri Division of Family Services, Missouri Employment and Training Program; the Missouri Department of Labor and Industrial Relations, Division of Employment Security; and Southwest Missouri State University. In a subsequent telephone conference call, I advised the parties that I would issue *subpoenas* for the two employment agencies, but would not issue them for the other entities since the documents furnished by the Secretary clearly indicated that nothing else was available.

By a letter dated January 16, 2001, counsel for the Respondent stated that, because they had not been issued all the *subpoenas* requested, they had chosen not to take Noakes' deposition. Instead, counsel renewed the objection to the affidavit, or, in the alternative, offered into evidence two statements given by Noakes to the Division of Employment Security.

The Respondent did not request a supplemental hearing when offered the opportunity to do so and elected not to take Noakes' deposition for its own reasons. Accordingly, the motion to strike Noakes' affidavit is **DENIED**. The Secretary has not responded to Respondent's offer of Noakes' statements; however, they appear to be relevant and are admitted into evidence as Respondent's Exhibits 76 and 77.

Back Pay

The company argues that Noakes is not entitled to back pay because he failed to mitigate his damages by reasonably searching for a suitable alternative job and because he became a full-time college student in January 1999. I find neither of these arguments persuasive.

Mitigation of Damages

The Commission has long held, with respect to damages in discrimination cases, that:

> The central purpose of the Mine Act is to promote safety and health among the nation's miners. To accomplish that goal it is essential that miners be encouraged to report unsafe conditions free from the threat of retaliation and subsequent economic loss. Thus, we are persuaded that upon a finding of discrimination, a *presumption of the right to monetary relief arises* and such relief should be denied only where "compelling reasons" otherwise dictate. Moreover, if monetary relief is denied, the bases for the failure to make the aggrieved party whole must be articulated.

Secretary on behalf of Gooslin v. Kentucky Carbon Corp., 4 FMSHRC 1, 2 (January 1982) (emphasis added).

Thus, any analysis of damages due to Noakes as the result of being discriminated against begins with a presumption that he is entitled to such damages. Turning to the Respondent's first argument, the burden is on the operator to rebut this presumption by showing that Noakes did not make a reasonable job search. *Secretary on behalf of Jackson v. Mountain Top Trucking Co., Inc. et al*, 21 FMSHRC 1207, 1214 (November 1999); *Metric Constructors, Inc.*, 6 FMSHRC 226, 233 (February 1984).

The Respondent's assertion that Noakes did not present any evidence that he looked for work, without more, falls short of rebutting the presumption. In *Metric Constructors*, the judge awarded full back pay to two complainants, neither of whom appeared at the hearing, one having died and the other serving in the Navy overseas, holding that the company had not shown a lack of reasonable effort to mitigate. The Commission held that the judge did not err, stating: "We recognize that there are circumstances, such as those at hand, under which a complainant may not appear to testify. However, an operator may prepare for that possibility by initiating pre-trial discovery relating to the issue of mitigation." *Id.* Here, the company had the opportunity to cross-examine the Complainant and did not ask him any questions concerning his efforts to find another job.

The operator has cited some federal circuit court of appeals cases which indicate, at least with regard to the Americans with Disabilities Act and employment discrimination, that the Complainant has to present some evidence of reasonable efforts to mitigate before the burden shifts to the company to show that no reasonable undertaking was made. However, even if the law in these specialized areas changes the Commission law set out above, the Respondent's argument still fails because the Complainant's affidavit filed with his penalty brief convincingly

demonstrates that he made a reasonable effort to find, and did eventually find, another job.[1] Thus, Noakes cannot be denied back pay on these grounds.

Full-time Student

The Respondent next contends that the Complainant is not entitled to back pay after he became a full-time student. Again, the burden is on the operator to show that Noakes was not looking for work while he was attending college and would not have been able to work if it became available. *Mountain Top Trucking et al*, 21 FMSHRC at 1214. In support of its position, the company has taken two statements of the Complainant out of context and cited the general rule concerning full-time attendance in school. Neither demonstrates that Noakes is not entitled to back pay.

The company quotes the statement of Noakes in a January 25, 1999, report on his work searches to the Missouri Department of Employment Security that: "I will not quit school to go to work." (Resp. Ex. 76.) Likewise, it quotes a February 16, 1999, report that: "I would not give up my schooling to accept full time work if the work conflicted with my class hours." (Resp. Ex. 77.) Both of these, it claims, demonstrate that Noakes was neither available nor looking for work.

