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

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF ROBERT RIBEL, COMPLAINANT	DISCRIMINATION PROCEEDING Docket No. WEVA 84-33-D MSHA Case No. MORG CD 83-18
v.	Federal No. 2 Mine
EASTERN ASSOCIATED COAL CORP., RESPONDENT	

ORDER DENYING ATTORNEY FEES
ORDER AWARDING DAMAGES

Statement of the Case

On November 2, 1984, the Commission remanded this matter to me for the limited purpose of ruling on a motion filed by Mr. Ribel's private counsel, after I decided the case on the merits, for an award of costs, expenses, and attorney's fees purportedly incurred by Mr. Ribel in connection with his discrimination complaint.

My decision with respect to the merits of the discrimination complaint filed on Mr. Ribel's behalf by MSHA was issued on September 24, 1984. I sustained the complaint and ordered that Mr. Ribel be reinstated. In view of the fact that the complaint was filed on his behalf by MSHA, and since no one raised the question of attorney's fees and expenses, my decision did not include those matters.

Mr. Ribel's private counsel filed her motion with the Commission's Executive Director on October 29, 1984, and included as part of the motion are four attachments itemizing expenses allegedly incurred by Mr. Ribel in connection with his discharge by the respondent.

On November 7, 1984, respondent's counsel filed an opposition to the motion for an award of costs, expenses, and attorney's fees.

Attachment 2 to the motion is an itemized statement prepared by counsel Barbara Fleischauer claiming $118.35 for mileage and meal costs, $258.98 for long distance telephone calls, and $8,688.33, for "expenses for legal services." These claims total $9,065.66.

Attachment 2(A) claims mileage and meal costs totaling $118.35, covering a period from September 5, 1983 to October 19, 1984.

Attachment 2(B) claims long distance telephone calls in the amount of $258.98, covering a period from August 22, 1983, to October 4, 1984.

Attachment 2(C) is an itemized list of claimed expenses for legal services in the amount of $8,688.83, covering a period from August 21, 1983, to October 24, 1984. Counsel states that during this period of time she provided 173.77 hours of legal services, billed at $50 per hour, for a total of $8,698.33.

Attachment 3 is a statement of expenses filed by Counsel Fleischauer on behalf of Professor Robert Bastress. Included in this statement are costs for mileage and meals amounting to $138.48, and "expenses for legal services" amounting to $656.25, for a total of $794.73.

Attachment 4 is a statement of expenses filed by Counsel Fleischauer on behalf of Professor Franklin D. Cleckley for "legal services" in the amount of $206.25.

In support of these charges, counsel submits an unsigned typewritten letter dated October 24, 1984, to Mr. Ribel advising him that he owes Professor Bastress $794.73, and Professor Cleckley $206.25 (Attachment 1).

Attachment 5 is a statement of expenses allegedly incurred by Mr. Ribel in connection with his discrimination claim. Included in this claim are mileage and meal costs in the amount of $135.92, long distance telephone calls in the amount of $53.54, and miscellaneous expenses in the amount of $470.88, for a total of $660.34.

Attachment 5(A) and (B) are itemized statements of Mr. Ribel's claimed expenses for mileage, meals, telephone, and miscellaneous expenses incurred by Mr. Ribel (and in one instance, his wife), covering a period from August 24, 1983, to November 15, 1983. Most of the items claimed appear to be for travel to and from the West Virginia University Law Center, and travel to and from Fairmont and Charleston,

West Virginia, and the West Virginia Department of Mines in connection with Mr. Ribel's appeal before the State of West Virginia on his discharge. Further, most of the claimed telephone calls on attachment 5(B), are between Mr. Ribel and an unidentified "witness" or "union representative."

Attachment 5(C), are claims in the amount of $290.88, for prescription medication expenses incurred by Mr. Ribel's family during the time he was off the payroll of the respondent. Mr. Ribel claims that these medical expenses would have normally been covered by his company insurance had he not been discharged.

Attachment 5(C), also includes interest charges in the amount of $180, which Mr. Ribel claims he incurred on loans made to cover expenses resulting from 3 months of lost wages while he was off the respondent's employment rolls.

