

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

August 3, 1984

UNITED MINE WORKERS OF AMERICA (UMWA), ON BEHALF OF JERRY D. MOORE,	:	DISCRIMINATION PROCEEDINGS
	:	
	:	Docket No. KENT 82-105-D
	:	MADI CD 82-05
	:	
LARRY D. KESSINGER,	:	Docket No. KENT 82-106-D
	:	MAD1 CD 82-04
Complainants	:	
v.	:	Eastern Division Operations
	:	
PEABODY COAL COMPANY, Respondents	:	
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF THOMAS L. WILLIAMS,	:	
Complainant	:	Docket No. LAKE 83-69-D
v.	:	VINC CD 83-04
	:	
	:	Eastern Division Operations
PEABODY COAL COMPANY, Respondent	:	

ORDER AWARDING DAMAGES
ORDER AWARDING ATTORNEYS FEES
ORDER ASSESSING CIVIL PENALTIES

Appearances: Mary Lu Jordan, Esq., United Mine Workers of America, Washington, D.C. on behalf of **Complainants** Jerry D. Moore and Larry D. **Kessinger**;
Frederick W. Moncrief, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, on behalf of Complainant, Thomas L. Williams;
Michael O. McKown, Esq., Peabody Coal Company, **St. Louis, Missouri**, for Respondent.

Before: Judge Merlin

On July 11, 1984, a decision was issued with respect to the operator's liability in these cases. The parties have set forth their positions with respect to damages, attorneys fees, and civil penalties so that determinations now may be made with respect to these matters.

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The operator and the Solicitor have stipulated that the total back pay and interest through July 23, 1984, to which Complainant, Thomas L. Williams, is entitled under the July 11 decision is **\$29,301.61**.

In addition, the Solicitor seeks recovery of unreimbursed medical expenses, the amount of which the parties agree is \$710. Reimbursement is also sought for the cost of obtaining recertification as an electrician. The parties agree that Complainant worked in the mines as an electrician before his lay off (Hearing, July 2-7, 1984, p. 6-7). The operator concedes that under the July 11 decision Complainant is entitled to medical expenses and recertification (Hearing July 27, 1984, p. 5, **7-8**).

Complainant further seeks money damages for losses he incurred in real estate and business ventures after he was laid off. By letter to the Solicitor dated May 5, 1984, Complainant's private attorney, Mr. Clyde Collins, alleges realty losses of \$58,380. Mr. Collins' letter sets forth the following: In June 1982 Complainant purchased a residential property and a rental property for \$58,000 (\$20,000 for residential and \$38,000 for rental); the purchase was financed through a first mortgage to The Peoples National Bank, New Lexington, Ohio, of \$50,000 and a second mortgage to the sellers of \$8,000; Complainant was unable to make the mortgage payments in the first half of 1983 and the bank foreclosed on the mortgages, which foreclosure became final January 13, 1984; both properties were sold at a Sheriff's sale from which deficiency judgments against Complainant total \$41,380; the properties were worth \$75,000 and Complainant's loss of equity is \$17,000; the combined damages from the deficiency judgments and the equity loss are \$58,380.

The Solicitor and operator's counsel agree that with additional interest through July 23, 1984, the claimed realty loss as of this date is **\$62,018.36 (Stipulation No. 6)**.

In addition, Complainant claims money damages arising from business losses. In this respect the attorney's letter sets forth the following: In December 1982, Complainant leased the real estate and equipment of a restaurant business for six months: Complainant borrowed \$2,500 from the City Loan in New Lexington to be used as capital in connection with the restaurant; during the first four months of 1983, when Complainant's mortgages became delinquent, he also became delinquent in the payment of the \$1,500 per month lease rental of the restaurant; the same bank which held Complainant's mortgages also held the mortgage on the

restaurant; the owners of the restaurant were also in default on the mortgage held by the bank on the restaurant property; in April 1983, Complainant reached an agreement with the owners of the restaurant for a new three year lease, but the bank refused to consent to the lease due to arrearages already existing on Complainant's residential mortgages with the bank: Complainant attempted a Chapter 13 bankruptcy, but a feasible plan could not be worked out since the liabilities had reached the point where the necessary payment into the plan was beyond Complainant's ability; Complainant returned possession of the restaurant premises to the owners at the conclusion of the initial lease period; the financial loss from this venture was \$12,809.16.,

Finally, the attorney's letter states that Complainant incurred attorneys fees arising out of the matters detailed above in the amount of \$7,235 and job hunting expenses of \$1418.64.

