CCASE:
COUNCIL OF THE SOUTHERN MOUNTAINS
v. MARTIN COUNTY COAL
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19810223
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

COUNCIL OF THE SOUTHERN MOUNTAINS, INC.,	Complaint of Discharge, Discrimination, or Interference
COMPLAINANT	
v.	Docket No. KENT 80-222-D
MARTIN COUNTY COAL CORPORATION,	No. 1-S Mine
RESPONDENT	

Appearances: L. Thomas Galloway, Esq., and Richard L. Webb, Esq., Center for Law and Social Policy, Washington, D.C., for Complainant; Jack W. Burtch, Jr., Esq., and James F. Stutts, Esq., McSweeney, Stutts & Burtch, Richmond, Virginia, for Respondent

DECISION DETERMINING ATTORNEYS' FEES AND OTHER EXPENSES

Before: Administrative Law Judge Steffey

The Question of the Judge's Continuing Jurisdiction

A decision was issued on October 3, 1980, involving the complaint filed in this proceeding as well as other matters pertaining to Docket Nos. KENT 80-212-R, et al. That decision found, among other things, that respondent had violated section 105(c)(1) of the Federal Mine Safety and Health Act of 1977 and ordered respondent to reimburse complainant for all attorneys' fees and other expenses incurred in connection with the filing and prosecution of the complaint in Docket No. KENT 80-222-D.

Complainant's posttrial brief (p. 11) had stated that it expected me to determine the actual amount to be awarded for attorneys' fees and other expenses in the "relief phase" of the case. I interpreted complainant's reference to the "relief phase" to mean a proceeding which I would hold after the Commission had determined whether there had actually been a violation of section 105(c)(1) because complainant is not entitled to recover anything unless the Commission agrees that respondent's refusal to permit complainant to monitor training classes constituted a violation of section 105(c)(1) of the Act.

Despite complainant's failure to give me any facts as a basis for determining attorneys' fees and other expenses and despite its insistence that I issue the decision no later than October 3, 1980, complainant filed a petition for discretionary review with the Commission claiming that my decision

of October 3, 1980, was not a final decision because I had not determined the exact amount of attorneys' fees and other expenses to which it is entitled. The Commission agreed with complainant's arguments and issued an order on November 12, 1980 (2 FMSHRC 3216), finding that I still have jurisdiction to determine costs and expenses and returning the record to me until such time as I have written a decision determining attorneys' fees and other expenses.

In complainant's memorandum in support of its statement of costs and expenses (p. 2) filed November 24, 1980, and in complainant's submission of supplemental data (p. 12) filed January 16, 1981, complainant expressly requests me to retain continuing jurisdiction over the matter of determining attorneys' fees and other expenses so that, after I have rendered the initial determination made in this decision, complainant may hereafter request that I make a supplemental and final award to cover attorneys' fees and expenses incurred subsequent to October 31, 1980.

I am expressly not retaining continuing jurisdiction over the matter of determining attorneys' fees and other expenses. It is obvious that the Commission and I cannot assert jurisdiction simultaneously because the record must be in the hands of the entity having jurisdiction at a given time. The record must be with the Commission after I have issued this decision so that any party seeking review of my decision may cite references to the record as required by section 113(d)(2)(A)(iii) of the Act. It should be recalled that the Commission returned the record to me so that I could make an initial award for attorneys' fees and other expenses. After this decision is issued, the record will again be forwarded to the Commission. If the Commission reverses me on appeal, complainant will not be entitled to the attorneys' fees and expenses which I am awarding in this decision. If the Commission should affirm me, it will either make a determination as to attorneys' fees or order me to make a further determination as to attorneys' fees and any other expenses that may be associated with complainant's participation in any appeals before the Commission and for the period for which complainant has voluntarily refrained from providing data, that is, for the period from October 31, 1980, to the date of issuance of the Commission's decision on appeal.

Complainant's anxiety as to whether anyone will be required to determine attorneys' fees is beyond by comprehension. The Act provides for award of attorneys' fees if a violation of section 105(c)(1) is found to have occurred. The Commission would certainly provide for whatever relief is appropriate under the Act and the Commission at all times has the power to order me to make such determinations as it sees fit regardless of whether I assert that I have continuing jurisdiction over the matter of determining attorneys' fees.

Actual Expenses Incurred by Complainant

Complainant in this proceeding is seeking to recover an

amount of $626.78 which it allegedly spent for labor, travel, meals, Xeroxing, postage, and phone calls. Complainant's statement of costs and expenses contains a four-page affidavit by Mr. Dan Hendrickson, one of complainant's employees, describing the above-mentioned items for which complainant seeks reimbursement. There is

no specific listing showing the addition of the items described in the affidavit. When I made separate listings of the items described in the affidavit, my figures produced a total amount of $626.69 which is 9 cents less than the amount claimed by complainant. If complainant can show from its own figures any error in my calculations and additions, I will be glad to order respondent to pay the additional 9 cents because all of the expenses are well supported in Mr. Hendrickson's affidavit and are reasonable in every way. Therefore, I find that the expenses described in the affidavit were incurred by complainant in connection with its efforts to obtain permission to monitor training classes and respondent will be ordered to reimburse complainant for the expenses listed below:

Type of Expense	Amount Expended
Phone Calls	$ 50.42
Fee paid to mine foreman to monitor training classes, although such monitoring was denied by respondent	40.00
Xeroxing and postage	43.11
Mileage (578 miles at 20 cents per mile)	115.60
Meals for Mr. Hendrickson on day of hearing	18.19
Hours expended by Mr. Hendrickson in effort to achieve permission to monitor classes (66 hours at $4.80 per hour)	316.80
Hours expended by Ms. Stanley in effort to achieve permission to monitor classes (11 hours at $3.87 per hour)	42.57
Total Expenses Allowed	$ 626.69

DETERMINATION OF ATTORNEYS' FEES

Amount Claimed

Complainant asks that it be awarded a total of $20,246.38 in attorneys' fees, including attorneys' expenses, for the period from October 1979 through October 31, 1980. Complainant will submit additional claims for attorneys' fees in connection with work done by its counsel subsequent to October 31, 1980. The total amount sought of $20,246.38 includes $864.57 in reproduction costs, telephone calls, postage, messenger service, and travel as well as a bonus of $2,528.06, the justification for which will hereinafter be evaluated.

The Claimed Basic Hourly Rate and Number of Hours Worked

Two lawyers worked for complainant from the filing of the complaint in Docket No. KENT 80-222-D up to and including the submission of the claims

for attorneys' fees here under consideration. The senior attorney seeks reimbursement for 77.25 hours at an hourly rate of $85 and the junior attorney seeks reimbursement for 150 hours at an hourly rate of $55. Five different law students worked on the case and reimbursement for their services is sought for a total of 81.50 hours at an hourly rate of $25. In Lindy Bros. Builders, Inc. of Phila. v. American R. & S. Sanitary Corp., 487 F.2d 161, 167 (3d Cir. 1973), the court indicated that the value of an attorney's time generally is reflected in his normal billing rate. In fixing a reasonable hourly rate, the court thought that a judge should take into consideration the attorney's legal reputation and status. The court believed that it would be appropriate to fix different hourly rates for different attorneys and to find that the reasonable rate of compensation should vary for different activities.

In Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-719 (5th Cir. 1974), the court set forth 12 criteria which should be considered by a judge in determining a lawyer's hourly rate and in establishing the number of hours claimed. In Evans v. Sheraton Park Hotel, 503 F.2d 177, 188 (D.C. Cir. 1974), the D.C. Circuit Court stated, "[w]e align ourselves with the guidelines set out by the Fifth Circuit in Johnson." Inasmuch as two circuit courts have adopted the 12 criteria established by the Fifth Circuit in the Johnson case, I believe that I should consider those 12 factors in evaluating the claims for attorneys' fees made in this proceeding. Since all of the factors are designed to assist the judge in arriving at a reasonable hourly rate as well as a reasonable number of hours, I find that the order of arrangement used by the Fifth Circuit is awkward to apply in this proceeding. Therefore, although I shall use the criteria established by the Fifth Circuit in the Johnson case, I shall consider them in an order which enables me to evaluate the specific types of work which were performed by complainant's attorneys in this proceeding.

The Twelve Criteria

1. The experience, reputation, and ability of the attorneys. Complainant's memorandum (p. 9) in support of attorney's fees states that the senior attorney has had considerable experience in practicing before administrative agencies and Federal courts. The senior attorney was in private practice for an unstated number of years and in 1975 became an attorney on the staff of the Center for Law and Social Policy. Since that time, he has represented complainant and individual miners in litigation in administrative proceedings, judicial review proceedings, and in the Federal courts. He was active in the legislative process in the passage of the Federal Mine Safety and Health Act of 1977 and presented testimony in both House and Senate proceedings. He has also testified extensively in rulemaking proceedings under the 1977 Act.

The junior attorney who represented complainant in this proceeding graduated from the Georgetown University Law School in 1978. While he was attending law school, the junior attorney

worked for a private law firm and for the Center of Law and Social Policy. Since 1978, the junior attorney has been employed by the Center and has worked with the senior attorney on a number of mine safety issues.

I find that complainant has justified paying a larger hourly fee for the services rendered by the senior attorney than for the work performed by the junior attorney. The memorandum shows that the junior attorney has been practicing law for a period of only 2 years, but the court stated in the Johnson case (488 F.2d at 719), that a young attorney should not be penalized for only recently having been admitted to the bar if he demonstrates skill and ability. The fact that the junior attorney is claiming payment for 150 hours of work, as compared to the 77.25 hours claimed by the senior attorney, shows that the basic drafting of pleadings, briefs, etc., has been done by the junior attorney. The detailed data submitted by complainant indicates that the junior attorney spent more time on the preparation of briefs and pleadings than the senior attorney did. The quality of work done on the various documents in this proceeding is considered under the criterion of the attorneys' skill. That evaluation shows that the junior attorney has a sufficient ability in drafting legal documents to merit the hourly fee of $55 which he claims in this proceeding.

Law students performed much of the legal research done in the preparation of briefs. Their work has been billed at a rate of $25 per hour. That is a reasonable charge and should be allowed because the cost to respondent for preparation of briefs has been considerably reduced by the fact that the law students performed 63.5 hours of the work required to prepare those documents.