The sum total of all claimed expenses filed by Counsel Fleischauer amount to $10,726.98.

Respondent's Opposition to the Awarding of Attorneys' Fees

In opposition to the motion for an award of attorneys' fees, respondent's counsel points to the fact that the complaint in this case was brought on Mr. Ribel's behalf by the Secretary pursuant to the provisions of section 105(c)(2) of the Act. Counsel submits that it is only with respect to an action brought by a complainant on his own behalf pursuant to the provisions of section 105(c)(3) of the Act that an award of costs and expenses, including attorneys' fees, is appropriate. Therefore, counsel concludes that an award of costs and expenses, including attorneys' fees, to Mr. Ribel in this case would be inappropriate.

Respondent submits that the language of section 105(c) of the Act is plain as to the question of when an award of costs, including attorneys' fees, should be made. Respondent emphasizes the fact that section 105(c)(2) of the Act requires the Secretary to file a complaint with the Commission on a complainant's behalf when he determines that a violation of that section has occurred. When the Secretary determines that a violation has not occurred, section 105(c)(3) confers upon the complainant the right to file an action in his own behalf before the Commission. Respondent submits that it is only in this instance that section 105 authorizes the award of costs including attorneys' fees. In support of this conclusion, respondent cites the following language of section 105(c)(3):

> When 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 attorneys' 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.

Respondent maintains that there is no similar provision authorizing the award of costs and fees when the Secretary prevails in an action commenced pursuant to the provisions of section 105(c)(2), and that it is only in connection with a successful action commenced pursuant to the provisions of section 105(c)(3) that an award of attorneys' fees is appropriate. In further support of its argument, respondent cites the legislative history of the Act as reported by the Joint Explanatory Statement of the Conference Committee, in pertinent part as follows:

> * * * If the complainant prevailed in an action which he brought himself after the Secretary's determination, the Commission Order would require that the violator pay all expenses reasonably incurred by the complainant in bringing the action. (Emphasis added.)

H.Confer.Rep. No. 95-655, 95th Cong., 1st Sess. (1977) U.S.Code Cong. Admin.News 1979, p. 3500.

Respondent concludes that it is apparent that Congress intended that an applicant be entitled to an award of fees and costs in an action brought pursuant to the provisions of section 105(c) only when the applicant is required to commence an action with the Commission on his own behalf, and that an award of costs including attorneys' fees, as requested by Mr. Ribel, would be inappropriate and unwarranted under the circumstances of this case.

In further opposition to the motion for award of attorney's fees, respondent's counsel asserts that subsequent to his discharge, Mr. Ribel also filed a petition with the West Virginia Coal Mine Safety Board of Appeals pursuant to the provisions of the West Virginia Coal Mine Health and Safety Act, W.Va.

Code 22-1-1 et seq., charging that his discharge had been in violation of the anti-discrimination provisions of that Act. Counsel states that a hearing was held on Mr. Ribel's petition before the Board in Charleston, West Virginia on November 15, 1983, but that on November 29, 1983, acting on a motion filed by Eastern, the Board entered an Order staying and deferring any further investigation or hearing with respect to Mr. Ribel's discrimination petition, and that Mr. Ribel's petition for discrimination is pending with the Board at this time.

Respondent's counsel also asserts that he believes that subsequent to his discharge, Mr. Ribel filed a claim for unemployment compensation with the West Virginia Bureau of Unemployment Compensation, and that a hearing was held on Mr. Ribel's claim on or about September 5, 1983.

Respondent submits that the requested attorneys' fees for Mr. Ribel's private counsel for work performed in connection with his proceedings before the State of West Virginia are inappropriate because any work done by counsel was not work which was necessary to the preparation and presentation of the issues before the Commission in this case. Moreover, counsel asserts that Mr. Ribel may be entitled to the award of fees under attorneys' fees provisions of the West Virginia Coal Mine Safety Act and the Unemployment Compensation Act. Counsel argues that any fee awarded under the Federal Mine Safety and Health Act for services performed in connection with the State proceedings would result in double recovery for Mr. Ribel. Under the circumstances, counsel maintains that any fee award by the Commission should be reduced so as to exclude all hours charged in connection with the proceedings before the State of West Virginia.

