

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 New Jersey Avenue, NW, Suite 9500  
Washington, DC 20001-2021

January 10, 2008

|                             |   |                            |
|-----------------------------|---|----------------------------|
| SHAWN JOHNSON,              | : | DISCRIMINATION PROCEEDING  |
| Complainant                 | : |                            |
|                             | : | Docket No. WEVA 2007-235-D |
| v.                          | : | HOPE CD 2006-04            |
|                             | : |                            |
| DAVID HUFFMAN TRUCKING INC. | : | No. 10 A Mine              |
| Respondent                  | : | Mine ID 46-08852 FVV       |

**DECISION**

Appearances: Mark L. French, Esq., Criswell & French, PLLC, Charleston, West Virginia, on behalf of the Complainant;  
Daniel R. Schuda, Esq., Schuda & Associates, PLLC, Charleston, West Virginia, on behalf of the Respondent.

Before: Judge Melick

This case is before me upon the complaint by Mr. Shawn Johnson pursuant to Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the “Act.” Following hearings, a decision was issued on August 27, 2007, finding that David Huffman Trucking, Inc., (Huffman Trucking) discharged Mr. Johnson in violation of Section 105(c)(1) of the Act. The parties were directed to confer regarding the possibility of settlement of damages and attorney fees, however, they were unsuccessful and hearings were held on those issues on November 29, 2007. At these hearings, the parties agreed to submit additional information regarding these issues and to again confer regarding possible settlement. On December 11, 2007, counsel for the Complainant submitted additional information regarding the issues and reported that he and counsel for the Respondent were unable to reach any agreement. Huffman Trucking responded on December 20, 2007, and the Complainant filed a rebuttal on December 27, 2007.

*Damages*

No damages other than back pay (and attorney fees) are claimed by the Complainant. The statutory authority for the award of back pay is derived from Section 105 of the Act, which empowers the Commission to remedy discrimination by such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest. *Secretary on behalf of Dunmire and Estle v. Northern Coal Company*, 4 FMSHRC 126, 142 (February 1982). Under normal employment circumstances back pay is the sum equal to the gross pay the employee would have earned but for the discrimination less his actual net interim earnings. *Northern Coal Company* at 144.

Mr. Johnson's employment history with Huffman was intermittent as a result of significant absenteeism. The calculation for Johnson's back pay award will therefore be made by taking Mr. Johnson's average gross earnings using the bi-weekly payroll periods of Huffman Trucking. In this regard it is noted that during the 25 two-week pay periods that Johnson was employed by Huffman Trucking, he earned a total of \$21,750.55. This is based upon the payroll summaries for the years 2005 and 2006 for Mr. Johnson reflecting his gross pay as well as information as to each of the individual bi-weekly paychecks received by Mr. Johnson during that period. His average gross pay for each two week period was therefore \$870.02.

There is no dispute that Mr. Johnson's employment with Huffman Trucking ended on April 14, 2006, and that he left the labor market on January 19, 2007, to become a full time student. During this period he worked for Kenton Meadows Co., Inc. (Kenton Meadows), from July 27, 2006, through January 18, 2007. Johnson's back pay award must therefore be based upon 41 weeks or 20.5 bi-weekly pay periods (less net interim earnings). 20.5 pay periods at \$870.02 equals \$17,835.41. At Kenton Meadows, Johnson worked 804 regular time hours at a rate of \$9.00 per hour and 107.5 overtime hours at a rate of \$13.50 per hour.<sup>1</sup> Accordingly Johnson's interim earnings amounted to \$8,687.25. Johnson is therefore entitled to back pay of \$9,148.16, plus interest paid to the date of payment in accordance with the Commission's decision in *United Mine Workers of America v. Clinchfield Coal Company*, 10 FMSHRC 1493, 1504-1507 (November 1988).

#### *Attorney Fees*

For the reasons stated in the memorandum issued this date as an appendix to this decision under seal for privacy reasons, counsel for the Complainant is hereby awarded attorney fees and expenses of \$8,984.09.

### **ORDER**

David Huffman Trucking Inc., is hereby directed to pay to the Complainant Mr. Shawn Johnson within 30 days of the date of this decision back pay of \$9,148.16, plus interest through the date of payment to be calculated in accordance with the Commission decision in *United Mine Workers of America v. Clinchfield Coal Company*, 10 FMSHRC 1493, 1504-1507 (November 1988). In addition, David Huffman Trucking Inc., is directed to pay to Mark L. French, Esq., attorney fees and expenses of \$8,984.09, within 30 days of the date of this decision.

Gary Melick  
Administrative Law Judge

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<sup>1</sup> It is assumed that the Complainant has correctly provided data to the Commission for his net interim earnings consistent with Commission precedent. See *Northern Coal Company Supra*, at 144.

Distribution: (Certified Mail)

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