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JOSEPH BURNS V. ASARCO
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

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| JOSEPH D. BURNS,<br>COMPLAINANT | COMPLAINT OF DISCRIMINATION<br>(Fee Application) |
| v. | Docket No. YORK 82-19-DM |
| ASARCO, INC.,<br>RESPONDENT | Manchester Unit |

DECISION

Statement of the Case

This case is before me on complainant's application for attorney fees(FOOTNOTE 1) pursuant to section 105(c)(3) of the Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(3). The fee application is the final phase of a discrimination complaint filed by Joseph D. Burns against ASARCO, Incorporated, a large multinational non-ferrous metal company.

From 1973 to March 1981, Burns was employed as a repairman at ASARCO's Manchester Unit, an open-pit illemite mine located in Lakehurst, New Jersey. One of Burns' duties was to repair a floating suction dredge utilized to extract alluvial sands from a water-filled pond approximately 65 feet deep.

On March 20, 1981, Burns was instructed by his foreman, Thomas Wheeler, to repair cracks in the cross braces of a dredge ladder. Burns refused to do the work because the ladder was improperly braced and stabilized and he feared for his safety. As a result, he was discharged for insubordination.

Believing his refusal to work was a protected activity within the meaning of section 105(c)(1) of the Mine Act, Burns filed a complaint with the Mine Safety and Health Administration (MSHA). Nine months later, MSHA advised Burns that his disciplinary discharge did not constitute a violation of section 105(c)(1) of the Act. Persisting in the belief that he was unlawfully discharged, Burns filed a complaint pro se with the Commission. In February 1982, perfecting amendments to the complaint were received and after ASARCO filed its answer in March the matter was assigned to this trial judge. The trial judge requested a copy of the MSHA investigative report. Upon its receipt, copies were furnished the parties together with an order to furnish additional pretrial information.(FOOTNOTE 2) The prehearing conference scheduled for July 22, was continued and reset for September 21 when complainant succeeded in engaging the firm of Terris & Sunderland of Washington, D.C. on a pro bono basis. Representing complainant thereafter were Philip G. Sunderland, a partner in the firm and David A. Klibaner, an associate.

Burns' counsel quickly familiarized themselves with the case and on August 12, 1982 endeavored to initiate settlement discussions with William O. Hart, counsel for ASARCO. When Mr. Hart rebuffed these overtures, they were renewed on August 30 and again on September 20, the day before the prehearing/settlement conference.

In each instance, Mr. Hart unequivocally rejected settlement discussions because "ASARCO felt strongly that the complainant was insubordinate, that he was attempting to harass the company and get whatever monies he could from the company through the very liberally worded (and interpreted) discrimination provisions of the Act." At the conference, Mr. Hart was not prepared to consider the strengths and

weaknesses of his case. His excuse was that in five and one-half years of practice before OSHRC and FMSHRC he was never before expected to have reviewed the facts of his case before appearing at a prehearing/settlement conference.

What transpired at the conference of September 21, convinced Mr. Hart to review his case carefully and discuss it with his employer. His concern was triggered by his belief that complainant would be able to establish a prima facie case and thus would be likely to prevail on the merits. Nonetheless settlement attempts during October and November were unproductive, the parties disagreeing on the amount of backpay for overtime to which Burns was entitled, and the necessity for treating complainant's damage claim separately from the claim for attorney fees in any settlement. On December 3, 1982, four days before the date set for trial in Toms River, New Jersey, the parties agreed to bifurcate the matter by settling Mr. Burns' claim for $4,000 and leaving the question of attorney fees and expenses for determination by the trial judge.

Thereafter, counsel for Burns submitted a fully documented fee application and a reply to ASARCO's opposition. Supplementing the application is a memorandum in support thereof, an affidavit by Philip Sunderland, and copies of all time sheets and expense receipts pertaining to the work done by Terris & Sunderland personnel on the Burns case. Applicants ask for $11,011.14 in fees and expenses resulting from 170.25 hours of work.