Assuming arguendo that the Act can be construed to authorize the award of fees for the efforts of private attorneys in an action brought by the Secretary on behalf of a complainant pursuant to section 105(c)(2), respondent's counsel cites the "intervenor" cases of Donnell v. United States, 682 F.2d 240 (D.C.1982); Alabama Power Co. v. Gorsuch, 672 F.2d 1 (D.C.Cir.1982) and Busch v. Bays, 463 F.Supp. 59, 66 (E.D.Va.1978), and argues that the test which has evolved from these decisions requires the Commission to make a determination as to the role played by the "intervenor" before making any fee award. Respondent submits that if the "intervenor" has contributed little or nothing of substance to the litigation, then no fee award is appropriate.

On the facts of the instant case, respondent's counsel asserts that the action commenced by the Secretary on Mr. Ribel's behalf before the Commission, including the necessary steps leading to my decision were as follows: the filing of the complaint by the Secretary; the representation of Mr. Ribel at the temporary reinstatement hearing on November 28, 1983; the representation of Mr. Ribel at his deposition which was taken for purposes of preparation for the hearing on the merits of his complaint; representation of Mr. Ribel at the hearings on the merits which were held on January 11 and 12, 1984,; and the preparation and filing of a post hearing brief with me. Since Mr. Ribel was represented by the Secretary in all of these matters, counsel concludes that the function performed by his personal attorney was limited to showing up at hearings and depositions and reading documents prepared by others. Counsel maintains further that there is no showing here that Mr. Ribel's personal attorneys contributed anything of substance or value to the outcome of the action commenced on his behalf by the Secretary. Under the circumstances, and in light of the principles set forth in his cited cases, counsel submits that an award of fees to Mr. Ribel for the hours logged by his personal attorneys would be inappropriate.

With regard to Attorney Fleischauer's fee charges in connection with the temporary reinstatement hearing held on November 28, 1983, and the hearing on the merits held on January 11 and 12, 1984, respondent's counsel points out that in both instances the hearings were handled by counsel for the Secretary and that Ms. Fleischauer's participation was strictly as an observer. Counsel submits that the same is true for the fee charges by Ms. Fleischauer in connection with the taking of Mr. Ribel's deposition in preparation for the hearing on the merits of his complaint. Further, counsel notes that Ms. Fleischauer has listed numerous charges for reviewing and reading documents prepared by other counsel, and he suggests that these charges should be reduced or eliminated as excessive and unnecessary.

Although the respondent takes the position that no attorney fee award is appropriate, it nonetheless submits that if a fee is awarded, the following is a schedule of reasonable hours and rates in light of Ms. Fleischauer's "minor role" in this matter:

1)	Client interview	2.0
2)	Review Complaint prepared by Secretary	.5
3)	Attendance at temporary reinstatement hearing	6.0

~2750

4)	Attendance and assistance at hearings on the merits	10.0
5)	Review Secretary's posthearing brief	1.0
6)	Review Judge Koutras' decision and meeting with client	1.0

20.5 at $50.00	$	1,025.00

Attorney Fleischauer's Arguments in Support of the Motion for Attorney Fees

By memorandum filed with me on November 26, 1984, Ms. Fleischauer maintains that the plain meaning of section 105(c)(3) of the Act authorizes the award of private attorneys fees and expenses reasonably incurred by Mr. Ribel in connection with the discrimination complaint brought on his behalf by the Secretary of Labor. In support of this argument, Ms. Fleischauer relies on the Supreme Court decision in New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980), a case litigated pursuant to Title VII of the Civil Rights Act of 1964. Ms. Fleischauer argues that the factual similarities between Mr. Ribel's case before this Commission and the facts presented in the New York Gaslight Club, Inc. are controlling on the question of the award of attorneys fees to her for the work performed on Mr. Ribel's behalf. She concludes that the Supreme Court's holding in the case stands for two separate propositions that are relevant to this case: (1) private attorneys who intervene in federal agency proceedings on the complainant's behalf may be reimbursed for their time under the federal statute, and (2) private attorneys who participate in state agency proceedings which are related to or have a connection with the federal proceedings, may also recover attorneys fees for the state proceedings under the federal statute.