2. The skill requisite to perform the legal service properly. In Mid-Hudson Legal Services v. G & U, Inc., 465 F. Supp. 261, 271-274 (S.D.N.Y. 1978), the judge evaluated the quality of work done on each pleading and the performance of the attorneys in personal appearances before the judge for the purpose of evaluating the skill they had displayed in carrying out their work. In this proceeding, complainant's attorneys prepared 11 pleadings of various types and made a personal appearance before me on August 21, 1980. In many cases, the courts have remarked about the distasteful aspects of having to evaluate attorneys' work. In the Johnson case, the court appropriately stated (488 F.2d at 720):

> * * * The trial judge is necessarily called upon to question the time, expertise, and professional work of a lawyer which is always difficult and sometimes distasteful. But that is the task, and it must be kept in mind that the plaintiff has the burden of proving his entitlement to an award for attorneys' fees just as he would bear the burden of proving a claim for any other money judgment.

With the foregoing observation in mind, I now turn to the unpleasant task of evaluating the attorneys' work done in this proceeding. The first example of the attorneys' work is to be found in the complaint itself which was filed on April 10, 1980. The complaint is 10 pages in length and there are 31 pages of appendices attached to the complaint. Section 2700.42 of the

Commission's Procedural Rules provides that a complaint of discharge, discrimination, or interference "* * * shall include a short and plain statement of the facts * * * and a statement of the relief requested." The complaint fails to

comply with section 2700.42 because it is unduly long; it is tedious to read; and it was, in fact, difficult for me to determine initially just what the complaint did allege. After I had spent several hours reading the mass of detail, I finally summarized all of the essential allegations in the complaint in 20 lines on page 2 of my order issued May 30, 1980, setting the case for hearing.

Complainant's supplemental data show that one of the law students spent 13 hours in drafting the complaint, that the junior attorney spent 5 hours in reviewing or conferring with the law student or the senior attorney about the complaint, and that the senior attorney spent 1.5 hours in reviewing and editing the complaint, or a total of 20.5 hours. I can understand why a law student might think that a lengthy document would be acceptable as a complaint, but both the junior and senior attorneys should have known that it was unduly long and they should have used their time for the purpose of complying with the Commission's Procedural Rules.

I cannot find that complainant's counsel are entitled to 20.5 hours of work for the drafting of the complaint. Neither the senior attorney nor the junior attorney was performing at his usual billing rates of $85 and $55 per hour, respectively. Therefore, the amount of time spent on the complaint by the senior attorney will be reduced by 1 hour, the time spent on the complaint by the junior attorney will be reduced by 3 hours, and the amount of time spent on the complaint by the law student will be reduced by 2 hours. I am not proportionately reducing the law student's time as much as I have the attorneys' time because the law student would not necessarily have been expected to know that he was making an unduly long draft. It was the responsibility of supervisory counsel to edit the law student's draft so as to make the complaint comply with the Commission's Rules.

The second group of documents submitted by complainant in this proceeding consisted of 10 pages of interrogatories and requests for production and 8 pages of requests for admission. Both the 10-page and the 8-page documents were filed on April 30, 1980. There were 46 questions in the interrogatories, but the last two questions repeated the use of Nos. 34 and 35 which had previously been used. That was a careless error and required respondent's counsel to have to answer two questions numbered "34" and two questions numbered "35." The senior attorney requests that he be paid for 15 hours of work at $85 per hour, or an amount of $1,275, for preparing the interrogatories and requests for admission. That is an exorbitant sum for respondent to pay for the preparation of interrogatories in a case as factually simple as this one. The only factual issue was whether respondent had refused to allow complainant to monitor training classes. Respondent has never denied that it refused to allow complainant to monitor training classes. In such circumstances, the facts in this proceeding are so simple that they did not warrant the filing of lengthy interrogatories. Such extensive use of discovery is unjustified and should be discouraged. Therefore, the senior attorney's claim for 15 hours of time for

preparation of interrogatories and requests for admission will be reduced by 10 hours. The junior attorney only claims to have spent .75 of 1 hour in working on discovery matters. Therefore, his time will not be reduced.

The next document filed in this proceeding by complainant's counsel was a three-page motion to consolidate submitted on May 9, 1980. That motion asked that complainant's case be consolidated with two factually related cases which had been filed by respondent's counsel in Docket Nos. KENT 80-212-R and KENT 80-213-R. That motion was well drafted and was prepared by the junior attorney who claims a total of 2 hours for drafting, editing, and proofing the motion. His time for that document at the rate of $55 will be allowed in full.

The fifth document filed by complainant was a motion for leave to file for summary decision or, in the alternative, to reschedule the hearing at a subsequent time. That motion was submitted on June 23, 1980, and the junior attorney claims 2 hours for drafting the motion, editing it, and filing it. Both the senior and junior attorneys claim some time for conferring about the motion, but those conferences will be discounted in a subsequent discussion and only the 2 hours for drafting the motion will be considered at this point. It should be noted that section 2700.64(a) of the Commission's Rules provides that a motion for summary decision may be filed at any time "* * * before the scheduling of a hearing on the merits." I had issued an order on May 30, 1980, scheduling a hearing to be held on the merits commencing on July 17, 1980.

Complainant's counsel not only waited until the time had passed during which a motion for summary decision could be filed, but waited 3 weeks after the order providing for hearing had been issued, to submit the motion which alternatively requested a continuance on the ground that complainant's counsel would be "out of the country" on July 17, 1980, the date of the hearing, and would not be back until August 11, 1980. Under the Commission's Rules (2700.8(b) and 2700.10(b)), respondent was entitled to 15 days within which to answer the motion. Inasmuch as I was involved in holding hearings in other matters, there was not time to wait 15 days before acting on the motion and still act in adequate time before the hearing was set to begin. Therefore, it was necessary for me to get the replies of respondent's and MSHA's counsel to the motion by telephone in order that a prompt decision could be made with reference to the motion. As it turned out, respondent's counsel wished to present evidence at the hearing and would not agree with complainant's contention that no genuine issue of fact existed. Therefore, the motion for permission to file a motion for summary decision had to be denied. Eventually, counsel for all parties agreed to a mutually convenient date for hearing and an order was issued on July 2, 1980, granting the complainant's motion for continuance and rescheduling the hearing for August 21, 1980.

In Parker v. Matthews, 411 F. Supp. 1059, 1066 (D.C. Cir. 1976), the court allowed attorneys' fees at an hourly rate of $60 after taking into account the fact that plaintiff's counsel "* * * has objected to any delays and has always stood ready and fully prepared to proceed." As will hereinafter be explained, counsel in this proceeding have seldom been ready to proceed and on two occasions either delayed, or tried to delay

the hearing, by filing tardy motions which required me to make phone calls to obtain answers to the motions so that they could be granted or denied before the 15-day period for answering the motions had elapsed.

I do not think that attorneys with the experience claimed by the senior attorney in this case should be so disorganized that they have to wait to the last minute to file their motions. Tactics such as those used by complainant's attorneys are responsible for the criticism which is often leveled at administrative agencies for failure to complete cases expeditiously. Complainant's counsel were responsible for bringing the action and should have been prepared to proceed diligently in representing their client at all stages of the proceeding.

Inasmuch as the filing of the motion for permission to file a motion for summary decision or, in the alternative, for continuance of the hearing was tardily filed, I do not believe that complainant's counsel should be rewarded fully for the time they spent in seeking to delay the proceeding and for failing to make a timely motion for summary decision. Therefore, the 2 hours claimed by the junior attorney will be reduced to 1 hour.

The sixth pleading filed by complainant in this proceeding consisted of some stipulations of fact which were submitted by the parties on July 18, 1980. They consist of 10 short paragraphs covering only two pages. The junior attorney claims that he spent 2.50 hours in drafting the stipulations and in editing and distributing them. The best work done in this case was the drafting of the stipulations. They are short, concise, and free of all excess verbiage. The junior attorney is to be commended for his role in bringing about the stipulations and he should receive full compensation for his work with respect to the stipulations. Neither the senior attorney nor any law student claims any time regarding the preparation of the stipulations.

The seventh pleading filed by complainant was a two-page letter submitted on August 8, 1980. The letter contended that no facts remained in dispute, insisted that I issue an order specifying the issues in dispute, and objected to attending a hearing in Pikeville, Kentucky. The letter was not filed until 20 days after the stipulations had been submitted. The letter was received on a Friday afternoon, too late for me to obtain the replies of respondent's counsel to the letter. I was eventually able during the subsequent week to get in touch with respondent's counsel and MSHA's counsel by telephone. Respondent's counsel still contended that he wished to present evidence at the hearing. I issued an order on August 12, 1980, requiring the parties to file a list of the witnesses they expected to present at the hearing to be held on August 21, 1980, and summarizing the subject of the prospective witnesses' testimony. The simplicity of the issues did not justify such an order, but the order was issued at the request of complainant's counsel. The junior attorney claims 2.25 hours for the time he spent in drafting the two-page letter. Since the stipulations of fact had been submitted on July 18, 1980, there was no need for complainant's counsel to wait an additional 20 days to renew his motion for permission to move for summary decision or for him to request that the issues be restated, or to request at the last minute that he be supplied with a list of witnesses and a summary of their testimony. The letter, in any event, should not have taken

more than 1 hour to write. In view of the letter's dilatory nature, the time of 2.25 hours claimed by the junior attorney should be reduced by 1.25 hours to 1 hour.

The eighth pleading filed by complainant's counsel was a pretrial brief submitted on August 15, 1980. The brief is 35 pages long. The first 11 pages are devoted to repeating unnecessary facts which were already stated in the unduly long complaint described above. The next four pages of the brief give reasons why a non-employee representative of miners ought to be permitted to monitor training classes. Pages 15 to 21 argue that a violation of section 105(c)(1) occurred, and pages 31 to 34 contend that a maximum civil penalty of $10,000 should be assessed for the violation of section 105(c)(1). Excluding time spent in conferences, which will be treated separately, the senior attorney claims that he spent 6.25 hours in editing the brief, the junior attorney claims that he spent 40.50 hours in drafting the brief, and a law student claims that she spent 20 hours drafting the brief. At their respective rates of $85, $55, and $25, per hour, complainant's attorneys seek a total of $3,258.74 for preparing the pretrial brief.

