

CCASE:
GLEN MUNSEY V. SMITTY BAKER COAL
DDATE:
19831212
TTEXT:

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

GLEN MUNSEY,
COMPLAINANT

DISCRIMINATION PROCEEDING

v.

Docket No. NORT 71-96

SMITTY BAKER COAL CO, INC.,
P&P COAL COMPANY, AND
RALPH BAKER,

IBMA 72-21

RESPONDENTS

DECISION

Appearances: Steven B. Jacobson, Esq., DeCastro, West & Chodorow, Inc., Los Angeles, California, for Complainant
J. Edward Ingram, Esq., Robertson, Williams, Ingram, Faulkner & Overbey, Knoxville, Tennessee, for Respondents Smitty Baker Coal Company, Inc. and Ralph Baker

Before: Judge Melick

This proceeding is before me on remand from the United States Court of Appeals, District of Columbia Circuit, *Munsey v. Federal Mine Safety and Health Review Commission*, 701 F.2d 976 (1983), cert. denied, 52 U.S.L.W. 3235 (October 3, 1983) (No. 83-182); for a determination in accordance with the standard set forth in *National Treasury Employees' Union v. U.S. Department of the Treasury*, 656 F.2d 848 (D.C. Cir. 1981), of the amount of costs and attorneys' fees to be awarded counsel for Complainant Munsey for the period during which Mr. Munsey received free representation by staff counsel of his union, the United Mine Workers of America (UMWA).

There is no need to restate here the lengthy history of this case. In sum, the individual complainant, Glen Munsey, has been awarded damages of \$2,858.26 plus interest for lost wages as a result of unlawful discrimination under section 110(b)(2) of the Federal Coal Mine Health and Safety Act of 1969. In addition, for services rendered by counsel for Mr. Munsey, Steven B. Jacobson, Esq., attorneys' fees of \$26,462.50 and expenses of \$335.16 have been awarded. Counsel is petitioning herein for additional fees of \$42,040.00. No hearing has been requested on this matter and none has been held.

In the amended petition filed by Mr. Jacobson, a request is made for attorneys' fees for work done (a) by Mr. Jacobson himself, from the inception of the case until September 1976, while Mr. Jacobson was staff counsel for the UMWA, (b) by two other UMWA staff attorneys, Charles P. Widman and Willard P. Owens, from the inception of the case until September 1976, and (c) by Mr. Jacobson (and a paralegal in Mr. Jacobson's law firm) for work done since the award of attorneys' fees by former Commission Administrative Law Judge Forrest Stewart in his decision dated September 4, 1981.

a. Attorney's fees for work performed by Mr. Jacobson while employed by UMWA. Mr. Jacobson seeks fees totalling \$3,793.75 for this representation. The recognized method of computing reasonable attorneys' fees begins by multiplying a reasonable hourly rate by the number of hours reasonably expended. *Hensley v. Eckerhart*, _____ U.S. _____, 76 L.Ed.2d 40, (1983); *Copeland v. Marshall*, 641 F.2d 880 (D.C. Cir. 1980). The resulting figure has been termed the "lodestar." The lodestar fee may then be adjusted to reflect a variety of other factors. *Copeland*, supra.

Counsel for the Complainant submitted the following information with respect to the hours spent representing Mr. Munsey during the period of time he was employed as staff attorney for the UMWA. The information was attached as Exhibit A to the affidavit of Mr. Jacobson accompanying his current petition for attorney's fees.

