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ROBERT SIMPSON V. KENTA ENERGY AND ROY JACKSON
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
September 29, 1989

ROBERT SIMPSON

v. Docket No. KENT 83.155-D

KENTA ENERGY, INC.

and

ROY DAN JACKSON

BEFORE: Backley, Doyle, Lastowka and Nelson, Commissioners

ORDER

BY THE COMMISSION:

This discrimination proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1982)(the "Mine Act" or "Act"). Following remand from the United States Court of Appeals for the District of Columbia Circuit, the Commission issued its final decision on May 11, 1989, concluding, in relevant part, that respondents Kenta Energy, Inc., and Roy Dan Jackson had discriminatorily discharged and refused to rehire complainant Robert Simpson. 11 FMSHRC 770 (May 1989). No party filed a petition for review of this decision in the United States courts of appeals. 30 U.S.C. 816(a)(1). On June 16, 1989, however, counsel for Simpson filed with the Commission a Motion to Remand, seeking remand to the Commission administrative law judge who had presided at the hearing in this matter for purposes of determining additional amounts of back pay and attorney's fees that counsel asserts are owing to Simpson. No response to this motion has been filed by respondents. For the following reasons, this proceeding is remanded to Commission Administrative Law Judge James A. Broderick.

The relevant factual and procedural background of this matter has

been set forth in our prior decisions and need not be repeated in detail here. Briefly, in his original decision on the merits and in a supplemental decision with respect to remedy, Judge Broderick concluded that Simpson had been discriminated against in violation of section 105(c)(1) of the Mine Act, 30 U.S.C. 815(c)(1), and ordered Simpson reinstated with back pay, interest, attorney's fees, and litigation expenses. 6 FMSHRC 1454 (June 1984)(ALJ); 7 FMSHRC 272 (February

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1985)(ALJ). Specifically, in his remedial decision, the judge awarded Simpson \$36,557.29 in back pay and interest through December 17, 1984, and, in addition, back wages at the rate of \$425.60 per week with interest, less interim earnings, from December 17, 1984, until Simpson's reinstatement. 7 FMSHRC at 278-80, 286. Interest was to be calculated according to the principles announced in *Secretary on behalf of Bailey v. Arkansas Carbona Co.*, 5 FMSHRC 2042 (December 1983). 7 FMSHRC at 278. The judge further awarded Simpson \$54,462.50 in attorney's fees and \$2,616.72 in litigation expenses. 7 FMSHRC at 280-86.

In his present motion, counsel for Simpson alleges that Simpson was never offered reinstatement by respondents and "has not yet received any of the relief due him." Motion at 5. Counsel requests proceedings before Judge Broderick for purposes of determining (1) the additional amounts of back pay and interest owed Simpson for the period from December 17, 1984, to the present, based on the formula in the judge's remedial decision, and (2) the amount of attorney's fees due for counsel's representation of Simpson during the review proceedings before the Commission as well as during the appellate proceedings before the United States Court of Appeals for the District of Columbia Circuit.

Upon consideration of the motion, we reopen this case for the limited purpose of disposing of the present motion. This matter is remanded to Judge Broderick for resolution of whether the attorney's fees being sought for administrative and court appeal proceedings are properly awardable under the Mine Act and, if so, for all appropriate findings of fact relevant to determination of the amount to be awarded. With respect to back pay and interest, in general, both are normally deemed due and owing under Commission precedent until time of reinstatement or the occurrence of an event tolling the reinstatement obligation. See, e.g., *Arkansas Carbona*, supra, 5 FMSHRC at 1049-55. Counsel is advised that, given the back pay formula in the judge's remedial order and the principles announced in *Clinchfield*, infra, the precise amounts of back pay and interest may be determined in any tribunal of competent jurisdiction and it is not necessary to return to the Commission for periodic updatings of these amounts if collection difficulties are encountered. In light of our remand on the attorney's fees issue, however, we find it appropriate also to determine at this time the amount of additional back pay due since December 17, 1984, with the amount of interest due thereon, calculated according to the procedures set forth at 54 Fed. Reg. 2226 (January 19, 1989). See *Loc. U. 2274, UMWA v. Clinchfield Coal Co.*, 10 FMSHRC 1493 (November 1988), pet. for review filed, No. 88-1873 (D.C. Cir. December 16, 1988).

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Accordingly, this proceeding is remanded to the judge. */

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*/ Chairman Ford did not participate in the consideration or disposition of this matter.