The fact is, however, that Noakes was attending school full-time at night, from 5:30 p.m. to 8:30 p.m. (Resp. Exs. 76 and 77.) In both reports, Noakes stated that he was seeking and available for full-time work during the day. As the Eighth Circuit Court of Appeals stated, in a case cited by the Respondent: "Some full-time students, those who attend classes at night, for example, are also full-time employees . . . ." *Washington v. Kroger Co.*, 671 F.2d 1072, 1079 (8th Cir. 1982). Thus, while the general rule is that one who is attending school full-time is neither available nor looking for work, there are exceptions to the rule. *See, e.g., Brady v. Thurston Motor Lines, Inc.*, 753 F.2d 1269, 1276 (4th Cir. 1985); *Hanna v. American Motors Corp.*, 724 F.2d 1300, 1308 (7th Cir. 1984). Indeed, the evidence in this case is that Noakes subsequently obtained a full-time job which he performed while attending school full-time.

In sum, I find that the Respondent has failed to meet its burden of establishing that the Complainant is not entitled to back pay either because he did not make a reasonable attempt to

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[1] In the September 28 decision, the parties were advised that if a further hearing was needed on the remedial aspects of the case, such a request should be made. 22 FMSHRC at 1169. While it would have been better if the Secretary had followed this procedure rather than submitting an affidavit with the brief, the failure to do so does not make the affidavit inadmissable. The Respondent was given the opportunity to cross-examine the Complainant on the matters contained in the affidavit and elected not to do so.

find another job or because he was attending school full-time. Accordingly, I conclude that Mr. Noakes is entitled to back pay.

Amount of Back Pay

The Complainant has requested $12,957.50 in back pay, as follows: $2,660.00 from the date of his discharge, December 3, 1998, until he began working part time, February 2, 1999; $6,780.00 from the time he began working part time until he began working full time, July 16, 1999; and $3,517.50 from July 16 until the date of his brief, October 27, 2000.[2] (Comp. Br. at 2-3.) I find that the Complainant is entitled to back pay of $9,157.50.

There is no dispute that the normal work week at Gabel Stone is 45 hours per week, performed at nine hours per day. Nor is there any dispute that Mr. Noakes was earning $7.00 per hour for the first 40 hours and received time and one half, or $10.50, for the five hours overtime each week.[3] Consequently, he earned $332.50 per week ($7.00 x 40 hrs. + $10.50 x 5 hrs. = $332.50). The Complainant claims that he was out of work for eight weeks. (*Id.*) Consequently, he is entitled to $2,660.00 for the eight weeks ($332.50 x 8 = $2,660.00).

The Complainant claims $6,780.00 for the period that he worked part time on the weekends. This was arrived at by subtracting the amount he earned on the weekends, $50.00 x 24 weeks = $1,200.00, from the amount he would have earned at Gabel Stone, $332.50 x 24 weeks = $7,980.00. (*Id.* at 3.) It appears that the Complainant has miscalculated; there were only 23 weeks between February 2 and July 16, 1999. Therefore, I will award him $6,497.50 [$332.50 x 23 weeks ($7647.50)-$50.00 x 23 weeks ($1,150.00) = $6,497.50]

The Complainant also claims $3,517.50 as the pay differential between what he would have earned at Gabel Stone and what he earns working full time for Town Square Internet. However, I find that he is not entitled to any back pay after he began working full time. The Commission has held that a mine operator is not required to pay a former employee back pay for any period of time after which he has unequivocally indicated that he does not wish to return to his former employment. *Secretary on behalf of Bailey v. Arkansas-Carbona Co.*, 5 FMSHRC 2042, 2055 (December 1983).

In this case, Noakes did not request reinstatement when he filed his complaint with MSHA, (Comp. Ex. 3), nor did he request it in the Complaint of Discrimination he filed with the Commission on October 22, 1999. On the other hand, he never expressly stated that he would

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[2] The Respondent has not made any offer as to the amount of back pay to which the Complainant should be entitled.

[3] While there is evidence in the record that Gabel employees occasionally also worked on the weekend, Noakes had not done so for several months and he makes no claim for any additional overtime.

decline reinstatement. Nevertheless, taking into consideration that he did not request reinstatement, that he began attending school and taking courses in a different field than mining, and that he began working full time in a totally unrelated type of work on July 16, 1999, I conclude that he unequivocally indicated that he did not wish to return to his former employment on July 16, 1999.

Accordingly, I conclude that Mr. Noakes is entitled to back pay in the amount of $9,157.50 plus interest calculated until the date of payment in the manner required by the Commission.[4]

Civil Penalty Assessment

The Secretary has proposed a penalty of $10,000.00 for this violation of the Act. However, it is the judge's independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Secretary on behalf of Johnson v. Jim Walter Resources, Inc.*, 18 FMSHRC 552, 555 (April 1996).

The Assessed Violation History Report for Gabel Stone for the two years preceding the company's discriminatory action shows that the operator was cited for 11 violations. (Comp. Ex. 1.) Eight of the citations were issued for violations observed during the inspection initiated by Noakes' 103(g) complaint. Only four of the 11 violations were designated as "significant and substantial."[5] From this, I find that the Respondent has a good history of prior violations.