Preparation for and attendance at first 1973 D.C. Circuit oral argument	20.25
Preparation for and attendance at second 1973 D.C. Circuit oral argument	16.50
	36.75
1973 - 36.75 hours at \$50.00/hr. = \$1,837.50	
Preparation of Motion to Add P&P as a Respondent	2.75
Preparation of Motion to Add Ralph & Smitty Baker as Respondents	2.00
Preparation of Report on Remand Procedures	3.75
	8.50
1975 - 8.50 hours at \$60.00/hour = \$510.00	
Preparation of exceptions and reply to opposing exceptions to ALJ's decision	22.25
1976 - 22.25 hours at \$65.00/hr. = \$1,446.25	

~2087

Total

\$3,793.75

In his affidavit, counsel explained in connection with the noted activities that he maintained a contemporaneous record of time spent on the instant case while he was a UMWA staff attorney. The hours of work performed were noted on sheets of legal size paper kept in his desk or in the case file. "The task performed, and the hours spent on them on the day they were begun, were noted on the sheets the day they were begun. Hours spent on the same task on subsequent days were noted as such. * * * The hours were totaled when each task was completed, and then were transferred to handwritten summary sheets. The summary sheets showed all tasks completed, and the total hours spent on each of them."

While it must be recognized that motivation for maintaining detailed and complete time records by a salaried staff attorney who apparently was not required to do so by his employer may be somewhat lacking, I nevertheless find the submissions herein to be sufficient to permit a determination of reasonableness. Accordingly, I find that said counsel reasonably expended 36.75 hours in 1973, 8.50 hours in 1975, and 22.25 hours in 1976. Mr. Jacobson stated in his affidavit that based on conversations with attorneys at six law firms and court decisions awarding fees for work performed during that period, the fair market value of his services in the Washington, D. C. area was \$50 per hour in 1973, \$60 per hour in 1975, and \$65 per hour in 1976. While Respondents, Smitty Baker Coal Company, Inc. and Ralph Baker, object to the method of calculating fair market value of services based on comparable hourly rates as hearsay, they offer no contradictory evidence. Under the circumstances, I find that the rates represented by Mr. Jacobson are reasonable in the community for similar work and that those rates accurately reflect the value of the time spent given the uncontested statement of counsel's background and expertise.

The number of hours reasonably expended by Mr. Jacobson multiplied by reasonable hourly rates result in a lodestar figure for the period at issue of \$3,793.75. No increase in that amount is warranted.

b. Claim for attorney's fees for work by UMWA staff attorneys Widman and Owens. Mr. Jacobson asserts a claim on his own behalf for market-value attorneys' fees for UMWA staff attorneys Charles P. Widman (\$15,600.00) and Willard P. Owens (\$8,625.00) on the grounds that when he left employment with the UMWA he reached an agreement with that union to continue legal representation in certain cases including this case in return for the assignment by the union to Jacobson of "any and all rights it had to fees recoverable in said actions, both as to work performed by Jacobson and as to work performed by Messrs. Widman and Owens."

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In accordance with the National Treasury Employees' Union decision, however, the UMWA is not itself entitled to any above-cost fee allowance in cases of this nature for work performed by its salaried staff attorneys. The UMWA is limited to recovery of the expense to which it was put in supplying the legal services in question. National Treasury Employees' Union, supra, at 855. Accordingly the UMWA has no right to assign to Mr. Jacobson an above-cost allowance of fees that might be awarded as a result of work performed by other staff attorneys. At most the UMWA could assign only the recovery to which it would be legally entitled, i.e., recovery of the expense to which it was put in supplying the legal services in question. No evidence has been presented in this case however concerning such expenses. Under the circumstances it is impossible to determine the UMWA interest that might be assignable to Mr. Jacobson.

Clearly, however, those staff attorneys could assign their interest to Mr. Jacobson. Such an assignment of an above-cost fee allowance in combination with the UMWA agreement with Jacobson would justify the payment of the fees to Mr. Jacobson. Since there is no evidence before me, however, of any assignment by either of those former UMWA staff attorneys, payment of their fees to Mr. Jacobson must be contingent upon sufficient evidence of such an assignment. The final order in this case reflects that contingency requirement.

The amount of fees requested on behalf of Widman and Owens is challenged by Respondents because of the absence of contemporaneous time records and a delineation of non-productive/unsuccessful time. Messrs. Widman's and Owens' reconstructed time was formulated by reference to the pleadings they prepared and the length of transcripts of the hearings they attended "recognizing that it takes a certain amount of time to prepare a complaint, to locate and prepare witnesses, to otherwise prepare for trial, etc.". In addition, apparently because his whereabouts were unknown, Mr. Owens' time was reconstructed without any input from him.