In further support of her request for attorney fees, Ms. Fleischauer includes an affidavit from Mr. Ribel and an affidavit executed by MSHA attorney Moncrief and filed with me on November 29, 1984. While taking no position on the award of attorney fees to Ms. Fleischauer, Mr. Moncrief states that during a period prior to the reinstatement hearing, he conferred with Ms. Fleischauer by telephone for the purpose of exchanging information, clarifying their understanding of the facts, and discussing "theories and approaches to the case." Mr. Moncrief also asserts that he conferred with Ms. Fleischauer the day before the hearing, and during the trial at counsel table and during recesses. He concludes that "my representation of Mr. Ribel was significantly enhanced by the collaboration with Ms. Fleischauer."

Findings and Conclusions

In Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-719 (5th Cir.1974), the court set down 12 criteria for a judge's consideration in determining an award of attorney fees. At 488 F.2d 720, the Court made the following observation:

> * * * 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.

In Donnell v. United States, 682 F.2d 240 (D.C.Cir.1982), a case involving attorney fees to intervenors on the side of the United States under the Federal Voting Rights Act, the Court observed as follows at 682 F.2d 248, 249:

> Where Congress has charged a governmental entity to enforce a statutory provision, and the entity successfully does so, an intervenor should be awarded attorneys' fees only if it contributed substantially to the success of the litigation. This inquiry primarily entails determining whether the governmental litigant adequately represented the intervenors' interests by diligently defending the suit. It also entails considering both whether the intervenor's proposed different theories and arguments for the court's consideration and whether the work it performed was of important value to the court.
>
> By providing for attorneys' fees to be awarded in actions brought to vindicate the civil rights laws, Congress did not intend to allow private litigants to ride the back of the Justice Department to any easy award of attorneys' fees. Obviously, if an intervenor did nothing but simply show up at depositions, hearings, and the trial itself and spend lots of time reading the parties' documents, an award of attorneys' fees would be inappropriate. The same would be true if the intervenors' submissions and arguments were mostly redundant of the government's or were otherwise unhelpful. (Emphasis added.)

The record in this case reflects that prior to the hearings concerning Mr. Ribel's complaints, Ms. Fleischauer failed to file any formal appearances as his counsel. Further, although her after-the-fact arguments in support of attorney fees suggest that she is an intervenor, the record reflects that at no time has she availed herself of the opportunity to file a motion of intervention pursuant to Commission Rule 29 C.F.R. 2700.4(c).

With regard to Ms. Fleischauer's participation at the temporary reinstatement hearing held in Pittsburgh on Monday, November 28, 1983, I take note of the fact that she did not actively participate in the hearing, questioned no witnesses, presented no arguments, and simply sat at counsel table as an observer. Her appearance was noted after MSHA Counsel Moncrief introduced her on the record as "an attorney retained by Ribel originally in anticipation of [sic] 105(C)(3) case, as well as certain matters in the State of West Virginia which are similar in nature to these proceedings" (Tr. 5). Mr. Moncrief also stated that "With me is Barbara J. Fleischauer, who has been privately retained by Mr. Ribel to represent him in ancillary matters, that is, matters ancillary to the proceeding" (Tr. 6).

The trial transcript consisting of 321 pages in Mr. Ribel's reinstatement hearing reflects that Ms. Fleischauer's participation was limited to responding to questions from me concerning the location of a mine phone (Tr. 198-199), the identity of two miners at a mine meeting (Tr. 237-238), and a question as to whether Mr. Ribel was receiving unemployment compensation (Tr. 291). I find nothing to support the conclusion that her participation was critical to Mr. Ribel's case, or that it significantly contributed to the presentation of his case, or the making of the record before me. In a trial transcript consisting of 321 pages, Ms. Fleischauer's name appears on three pages, and I cannot conclude that her participation made any significant contribution to the case as it was being presented by MSHA counsel Moncrief. Accordingly, Ms. Fleischauer's reliance on MSHA Counsel Moncrief's affidavit in support of her contention that she made a significant contribution at the hearing is rejected.