Respondent submitted a generalized opposition to the application claiming the case was so simple, obvious and straightforward that any award should be limited to not more than $2,000. After consideration of the application, opposition and reply, I determined respondent had not supported with sufficient particularity its challenge to the number of hours expended and issued an order requiring respondent to show cause why the application should not be granted. Respondent filed its response on July 22, 1983.

The following chart summarizes the amounts claimed by Terris & Sunderland for Attorney fees and expenses:

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| | WORK CATEGORIES | HOURS(FOOTNOTE 3) | AMOUNT |
|---|---|---|---|
| I - | Initial Preparation | 30.75 | $2,325.00 |
| II - | Preparation of Proposed Stipulations of Fact, Conclusions of Law and Proposed Findings of Fact and Conclusions of Law | 27.25 | 1,835.00 |
| III - | Hearing Preparation | 40.25(FOOTNOTE 4) | 2,511.25 |
| IV - | Calculation of Damages | 16.25 | 596.25 |
| V - | Settlement Discussions | 10.00 | 718.75 |
| VI - | Subpoenas | 4.75(FOOTNOTE 5) | 315.00 |
| VII - | Preparation of Attorney Fees Application | 41.00(FOOTNOTE 6) | 2,402.50 |
| | Total | 170.25 | $10,703.75 |
| | | Expenses | 307.39 |
| | | Total | $11,011.14 |

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The trial judge has reviewed the fee application in considerable detail and concludes (1) ASARCO failed to show any of the time claimed was excessive or unreasonable, (2) the fair market value of the services rendered is the amount claimed, $11,011.14 plus interest from the time the application was filed.

## Market Value Formula

While the Commission has not addressed the question,(FOOTNOTE 7) the Supreme Court and the federal courts of appeal have held that under statutes that provide for public interest enforcement the award of fees to prevailing parties should include compensation (1) for all time reasonably expended, (2) at rates that reflect the full market value (hourly rates) for such time. Hensley v. Eckerhart, 51 L.W. 4552, 4554-4555, 4558 (1983); Copeland v. Marshall, 614 F.2d 880, 890-900 (D.C. Cir. 1980) (en banc); Lindy Bros. Bldrs. v. American Radiator Standard Sanitary Corp., 540 F.2d 102, 112-118 (3d Cir. 1976); Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-719 (5th Cir. 1974); Laffey v. Northwest Airlines, C.A. 2111-70, (D.D.C., July 29, 1983). Under this formula, known as the Copeland III or market value formula, the number of hours reasonably expended is multiplied by the applicable hourly rates for the attorneys to arrive at the "lodestar" calculation. Copeland, supra, 641 F.2d at 891. A reasonable hourly rate is defined as that prevailing in the community for similar work. Id. at 892. Once established, the lodestar may be adjusted upward or downward to reflect the characteristics of the case (or counsel) for which the award is sought. A premium is usually awarded if counsel would have received no fee if the suit was unsuccessful, unless the hourly rate reflects that factor. In addition, the lodestar may be increased or decreased to recognize a delay in payment or legal representation of superior or inferior quality. Id. at 892-894. In multi-claim proceedings no fee is recoverable for services on unsuccessful claims. Henseley, supra.

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In evaluating fee applications the trial judge is required to exercise considerable discretion and to articulate his analysis as clearly as possible. Unless the end product falls outside a rough "zone of reasonableness," or unless the explanation articulated is patently inadequate, a reviewing authority as a matter of sound judicial administration will not disturb the trial judge's solution to the problem of balancing the many factors that have to be taken into account. Cf. Permian Basin Area Rate Cases, 390 U.S. 747, 767 (1968). To accomplish the statutory purpose attorneys must feel confident they will receive fair compensation for their efforts when they are successful. By the same token, operators must be assured that judicial oversight and discretion will be exercised to prevent "windfalls."(FOOTNOTE 8)