Section 105(c)(2) of the Act, pursuant to which the Solicitor filed this action on Complainant's behalf, provides as follows with respect to the relief that can be given:

* * * The Commission shall afford an opportunity for a hearing: (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section) and thereafter shall issue an order, based upon findings of fact, affirming, modifying or vacating the Secretary's proposed order, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest. * * * [Emphasis supplied.]

The Senate Report states with respect to relief in section 105 cases as follows:

It is the Committee's intention that the Secretary propose, and the Commission require, all relief that is necessary to make the complaining party whole and to

remove the deleterious effects of the discriminatory conduct including, but not limited to reinstatement with full seniority rights, back-pay with interest, and recompense for any special damages sustained as a result of the discrimination. The specified relief is only illustrative.

S. REP. NO. 95-181, 95th Cong., 1st Sess. 37 (1977), reprinted in LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, 95th Cong., 2d Sess., at 625 (1978).

The Act specifically provides for back pay and interest. Accordingly, the Complainant is entitled to **\$29,301.61** plus additional interest from July 23, 1984 to the date of payment computed in accordance with applicable Commission precedent.

In addition, it must be determined whether the additional special damages which Complainant seeks may be awarded as "other appropriate relief" under section 105 (c) (2), supra. In the words of the Senate Report quoted, supra, **such damages** are awarded when they are sustained "**as a result**" of the discrimination. The right to recover such amounts under the Mine Act has not been decided. Reference may be made, however, to general principles of law. It has been held that in order to be recoverable, damages must be proved to be the proximate result of the complained wrong. Classic Bowl, Inc. v. AMF Pinspotter, Inc., 403 F.2d 463 (7th Cir. 1968). The legal concept of proximity is applicable to ascertain and measure damages. The necessary and appropriate limits of judicial inquiry are served by disregarding consequential and remote effects. Commonwealth Edison Company v. Allis-Chalmers Manufacturing Company, 225 F. Supp. 332 (N.D. Ill. 1963). The usual monetary measure of damages for wrongful discharge at common law, under the National Labor Relations Act and under the Equal Opportunity Act is back pay less interim earnings. St. Clair v. Local Union 515, 422 F.2d 128 (6th Cir. 1969). An employee discharged in **violaticn** of the Railway Labor Act was held entitled in addition to reinstatement only to an award of back pay. Brady v. Trans-World Airlines, Inc., 244 F. Supp. 820 (D. Del. 1965).

In this case the wrongful layoff of Complainant by the operator cannot be held the proximate cause of Complainant's monetary losses from real estate and business **activities**. To put it in terms of the Senate Report, quoted above! these damages were not sustained as a result of the discrimination. It is clear from the letter of Complainant's attorney that Complainant engaged in a series of highly speculative and

risky ventures. 1/ He bought \$58,000 worth of real estate with no equity down and obligated himself under a \$50,000 first mortgage and an \$8,000 second mortgage, both at a 16.5% interest rate (Hearing July 27, 1984, p. 13). Even where the individual did not engage in such activities, recovery for his loss of a home to the mortgage holder has been denied. St. Clair v. Local Union No. 515, supra. Moreover, just a few months after Complainant undertook the **sizeable real** estate debts just described and after he had been laid off, he went into the restaurant business, again without any equity of his own and borrowing additional cash from a loan company and obligating himself to monthly payments of \$1500 under a six months lease. It is little wonder that the bank which held the mortgages on Complainant's realty and the mortgage on the restaurant refused to consent to a new lease on the restaurant. It must also be noted that it appears from the attorney's letter that the owners of the restaurant had no other assets because they immediately went into default when Complainant could not pay them. In sum therefore, many intervening factors, and not the wrongful layoff, are responsible for Complainant's damages in real estate and business. The principal and precipitating factor in Complainant's financial debacle has been his own business and financial judgment, or lack thereof. Under such circumstances, award of special damages would not be appropriate under the Act and such relief is denied.