Ms. Fleischauer's reliance on Mr. Ribel's affidavit in support of her suggestion that she made a significant contribution to the presentation of his case before me is also rejected. Mr. Ribel's assertion at page 2 of his affidavit that during his reinstatement hearing, Ms. Fleischauer "cleared up some confusion about the direction the air was flowing across the face," and that this was an "important part of my case," is nonsense. The ventilation flow in the mine had nothing to do with Mr. Ribel's discharge for allegedly sabotaging a mine phone.

With regard to the hearing on the merits of Mr. Ribel's discharge, Ms. Fleischauer claims 13 hours of work in connection with the "hearing at Ramada Inn in Morgantown" on January 11, 1984, and "second day of hearing, consultation with client," on January 12, 1984. The hearing transcript for January 11, 1984, reflects that she entered an appearance that day. However, the transcript for the second day, January 12, 1984, does not show that she was present, or that she entered an appearance. However, even assuming that she was present for the full two days of hearings, a review of the 743 pages of trial transcripts concerning Mr. Ribel's case, and two other complainants not represented by Ms. Fleischauer, reflects that Ms. Fleischauer is not mentioned at all. In short, the transcripts reflect that she was a nonparticipant.

In my view, Mr. Ribel's statement at page 3 of his affidavit that Ms. Fleischauer's presence at the hearing on the merits of his discharge "gave us an opportunity to gather information and observe how witnesses acted in case we needed to have a hearing at the state level," accurately portrays the role played by Ms. Fleischauer in the hearings before me. As I stated earlier, her role in both hearings before me was that of an observer monitoring the hearings. Ms. Fleischauer admits as much when she states at page eleven of her memorandum that she would have been negligent if she had not monitored Mr. Ribel's case before this Commission.

At pages 9 and 10 of her memorandum, Ms. Fleischauer asserts that in a discrimination case brought by MSHA on behalf of a complainang miner, the first duty of MSHA's attorneys is to see that the Act is enforced, and its obligation to the miner is only of secondary importance. In support of this conclusion, Ms. Fleischauer maintains that MSHA's lack of committment to Mr. Ribel "is shown by the fact that to date three different MSHA attorneys have been assigned to represent his case."

I find Ms. Fleischauer's self-serving criticism concerning MSHA's asserted lack of committment to Mr. Ribel to be unwarranted and lacking in substance. MSHA Counsel Moncrief, who represented Mr. Ribel at the reinstatement hearing, and MSHA Counsel Rooney, who represented him at the hearing on the merits, more than adequately represented and protected Mr. Ribel's interests.

I assume that the third attorney referred to by Ms. Fleischauer is the MSHA staff attorney who will represent

MSHA and Mr. Ribel in the appeal filed with the Commission by the respondent. The fact that three MSHA staff attorneys have pursued Mr. Ribel's case before this Commission reflects committment, rather than a lack thereof.

I believe it is clear from the record in this matter that Ms. Fleischauer provided no active input at the hearings which I conducted, asked no questions of witnesses, presented no evidence, did not participate in any cross-examination, and filed no post-hearing briefs or proposed findings and conclusions. In short, her role was that of a passive observer and nonparticipant. The work in connection with the presentation of Mr. Ribel's case before me, both at the temporary reinstatement hearing, and the hearing on the merits, was carried out by the Secretary's staff attorneys. The record reflects that both attorneys (Moncrief and Rooney), provided more than adequate legal support for Mr. Ribel's position, and that his interests were protected and pursued in a competent manner by government counsel. The record here does not support a conclusion that Ms. Fleischauer made any meaningful contribution to the final outcome of Mr. Ribel's case before me.