While I feel that the pretrial brief is unnecessarily long and cites many cases which are not helpful in deciding the issues, it is a fact that complainant's counsel were trying to persuade a judge to decide a novel issue in their favor. The brief was written within a short period of time. In this instance, I believe that both attorneys and the law student were working at the outer limits of their abilities and experience and are entitled to the full amount which they claimed for preparation of the pretrial brief.

The ninth pleading filed by complainant's attorneys in this proceeding was a posttrial brief submitted on September 25, 1980. The brief is 12 pages long. Pages 1 to 7 discuss the implied violation of the Act, pages 7 to 10 argue that a violation of section 105(c)(1) occurred, and pages 10 to 12 ask that I order respondent to pay complainant for the expenses it incurred in bringing the action in this proceeding. The senior attorney claims that he spent 6.50 hours in editing and reviewing the brief, the junior attorney claims that he spent 5.25 hours in drafting the brief, and a law student claims that she spent 16 hours in doing research and drafting the brief. At the rates allowed for each person, the brief involves a total charge of $1,241.25. It should be recalled that I had already issued a bench decision finding in complainant's favor. The posttrial brief was written primarily because respondent's attorney insisted on being given an opportunity to file a brief between the time that my bench decision had been rendered and the time when the bench decision was issued in final form on October 3, 1980.

There was one issue in complainant's posttrial brief which was raised because I indicated at the hearing that I would not require respondent to pay the "damages" which complainant was seeking. I had so ruled at the hearing because I thought complainant was asking for punitive damages rather than for reimbursement for out-of-pocket costs associated with bringing the action. After reading the last two pages of complainant's posttrial brief, I realized that I had no problem with

complainant's request that I order respondent to pay complainant's expenses.

The brief's request for award of expenses was poorly prepared because it suggests that the exact amount of expenses and attorneys' fees will be considered in a "relief phase" of the proceeding. Since I knew that my decision

would be appealed to the Commission, I interpreted the "relief phase" to be a further proceeding which would be necessary only if the Commission should affirm my decision. If complainant's counsel wanted to be reimbursed for attorneys' fees before the Commission had acted on the petition for discretionary review to be filed by respondent, they should have indicated that fact in their posttrial brief and should have presented a statement of costs and expenses at the time they filed the posttrial brief.

Since both respondent's and complainant's posttrial briefs were filed simultaneously, complainant's brief did not reply to the new arguments advanced by respondent in its posttrial brief. Therefore, complainant's posttrial brief was useless to me in the writing of my supplemental decision, but that is no fault of complainant's counsel. Complainant's attorneys no doubt felt that they should submit a posttrial brief since respondent had requested permission to do so. Despite the misleading part of the brief dealing with recoupment of complainant's expenses, I believe that the amount of time claimed by complainant's counsel with respect to the drafting of the posttrial brief has been justified and should be allowed in full.

The tenth pleading filed by complainant's attorneys was submitted on October 22, 1980, and asked me to retain jurisdiction over this proceeding until such time as I had determined the amount that respondent should be required to pay for attorneys' fees and other expenses. The motion is four pages long and the junior attorney claims that he spent 3 hours in drafting and filing the motion. Some courts have declined to allow attorneys to obtain any compensation for time spent in justifying an award of attorneys' fees. In Kiser v. Miller, 364 F. Supp. 1311, 1318 (D.D.C. 1973), the court discounted by 30 percent the amount of time spent by attorneys on the question of attorneys' fees, but most courts have allowed the full amount of time spent to collect attorneys' fees (Parker v. Matthews, 411 F. Supp. 1059, 1066-1067 (D.D.C. 1976)). In Pitchford Scientific Instruments Corp. v. Pepi, Inc., 440 F. Supp. 1175, 1180 (W.D.Pa. 1977), the court allowed in full the amount of time spent in recovering attorneys' fees, noting that work to justify fees is just as much a part of the cost of a case as are the court costs associated with initiation of the action. In Mid-Hudson Legal Services v. G & U, Inc., 465 F. Supp. 261, 270 (S.D.N.Y. 1978), the court held that attorneys are entitled to the time spent on attorneys' fees because denial of that time would discourage attorneys from representing indigent clients and acting as private attorneys general in vindicating congressional policies. In the Mid-Hudson case, the court awarded $31,945 in attorneys' fees, but only $10,092.50 of that amount was awarded for work other than time spent in justifying attorneys' fees. Therefore, I am allowing the full amount claimed by the junior attorney for preparation of the motion for clarification.

The eleventh pleading filed in this proceeding by complainant's attorneys was a petition for discretionary review submitted on October 31, 1980. That petition is six pages long and asks the Commission to hold that I still had jurisdiction, after

issuance of my decision on October 3, 1980, to decide the question of the amount of attorneys' fees and other expenses. The junior

attorney claims that he spent 2.25 hours in preparing the petition for discretionary review and the senior attorney claims that he spent .25 of an hour in reviewing the petition. Those claims are reasonable and will be allowed in full.

The twelfth pleading filed by complainant's attorneys is a statement of costs and expenses which was submitted on November 24, 1980, but which was prepared and completed by the junior attorney on October 27, 1980. The junior attorney claims that he spent 13 hours preparing that statement. It is 32 pages long, but it did not provide a complete breakdown of data to permit me to analyze it under the court decisions cited by complainant in support of the award of attorneys' fees. Therefore, it was necessary for me to issue an order on December 30, 1980, requiring complainant's attorneys to submit supplemental data. Those data were filed on January 16, 1981, but none of the work done in preparing the supplemental data is before me at this time because complainant's counsel have not sought to collect attorneys' fees for any work performed after October 31, 1980.

Complainant's attorneys also submitted a memorandum in support of their statement of costs and expenses. That memorandum cited a large number of cases to show how the courts have determined attorneys' fees. Despite the fact that the cases were cited by complainant's attorneys to persuade me to allow all the claims which they have made, they did not prepare their materials properly with the result that I was forced to spend a great deal of time in the preparation of the order of December 30, 1980. Although most courts have said that the time spent by counsel to obtain attorneys' fees should be allowed in full, I have not seen any court allow the full amount of time when the material submitted was not correctly and fully prepared. Therefore, I think that the 13 hours claimed by the junior attorney for the preparation of the statement of costs and expenses should be discounted by 50 percent; consequently, he will be allowed only 6.50 hours of the 13 hours claimed.

The final matter to be considered under the criterion of the attorneys' skill is the time claimed by both the senior attorney and the junior attorney for preparation for hearing, for traveling to Pikeville, and for attending the 6-hour hearing. The senior attorney claims that he spent 26 hours for those purposes and the junior attorney claims that he spent 34.25 hours for those purposes. The time claimed by each attorney includes 13.50 hours used in traveling to and from Pikeville. Excluding actual traveling costs, the senior attorney seeks $2,210 for attending the hearing and the junior attorney seeks $1,856.25 for attending the hearing, or a total of $4,066.25.

Complainant's memorandum in support of its statement of costs seeks to justify the time and costs of two attorneys at the hearing on several grounds. They argue that they tried to get the case disposed of on the basis of a motion for permission to file a motion for summary decision. They note that their motion to do so was denied because respondent's counsel insisted on introducing evidence at the hearing. Then they claim that their

position that no hearing was required was vindicated at the hearing because no testimony by any witness was received in evidence and the case was disposed of on

the basis of the stipulations which had been filed on July 18, 1980. Complainant's attorneys overlook the important fact that I announced at a prehearing conference held before any evidence was submitted that I was going to rule in respondent's favor as to all issues in the case except for complainant's contention that refusal of respondent to allow complainant to monitor training classes was an implied violation of the Act as well as a violation of section 105(c)(1) of the Act. That ruling required a complete reappraisal by respondent's attorney of his previous belief that he needed to present evidence and, not surprisingly, he decided that he did not need to introduce any evidence beyond the stipulation of facts which had already been prepared. There is no doubt in my mind that a conference of counsel for complainant, respondent, and MSHA was needed to resolve the doubts which each attorney had about whether their clients' best interests could be served without the introduction of evidence in the form of testimony.

Another factor about the case which complainants' attorneys decline to evaluate is the fact that they asked that their case be consolidated with other proceedings in which Martin County Coal Corporation had the burden of proof and in another case in which MSHA had the burden of proof. Martin County's attorney had requested that the hearing be held in Pikeville. It would have been improper for me to deny Martin County a hearing in Pikeville simply because complainant's attorneys happen to have an office in the District of Columbia. Therefore, their claim that no hearing was necessary is without merit.

Another reason advanced by complainant's counsel for having two attorneys attend the hearing in Pikeville is that respondent was represented at the hearing by two attorneys. If that were any reason to justify the use of two attorneys to represent complainant, then it would be offset by the fact that MSHA was represented at the hearing by only one attorney. MSHA's attorney made some of the most persuasive arguments on complainant's behalf which were advanced at the hearing and yet at no time did he have a second attorney to assist him. Moreover, the issue before me is the ability of complainant's attorneys to justify the fees they are asking me to award. There is nothing in the record to show why respondent was represented at the hearing by two attorneys and I do not know whether respondent was billed for the hours both attorneys spent in representing respondent at the hearing.

In the Johnson case, supra, the court stated (488 F.2d at 717):

> * * * If more than one attorney is involved, the possibility of duplication of effort along with the proper utilization of time should be scrutinized. The time of two or three lawyers in a courtroom or conference when one would do, may obviously be discounted. * * *

The duplication of effort by the senior and junior attorney with

respect to both preparation for trial and attendance at the hearing is obvious from the hours shown on the summary sheet located between pages 9 and 10 of the complainant's supplemental data. The senior attorney seeks to recover payment for 6.50 hours of trial preparation, while the junior attorney seeks payment

for 14.75 hours of trial preparation. Each of the attorneys seeks payment for 6 hours for attending the hearing and each of the attorneys seeks payment for 13.50 hours for traveling to and from Pikeville. Their request for $682.14 in traveling expenses is not itemized except for the rental of a car at a cost of $125.00, but it is obvious that the total expenses include two round-trip plane tickets to Huntington, West Virginia, and the cost of meals and lodging for two attorneys. Each of the attorneys also seeks payment for 4 hours for preparing a single witness for testifying at the hearing.

