

CCASE:

JAMES ELDRIDGE V. SUNFIRE COAL

DDATE:

19830711

TTEXT:

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

JAMES ELDRIDGE,
COMPLAINANT

Complaint of Discrimination

Docket No. KENT 82-41-D

v.

SUNFIRE COAL COMPANY,
RESPONDENT

ORDER AWARDING BACKPAY AND LEGAL FEES

In response to my Order of April 5, 1983, the parties filed their claims and supporting arguments with respect to the compensation due the complainant in this case. Respondent's "calculations of lost wages", filed with me on April 27, 1983, covers the period from August 6, 1981, the date of the complainant's discharge, through and including September 9, 1982, the date on which the respondent claims it ceased operations and terminated its work force, and the date that the complainant would have been finally terminated had he continued in respondent's employment. Respondent's calculations for the total gross wages, without deductions for withholdings, state and local taxes, which the complainant would have earned had he continued in respondent's employment is \$18,634.60, and those calculations were arrived at by an affidavit executed by respondent's personnel director. Included in those calculations is the sum of \$17,879.40 in gross wages, plus accrued vacation time in the amount of \$755.20, for a total of \$18,634.60. The wage calculations include a weekly summary for each company payroll period in 1981 and 1982, the hours worked, the hourly wage, and periods of lay-offs. The calculations for 1981 are based on the payroll periods ending August 15, 1981 through December 25, 1981, and for the year 1982, they are computed for the payroll period ending January 4, 1982, through September 10, 1982, when the respondent asserts the mine was closed and all employees were terminated.

In addition to its calculation of the complainant's gross wages, respondent asserts that the complainant earned gross wages in the amount of \$255.20 as an employee of Linefork Coal Corporation, and the sum of \$3,005 as an employee of P.M. Coal Company, and in support of this assertion included copies of the complainant's withholding statements for these employments subsequent to his discharge.

Respondent asserted that subsequent to his discharge, the complainant had received unemployment insurance benefits in the amount of \$3,444; \$560 from an extended benefits claim; and \$2,240 for federal supplemental compensation, the sum of which totals \$6,244. Respondent maintained that it is entitled to deduct this amount from complainant's gross wages, and based on its submitted calculations, stated that the total gross wages

which complainant should receive subsequent to his discharge of August 6, 1981, is \$9,130.40, based on the following:

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\$18,634.60.....Wages complainant would have earned had he not been discharged.
 - 3,260.20.....Less wages earned subsequent to discharge.
 \$15,374.40
 - 6,244.00.....Less unemployment benefits and compensation.
 \$ 9,130.40.....Total respondent claims is due.

With regard to any award of costs and attorneys fees, respondent argued that the complainant in this case was represented by the Appalachian Research & Defense Fund of Kentucky, Inc., an organization which respondent believes is federally funded. Although recognizing the fact that an attorney would ordinarily be entitled to be compensated for services performed in representing the complainant in this matter, respondent apparently takes the position that since the legal services organization which pursued his claim is federally funded, by its mandate, it should not have accepted this case. By doing so, respondent infers that the organization which represented the complainant provided free legal service, and the complainant incurred no legal expenses in pursuing his claim. Accordingly, respondent concluded that no amount should be awarded as attorney's fees for complainant's legal representation in this case.

In its response to my Order of April 5, 1983, complainant's counsel took issue with the following items submitted by the respondent in its calculation of lost wages, and requested an opportunity for additional discovery:

- lack of documentation for the assertion that complainant would have worked less than 40 hours during several weeks of the back-pay period.
- lack of documentation to support the assertion that the complainant would have been laid off during a three month period from October-December 1982.
- failure by the respondent to address the question of reinstatement, particularly in view of information received by the complainant that any sale of Sunfire Coal Company includes a clause providing for reinstatement by the purchaser of laid-off miners.

Complainant's calculations of the backpay and costs due are stated in a copy of a letter dated March 24, 1983, to respondent's counsel, and they are as follows:

Wages through September 10, 1982	\$25,804
Minus wages earned	- 3,260
Back owed	\$22,544
Interest	x .12
	\$ 2,705
Backpay + interest	\$25,249
Mileage	+ 92
TOTAL	\$25,341

Complainant's calculations of attorneys' fees and costs are reflected in itemized exhibits which show the dates the work and expenses were performed and incurred, the type of work or expense, and the number of hours devoted to each task. In summary, these fees and costs, for legal services through October 21, 1982, are as follows:

Tony Oppegard:	284.3 hours at \$70/hr.	\$19,901
Stephen A. Sanders:	34.5 hours at \$50/hr.	1,625
	attorneys' fees	\$21,526
	mileage	+ 289
	phone	+ 53
	other expenses	+ 304
	(depositions, transcript, witness fees, etc.)	
	TOTAL	\$22,172

In response to the respondent's assertion that unemployment compensation benefits should be deducted from any back-pay due the complainant, complainant's counsel asserted that such benefits should not be considered interim earnings, and thus should not be deducted from any backpay award, and in support of this argument he cites 3 NLRB Casehandling Manual 10604.1, Bradley v. Belva Coal Co., 3 FMSHRC 921 (1981); Neal v. Boich, 3 FMSHRC 443 (1981); Wilson & Rummel v. Laurel Shaft Const. Co., 2 FMSHRC 2623 (1980); NLRB v. Pan Scape Corp., 607 F.2d 198 (7th Cir. 1979); Marshall v. Goodyear Tire & Rubber Co., 554 F.2d 730 (5th Cir. 1977).