Most of the claimed legal expenses itemized in Attachment 2(C) of Ms. Fleischauer's motion, appear to be claims associated with her work in connection with Mr. Ribel's state unemployment compensation claim and his state appeal in connection with his discharge. In each instance where she claims that she spent a designated amount of time on a particular matter, she has failed to indicate that it was in connection with Mr. Ribel's discrimination case before this Commission. For example, at page 1 of attachment 2(C), she states that on August 24, 1983, she spent 2 hours and forty-five minutes reading portions of the West Virginia Mine Safety Statute. On September 2, 1983, she claims that she spent approximately 3 hours researching state unemployment compensation laws, and that on September 5, 1983, she spent 6 1/2 hours preparing for Mr. Ribel's state unemployment compensation claim hearing. On October 8 and 22, 1983, she claims she spent approximately 4 hours reviewing and analyzing the transcript of Mr. Ribel's arbitration hearing. On November 7, 1983, she claims she spent over 7 hours meeting with an unidentified witness, and that on November 11, 1983, she spent over 9 hours for work connected with the "Appeal Board." On November 23, 1982, she claims she spent over 7 hours meeting with a representative of the West Virginia Department of Mines Appeal Board.

In her itemized expenses for legal services shown in Attachment 2(C), Ms. Fleischauer includes the following charges for researching, preparing, and computing the amount

of claimed attorneys fees, and it includes the time spent in preparing her billings:

12/9/83	45 minutes
2/5/84	65 minutes
10/5/84	90 minutes
10/12/84	105 minutes
10/20/84	120 minutes
10/23/84	165 minutes (unspecified portion)
	590 minutes

Based on a fee of $50 per hour, Ms. Fleischauer has claimed a fee of approximately $500 for compiling and computing how much Mr. Ribel owes her for her legal services.

The New York Gaslight Club, Inc., case involved a racial discrimination complaint filed under Title VII of Civil Rights Act of 1964, with the Federal Equal Employment Opportunity Commission. Pursuant to certain procedures established by the EEOC for processing such complaints, the case was referred to the appropriate State of New York administrative Agency. The complainant was represented by private counsel throughout the state proceeding, and after completion of the state administrative and judicial proceeding, the state agency's determination in favor of the complainant was affirmed.

The critical issue presented in the New York Gaslight Club, Inc. was the question of whether or not attorney fees could be awarded for work performed by a private attorneys in connection with proceedings pursuant to a federal statute before a state adjudicatory agency where there was no state provision for the payment of fees for private counsel. In holding that attorneys fees were payable, the Supreme Court relied on the broad language found in section 706(k) of Title VII, allowing discretionary court approval of such fees "in any action or proceeding under this title," the fact that the complaint was initially referred to the state agency for resolution, the fact that Title VII gave the complainant the right to sue in Federal Court for attorneys fees regardless of the posture of the state proceeding, and the fact that the legislative history of Title VII reflected a broad and comprehensive enforcement provides for an initial state and local resolution of the complaint, with the ultimate compliance authority residing in the federal courts.

Ms. Fleischauer asserts that the facts presented in Mr. Ribel's case are similar to those which prevailed in

New York Gaslight. She maintains that MSHA's inspectors encouraged Mr. Ribel to retain private counsel; that MSHA's attorneys somehow viewed Mr. Ribel's interests as of secondary importance and lacked committment to his case; that she made a positive contribution to the development of the record before me in Mr. Ribel's case; that her work in connection with Mr. Ribel's state proceeding "aided in the protection and preservation of Mr. Ribel's federal rights"; and that the state's proceedings were inadequate.

Ms. Fleischauer's reliance on the asserted shortcomings and inadequacies of the State of West Virginia's procedures for adjudicating mine safety discrimination cases to support her claims for attorneys fees in the case before me is irrelevant. Mr. Ribel's complaint under the Federal Mine Act has afforded him a full and fair opportunity to be heard before this Commission, and I remain unconvinced that Ms. Fleishcauer's limited participation in the proceedings before me contributed in any meaningful way to the adjudication of his case. I am also not convinced that her work in connection with Mr. Ribel's state complaints, including his claims for unemployment compensation, contributed in any meaningful way to my adjudication of his case.

Ms. Fleischauer's reliance on the New York Gaslight case in support of her claimed attorneys fees for work in connection with Mr. Ribel's state proceedings IS REJECTED. In Mr. Ribel's case, it seems clear to me that the complaint filed on his behalf by MSHA before this Commission was separate and apart from any remedy which may have been available to him under state law. In these circumstances, I am of the view that Ms. Fleischauer should look to the State of West Virginia to recover any attorneys fees incurred by Mr. Ribel in connection with counsel's legal work in that forum.