Burden of Proof

Recognizing that the analytical framework established by the market value formula places a difficult, sometimes onerous, burden on the trial judge(FOOTNOTE 9) the courts have held this burden can only be lightened by placing on the fee applicant a "heavy obligation" to document the various facets of his claim. To meet this burden and to establish the time expended was reasonable, the fee application must contain detailed information about the hours logged and the work done. Nat. Ass'n of Concerned Vets. v. Sec. of Defense, 675 F.2d 1319, 1323-1324 (D.C. Cir. 1982). While the fee application need not present "the exact number of minutes spent nor the precise activity to which each hour was devoted nor the specific attainments of each attorney," the application must be sufficiently detailed to permit the

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trial judge to make an independent determination of whether the hours claimed are justified. Id. at 1327. Casual, after-the-fact estimates are insufficient. Attorneys who anticipate making fee applications must maintain contemporaneous, complete and standardized time records which accurately reflect the work done.(FOOTNOTE 10) Ibid. The application should also indicate whether nonproductive time or time expended on unsuccessful claims was excluded.(FOOTNOTE 11)

Once a properly documented application is submitted, the burden shifts to the party opposing the fee award, who must submit facts and detailed affidavits to show why the applicants' request should be reduced or denied.(FOOTNOTE 12) Donnell v. United States, 682 F.2d 240, 250 (D.C. Cir. 1982); Concerned Veterans, supra, at 1337-1338 (concurring opinion of Judge Tamm). Opposing counsel must frame his objections with particularity and specificity. The trial judge is not expected sua sponte to "inquire into the reasonableness of every action taken and every hour spent by counsel, and will consider objections to filed hours only where ÕheÊ has been presented with a reasonable basis for believing the filing is excessive." Donnell, supra, at 250. It is not enough for opposing counsel to state the hours claimed are excessive and/or the rates too high and expect the trial judge to make a line item audit and assume the burden of making the particularized showing necessary to support such a conclusory position. Concerned Veterans, supra, at 1338, Copeland, supra, 903.

ASARCO did not seek discovery to support its assertion that the hours claimed were excessive. It simply asserts that the application as presented and supported was too vague and indefinite to permit a rational evaluation.

ASARCO concedes Burns was the prevailing party, the reasonableness of applicants' hourly rates and the applicability of the lodestar or market value method of evaluating the application.

The sole challenge made is to the reasonableness of the number of hours claimed for the particular services performed. My independent analysis concludes the hours claimed were reasonable in view of the difficulties encountered in developing the necessary support for complainant's prima facie case and ASARCO's total lack of cooperation in limiting, until after the fact, the issues to be considered in deciding the fee application.

Hours Reasonably Expended

Sufficiency of the Application

Applicant's submission was sufficiently detailed to permit opposing counsel to conduct an informed appraisal of the merits of the application or to file a detailed and focused request for any discovery deemed essential to permit such an attack. The trial judge's analysis finds that, in accordance with the market value formula, the application includes a breakdown and itemization within seven categories of the work performed, an affidavit describing in adequate detail the work actually performed by counsel and the paralegals, the time sheets of the attorneys and paralegals who performed the work, documentation of the expenses claimed and resumes of the qualifications and attainments of the lawyers involved. From this data, detailed schedules for each attorney and paralegal who worked on the case listing specific tasks performed (e.g., "prehearing conference," "prepare stipulations," "draft findings," "draft FOIA request," "calculate damages," "discuss settlement," "research and prepare fee affidavit") were compiled. In addition, applicants submitted a supporting memorandum and a response to ASARCO's opposition. Each of these documents were independently researched in order to evaluate their worth and to form my own independent view of the many procedural, policy and factual issues presented(FOOTNOTE 13) in this the first separately contested fee application submitted to the Commission under

the market value formula.(FOOTNOTE 14) I find ASARCO's claim that the application is too conclusory to permit anything other than a generalized attack lacking in merit.