Gabel Stone has only five to seven employees, including Joyce and Gary Gabel. Consequently, I find that Gabel Stone is a very small business.

I find that the operator was highly negligent. After being specifically advised that firing a miner who filed a 103(g) complaint, 30 U.S.C. § 813(g), was a violation of section 105(c), he fired the Complainant anyway. Then he later tried to make it appear that the Complainant had quit.

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[4] The proper method of calculating interest on back pay is: *Amount of interest = The quarter's net back pay x number of accrued days of interest* (from the last day of that quarter to the date of payment) *x the short-term federal underpayment rate*. *Secretary on behalf of Bailey v. Arkansas Carbona Co.*, 5 FMSHRC 2042, 2052 (December 1983), as modified by *Clinchfield Coal Co.*, 10 FMSHRC 1493, 1505-06 (November 1988). The applicable interest rates and daily interest factors may be obtained on the Internet at: www.nlrb.gov/ommemo/ommemo.html.

[5] The "significant and substantial" terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard."

The company argues that a $10,000.00 penalty would "devastate" the employer. (Resp. Br. at 8.) Unfortunately, the only evidence presented on this issue was the bald assertion by the operator that in 1999 the company "grossed 400,000 and we operate on about a 10 percent. We paid taxes forty some thousand dollars. A $10,000 fine would take 25 percent." (Tr. 710.) The burden is on the operator to show that the penalty will adversely affect its ability to remain in business. *Sellersburg Stone Co.*, 736 F.2d at 1153 n.14. The operator's statement clearly is insufficient to meet this burden. *See Broken Hill Mining Co.,* 19 FMSHRC 673, 677 (April 1977) (must submit financial information or other specific evidence to meet burden). Furthermore, even assuming that the company's net profits were $40,000.00, the penalty would come out of the gross, not the net. Consequently, I find that the penalty will not adversely affect Gabel Stone's ability to remain in business.

The Secretary asserts that the gravity of this violation was serious because "a 'chilling effect' on protected activities naturally occurs by virtue of the very fact that the miner was punished for reporting safety problems." (Sec. Br. at 9.) This argument is based on the legislative history of the Act. However, the Commission has held that:

> Contrary to the Secretary's assertions, this legislative history does not suggest that a chilling effect should be presumed to result from every section 105(c) violation. In our view, Congress intended that section 105(c) would protect miners against the chilling effect of employment loss they might suffer as a result of an illegal discharge. We therefore hold that the Mine Act does not support such a presumption and that a determination of whether a chilling effect resulted from a section 105(c) violation is to be made on a case-by-case basis.

Jim Walter Resources, Inc., 18 FMSHRC at 558.

The Complainant testified that he made the 103(g) complaint rather than taking the matter up with Gary Gabel because he feared Gabel's reaction. However, he gave no basis, such as previous reactions by Gabel to such complaints, to support his belief. He also testified that he thought other employees were afraid to bring safety matters to Gabel's attention. Contrarily, two of those employees testified that they were not afraid. Significantly, no one testified as to their concerns, or lack thereof, after the Complainant was fired.

Despite this conflicting evidence, I find that Gabel's reaction to the complaint, manifested at the time of the inspection, and his subsequent termination of Noakes would reasonably tend to discourage the other miners at this small operation from engaging in protected activities. Therefore, I find that a chilling effect probably did result from the violation and that the gravity of the violation was serious.

Finally, I find that the Respondent did not demonstrate good faith in abating this violation. There is no evidence that he did anything to abate it. Further, as noted previously, when discussing the matter with the MSHA District Supervisor who had advised him about section 105(c) of the Act, Gabel attempted to cover-up the matter by stating that Noakes had quit.

Taking all of these factors into consideration, I conclude that an appropriate penalty in this case is $5,000.00. I am reducing the penalty mainly because of the size of the company. I am also taking into consideration the $9,157.50 in back pay I am awarding, which serves two functions: "to further the purposes of the Act by deterring retaliatory actions, and to put an employee into the financial position he would have been in but for the discrimination." *Kentucky Carbon Corp.*, 4 FMSHRC at 2 (citation omitted).

Order

Accordingly, having previously found that Gabel Stone Co., Inc., discriminated against John Noakes by discharging him on December 3, 1998, it is **ORDERED** that:

1. My September 28, 2000, decision in this matter is **FINAL**.

2. The Respondent **PAY** John Noakes **$9,157.50** in back pay, within 30 days of the date of this decision, for the period from December 4, 1998, until July 16, 1999, with interest computed using the *Arkansas-Carbona/Clinchfield Coal Co.* method.

3. Gabel Stone Co., Inc. is **ORDERED TO PAY** a civil penalty in the amount of **$5,000.00**, for its violation of section 105(c) of the Act, within 30 days of the date of this decision.

T. Todd Hodgdon
Administrative Law Judge

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