The same considerations apply with respect to the attorney's fees and related expenses which were incurred by Complainant as a result of his real estate and business activities. Recovery of damages for these items is also denied.

1/ None of the real estate and business figures given by **Complainant's** private attorney have been verified. Many appear highly questionable. For example, the value of the real estate is given as \$75,000 although Complainant paid only \$58,000 for it with no down payment. At the foreclosure sale, the properties were sold for \$26,666 which, according to the Order of Sale furnished by the Solicitor, was at least 2/3 of the appraised value. Accordingly, the appraisal value could not have been more than \$40,000. For the reasons set forth herein, it is not necessary for present purposes to determine the true extent of Complainant's losses in these matters.

As set forth above, the letter from Complainant's attorney alleged expenses of **\$1,418.64** related to seeking employment. The Solicitor's brief cited no case law to support an award of such damages. The Solicitor advised that he knew of no precedent to support such an award and indeed stated that decisions under the National Labor Relations Act indicated such an award would not be made (Hearing July 27, 1984, p. **16**). The claim of damages for these amounts is, therefore, denied.

Two other items remain for consideration. As previously stated, the parties agree that the unreimbursed medical expenses are \$710. Operator's counsel advised that no objection exists with respect to this item (Hearing July 27, 1984, p. **5**). So too, the operator does not object to payment for the Complainant's recertification as an electrician (Hearing July 27, 1984, p. 7-8). It should be noted that an award of damages in these two instances would be appropriate under the principles set forth herein. The medical expenses would have been paid for by health insurance if Complainant had been working and the electrical certification would not have expired if Complainant had not been laid off. The layoff was the proximate cause of these particular losses.

Finally, careful consideration has been given to the decision in Secretary of Labor on behalf of **Noland** v. **Luck Quarries, Inc.**, 2 FMSHRC 954 (1980). In that case, recovery was allowed under section 105(c)(2) for lost equity in a truck. The miner there had been a truck driver who hauled rock in his own truck for the company which had wrongfully discharged him. Because of earnings lost due to the discharge, the Complainant lost the truck. In order for the miner in **Noland** to return to his former work hauling rock, he needed a truck. It was therefore not enough in that case to order reinstatement with back pay and interest. The analogous item in the instant case is the cost of recertification as an electrician which has been allowed and which would permit Complainant to resume his former position in the mines as an electrician. The decision in **Noland** is not precedent for an award in this case of special damages arising from real estate and business losses unrelated to Complainant's ability to return to his former position and caused by many factors other than the discriminatory layoff.

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The operator and the United Mine Workers have agreed that under the July 11 decision, total back pay and interest through July 23, 1984, payable to Mr. Kessinger is **\$43,320.12** and to **Mr. Moore is \$59,294.25.**

Section **105(c)** (3) of the Act, pursuant to which the union brought these actions on behalf of Complainants **Kessinger** and **Moore**, provides for relief in terms like those of section **105(c)** (2) already considered with respect to the suit brought by the Solicitor. Section **105(c)** (3) provides in **pertinent** part as follows:

* * * The Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section), and thereafter shall issue an order, based upon findings of fact, dismissing or sustaining the complainant's charges and, if the charges are sustained, granting such relief as it deems appropriate, including, but not limited to, an order requiring the rehiring or reinstatement of the miner to his former position with back pay and interest or such remedy as may be appropriate. Such order shall become final 30 days after its issuance. 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.
* * * [Emphasis supplied.]

Since the Act specifically provides for back pay and **interest**, Complainant **Moore** is entitled to **\$59,294.45** plus interest after July 23, 1984, and Complainant **Kessinger** is entitled to **\$43,320.12** plus interest after July 23, 1984. Interest is computed in accordance with applicable Commission precedent.

These cases present the additional issue of attorneys fees. Counsel for the union has filed a petition for attorneys fees detailing 127.75 hours spent on these cases and stating that the market rate for attorney's services is

\$100 per hour. The total fee sought is **\$12,628.50.**^{2/} The operator did not object to the number of hours **claimed** or to the market rate given by the union (Hearing July 27, 1984, p. 4).