As the courts have admonished, fee contests should not be allowed to evolve into exhaustive trial-type proceedings or result in a second major litigation. Henseley, supra, at 4555; Concerned Veterans, supra, at 1324; Copeland, supra at 896, 903. If each victory on the merits is but the prelude to an all-out war over the reasonableness of the fee claimed attorneys may be deterred from pro bono representation of miners asserting their rights to be free of unlawful coercion, retaliation, interference, and discrimination. Should this occur, the legislative purpose will be frustrated.(FOOTNOTE 15)

Challenges to the Lodestar

ASARCO's opposition and its response to the show cause order reflect its disdain for the whole proceeding and smack more of a dilatory, blunderbuss attack than a well conceived, lawyerlike, challenge. That opposing counsel allegedly chose to spend only 32 to 45 hours in defending the case may be of interest to his employer but is hardly the measure of

the effort reasonably warranted in behalf of a complainant.(FOOTNOTE 16) The trial judge is not in a position to take such a bald assertion seriously.(FOOTNOTE 17) As a basis for comparison not only is it irrelevant, it is also wholly undocumented.

After all, if applicants did not win they got nothing, whereas opposing counsel would be on the corporate payroll regardless of the outcome.(FOOTNOTE 18) In a case he did not believe he could win and with generous authority to settle at any time, opposing counsel chose to sit back and let complainant's counsel "sweat it out."

The fact that opposing counsel chose to spend so little time in preparation for both the pretrial and the trial is more a commentary on his own evaluation of the lack of merit of his defense than a basis for criticizing the efforts by complainant's counsel. It is true, of course, that the Solicitor's finding of no violation gave opposing counsel some grounds for complacency and complainant's counsel considerable cause for concern. With this concern in mind, applicants were hardly in a position to take the matter of trial preparation lightly. Counsel working on a contingent fee basis, unlike counsel who work on a guaranteed salary basis, have to make money the old fashioned way. They have to earn it. I reject, therefore, the "invidious comparison of time expended" approach espoused by opposing counsel as a sound basis for reducing or denying any of the time claimed by applicants.

ASARCO's claim that 170 hours is far too much for a "straighforward" case such as this is equally without merit. As respondent admits there were seven disputed issues of fact, several of which turned on the credibility of opposing, extremely hostile witnesses. This case had to be prepared in the manner of all classic swearing matches--leave no stone unturned to develop information useful in impeaching the opposition's witnesses, and thoroughly prepare your own witnesses for a rigorous cross examination. In view of the number of witnesses involved (12 to 15) and

the incentive for them to be selective in their testimony, I cannot conscientiously find that the 98.25 hours of time expended in preparation for the trial of this matter was by any reasonable standard excessive.

The proposed stipulations and proposed findings of fact challenged were contemplated by the pretrial orders. Their function was to clarify and narrow the issues in order to save trial time. It is undisputed that respondent's counsel depended heavily on applicant's work product in preparing his own proposed findings. It hardly lies in opposing counsel's mouth, therefore, to argue that the time expended, 27.25 hours, was unnecessary. My review of these proposals shows applicants did a thorough, competent and responsible job, particularly with respect to the damage calculations. I am unable to conclude that the time expended was unreasonable. Certainly respondent has furnished no probative basis for my doing so.

If anything, I find the work performed by the paralegals in calculating the damages was extremely efficient considering the difficulties they encountered. Reconstructing complainant's overtime in the face of respondent's reluctance to cooperate was no mean feat. I cannot fault the 16.25 hours expended for this work.

Respondent has not questioned the 10 hours spent in settlement discussion. Nor has any question been raised about the 4.75 hours expended in preparing subpoenas for witnesses. The extra work involved in persuading the Department of Labor to allow the MSHA Special Investigator to appear was certainly time well spent even though his appearance later became unnecessary. His prospective appearance was obviously a factor that contributed to the settlement.