I find that the lack of specificity and the absence of contemporaneous documentation and verification in the fee application warrants a downward adjustment in the estimate of hours reasonably expended. Copeland, supra. Accordingly, I find that Mr. Widman's time should be reduced to 150 hours and that Mr. Owens' time should be reduced to 50 hours. Based upon the proffered reasonable hourly rates of \$75/hour and 100/hour respectively, the lodestar for Mr. Widman is therefore \$11,250.00 and the lodestar for Mr. Owens is \$5000.00. No further adjustment in the lodestars is warranted.

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c. Attorneys' fees for the period September 1981 through October 1982. Fees of \$14,021.25 are also requested for work performed subsequent to the decision of Judge Forrest Stewart on September 3, 1981. This work was performed by Mr. Jacobson while in private practice located in Los Angeles, California. Fee application is also made for work performed during this period by a paralegal in Mr. Jacobson's law firm, Merna Figoten. The fee petition (Exhibit A) discloses the following information:

a. Steven B. Jacobson

1. September 1981 - September 1982

Review and Analysis of ALJ's Decision	.75
Preparation of Petition for Commission review	9.25
Prepare petition for D.C. Circuit review	.50
Prepare Motion to Transfer Baker Appeal from Fourth Circuit to D.C. Circuit	16.00
Prepare Opposition to Motion to Transfer Munsey Appeal to Fourth Circuit	2.00
Preparation of Reply to Baker Opposition to Munsey Motion to Transfer	2.25
Prepare Motion for Leave to Intervene in Baker Appeal	.75
Prepare Motion to Set D.C. Circuit Briefing Schedule	3.25
Prepare D.C. Circuit Brief and Appendix	25.00
Analyze Baker Brief and Prepare D.C. Circuit Reply Brief	20.25
Prepare Extension Motions	1.00
Court, Commission and Labor Department Correspondence	1.50
Client Correspondence	.50
Total September 1981 - September 1982	83.00

83.00 hours at \$115.00/hour = \$9,545.00

2. October 1982 to Present

Prepare Opposition To Baker Motion To Strike	3.75
Preparation For and Attendance At D.C. Circuit Oral Argument	18.25
Review of D.C. Circuit Decision	.25
Prepare D.C. Circuit Bill of Costs and Review of Opposition Thereto	1.50
Client Correspondence	2.50
Preparation of Petition for Attorney's Fees	5.00
Total October 1982 - Present Time	31.25

31.25 hours at 125.00/hour = \$3,906.25

Total September 1981 - October 1982 Attorney Time \$13,451.25

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b. Merna B. Figoten

Preparation of D.C. Circuit Briefs 9.50

9.50 hours at \$60.00/hour = \$570.00

Total September 1981 - September 1982 Paralegal Time \$570.00

Exhibit B attached to the fee petition was represented to be a copy of computerized time records maintained by Mr. Jacobson's current law firm for work performed in this case subsequent to the September 3, 1981, decision. It is explained in the accompanying affidavit that it is the practice of attorneys and paralegals in this law firm to prepare handwritten time sheets of the work performed each day. The time sheets are then typed up and turned in to the computerized central billing facility on a daily basis. That facility prepares and keeps a running statement of all work performed on each matter in the law firm from its inception, and prepares periodic bills which are sent to clients. Exhibit B is represented to be the portion of the running statement for this case covering the period for which fees are sought. Both Mr. Jacobson's and Ms. Figoten's credentials are set forth in the affidavit accompanying the fee petition and are not disputed