It has been decided that attorneys fees may be awarded in discrimination cases brought under the Mine Safety Act by the union on behalf of miners. In Munsey v. Federal Mine Health and Safety Review Commission, 701 F.2d 976 (D.C. Cir. 1983), the Court of Appeals for the District of Columbia held in this respect as follows:

* * * This circuit has recognized that unions and union attorneys are entitled to costs and attorney fees for representation of union members. Nat'l Treasury Employees Union v. U.S. Dep't of the Treasury, 656 F.2d 848 (D.C. Cir. 1981). If attorney fees are awarded to the union itself rather than its attorney, the union can only recoup the expenses it incurred in supplying services to the client; above-cost fees to the union itself would be inappropriate. Id. at 853. If attorney fees are awarded to the attorney alone (and not for the union's general treasury), the attorney is entitled to receive the market value of the services rendered. The mere fact that an attorney is a salaried employee of the union should not affect the size of the fee to which he is entitled. Id. at 850. "Reasonableness, in terms of market value **of the** services rendered, is the sole limit on fee awards to organizationally-hired lawyers when the fees are to be paid to the lawyers **alone.**" Id. at 852-853.

On remand, the Commission should determine the amount to be awarded in accordance with the standards set forth in Nat'l Treasury Employees Union v. U.S. Dep't of the Treasury, supra. ^{1/}

^{1/} We note that in past cases we have required salaried attorneys recovering the market value of their services from defendants to reimburse their employers for the kinds of expenses the employers incurred that would normally be included in an attorney's fee, including the salaries of the lawyers and their adjunct staff. * * *

^{2/} Four hours representing work performed by an attorney who is no longer with the UMW legal staff and who has waived her right to any attorney fees were billed at the union's cost of \$60 per hour. Parking expenses were \$13.50.

The hours and market rate claimed are reasonable in light of the nature of the cases and all that has transpired in them. Accordingly, a total fee of **\$12,628.50** is awarded. The representation that the union's cost is \$60 per hour is accepted. Accordingly, **\$7,678.50** of the total fee is awarded to the union and the balance of \$4,950 is awarded to union counsel.

The statutory scheme of health and safety in the mines expressed in the Mine Safety Act provides throughout for meaningful participation by miner representatives. By bringing these actions, the union has fulfilled its intended role and demonstrated the value of the opportunity to participate.

Assessment of Civil Penalties

The Solicitor has filed a petition seeking the assessment of a civil penalty of \$1000 in each of the three cases. The parties agreed with respect to the six criteria set forth in section **110(i)** of the Act (Hearing July 27, 1984, p. 25-27). The operator waived its right to file an answer and had no objection to payment of these amounts (Hearing July 27, 1984, p. 24). The proposed penalties are consistent with the Act and will advance its purposes. Accordingly, civil penalties totalling \$3,000 are assessed.

Order

It is Ordered that the operator pay Complainant Thomas L. Williams **\$29,301.61** and \$710 plus interest from July 23, 1984, to the date of payment.

It is further Ordered that when Complainant Thomas L. William is recalled, the operator either pay necessary and reasonable costs of electrical recertification or provide the instruction necessary for such recertification.

It is further Ordered that all other claims of Complainant Thomas L. Williams for damages are Denied.

It is further Ordered that the operator pay Complainant Jerry D. Moore **\$59,294.45** plus interest from July 23, 1984, to the, date of payment.

It is further Ordered that the operator pay Complainant Larry D. Kessinger **\$43,320.13** plus interest from July 23, 1984, to the date of payment.

It is further Ordered that the operator pay attorneys fees of **\$7,678.50** to the United Mine Workers of America.

It is further Ordered that the operator pay attorneys fees of \$4,950 to Ms. Mary Lu Jordan, Esq.

It is Ordered the operator pay civil penalties of **\$3,000**. If no appeal is taken, payment of civil penalties shall be made within **30** days **of** the expiration of the appeal period.

A handwritten signature in black ink that reads "Paul Merlin". The signature is written in a cursive, flowing style with a large initial "P" and "M".

Paul Merlin
Chief Administrative Law Judge

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