The claim that time spent in trial preparation on and after October 7, 1982, was unnecessary is without substance.(FOOTNOTE 19) Counsel admits that shortly after the pretrial conference of September 21, 1982, ASARCO authorized him to settle the matter for $5,000. Despite this, he delayed making the offer until applicants called him on October 7 and proposed

settling the matter for $7,000.(FOOTNOTE 20) Mr. Hart rejected this but countered with an offer to settle both claims for $4,000. When the counteroffer was rejected, applicants again proposed separating the damage claim from the fees claim and to settle the former for $5,750. This was on November 22, 1982. Mr. Hart considered the proposal "insulting" and never responded.

In the meantime, applicants were expending considerable time in preparation for the trial which had been set for December 7, 1982. On the eve of trial, December 3, 1982, Mr. Hart suddenly reversed his position and thereafter the parties agreed to settle complainant's claim for $4,000 and to submit applicants' fees for determination by the trial judge.

While attorney fee applications are closely related to the merits proceeding, they are at the same time more akin to separate causes of action. It is the mixed nature of such proceedings that gives rise to much misunderstanding and procedural floundering. ASARCO's claim that applicants' refusal to take their fees and expenses out of a common fund was a ploy to prolong unnecessary trial preparations shows a lack of sensitivity to the relevant ethical and tactical considerations. The Code of Professional Responsibility prohibits an attorney from representing a client where the lawyer's personal financial interest may be in conflict with that of his client. DR 5-101(A). Thus, where a lump sum settlement is offered to cover both damages and fees the lawyer and his client are invited to compete over how the fund shall be shared. This creates a conflict of interest which is best avoided and resolved by settling the two claims separately. Prandini v. National Tea Co., 557 F.2d 1015, 1021 (3d Cir. 1977); Mendoza v. United States, 623 F.2d 1338, 1352-1353 (9th Cir. 1980); Obin v. Dis. 9 of Intern. Ass'n. etc., 651 F.2d 574, 582 (8th Cir. 1981).

It was not, therefore, improper for applicants to insist that the fees question be decided separately from the settlement on the merits. Further, it would be contrary to the legislative purpose to force miners to absorb attorney fees and expenses or to allow operators to force their attorneys to compete with their clients for reimbursement for such fees and expenses.

Counsel for ASARCO was aware from the beginning that applicants were reluctant to take a discounted common fund settlement and were insisting on separating the two issues. At any time on or after October 7, 1982, Mr. Hart could have saved the expenditure of time for trial preparation by agreeing to bifurcate the matter. Applicants were duty bound to continue their preparation until the matter was settled. The pressure of such preparation and the imminence of the trial date undoubtedly encouraged reversal of ASARCO's position with respect to separation of the issues. To deny or reduce the hours spent in trial preparation would unfairly penalize applicants and encourage a practice inimical to the purpose of the statute and high professional standards.

For reasons previously stated, ASARCO's objection to the time spent in preparing applicants' supporting memorandum is denied.(FOOTNOTE 21) Once Mr. Hart made the decision to require applicants to prepare and file a fully supported lodestar application rather than to stipulate with respect to matters that have subsequently been conceded, applicants in the exercise of responsible professional judgment had no choice but to follow the applicable precedents and to furnish the trial judge and the Commission with a fully articulated rationale for awarding the same fees that would be charged a fee-paying client under the market value approach.(FOOTNOTE 22)

The hourly rates of $90 for Mr. Sunderland, $65.00 for Mr. Klibaner, and $25.00 for the paralegals are not contested

and are certainly reasonable.(FOOTNOTE 23) No request is made for an increase in the lodestar due to the contingent nature of the arrangement because the billing rate already includes an allowance for that contingency.

I find the quality of representation was at the level of skill normally expected for attorneys practicing at these rates and that no upward or downward adjustment in the lodestar is called for on the basis of the results achieved.(FOOTNOTE 24) To account for the delay in payment, however, the award should include interest at the market rate from the date of filing of the application. Donnell, supra at 254; EDF v. EPA, supra, at 51-52; Copeland, supra, at 893; Concerned Veterans, supra, at 1329. Interest, of course, reflects the time-value of money. That when coupled with what I find is a fully compensable hourly rate for all hours reasonably expended constitutes the full market value of the services rendered.

