

CCASE:  
SOL (MSAH) V. STAFFORD CONSTRUCTION  
DDATE:  
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TTEXT:

Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
ON BEHALF OF  
PATRICIA ANDERSON,  
COMPLAINANT  
v.

DISCRIMINATION PROCEEDING  
  
Docket No. WEST 80-155-DM  
MD 79-267  
  
Cotter Mill

STAFFORD CONSTRUCTION COMPANY,  
RESPONDENT

DECISION AFTER REMAND

Appearances: James H. Barkley, Esq., Office of the Solicitor,  
U.S. Department of Labor, Denver, Colorado,  
for Complainant;  
Mrs. Jackie Stafford, Stafford Construction Company,  
Grand Junction, Colorado, pro se.  
Before: Judge Morris

This case involves a complaint of discrimination filed by the Secretary of Labor on behalf of Patricia Anderson pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. Complainant Patricia Anderson alleged the operator discriminated against her and thereby violated section 105(c) of the Mine Act, 30 U.S.C. 815(c).

The case was heard by the undersigned judge who entered an order dismissing the complaint, 3 FMSHRC 2177 (1981). The Commission subsequently affirmed the judge, 5 FMSHRC 618 (April 1983).

Thereafter, on April 20, 1984, the U.S. Court of Appeals for the District of Columbia Circuit entered its decision in the matter, 732 F.2d 954 (D.C.Cir.1984). The Court reversed the Commission's decision and concluded that Stafford Construction Company's discharge of Patricia Anderson violated section 105(c) of the Mine Act, 30 U.S.C. 815(c). The Court further remanded the case to the Commission "for the award of back pay and other remedies, if warranted", 732 F.2d at 962. A certified copy of the Court's judgment, in lieu of a mandate, was received by the Commission on July 26, 1984.

On August 9, 1984 the Commission remanded the case to the judge for further proceedings consistent with the Court's opinion.

The judge set the case for a hearing in Canon City, Colorado on September 13, 1984. Respondent requested a continuance and the hearing on the merits was rescheduled and took place on October 11, 1984.

The parties waived the filing of post trial briefs.

Issues

The issues concern whether back pay is due Patricia Anderson, and, if so, the amount of the back pay. A secondary issue concerns the assessment of a civil penalty against respondent.

Summary of the Evidence

At this hearing complainant Patricia Anderson reaffirmed her previous testimony and indicated she had been terminated by respondent on February 9, 1979. Her rate of pay at that time was \$1,050 per month. She found employment again on June 7, 1979. (Transcript at pages 29 and 30, hearing of October 11, 1984).

Complainant received unemployment compensation of \$110 per week for 14 weeks from the State of Colorado. Complainant further submitted exhibits calculating the back pay and interest. These calculations were summarized as follows:

	Backpay Due	Interest to 9/13/84	Quarter Total
1st Qtr 1979	\$1,696.10	\$1,182.82	\$2,878.92
2nd Qtr 1979	2,277.62	1,554.22	3,831.84
Totals	\$3,973.72	\$2,737.04	\$6,710.76

Interest at the current rate of 11% per annum (.0003055 daily) will continue to accrue on \$6,710.76 after 9/13/84 at the rate of \$2.05 per day.

(Exhibit P-A).

Jackie Stafford, formerly the Secretary/Treasurer for respondent, testified that respondent is now defunct, no longer exists, and has no officers (Tr. 10, 17). Respondent's 1981 income tax return shows a negative balance (Tr. 22; Exhibit R-C).

There was a \$50,000 cash bond posted at the time of company's liquidation. According to Mrs. Stafford, both Tom Smith and Steve Smith (complainants whose cases were heard with the Patricia Anderson case), received their back pay from that bond (Tr. 8-9).

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Mrs. Stafford further indicated that respondent had a \$453,000 letter of credit. Rippy Construction Company was apparently awarded that asset. Mr. Rippy told Mrs. Stafford that any wages due to Patricia Anderson would be paid (Tr. 10, 18).

The Internal Revenue Service cleared respondent after an audit and a criminal investigation (Tr. 13).