At the hearing, the senior attorney did all the talking on complainant's behalf. I do not believe that allowance of two attorneys' time can be justified for attending a hearing which was not factually complicated, especially since complainant's attorneys had already filed an extensive prehearing brief discussing the legal issues. While I doubt that the junior attorney's trial preparation of 14.75 hours was necessary in view of the simple factual issues involved, I shall allow him to be paid for that amount of time because he could have prepared questions for prospective witnesses and other materials which could have been used by the senior attorney if witnesses had been presented at the hearing. There is not, however, any justification for respondent's having to pay two attorneys to make a round trip to Pikeville and attend a hearing in Pikeville. Therefore, all of the 26 hours claimed by the senior attorney for trial preparation, travel, and attendance at the hearing will be allowed and the 14.75 hours expended by the junior attorney for trial preparation will be allowed, but the 19.5 hours for the junior attorney's traveling to and from Pikeville and attending the hearing will be disallowed.

Complainant's counsel seek to recover a total of $682.14 in expenses for traveling to Pikeville from Washington, D.C., and returning. The statement of expenses does not show a breakdown for air fare to Huntington, West Virginia, where a rental car was obtained at a cost of $125.00. Therefore, the claim for traveling expenses in the amount of $682.14 will be allowed except that the cost of one round-trip ticket to Huntington, West Virginia, the cost of a single daily room for one person, and the cost of one person's meals shall be deducted from the traveling expenses.

3. The amount involved and results obtained. The third criterion which the court in the Johnson case, supra, requires a judge to consider in determining attorneys' fees is the size of the monetary award which the plaintiff obtained. The Johnson case involved a racial discrimination issue tried under the Civil Rights Act of 1964, 42 U.S.C.A. 2000a et seq. Although the instant case was brought under the discrimination provisions of the Act here involved, no large monetary award for reimbursement of back pay is at issue here because the complainant is seeing only to be permitted to monitor training classes. The monetary award for expenses, apart from attorneys' fees, amounts to only $626.69. Therefore, the monetary amount involved in this case is small and requires no upward adjustment in attorneys' fees on the

ground that complainant's attorneys have been able to recover a large sum of money.

The remaining aspect of the third criterion is whether the results obtained from the decision in this case will benefit a large class of persons.

Complainant's counsel did not introduce any evidence regarding the number of persons employed at respondent's mines, but Exhibit 1, page 11, introduced by MSHA's counsel, shows that respondent produced 1,212,092 tons of coal at all of its mines in 1980. I have always considered a company which produces well over a million tons of coal annually to be a large operator. A large operator generally employs at least 200 miners. There is no evidence in the record to show that complainant represents miners who work for companies other than the respondent in this proceeding. The results of the decision in this case, therefore, would not appear to benefit a large class of persons. Cf. Lindy Bros. Builders, Inc. v. Am. Radiator, Etc., 540 F.2d 102, 114 (3d Cir. 1976), which involved a consolidation of 374 cases and over 10,000 claims filed by builder-owners, and Kiser v. Miller, 364 F. Supp. 133 (D.D.C. 1973), involving recovery of from $8,495,193 to $15,911,206 in welfare benefits for from 356 to 666 miners.

4. The customary fee. The fourth criterion which the court in the Johnson case, supra, requires a judge to consider in determining attorneys' fees is whether the hourly fee sought by the attorneys is in line with the customary fee charged for similar work in the community where the attorneys practice law. I have already noted in considering the first criterion, supra, that the senior attorney in this case is seeking an hourly fee of $85 and that the junior attorney is seeking an hourly fee of $55. In Mid-Hudson Legal Services v. G & U, Inc., 465 F. Supp. 261, 270 (D.N.Y. 1978), the court found as reasonable in 1978 an allowance of $55 per hour for attorneys with 0 to 3 years of experience, of $70 per hour for attorneys with 4 to 6 years of experience, and of $80 per hour for attorneys with 7 or more years of experience. In Pitchford Scientific Instruments Corp. v. Pepi, Inc., 440 F. Supp. 1175, 1180 (D.Pa. 1977), the court found that an attorney's hourly fee should be allowed to increase from $60 at the beginning of the case in 1973 to $90 at the end of the case in 1977 "* * * due to the progress of inflation * * *". In Parker v. Matthews, 411 F. Supp. 1059, 1066 (D.D.C. 1976), the court allowed the senior attorney's hourly fee to increase from $50 in 1973 to $75 in 1975. Although the court in the Parker case allowed the senior attorney's fees to increase from $50 in 1973 to $75 in 1975, all in recognition of inflationary trends in recent years, the court declined to allow a similar increase for junior attorneys' hourly rates from a low of $40 in 1974 to a high of $55 in 1975. The refusal to allow the amounts asked by junior attorneys in the Parker case, however, was based on the failure of the attorneys to specify their prior experience in the civil-rights type of case which was before the court in that instance.

In this proceeding, the affidavit submitted by the junior attorney shows that he has had prior experience in cases involving the mining industry and my discussion under the first criterion, supra, shows that the junior attorney in this proceeding was initially responsible for the drafting of most of the pleadings submitted in this proceeding. Therefore, I find that his request for $55 an hour is justified on the basis of the work which has been done in this case as well as the experience

discussed in his affidavit.

The only Commission case involving attorneys' fees cited by complainant's counsel is Joseph D. Christian, 1 FMSHRC 126, 140 (1979), in which

Judge Stewart allowed a senior attorney to recover for his services at an hourly rate of $85 and allowed the junior attorney to recover at an hourly rate of $60 for work done in 1978 and 1979. There can hardly be any doubt but that the fees of $85 and $55 requested by the senior and junior attorneys, respectively, in this proceeding are within the customary range charged by attorneys in the Washington, D.C., area.

Respondent's response (p. 3) objects to the hourly fees sought by complainant's counsel on the ground that their fees would not be as high as claimed if they did not practice in the Washington, D.C., area. Respondent argues that it should not be required to pay complainant's attorneys at a higher hourly fee than it pays its own senior attorney who charges only $70 per hour (Council's Memorandum, p. 12). Respondent also argues that it "* * * should not be penalized because the Council chose its representation from one of the nation's highest priced legal communities" (Response, p. 3). The cases which I have cited above indicate that the hourly rates sought by the senior and junior attorneys in this proceeding are not out of line with the amounts which have been allowed by other courts for attorneys practicing in cities other than Washington, D.C. As to the argument that respondent should not be penalized by the fact that complainant chose lawyers from a high-cost area, respondent must be reminded that the kind of relief complainant sought was somewhat novel and was not the type of case which the average lawyer would have been willing to undertake, especially since, as hereinafter discussed, complainant's counsel brought the action in this case with the understanding that they would receive no compensation whatsoever if they failed to win the case on its merits. In such circumstances, it is not surprising that complainant sought legal assistance from attorneys who practice law in the Washington, D.C., area.

Complainant's attorneys seek to recover an hourly amount of $25 for work done by law students. The response filed by respondent's counsel has not objected to complainant's request that it be reimbursed for work done by law students at the rate of $25 per hour, but the letter filed on November 24, 1980, indicates that respondent's attorney pays only $20 for such services. I have read no cases in which the courts objected to allowing a request of $25 per hour for work done by legal assistants. As I indicated in considering the first criterion, supra, the hourly rates sought by the senior and junior attorneys and by the law students are reasonable. Certain adjustments have been, and will be, made in the number of hours claimed, but I find that the basic hourly rates are in line with the customary fees charged by law firms in 1980.

5. Awards in similar cases. The fifth criterion which the court in the Johnson case, supra, requires a judge to consider in determining attorneys' fees involves a comparison of the amount sought in the case before the judge with awards which the courts have made in similar cases. Complainant's counsel argue in their memorandum in support of their statement of costs and expenses (pp. 13-14) that they are entitled to a 15-percent bonus in

addition to the basic hourly fees of $85, $55, and $25 for senior attorney, junior attorney, and law students, respectively. The bonus of $2,528.06 was calculated by

taking 15 percent of the sum of $16,853.75 in attorneys' fees which was computed, in the first instance, by multiplying the number of hours claimed by the respective hourly rates referred to in the preceding sentence (Statement of Costs and Expenses, p. 2).

The bonus which complainant's counsel seek is supported in their memorandum (pp. 13-15) by reference to cases in which the courts have allowed incentive fees when the work done by the attorneys was considered to be outstanding or there was a strong risk that they would recover nothing in the event they failed to prevail. The bonus to which complainant's counsel refer has not always been considered by the courts and has not been awarded for the same reasons in all cases. In no event, should a bonus be allowed apart from some unusual risk or performance of unusually high quality of work by the attorneys.

In Kiser v. Miller, 364 F. Supp. 1311 (D.D.C. 1973), for example, the court allowed an incentive fee of 10 percent because the court had found that the attorneys' contingent fee arrangement was void as being contrary to public policy. Since the court's decision had barred the attorneys from being paid the lucrative fees they had anticipated receiving, the court allowed a contingency fee of 10 percent as "* * * a premium, for class representation" (364 F. Supp. at 1318). In Parker v. Matthews, 411 F. Supp. 1059 (D.D.C. 1976), the court awarded a 25 percent incentive fee in a case involving almost 3 years of work, research of 20 years of the plaintiff's employment record, and a demonstration on the part of counsel of great diligence, persistence, and dedication. In Pitchford Scientific Instruments Corp. v. Pepi, Inc., 440 F. Supp. 1175, 1181 (W.D. Pa. 1977), the court allowed an increase of 20 percent in the hourly rate because of quality trial work.

In cases where the judge is applying the 12 criteria set forth by the court in the Johnson case, the judge will necessarily have to consider whether any incentive award is required, but the award, when made, will be specifically associated with one of the 12 criteria. I am hereinafter discussing at considerable length, in considering additional criteria, why complainant's counsel in this proceeding are not entitled to any incentive awards. The quality of the work performed by complainant's attorneys has been discussed under the second criterion evaluated above and the hourly allowances there made are fully adequate to pay complainant's counsel for the caliber of work which they performed in this proceeding.

The primary argument advanced by respondent in opposition to the attorneys' fees sought by complainant's attorneys is that complainant did not prevail on the majority of the issues involved in the consolidated proceeding in Docket Nos. KENT 80-212-R, et al., of which the complaint filed in Docket No. KENT 80-222-D is only a part. Respondent argues that since complainant's counsel did not break down their hourly claims on the basis of the number of hours devoted to the issues which were lost, that it is not possible to determine whether they are

entitled to payment for the number of hours claimed.