Expenses, which were undisputed, amounted to $307.39.

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Order

The premises considered, it is ORDERED that on or before Thursday, September 15, 1983, ASARCO, Incorporated pay attorney fees and expenses in the amount of $11,011.14 with interest at the rate of 12% per annum from the date of the fee application, February 15, 1983, to the date of payment to the law firm of Terris & Sunderland, 1526 18th St., N.W., Washington, D.C., and that subject to payment the captioned matter be DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

FOOTNOTES START HERE-

1 While the accepted practice is to use the word "attorney" as a noun in either the singular or plural possessive, I find it simpler to use it as an adjective.

2 In pro se cases, particularly, the trial judge believes the decisionmaker has a "duty of inquiry" which imposes an obligation to scrupulously and conscientiously explore all relevant facts. Inherent in the concept of a due process hearing is the trial judge's obligation, especially in cases involving unrepresented parties, to inform himself of all facts relevant to his decision. Goss v. Lopez, 419 U.S. 465, 580 (1975); Heckler v. Campbell, 51 L.W. 4561, 4564, n. (1983), (concurring opinion of Justice Brennan).

3 These figures do not include 35 hours of time eliminated from the fee request by applicants in the exercise of "billing judgment."

4 ASARCO's response to the show cause order suggests the total for categories I, II, and III of 98.25 hours was excessive because this work "to a large extent, merged into the general subject of becoming acquainted with the record." This was not time spent becoming acquainted with an existing record, it was time spent in preparing for trial. It was the thoroughness of this preparation that convinced ASARCO to rethink its intransigent position with respect to settlement.

5 Nothing in ASARCO's discursive submittals specifically challenges the time spent on categories IV, V, and VI.

6 The only specific challenge is to the time spent in preparing applicants' supporting memorandum. I consider the time well spent since it contributed greatly to my understanding of the context against which this dispute must be resolved. The discussion of the principles that underlie the lodestar approach was directly relevant to ASARCO's claim that the fees sought are disproportionate to the amount recovered. I can find nothing in the record to support the assertion that ASARCO was prepared to stipulate that the hourly rate was reasonable. On the contrary, ASARCO suggests that at one time it felt the hourly rate should

not exceed $60.00. It was not until after the application was prepared and filed that ASARCO conceded the hourly rates were reasonable.

7 In Glen Munsey, 3 FMSHRC 2056 (1981), rev'd in part and remanded Glen Munsey v. FMSHRC, No. 82-1079, D.C. Cir. 1983, Judge Stewart used the market value or Copeland III approach in awarding fees and expenses of $26,462.50 on a recovery of $2,858.26. See also Joseph D. Christian, 1 FMSHRC 126 (1979) ($26,231.32 awarded in attorney fees and expenses on a recovery of $12,072.52); Council of the Southern Mountains, Inc., 3 FMSHRC 526 (1981), appeal pending, ($14,108.32 awarded in fees and expenses on a recovery of $626.69).

8 The attorney fees remedy is actually an independent cause of action designed by Congress to facilitate litigation by otherwise unrepresented litigants in furtherance of more effective enforcement--enforcement essentially freed of the bureaucratic, political and fiscal constraints that otherwise impairs agency enforcement. The existence of this remedy encourages miners to perform their deputized police function, gives operators a strong incentive to comply and tends to deter unnecessary protraction of public interest litigation.

9 In Council of Southern Mountains, Inc., supra, Judge Steffey complained of having to spend "weeks" evaluating a fee application, apparently assuming the entire burden of doing so was on him. On the other hand, in Glen Munsey, supra, Judge Stewart found that allocation to the parties of the Copeland III burden greatly facilitated his disposition of the matter.

10 This requirement may have to be flexibly applied in Commission proceedings that involve attorneys or parties that do not have the resources to maintain such records. Compare Kling v. Dept. of Justice, 2 MSPB 620 (1980) with O'Donnell v. MSPB, 2 MSPB 604 (1980).