In response to the respondent's argument that the complainant has incurred no legal expenses in pursuing his claim because of legal representation furnished him by the Appalachian Research & Defense Fund of Kentucky, Inc., a legal services organization, complainant's counsel states that this argument is wholly without merit and that similar challenges have been rejected not only by a Commission Judge, Bradley v. Belva Coal, 3 FMSHRC 921, 924 (1981), but by the eight U.S. Circuit Courts of Appeals that have considered the issue. Bonnes v. Long, 599 F.2d 1316 (4th Cir. 1979); Weisenberger v. Huecker, 593 F.2d 49 (6th Cir. 1979); Mid-Hudson Legal Services v. G & U, Inc., 578 F.2d 34 (2nd Cir. 1978); Perez v. Rodriguez Bou, 575 F.2d 21 (1st Cir. 1978); Rodriguez v. Taylor, 569 F.2d 1231 (3rd Cir. 1977); Bond v. Stanton, 555 F.2d 172 (7th Cir. 1977), cert. denied, 438 U.S. 916 (1978); Sellers v. Wallman, 510 F.2d 119 (5th Cir. 1975); Brandenburger v. Thompson, 494 F.2d 885 (9th Cir. 1974).

Complainant's counsel points out that respondent has cited no authority to support its argument that the Appalachian Research & Defense Fund of Kentucky, Inc., should not have accepted this case because of its Congressional "mandate". Counsel states further that Federal Courts have uniformly held that challenges to the propriety of Legal Services programs representing clients in particular access are improper in a lawsuit because eligibility for federally-funded legal services is a question of internal program administration, to be resolved

according to administrative procedures. *Harris v. Tower Loan of Mississippi*, 609 F.2d 120 (5th Cir. 1980); *Martens v. Hall*, 444 F. Supp 34 (S.D. Fla. 1977); *Jacobs v. Board of School Comm'rs*, 349 F. Supp. 605 (S.D. Ind. 1972), *aff'd*, 490 F.2d 601 (7th Cir. 1973), *dismissed as moot on other grounds*, 420 U.S. 128 (1975).

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After receipt of the responses to my April 5, 1983 order, I issued another order on May 3, 1983, granting the complainant's motion for further discovery, and I also ordered production of certain personnel and payroll records in the custody of the respondent for the complainant's review. Subsequently, complainant's counsel filed a motion for a subpoena duces tecum requesting certain payroll records for the years 1980-1983, a second set of interrogatories, and a motion for a hearing date. Respondent has filed oppositions to these motions and states that the company has ceased mining operations and no longer has any regular employees with knowledge of the further information requested by the complainant.

The respondent has answered complainant's first set of post-hearing interrogatories and has also made available certain company payroll and personnel documents requested by complainant's attorney for their joint review. Complainant's counsel states that he has reviewed the information provided, but has advanced no valid argument justifying any subpoena duces tecum for these records. Accordingly, the motion for a subpoena IS DENIED.

Although I did indicate in one of my previous orders that I would consider scheduling a hearing if the parties could not agree on the compensation due to the complainant, I have reconsidered the matter and have now decided that any further hearing in this case is not warranted. Accordingly, complainant's motion for a hearing date IS DENIED.

With regard to the complainant's motion for additional discovery, I believe that there is enough information of record to enable me to rule on the compensation question without the need of further discovery. It seems obvious to me that counsel for both sides are at odds with each other over the claimed compensation, and any further discovery will be nonproductive. Accordingly, complainant's motion for further discovery IS DENIED.

Attorneys Fees and Costs

Respondent's objections to the awarding of any attorney fees and other costs of litigation is limited to a legal argument that Counsel Opeppard's employer is a quasi-public corporation funded in part by Federal funds. Counsel Roark has filed no objection to the reasonableness of the claimed attorney fees and costs, and Counsel Opeppard has filed a detailed itemized statement of expenses and costs.

After careful review and consideration of the arguments and documentation filed by the parties, I conclude and find that respondent's arguments concerning the eligibility of the Appalachian Research & Defense Fund of Kentucky, Inc., to be compensated for its services in this case are without merit and they are rejected. I conclude and find that Mr. Opeppard's employing agency is entitled to be compensated for the services performed on behalf of Mr. Eldridge in pursuing his claim in this

case. I also conclude and find that the claimed legal fees and costs itemized by Mr. Oppegard, including the \$92 in mileage costs incurred by Mr. Eldridge, appear to be reasonable and they are APPROVED.