The courts have uniformly rejected the foregoing argument made by respondent's counsel. In M.C.I. Concord Advisory Bd. v. Hall, 457 F. Supp. 911

(D. Mass. 1978), the court noted that the plaintiff had raised eight claims and had prevailed only as to part of the first claim and all of the fifth, but the court nevertheless held that plaintiffs were prevailing parties for the purpose of awarding attorneys' fees because they had succeeded in achieving some of the benefits which they had sought in bringing the action. In Pitchford Scientific Instruments Corp. v. Pepi, Inc., 440 F. Supp. 1175 (W.D. Pa. 1977), the court rejected defendants' argument that the fees claimed by plaintiffs' attorneys should be reduced because the plaintiffs' had failed to win on all points raised. The court denied that argument after noting that a prudent lawyer would have litigated all the points he lost, but that since the plaintiffs had won on the primary issues, no reduction should be made in their claimed fees just because they did not win on every single issue.

In this proceeding, complainants' attorneys requested that their complaint be consolidated with other cases in which counsel for the Secretary of Labor was contending that respondent had committed an implied violation of 30 C.F.R. 48.3 in refusing to allow complainant's non-employee representative access to the mine site for the purpose of monitoring training classes. In my decision, I found that no implied violation of section 48.3 had occurred, but I found that an implied violation of the Act had occurred and that respondent had also violated section 105(c)(1) of the Act by interfering with the right of complainant's representative to come on mine property to monitor training classes. Therefore, complainant's counsel won the only real issue claimed in their complaint filed in Docket No. KENT 80-222-D and their request that their complaint be consolidated with the proceedings involving the Secretary's alleged violation of section 48.3 was an action which any prudent lawyer would have taken to make certain that an adverse decision in Docket Nos. KENT 80-212-R, et al., would not prejudice their chances of obtaining a favorable decision on their complaint filed in Docket No. KENT 80-222-D. Therefore, I find that complainant's attorneys do not need to break down their claims for hours worked in accordance with the exact number of hours spent working on the issues raised by respondent in the other cases in the consolidated proceeding in Docket Nos. KENT 80-212-R, et al.

I believe that the discussion above shows that the attorneys' fees being awarded in this decision are in line with awards made by courts in similar cases.

6. Nature and length of relationship. The sixth criterion which the court in the Johnson case, supra, requires a judge to consider in determining attorneys' fees is the question of whether the attorneys here involved would be inclined to vary their fees for representing the complainant in this case because the attorneys have represented complainant in prior cases over a number of years. If I had not issued an order on December 30, 1980, requiring complainant's counsel to submit supplemental information, the sixth criterion could not have been evaluated.

The information submitted in response to my order of

December 30 shows that complainant was organized in 1913 as a nonprofit association and was

thereafter incorporated in 1944 in the State of Kentucky as a nonprofit corporation whose purpose of incorporation was to promote the best economical, cultural, spiritual, and health interests of the people of the Appalachian region with special concern for those in deprived areas. Complainant moved its base of operations to Clintwood, Virginia, in 1972, and it is currently located in Clintwood. Among other things, complainant has an ongoing mine safety and health program. Complainant has a committee which has the delegated responsibility of approving strategy to further the complainant's mine safety and health program.

Complainant's attorneys in this proceeding are employees of the Center for Law and Social Policy. The Center is a nonprofit, public-interest law firm which was incorporated in the District of Columbia in 1968. The Center is an educational and charitable organization, one of whose purposes is to conduct litigation and other legal activity on behalf of the poor and under-represented. One of the components of the Center is the Mining Project which was founded in 1975 for the purpose of assisting under-represented interests under the federal mine safety and strip-mining control laws. The Center has been representing the complainant in this proceeding as only one of many clients represented by the Center's Mining Project. An executive committee of the Center's Board of Trustees must approve any litigation before it is undertaken by Center staff attorneys on behalf of any client.

As will hereinafter be shown in my consideration of the eleventh criterion regarding the payment of fees, the Center is a nonprofit organization which cannot legally accept fees from its clients. Therefore, the sixth criterion is inapplicable in the circumstances involved in this case because complainant's attorneys in this case do not vary their fees on the basis of any long-term relationship in view of the fact that no fees at all are charged any of their clients.

7. Preclusion of other employment. The seventh criterion which the court in the Johnson case, supra, requires a judge to consider in determining attorneys' fees is whether the attorneys, in agreeing to represent complainant in this proceeding, became so completely committed to representing complainant that they were required to forego acceptance of business which might otherwise have been available if the attorneys had not undertaken to represent complainant in this proceeding. As to the seventh criterion, complainant's attorneys have failed to provide any data and I did not request any supplemental information concerning this criterion in my order of December 30 because the facts in this proceeding show that complainant's attorneys did not forego any business otherwise available to them as a result of their having agreed to represent complainant in this proceeding. The occurrence of several events supports the foregoing conclusion.

The first event was that when this case was initially set for hearing on the merits, complainant's attorneys asked for a

postponement of the hearing because they were scheduled to be "out of the country" on another matter and could not come to the hearing first scheduled. Additionally, complainant's counsel had apparently not evaluated the facts in the case sufficiently

to know whether a timely motion for summary decision would be appropriate because, after the case had been scheduled for hearing on the merits, they filed a motion for permission to file a motion for summary decision. Their preoccupation by other matters additionally is shown by the fact that the motion for postponement was not filed until 23 days after the order scheduling the hearing was issued.

The second event showing that complainant's counsel were occupied by other matters occurred after the parties had filed a stipulation of the facts on July 17, 1980. Even though all the essential facts had been covered in the stipulation, complainant's counsel waited 20 additional days and filed a letter on August 8, 1980, contending that the case could be disposed of on the basis of the stipulation and without the need of holding a hearing. That pleading was not received by me until late on a Friday afternoon which forced me to call counsel for the other parties to obtain their responses to the second request for summary decision and issue a second order on August 12, 1980, reconsidering the same questions which had already been dealt with in my order issued July 2, 1980.

The third event showing preoccupation by complainant's counsel with other matters and reluctance to pursue diligently their client's interest, may be found in the representation by complainant's counsel in their motion filed on June 23, 1980, to the effect that attending a hearing in Pikeville would be especially burdensome to their client because its resources were limited. A hearing held in Pikeville would not have been any more burdensome to their client than a hearing held in Washington, D.C., where the client's lawyers are located because the client's location is Clintwood, Virginia, which is about 92 miles from Pikeville. The client's representative drove about the same distance to Pikeville to come to the hearing that the client's attorney drove from the airport to Pikeville. In other words, it did not cost the client any more to pay for its lawyer to come to Pikeville than it would have cost the client to send its representative to a hearing held in Washington, D.C., and a hearing was necessary, as will hereinafter be explained.

Moreover, the representation in the motion filed on June 23, 1980, to the effect that a hearing held in Pikeville would be unduly burdensome for their client was a false claim because the supplemental data provided by complainant's attorneys on January 16, 1981, stated at page six that "[a]s a 501(c)(3) non-profit organization, the Center legally cannot accept fees from its clients" but the Center does expect its clients to pay out-of-pocket expenses incurred in the course of the clients' representation. Inasmuch as complainant's attorneys each claimed 13.5 hours of salary at the rate of $85 and $55 per hour, respectively, solely for the time spent in traveling to and from Pikeville, there were more than out-of-pocket expenses associated with the trip to Pikeville. There was certainly no explanation in the motion filed by complainant's attorneys to the effect that all they were concerned about were the out-of-pocket expenses associated with their trip to Pikeville.

The plain truth of the matter is that the Center for Law and Social Policy paid the salaries of complainant's attorneys for the trip to and from Pikeville.

The reluctance of complainant's attorneys to travel to Pikeville was purely an effort on the part of complainant's attorneys to save money for the Center. The arguments made by MSHA's counsel and complainant's counsel at the prehearing conference held in Pikeville were the sole basis for complainant's having won a favorable decision in this proceeding. My announcement at that prehearing conference that I was going to rule in respondent's favor with respect to three of the four cases set for hearing was almost entirely responsible for the fact that respondent chose not to present witnesses at the hearing. It is arrogant for complainant's counsel to claim on page five of their memorandum in support of legal fees that their position that this complaint should have been disposed of by summary decision was vindicated at the conference held on August 21, 1980, because I would have found against complainant on all issues if I had decided this case on the basis of a motion for summary decision and on the basis of the pretrial brief filed by complainant's counsel in this proceeding.

The foregoing discussion shows that the preoccupation of complainant's attorneys by other cases or their concern about saving their employer (the Center for Law and Social Policy) money almost caused their client to lose every point argued by them on behalf of their client.

The events discussed above do not end the list of items showing indifference by complainant's attorneys to their responsibilities in this proceeding. After the Commission had ruled in its order of November 12, 1980, that I still had jurisdiction to determine the issue of appropriate attorneys' fees, I issued an order on November 14, 1980, requiring the parties to file a stipulation as to attorneys' fees and other expenses by November 24, 1980, or to file an itemization of costs, hours, etc., by November 24, 1980, if they could not agree on a stipulation. Additionally, I ordered counsel for the parties to appear at a conference to be held on November 28, 1980, to consider the question of attorneys' fees and other expenses. Instead of appearing at the conference, counsel for both complainant and respondent filed a joint motion for an extension of time to and including December 15, 1980, within which to reach a settlement of the amount to be awarded for legal fees and other expenses. I issued an order on November 24, 1980, granting the request for an extension of time, although I observed in that order that counsel had already had a period of 50 days within which to arrive at a settlement if they were inclined to do so.

Complainant's counsel filed on December 15, 1980, a short two-paragraph letter in which they stated that no settlement had been reached because "Martin County Coal Corporation has failed to make any counter-offer to the Council's Statement of Costs and Expenses, filed with the Court on November 24, 1980, and indeed has offered no explanation for its objection to the amount requested therein." Despite the fact that complainant's counsel had requested an extension of time to December 15, 1980, for settling the question regarding attorneys' fees, they seemed to

think that they had carried out their obligations toward settlement by declining to initiate discussions with respondent's counsel when respondent's counsel failed to make a counteroffer. Furthermore, complainant's counsel incorrectly state that respondent's counsel had failed

to explain his objections to the attorneys' fees claimed by complainant's counsel because complainant's counsel had been served with a copy of the response filed by respondent's counsel on November 24, 1980. That response made it abundantly clear that respondent was objecting to all aspects of the claims for attorneys' fees submitted by complainant's counsel.