11 Here applicants state 35 hours of time was excluded in the exercise of "billing judgment" which I assume means time considered largely unproductive. Because the nature of the work and the individuals involved were not specified, I have disregarded this factor in evaluating the fee application.

12 Discovery is, of course, available to assist a party in preparing his opposition. Discovery requests should be precisely framed and promptly advanced before final opposition papers are filed. Unfocused requests serve no useful purpose and will be denied. If discovery is pursued for purposes of delay or other improper purposes the final award may take that into account. Compare, Concerned Veterans, supra, at 1329.

13 No pleading by pleading evaluation was made of the underlying case file. In Copeland, supra, at 903, the court held it is neither practical nor desirable to expect the trial court to examine each paper in the case file to decide whether it should have been prepared or could have been prepared in less time.

14 In view of the amounts involved in both the claim on the merits and the fee application, my initial reaction was that the litigants should settle the amount of the fee. I was somewhat shocked, therefore, to find they were so far apart. My "displeasure" over this difference--and not the amount of either--caused me to urge the parties to stipulate away some of their differences and to attempt further settlement discussions.

15 In view of the number of cases in which the Solicitor declines prosecution that are later found to be meritorious in public interest proceedings, it is obvious the agency's enforcement policy leaves much to be desired. During the last 18 months, miners refused protection by the Labor Department were filing cases at almost three times the rate of filing by the agency. Most of these miners are unrepresented but must appear against experienced attorneys representing the operators. This puts a tremendous strain on the trial judge charged, as he often is, with both developing and at the same time trying the facts. See note 2, supra.

16 Casual, after-the-fact estimates of time expended by opposing counsel are no more acceptable than those by fee applicants.

17 Sworn, undocumented assertions are not a lawyerlike way to establish time expended in a matter.

18 The total absence of a risk factor makes time expended by opposing counsel an unacceptable calculus of the time expended by complainant's counsel.

19 Mr. Hart was warned that unless the matter was settled a heavy expenditure of time would be necessary to prepare for trial.

20 At that time it appears the attorney fees may have amounted to only $3,000.

21 Note 6, supra. Time reasonably devoted to obtaining attorney fees is, of course, itself subject to an award of fees. Environmental Defense Fund v. EPA, 672 F.2d 42, 62 (D.C. Cir. 1982).

22 ASARCO, of course, cannot expect the trial judge to protect it against actions by its own counsel that increased its exposure to liability for complainant's fees and expenses. Operators should not be given an incentive to protract litigation in which miners seek to vindicate rights guaranteed by the statute. The prospect of liability for fees and expenses should deter not only violations of the statute but obviate any incentive to litigate imprudently. Copeland, supra, at 899.

23 There is no claim or showing that the associate's efforts were unorganized, wasteful, or duplicative or that the associate's labors were inadequately supervised by the partner. The ratio of the associate's time to the partner's time (3:1) is

within an acceptable zone or reasonableness.

24 The suggestion that the fee claimed is disproportionate to the monetary relief obtained reflects a basic misunderstanding of the fee remedy. The purpose of the fee provision is to give miners victimized by discrimination the resources to vindicate their rights through litigation. Attorneys who undertake such representation face not only the risk of losing but also the fact that in most instances the monetary recovery is relatively modest. It is comparatively easy to obtain competent counsel when the litigation is likely to produce a substantial monetary award. It is much more difficult to attract counsel when a substantial part of the relief sought is intangible and nonmonetary. Here the nonmonetary effect of the litigation is a deterrent to future acts of retaliation against miners who refuse to work under unsafe conditions. If that results in preventing one fatality or one disabling injury the socio-economic purpose of the statute and the litigation will be achieved and will more than justify the fee claimed. "Fee awards that produce substantial nonmonetary benefits must not be reduced simply because the litigation produced little cash." Copeland, supra, at 907.