Respondent's exhibits included calculations showing unpaid bills totaling \$111,732.83. Further, respondent submitted a copy of a judgment against it and in favor of Rippy Construction in the amount of \$1,313,561.35. In addition, respondent offered a copy of its 1981 Corporation Income Tax return (Exhibits R-A, R-B and R-C).

#### Discussion

Respondent's evidence establishes that it is insolvent. However, bankruptcy and insolvency of a respondent are insufficient reasons to stay proceedings under the Act. Secretary on behalf of George W. Heiney et al v. Leon's Coal Company et al, 4 FMSHRC 572, 574 (1982).

In connection with an award of back pay, a credibility issue arises as to whether Ed Rippy of Rippy Construction paid Patricia Anderson her back wages. Mrs. Stafford claims that Rippy stated that Patricia Anderson's wages would be "taken care of" (Tr. 18). On the other hand, Mrs. Anderson denied that Rippy paid her any money. In fact, she had "never heard of that" (Tr. 31).

I credit Mrs. Anderson's testimony. She would know if a third party paid her. Respondent's claim is, at best, based on unsupported hearsay.

In the presentation of respondent's evidence Mrs. Stafford also sought to offer the records that would support respondent's reasons for discharging Patricia Anderson. The judge ruled that this evidence was not relevant because that issue had been decided by the Court of Appeals when it ruled that respondent had discriminated against complainant (Tr. 24-26).

Based on the record, complainant is entitled to back wages and interest in the total amount of \$6,852.21. The interest is calculated to the date of the issuance of this decision after remand, namely November 21, 1984 (Exhibit P-A). Complainant's interest calculations are in accordance with the Commission decision of Secretary on behalf of Milton Bailey v. Arkansas-Carbona Company and Walker, 5 FMSHRC 2042 (December, 1983).

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Complainant received unemployment compensation from the State of Colorado for 14 weeks in the amount of \$110 per week, or a total of \$1,540. The total award to complainant in this case includes said amount but the applicable Colorado statute requires complainant to reimburse the State for said amount, section 8-2-119 C.R.S.1973. Complainant is, accordingly, directed to reimburse the State of Colorado upon collection of the back pay due her.

#### CIVIL PENALTIES

The mandate of the Appellate Court encompasses the assessment of a civil penalty against respondent.

The statutory criteria to be followed in assessing such a penalty is contained in section 110(i) of the Act, now 30 U.S.C. 820(i). It provides, in part, as follows

The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

In considering these factors, I find that the operator has no prior adverse history except for the fact that Tom Smith and Stephen Smith were discharged in violation of the Act before Patricia Anderson was unlawfully discharged. The Secretary proposes a civil penalty of \$8,000 and while respondent was insolvent at the time of the hearing it had gross receipts in excess of four million dollars in 1981 (Tr. 47, 48). Accordingly, the proposed penalty appears appropriate in relation to the size of the business of the operator. The operator's negligence is not a factor on this record. The assessment of a penalty will not affect the operator's ability to continue in business because it has already terminated its activities and discontinued operations. The gravity of the violation is exceedingly high. Patricia Anderson was retaliated against because she refused to lie to MSHA investigators. Miners need to know they are protected and here the actions by respondent struck at the heart of the enforcement of the discrimination provisions of the Act. The final factor, statutory good faith, is not an element herein.

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Considering all of the statutory criteria, I consider that a civil penalty in the amount of \$8,000 is appropriate.

Based on the entire record, I enter the following:

ORDER

1. Complainant Patricia Anderson is awarded and respondent is ordered to pay to her the following amounts:

Back Pay	\$3,973.72
Interest	2,878.49
Total	\$6,852.21

2. The interest awarded herein is to the date of the issuance of this decision after remand.

3. Upon collection of the back pay provided in paragraph 1, complainant is ordered to reimburse the State of Colorado for the unemployment compensation she received from the State between the time of her discharge on February 9, 1979 and her subsequent employment on June 7, 1979.

4. A civil penalty of \$8,000 is assessed against respondent.

John J. Morris  
Administrative Law Judge