Although complainant's counsel had stated on page 15 of their memorandum submitted on November 24, 1980, in support of their statement of costs and expenses that they thought oral argument before me would assist me in disposing of the question of attorneys' fees, in their letter filed on December 15, 1980, they announced that they believed that I could dispose of the question on the basis of the information they had already supplied. Then they condescendingly added that they stood ready to appear at any conference or hearing that I might schedule so long as the date of the conference is "* * * a date prior to January 10, 1981, when counsel will be out of the country." Here, once again, complainant's counsel were so preoccupied with other cases that they had to put a deadline on any date that I might set for a conference or hearing with respect to the question of determining attorneys' fees. As will hereinafter be shown, complainant's counsel declined my offer to hold a hearing even though I agreed to do so prior to January 10, 1981, so that the conference or hearing could be held before complainant's counsel had to leave the country.

The refusal by complainant's counsel of my offer to hold a hearing or conference came about as a result of my having carefully examined the statement of costs and expenses and memorandum in support of those costs and expenses which had been submitted by complainant's counsel. I found, upon examination of the materials submitted by complainant's counsel, that they were so woefully deficient that it was impossible to analyze them under the criteria which the courts have established for determining attorneys' fees. Therefore, I issued an order on December 30, 1980, explaining in considerable detail what the deficiencies were which I had encountered and requesting that complainant's attorneys submit the supplemental data which were described in five paragraphs set forth at the end of the order. Additionally, I stated in the order that I would not hold a hearing or conference unless counsel for the parties specifically requested a hearing, but I indicated that I would hold the hearing or conference prior to January 10, 1981, since complainant's counsel would be out of the country after that time.

The supplemental data requested in my order were submitted by complainant's attorneys on January 16, 1981, and on page 12 of those data, complainant's counsel stated that "No hearing in this matter is necessary, since Respondent has not disputed any of the factual representations made by Complainant."

One final example of indifference shown by complainant's counsel to matters which occurred in this case was associated with the filing on January 9, 1981, by respondent's counsel of a

request that I issue a subpoena requiring an MSHA employee to make available to respondent's counsel an investigative

report regarding the complaint filed by complainant's attorneys in this proceeding. Although MSHA's attorney filed a prompt reply opposing the granting of the request for a subpoena, complainant's attorneys did not file any reply to the request for subpoena even though I waited for the expiration of the 15-day period provided for in sections 2700.8(b) and 2700.10(b) of the Commission's Rules before issuing an order on January 16, 1981, denying the request for a subpoena.

I believe that the foregoing discussion supports my conclusion that the representation of complainant in this proceeding has in no way precluded complainant's counsel from accepting other business available to them, regardless of whether such business involved trips inside or outside the boundaries of the United States.

8. Time limitations imposed by the client or the circumstances. The eighth criterion which the court in the Johnson case, supra, requires a judge to consider in determining attorneys' fees is whether the case involved priority work which delays a lawyer's other legal work. If such time limitations exist, the court seemed to think that they might entitle the attorneys to a premium.

The discussion under the seventh criterion above shows that complainant's counsel failed to give this case the kind of diligent attention which it deserved. A few time limitations existed, but they occurred entirely because complainant's attorneys sought delays in the convening of a hearing. For example, when I orally advised the parties prior to the hearing that I intended to issue a bench decision after the hearing was concluded, they insisted on filing prehearing briefs which I did not particularly want and which did not assist me in determining the issues. The request by complainant's attorneys for a continuance after the first hearing was scheduled was brought about by the fact that complainant's attorneys were involved in other matters and could not give this case the attention it merited. My granting of the postponement then made the date of the continued hearing fairly close to the time when the next training classes were to be held. The parties asked me to issue my decision by October 3, 1980, and to consider supplemental arguments between the time my bench decision was issued and the time the new training classes were scheduled to be held. Although complainant's attorneys filed a posthearing brief, the important issues in the case had already been decided in complainant's favor in the bench decision and their brief was of no assistance to me in dealing with the additional issues raised by respondent's posthearing brief because all briefs were filed simultaneously and complainant's brief did not deal with the arguments contained in respondent's posthearing brief. The primary point raised in complainant's posthearing brief was the issue of determining attorneys' fees which they misleadingly claimed could be determined in the "relief stage" of the proceeding.

After the Commission issued its order on November 12, 1980,

holding that I had jurisdiction to determine attorneys' fees, I was under the erroneous impression that complainant's attorneys wanted a prompt disposition made of

that question. Therefore, my order issued November 14, 1980, required the submission of materials in support of the requested attorneys' fees within a period of 10 days. According to the supplemental data filed by complainant's attorneys on January 16, 1981, their statement of costs and expenses had already been completed on October 27, 1980. Therefore, my order requiring that those data be submitted by November 24, 1980, was certainly no time constraint that should have caused any problem. Moreover, as I have already pointed out above under the discussion of the seventh criterion, complainant's attorneys sought and were given an extension of time to December 15, 1980, within which to strive to settle the issue of attorneys' fees.

The discussion above shows that there were no time limitations in this case which were so demanding that complainant's attorneys should be given a premium for work done under time constraints. The court explained in the Johnson case (488 F.2d at 718), that the premium would be awarded primarily if doing work for the client in this case would have interfered with performance of work for other clients in other cases. Since I granted all requests for extensions of time so that complainant's attorneys could perform work for other clients in and out of the United States, they were never deprived of an opportunity to do work in other cases because of any deadlines established in this case.

9. The undesirability of the case. The ninth criterion which the court in the Johnson case, supra, requires a judge to consider in determining attorneys' fees is whether the undesirability of representing clients in such proceedings as civil-rights cases might be unpleasantly received by the community in which the attorneys practice with the result that acceptance of civil-rights cases might have an economic impact on the attorneys' business. The fear expressed by the court with respect to the ninth criterion does not apply in the circumstances which exist in this case.

In the supplemental data provided by complainant's counsel, it is stated that complainant's counsel work for the Center for Law and Social Policy which was founded as an educational and charitable organization and that one of its purposes is the "conduct of litigation and other legal activity on behalf of the poor and under-represented." A special Mining Project was established at the Center for the sole purpose of representing "under-represented interests under the federal mine safety and strip mining control laws." Inasmuch as the Center was specifically established for the purpose of representing entities in mine-safety cases, the Center would not be concerned about whether its agreement to represent complainant in this case would have an adverse economic effect on its ability to attract other clients. Therefore, I find that complainant's counsel are not entitled to any increase in legal fees under the court's ninth criterion.

10. The novelty and difficulty of the questions. The tenth criterion which the court in the Johnson case, supra, requires

judges to consider in determining attorneys' fees is whether the issues raised in a given case are so novel and complex that the attorneys are required to perform more than a normal amount of work so that they should be specially compensated for

accepting the challenge. The issue in this case is unusually simple in that the only question raised by the complainant's lengthy complaint is whether respondent's refusal to allow complainant's representative to enter mine property for the purpose of monitoring training classes was an implied violation of the Act and, if so, whether that violation was also a violation of section 105(c)(1) by having interfered with a statutory right impliedly given complainant under the Act. The aforesaid issue was novel, but not complex. The only research which complainant's attorneys had to do was to examine the Act to determine what rights the Act gives to miners and their representatives. It should be recalled from my discussion of the first criterion above, that complainant's counsel are specialists in interpreting the Act and that the senior attorney participated in the rulemaking which followed passage of the present 1977 Act containing provisions pertaining to the training and retraining of miners and their representatives. Consequently, complainant's counsel were not required to perform an unusual amount of research or effort in order to deal with the issues raised by the complaint.

The pretrial brief filed by complainant's attorneys was voluminous and cited several court decisions which had no specific bearing on the real issues. As I stated at the hearing (Tr. 11), the brief was "very excellent" in the sense that it displayed the attorneys' ability to engage in an academic exercise expounding on esoteric legal principles, but the brief failed to come to grips with the provisions of the Act--as was done, for example, by the Commission in Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980),--for the purpose of helping me determine whether refusal to allow complainant's representative to monitor classes was an implied violation of the Act. Therefore, I find that the issues in this case were not so novel or complex that complainant's attorneys are entitled to any special compensation because they agreed to represent complainant in this proceeding.

11. Whether the fee is fixed or contingent. The eleventh criterion which the court in the Johnson case, supra, requires a judge to consider in determining attorneys' fees is whether the attorney expected to receive a large fee when he agreed to accept the case. The court, in discussing the eleventh criterion pointed out that the criterion for the judge to consider "is not what the parties agreed but what is reasonable". The court added that "[i]n no event, however, should the litigant be awarded a fee greater than he is contractually bound to pay, if indeed the attorneys have contracted as to amount" (488 F.2d at 718 for both quotations).

No contract existed between the client and its attorneys in this proceeding. The supplemental data submitted by complainant's counsel state as follows (p. 6):

> As in most public interest litigation, the Council has not agreed to pay the Center legal fees.a The Center's receipt of legal fees for its representation

of the Council in this matter, therefore, has been wholly contingent on the

> Council's prevailing on the merits and the consequent entitlement to an award of attorney fees under 105(c) of the Act. [Second footnote omitted.] (FN.a)

The fee arrangement between complainant and its attorneys in this case shows that the attorneys took the case without expecting to be paid anything, other than out-of-pocket costs, unless they were successful in winning the case. In the event they won, as they have pending possible reversal of my decision by the Commission, they expect only to obtain whatever is found to be reasonable under section 105(c)(3) of the Act. Some courts have awarded incentive fees just to encourage attorneys to continue representing persons in public-interest class actions. See, for example, Kiser v. Miller, 364 F. Supp. 1311 (D.D.C. 1973), where a 10-percent incentive fee was awarded in a case where the court denied the attorneys the fee they had anticipated in receiving.

In Mid-Hudson Legal Services v. G & U, Inc., 465 F. Supp. 261 (S.D.N.Y. 1978), the issue was very similar to the issue raised in this case because the attorneys won the right to go on the property of an employer to assist migrant workers with their problems. The court awarded the attorneys $31,945 in legal fees and held that the fact that the action involved legal work of a nonprofit or public-interest nature did not bar the attorneys from being paid reasonable fees, but the court did not award the attorneys any incentive fees.