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Complainant's unemployment compensation benefits

Respondent's arguments that any unemployment payments made to Mr. Eldridge should be deducted from any award of backpay are REJECTED. I accept the arguments advanced by complainant in support of the proposition that such payments should not be deducted. If such payments to Mr. Eldridge are illegal under state or local laws, I leave it to those jurisdictions to pursue their claims against Mr. Eldridge.

Complainant's backpay

The only thing that the parties agree on is that the sum of \$3260, representing wages earned by Mr. Eldridge during the time he was discharged, should be deducted from any base backpay figure. Although the record contains a letter of June 17, 1983, indicating that Mr. Eldridge is willing to compromise with the respondent by accepting a base backpay figure of \$25,804, less interest, in exchange for Mr. Eldridge's foregoing his additional claims for overtime, vacation time, and a bonus, the parties obviously cannot compromise or otherwise settle the matter of compensation.

The initial submission on behalf of Mr. Eldridge concerning his claimed backpay is in the form of a letter from Counsel Oppedard to Counsel Roark, stating that his earnings through September 10, 1982, were \$25,804. Although Counsel Oppedard submitted a detailed itemized breakdown of hours worked in support of his claimed attorney fees, the claimed backpay is simply stated as a lump sum figure with no supporting documentation or itemization. On the other hand, respondent's submissions concerning Mr. Eldridge's back wages are supported by an itemized breakdown, by payroll period, with supporting affidavits.

With regard to the respondent's calculations of lost wages, Mr. Eldridge's counsel takes issue with the assertion by the respondent that Mr. Eldridge would only have worked 36 hours during the pay period ending 3/20/82 and 32 hours during the pay period ending 6/11/82. Counsel Oppedard states that the respondent's payroll records reflect that 74 mine employees worked a full 40 hour week during the first disputed payroll period, and that 86 mine employees worked a full 40 hour week during the second disputed period. He therefore concludes that Mr. Eldridge would more than likely have worked full 40 hour weeks during these periods which are in dispute. After review and consideration of the information furnished by the parties concerning these disputed pay periods, I conclude that Mr. Eldridge should be compensated for the full 40 hour weeks in question, rather than the 32 hour and 36 hour weeks as stated by the respondent.

It seems clear to me that the backpay period in this case begins on August 6, 1981, the date of Mr. Eldridge's discharge, and ends on September 9, 1982, the date that the mine closed and mine operations ceased. Counsel Oppedard's lump sum backpay

claim of \$25,804, up to and including September 10, 1982, obviously does not take into account the 1981 layoff periods shown in respondent's detailed statement of wages earned, two days on July 2 and 9, 1982, where respondent claims Mr. Eldridge was not due any vacation pay, and some possible overtime which may have been earned by Mr. Eldridge but omitted in the respondent's calculations.

The affidavits and other information filed by the respondent indicates that the Sunfire Coal Company has ceased all mining operations and no longer has any regular employees. Given these circumstances, I believe that any further efforts attempting to document such matters as speculative and estimated overtime hours, layoffs which took place over a year or so ago, etc., etc., would be a fruitless exercise, and would only result in additional delays in bringing this matter to finality, plus additional legal costs, none of which are to Mr. Eldridge's benefit. Accordingly, in order to bring this matter to finality, I will decide the backpay compensation due Mr. Eldridge on the basis of the information of record, and in particular, the detailed compensation calculations submitted by the respondent, as supported by a sworn affidavit of its personnel director. On the basis of that information, which I find credible, I award backpay and other compensation as follows:

Total 1981 Gross Wages.....	\$ 3,616.00	
Total 1982 Gross Wages.....	\$ 14,263.40	
12 additional work hours for payroll periods ending 3/20 and 6/11/82 at \$11.80 hrly. rate.....	\$ 141.60	
	\$ 18,021.00	
Accrued Vacation Days (8).....	\$ 755.20	
	\$ 18,776.20	
Minus wages earned.....	-\$ 3,260.00	
	\$ 15,516.20	
Interest at 12%.....	\$ 1,861.95	
	\$ 17,378.15	
Mileage expenses incurred by Mr. Eldridge.....	\$ 92.00	
	\$ 17,470.15	TOTAL

ORDER

Respondent shall pay to Mr. Eldridge the sum of \$17,470.15, less any amounts withheld pursuant to state and Federal law, and payment is to be made within thirty (30) days of the date of this Order.

Respondent shall pay to the Appalachian Research & Defense Fund of Kentucky, Inc., Hazard, Kentucky, the sum of \$22,172, as attorneys fees and legal costs, and payment is likewise to be made within thirty (30) days of the date of this Order.

George A. Koutras
Administrative Law Judge