Respondents object to the requested fees primarily on the grounds that the fees should be reasonable in relation to the results obtained. In particular, Respondents object to alleged non-productive/unsuccessful time for the period after September 1981. They note that the Petition for Commission Review raised five issues and that two of those issues involved reinstatement and two involved interest and increasing the "lodestar" fee determined by Judge Stewart. The Commission denied review of all four of these issues and the Circuit Court affirmed that decision. Respondents further note that the fifth issue (allowance of fees during counsel's tenure with UMWA) represented only a small segment of the Petition. They also point out that the appeal was successful on only that one issue in proceedings before the Circuit Court and was unsuccessful in any matter of benefit to Mr. Munsey. Further objections are based upon alleged unnecessary procedural matters and excessive time spent upon preparation of the second petition for attorneys' fees which duplicated in large part the earlier fee petition filed with Judge Stewart.

Certainly to the extent that there has been but limited success in the review process there is indeed merit to the Respondent's allegations. It is apparent moreover that the limited

~2091

claim which was successful did indeed relate to an issue of no direct benefit to the victim of discrimination in this case. Under all the circumstances, I find that Mr. Jacobson is entitled to compensable time for the period September 1981 - September 1982 of 40 hours and for the period since October 1982 of 15 hours. I further find that compensable time of 4 hours for paralegal Figoten is appropriate. Hensley, supra.; Copeland, supra. at pp. 891-892.

Mr. Jacobson stated that his billing rate was \$115 per hour for work performed during the period September 1981 through September 1982 and \$125 per hour for work performed since October 1982. According to the affidavit, these rates were based upon "exhaustive surveys of rates charged by law firms in the Los Angeles area and are, if anything, somewhat low, given my experience and expertise." It is further represented that Ms. Figoten's billing rate was \$60 per hour during the time she worked on this case. Ms. Figoten's billing rate "was likewise set after an exhaustive survey of rates charged by Los Angeles law firms, and is likewise no greater than the average rate charged here." While these rates are again challenged by Respondents as based upon hearsay, they submit no contradictory evidence. Accordingly, I find the rates quoted to be reasonable in the community for similar work. I also find that the quoted rates accurately reflect the value of Mr. Jacobson's and Ms. Figoten's time, given their backgrounds.

The number of hours reasonably expended by Mr. Jacobson during the period at issue multiplied by the corresponding hourly rates results in a lodestar figure of \$5225.00. The number of hours reasonably expended by Ms. Figoten multiplied by the reasonable hourly rate result in a lodestar figure for the paralegal of \$240.00.

While the overall attorney fee award in this case is more than seventeen times the damages awarded the actual victim of discrimination, it is well recognized that market value fee awards in cases such as this take into account the need to assure that miners with bona fide claims of discrimination are able to find capable lawyers to represent them. In addition, the success in this case represents a vindication of societal interests incorporated in the mine safety legislation above and beyond the particular individual rights vindicated in the case. Accordingly I do not find the substantial fee award in this case to be excessive or in the nature of a "windfall".

Order

Under prior decisions rendered in this matter, the Respondents, namely Ralph Baker, Smitty Baker Coal Company, and P&P

~2092

Coal Company, were ordered jointly and severally to pay the total amount of \$2,858.26 plus interest "computed on the total amount at a rate of 8% until the date of payment". It has also been previously ordered that Respondents jointly and severally pay attorney's fees in the amount of \$26,462.50 and expenses in the amount of \$335.16 to Steven Jacobson, Esq. In addition to payment of the above amounts, it is further ordered that the Respondents, jointly and severally, pay (a) the additional amount of attorneys' fees in the amount of \$9,018.75 to Steven Jacobson, Esq., and fees to the law firm of De Castro, West & Chodorow, Inc. for the services of paralegal Merna Figoten in the amount of \$240.00; and, (b) attorney's fees in the amount of \$16,250.00 to Steven Jacobson, Esq., upon presentation to Respondents and the undersigned of an assignment to Mr. Jacobson of the respective interests of Charles P. Widman, Esq., and Willard P. Owens, Esq., in such attorneys' fees. Payment of amounts due must be made within 30 days of the date of this decision.

Gary Melick
Assistant Chief Administrative Law Judge