In Lindy Bros. Builders, Inc. of Phila. v. American R. & S. San. Corp., 487 F.2d 161 (3d Cir. 1973), the court held that an incentive fee award might be appropriate, but that such an award is unnecessary if the number of hours worked is a large proportion of the total recovery so that adequate compensation is awarded for the type of work done. In Lindy Bros. Builders, Inc. of Phila. v. American R. & S. San. Corp., 540 F.2d 102 (3d Cir. 1976), the court majority was highly critical of a judge's allowance of a 100 percent incentive award. The majority affirmed the judge's award because it found that the "* * * lengthy proceedings at bar--now in their fifth year--" should be brought to an end. The court expressly added that although it was not reversing the judge's award, "* * * it should be apparent that we do not necessarily endorse the methods or the reasoning employed to reach its result" (504 F.2d at 118). The dissenting opinion disagreed with the majority's allowing the doubling of fees and stated, among other things, that "[t]he case is old, but appellate judges cannot operate on the premise that what was unacceptable on the first appeal becomes palatable by attrition" (540 F.2d at 125).

The response filed by respondent's attorney argues that complainant's attorneys are not entitled to a special incentive fee because they are employed by a nonprofit organization whose sole function is to bring public-interest litigation. That argument must be rejected because several courts

have held that the fact that attorneys agree to undertake public-interest litigation without expecting to be paid does not affect their right to be awarded reasonable fees for their services. Such rulings were made in Tillman v. Wheaton-Haven Recreation Ass'n, Inc., 517 F.2d 1141 (4th Cir. 1975), and in Jordan v. Fusari, 496 F.2d 646 (2d Cir. 1974). Although the courts ruled that attorneys for nonprofit organizations should be paid reasonable compensation, they did not indicate that a special incentive fee should be awarded simply because the plaintiffs were represented by public-interest organizations which did not expect to be paid fees by the plaintiffs. In the Tillman case, the court held that (417 F.2d at 1148):

> * * * when an allowance of attorneys' fees is justified, it should be measured by the reasonable value of the lawyer's services. It should not be diminished because the attorney has agreed to contribute the money, in whole or part, to a civil rights organization whose aims have stimulated him to work voluntarily.

In my evaluation of the second criterion, supra, and in my evaluation of the twelfth criterion, infra, I have allowed an ample amount of time at the rates proposed by complainant's counsel. I believe the caliber of representation discussed under the seventh criterion, supra, would make it inappropriate in this proceeding to allow any special incentive fee merely because complainant's counsel undertook the instant litigation without expecting to receive any fees if they failed to win the case.

I find no merit to a final argument contained in the response filed by respondent's attorney. That argument is that allowance of an incentive fee is improper in a proceeding section 105(c)(3) of the 1977 Act because section 105(c)(3)'s provision for payment of attorneys' fees is different from 42 U.S.C.A. 2000e-5(k) of the Civil Rights Act under which incentive award were made in such cases as Parker v. Matthews, 411 F. Supp. 1059 (D.D.C. 1976). Section 105(c)(3) provides as to award of attorneys' fees as follows:

> * * * Whenever an order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner, applicant for employment or representative of miners for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation. * * *

The comparable provisions of section 2000e-5(k) of the Civil Rights Act read as follows:

> (k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States,

a reasonable attorney's fee as part of the costs, and the

> Commission and the United States shall be liable for costs the same as a private person.

In both Acts, the only provision with respect to attorneys' fees is that the Commission or the court is authorized to award reasonable attorneys' fees. The courts have awarded special incentive amounts upon various grounds, but all such awards have been based on a finding by the court that the attorneys have performed in some outstanding manner. In the Parker case, supra, for example, the court awarded an incentive fee of 25 percent after noting that the case had taken nearly 3 years to complete, that the senior attorney had done extensive work throughout that period, and had demonstrated great diligence, persistence, and dedication. I believe that a bonus or incentive award should be based on the performance of the attorneys in each case on an individual basis. My extensive discussions of the work performed by complainant's attorneys in this proceeding show that they were not required to do legal work over an extended period of time and that they did not display any unusual diligence which would entitle them to a special incentive award.

12. The time and labor required. The twelfth and final criterion which the court in the Johnson case, supra, requires a judge to consider in determining attorneys' fees is an evaluation of the hours claimed or spent on the case. The court stated that "* * * [t]he trial judge should weigh the hours claimed against his own knowledge, experience, and expertise of the time required to complete similar activities" (488 F.2d at 717). In my discussion of the second criterion, supra, I have evaluated the work done by complainant's attorneys and law students and have fixed specific time periods for such work as well as the hourly rate. Those findings will hereinafter be summarized in this section of my decision.

One final aspect of the number of hours claimed has not, however, yet been reviewed. That final aspect of the hours claimed by complainant's counsel relates to time spent in making phone calls and in engaging in conferences. The court in the Johnson case stated that non-legal work should be carefully scrutinized because the dollar value of such work "* * * is not enhanced just because a lawyer does it" (488 F.2d 717).

The summary of activities located between pages 9 and 10 of the supplemental data submitted by complainant's attorneys shows that the senior attorney spent 5 hours in making phone calls and that the junior attorney spent 8.25 hours in making phone calls. The summary shows that the senior attorney spent 14.25 hours in conferences, that the junior attorney spent 15 hours in conferences, and that all five law students spent a combined total of 5 hours in conferences.

In the Kiser case, supra, the court discounted from 30 to 35 percent the amount of time spent on phone calls and conferences (364 F. Supp. at 1318-1320). In the Parker case, supra, the court discounted the double-time nature of conferences by 20 percent and the time spent on making phone calls by 20 percent

(411 F. Supp. at 1067).

Out of the total of 77.25 hours claimed by the senior attorney, he spent 19.25 hours or 25 percent of his time in making phone calls or engaging in conferences. At the hourly rate of $85 claimed by the senior attorney, complainant would have to pay $1,636.25 solely for the time he engaged in phone calls and conferences. That is an inordinate amount of time to claim for phone calls and conferences at an hourly rate of $85. I shall, therefore, discount the senior attorney's time spent on phone calls and conferences by 35 percent or by 6.75 hours. Out of the 150 total hours claimed by the junior attorney, 23.25 hours were spent in making phone calls and engaging in conferences. Despite the large number of hours spent on phone calls and conferences by the junior attorney, his time in such activities amounted to only 15.5 percent of the total number of hours claimed. Consequently, the junior attorney's time for making phone calls and conferences will be reduced by 25 percent or by 5.8 hours. All five law students claim total time of 81.5 hours. Of that time, only 6 percent or 5 hours were used for conferences and no time was spent on phone calls. Since those conferences were necessary for the law students to obtain guidance from the junior attorney or senior attorney whose time will be discounted as indicated above, I believe that no discount should be applied for the time the law students spent in conferences, particularly since their time is valued at only $25 per hour.

In my discussion of the second criterion, supra, I ruled that the senior attorney's time should be reduced by 1 hour for the time spent on the complaint and by 10 hours for the time spent on discovery. I have just determined in the preceding paragraph that the senior attorney's time spent on phone calls and conferences should be reduced by 6.75 hours. Therefore, the total reductions in the senior attorney's time should be 17.75 hours.

In my discussion of the second criterion, supra, I ruled that the junior attorney's time should be reduced by 3 hours for time spent on the complaint, by 1 hour for time spent on the motion for permission to file a motion for summary decision, by 1.25 hours for time spent on the letter again asking for a summary decision and other relief, by 19.5 hours for the time claimed by the junior attorney for his unjustified trip to Pikeville, and by 6.5 hours for time claimed for the preparation of the deficient statement of costs and expenses. I have just determined in my discussion of this twelfth criterion that the junior attorney's time should be reduced by 5.8 hours for the time claimed for phone calls and conferences. Therefore, the total reductions in the junior attorney's time should be 37.05 hours.

In my discussion of the second criterion, supra, I ruled that the time of one law student should be reduced by 2 hours for the time spent in preparing the complaint. Therefore, the total time which should be deducted from the time claimed for work done by law students should be 2 hours.

The summary sheet located between pages 9 and 10 in the

supplemental data submitted by complainant's attorneys makes the hourly claims listed below under the words "Hours Claimed". The above-described reductions of 17.75, 37.05, and 2 hours, for the senior attorney, junior attorney, and law

students, respectively, have been applied to the claimed hours to produce the hours appearing below under the words "Hours Allowed". Application of the hourly rates of $85, $55, and $25 claimed by the senior attorney, junior attorney, and law students, respectively, produces the amounts appearing below under the words "Approved Amount".

	Hours Claimed	Hours Allowed	Approved Amount
Senior Attorney	77.25	59.50	$ 5,057.50
Junior Attorney	150.00	112.95	6,212.25
Law Students	81.50	79.50	1,987.50

Total Attorneys' Fees $ 13,257.25

The direct costs and expenses claimed by complainant's attorneys total $864.57. Those claims appear to be reasonable and will be allowed, except that I have already ruled in my discussion of the second criterion, supra, that the cost of one round-trip plane fare to Huntington, West Virginia, the cost of lodging for one person, and the meals for one person must be deducted from the total of $864.57 claimed by the attorneys as direct costs and expenses. I have already determined under the heading of "Actual Expenses Incurred by Complainant", supra, that complainant is entitled to recover $626.69 for the time and costs expended by complainant in connection with the complaint filed in this proceeding. Therefore, respondent will be ordered to pay complainant for those costs and expenses.

I have explained in great detail in my discussions of the fifth, seventh, and eleventh criteria why complainant's attorneys are not entitled to a bonus for their representation of complainant in this proceeding.

Respondent's Claim that No Attorneys' Fees Can Be Awarded

Thirteen days after complainant's attorneys had submitted supplemental data on January 16, 1981, in response to my order of December 30, 1980, respondent's counsel sought permission to file an additional brief in opposition to the request for attorneys' fees. I granted the motion in my order issued February 2, 1981, and respondent's attorney filed on February 9, 1981, the supplemental brief or "Martin County's Response to Complainant's Submission of Supplemental Data". I have essentially disposed of the arguments raised in respondent's brief of February 9 in my discussion of the eleventh criterion, supra, but I shall reconsider the arguments again in this section of my decision because my discussion of the eleventh criterion also explained why complainant's counsel are not entitled to a bonus or special incentive award.

In the brief of February 9, respondent argues that section 105(c)(3) allows a complainant to be reimbursed for attorneys' fees only if such fees are awarded as part of the costs and expenses actually incurred by complainant in filing and prosecuting its complaint. In support of that argument,

respondent cites the Supreme Court's opinion in Alyeska Pipeline Service Company v.

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The Wilderness Society, 421 U.S. 240 (1975), in which the Court held that, under the "American Rule", in the absence of a statutory provision awarding attorneys' fees to be paid to the prevailing party, the prevailing party may not recover attorneys' fees as costs or otherwise (421 U.S. at 245).

Respondent argues that all the cases cited by complainant's counsel in their supplemental data (p. 6) in support of their argument, that they are entitled to attorneys' fees even though they undertook the case without expecting to be paid by their clients, are civil-rights cases in which the courts awarded attorneys' fees to be paid because the attorneys were acting as private attorneys general and it was held that they were entitled to be paid reasonable fees regardless of the altruistic principles which may have motivated the attorneys when they agreed to file complaints on behalf of the persons whose civil rights had been curtailed.

Respondent also argues that since both the complainant and the Center for Law and Social Policy were incorporated as charitable organizations for the purpose of obtaining interpretations of the Mine Act which are favorable to their point of view, they are merely carrying out their corporate purposes when they bring actions such as those in this case and that they are not entitled to be paid for doing that which they were organized to do. Respondent claims further that the "private attorney general" theory relied on by some courts for awarding attorneys' fees was rejected by the Supreme Court in the Alyeska case and that complainant's attorneys may not rest their claim for attorneys' fees on cases involving that theory.

Respondent's counsel has misapplied the Supreme Court's opinion in the Alyeska case. In that proceeding, some lawyers for the Wilderness Society and other environmental groups brought an action to enjoin the Secretary of the Interior from issuing permits under the Mineral Leasing Act of 1920 which would grant Alyeska rights-of-way needed to construct a pipeline to transport oil from Alaska to the lower 48 States. After the action was brought, Congress amended the Mineral Leasing Act and ruled that no other action was necessary under the National Environmental Policy Act of 1969 before construction of the pipeline could proceed. Since the merits of the environmentalists' case had been disposed of by Congress, the D.C. Circuit turned to the question of an award of attorneys' fees sought by the environmental groups' attorneys. There was no statute providing for an award of attorneys' fees, so the court relied on the "private attorney general" theory and awarded attorneys' fees on the ground that the attorneys had brought the action to vindicate important statutory rights of all citizens. The Supreme Court reversed the D.C. Circuit's award of attorneys' fees solely because, under the "American Rule", the losing party cannot be made to pay attorneys' fees as part of the cost of an action unless there is a statute permitting the winning party to be paid attorneys' fees.

Since there is a statute in this proceeding and in the cases

cited by complainant's counsel on page 6 of their supplemental data providing for an award of attorneys' fees, the Alyeska case has no bearing whatsoever on the request for attorneys' fees which is before me in this proceeding. The Supreme Court

in the Alyeska case specifically noted that its decision did not apply to cases brought under the Civil Rights Act (421 U.S. at 261). Therefore, the cases cited by complainant's attorneys in support of their contention that they are entitled to recover attorneys' fees, even though their client did not agree to pay them anything if they did not prevail, are still the applicable law with respect to the request for attorneys' fees in this proceeding.

In one of the cases cited by complainant's attorneys, Tillman v. Wheaton-Haven Recreation Ass'n., Inc., 517 F.2d 1141 (4th Cir. 1975), the court held that (517 F.2d at 1148):

> * * * An award that ultimately is donated to a civil rights organization that opposes such discrimination can do much to further this goal [of seeking judicial redress for unlawful discrimination]. Litigation to secure the full measure of the law's protection has frequently depended on the exertions of organizations dedicated to the enforcement of the Civil Rights Acts. Consequently, when an allowance of attorney's fees is justified, it should be measured by the reasonable value of the lawyer's services. It should not be diminished because the attorney has agreed to contribute the money, in whole or in part, to a civil rights organization whose aims have stimulated him to work voluntarily.

Another case cited by complainant's counsel in support of their claim that they are entitled to be paid even though they work for a nonprofit organization is Torres v. Sachs, 538 F.2d 10 (2d Cir. 1976), in which the court cited the Tillman case above, among others, in holding that attorneys' fees should be awarded in cases involving attorneys who work for civil rights organizations or have undertaken cases without exacting a fee. The court stated that award of attorneys' fees to nonprofit, public-interest organizations "* * * promotes their continued existence and service to the public" (538 F.2d at 13).

Even though the Center for Law and Social Policy agreed to represent complainant in this case without an agreement that it would be paid anything by complainant for its services except out-of-pocket costs, the award of reasonable attorneys' fees in the amount provided for in this proceeding will promote the Center's efforts in providing legal assistance to miners or their representatives in future situations where discriminatory treatment is alleged to have occurred.

Having disposed of respondent's preliminary challenges, it is now possible to turn to the final objection to awarding attorneys' fees raised by respondent in its brief filed February 9, 1981. That objection is that the statutory provision, or section 105(c)(3) here involved, does not give a judge authority to award attorneys' fees because section 105(c)(3) permits an award of attorneys' fees to be made only when such fees have been incurred as a cost or expense "* * * by the miner, applicant

for employment or representative of miners for, or in connection with, the institution and prosecution of

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* * *" the complaint. In other words, respondent claims that since complainant did not specifically incur any attorneys' fees as a part of its costs or expenses, I am barred from awarding any attorneys' fees to the counsel who did bring the action on complainant's behalf. I believe that respondent seeks an overly narrow interpretation of the statutory language. While it is true that complainant did not have a contract with its attorneys under which it specifically agreed to pay attorneys' fees, complainant knew that it could not hope to prevail without being represented by attorneys with a knowledge of the Act. Therefore, it cannot be denied that expenditures of time and effort by attorneys were made "* * * in connection with, the institution and prosecution of" this proceeding. The supplemental data (p. 6) submitted by complainant's attorneys clearly show that they expected to seek an award of attorneys' fees if they prevailed. Consequently, although complainant did not expect to pay any attorneys' fees, the attorneys who represented complainant clearly expected to be paid for their services if their client turned out to be the prevailing party in this proceeding. For the foregoing reasons, I reject the arguments advanced by respondent's counsel in his "Response to Complainant's Submission of Supplemental Data" filed February 9, 1981.

EPILOGUE

In Lindy II, supra, the court stated (540 F.2d at 116):

> We find it necessary also to observe that we did not and do not intend that a district court, in setting an attorney's fee, become enmeshed in a meticulous analysis of every detailed facet of the professional representation. It was not and is not our intention that the inquiry into the adequacy of the fee assume massive proportions, perhaps even dwarfing the case in chief. * * *

Despite the foregoing observation, the court stated that the judge should consider the quality of the attorneys' work and should inquire separately into various factors, such as contingency fees, which have been considered in my opinion. Judges have been reversed for failing to explain in detail why they have increased or decreased the hourly rates or number of hours claimed by attorneys in the cases before them. Therefore, regardless of what a court's intention may be, the determination of attorneys' fees is a difficult and complex task which requires weeks of work when each claim by complainant's attorneys is contested by respondent's counsel.

The unfortunate aspect of my decision on the issue of attorneys' fees in this proceeding is that the Commission may reverse my original decision on the merits of the case. If the Commission reverses my finding of an implied violation of the Act, the weeks of work which were devoted to determining attorneys' fees will be completely wasted because complainant's attorneys will not be entitled to an award of any fees.

A means exists for avoiding the time-consuming and distasteful chore of determining attorneys' fees, pending completion of review proceedings. It is

obvious from the objections raised by respondent's counsel to the fees claimed by complainant's attorneys that he would have been willing to agree on a settlement of the matter, pending review, if complainant's attorneys would have agreed to charge no more than he did for an hour's work, that is, $70 instead of the $85 hourly figure claimed by complainant's senior attorney. The other primary objection raised by respondent's counsel to the fees sought by complainant's attorneys was their claim for a bonus of 15 percent. In such circumstances, there is no reason whatsoever that, pending the Commission's decision on appeal, respondent could not have been ordered to pay legal fees based on $70 per hour and other hourly rates which respondent's counsel was willing to accept, pending the outcome of his appeal. If that procedure had been followed in this instance, my original decision could have awarded an amount based on reduced hourly rates and deletions of the request for a bonus until such time as the Commission had ruled on the issues raised on appeal. Thereafter, if respondent's attorney and complainant's attorneys were still unable to reach a satisfactory stipulation with respect to attorneys' fees, assuming my decision had been affirmed, a proceeding could then have been held or pleadings could have been filed, as they were in this case, and the question of attorneys' fees could have been determined on a final basis.

As this case now stands, if the Commission affirms my decision, there will still have to be another phase in this proceeding which will require me to write another lengthy decision dealing with the claims for legal fees and expenses to be submitted by complainant's attorneys for the work they have already expended, or will expend, on behalf of complainant for the period after October 31, 1980.

In all future cases, I intend to follow the procedure outlined above so as to avoid the possible waste of weeks of work in determining attorneys' fees in any case in which the parties have indicated that they intend to file a petition for discretionary review at the time a determination as to contested attorneys' fees has to be made.

WHEREFORE, it is ordered:

For the reasons hereinbefore given, paragraph (C)(3) of my decision issued October 3, 1980, in the proceedings in Martin County Coal Corporation, et al., Docket Nos. KENT 80-212-R, et al., is amended to read as follows:

> (3) To reimburse the Council of the Southern Mountains, Inc., for expenses directly incurred by the Council in the amount of $626.69 and to pay the Center for Law and Social Policy an amount of $13,257.25 in attorneys' fees plus an amount of $846.57 for expenses claimed by the Center's attorneys less (a) the cost of one round-trip plane fare from Washington, D.C., to Huntington, West Virginia, (b) the cost of one person's lodging associated with the trip to Pikeville,

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and (c) the cost of one person's meals associated with the trip to Pikeville.

Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

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~FOOTNOTE_ONE

a. As a 501(c)(3) non-profit organization, the Center legally cannot accept fees from its clients. It may receive only court awarded or approved legal fees, or it will lose its tax-exempt status. Rev. Rul. 75-76, 1975-1 C.B. 154.