Ms. Fleischauer does not adequately explain the services purportedly rendered by "Professor" Bastress and "Professor" Cleckley on behalf of Mr. Ribel. It would appear to me that these services were in connection with Mr. Ribel's claims before several state agencies. In any event, these individuals are totally unfamiliar to me, and they entered no appearances and did not participate on the record in any proceeding before me in connection with Mr. Ribel's discrimination complaint. Under the circumstances, these claims ARE REJECTED as unsupported and unwarranted.

In Secretary of Labor, ex rel Michael J. Dunmire and James Estle v. Northern Coal Co., 4 FMSHRC 126 (February 5, 1982),

the Commission affirmed a decision by Judge Morris awarding two miners expenses they incurred while attending hearings concerning their discrimination complaints brought on their behalf by MSHA. In granting this relief, the Commission noted as follows at 4 FMSHRC 143-144:

> Regarding incidental, personal hearing expenses incurred by Estle and Dunmire in connection with their attendance, Northern argues that because section 105(c)(3) of the Mine Act expressly provides for hearing expenses, while section 105(c)(2) does not mention the subject, Congress must have intended that such expenses were outside the scope of a section 105(c)(2) remedial award. We agree with the judge that the differences in language between the two sections are not as significant as Northern argues. Section 105(c)(2) expressly provides that the relief it authorizes is not limited to the reinstatement and back pay mentioned. Furthermore, the "illustrative" nature of the relief listed in section 105(c)(2) is made clear by the legislative history we quoted above. Estle and Dunmire would not have borne such expenses (and inconvenience) but for Northern's discrimination. We therefore hold that reimbursement of their hearing expenses is an appropriate form of remedial relief.

In his decision of May 27, 1981, in the Northern Coal Co. case, Judge Morris made the following findings and conclusions with respect to the question of reimbursement of expenses in connection with attending the hearings, 5 FMSHRC 1342-1343:

> * * * Under Section 105(c)(2), in a discrimination proceeding brought by the Secretary, the Commission may direct "other appropriate relief,' including an order incorporating affirmative action to abate and "back pay and interest.' A Section 105(c)(2) case brought by the Secretary does not directly authorize costs and expenses.
>
> On the other hand, in a proceedings [sic] brought by a miner on his own behalf under Section 105(c)(3), in addition to back pay and interest, the Commission shall award a sum for "all costs and expenses.' The apparent conflict, as outlined above, is resolved by a review of the legislative history:

> It is the Committee's intention that the Secretary propose, and that 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 with [sic] interest, and recompense for any special damages sustained as a result of the discrimination. The specified relief is only illustrative. Thus, for example, where appropriate, the Commission should issue broad cease and desist orders and include requirements for the posting of notices by the operator.
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> S.Rep. No. 95-181, 95th Cong. 1st Sess. 37, reprinted in (1977) U.S.Code Cong. & Ad News 3400, 3437.

Application of the statutory standard has resulted in the reimbursement of lost equity in a truck (Secretary on behalf of E. Bruce Noland v. Luck Quarries, Inc., 2 FMSHRC 954), an employment agency fee (Secretary on behalf of William Johnson v. Borden, Inc., SE 80-46-DM, April 13, 1981), transcript, court costs, and attorneys fees (Frederick G. Bradley v. Belva Coal Company, supra. Here the expenses incurred in participation in the hearings are special damages necessarily resulting from complainants' prosecution of their claims. The statute intended these expenses to be borne by the individual whose conduct occasioned them.
Northern also argues that no expenses should be awarded Dunmire for the hearing on the temporary reinstatement order because the Secretary asserted that no testimony could be taken regarding the merits of the case. This point has been thoroughly discussed (supra, pages 8-11). In addition, there is no doubt that the presence of Dunmire was necessary in the prosecution of his claim.

In the Borden case cited to by Judge Morris, former Commission Judge Laurenson awarded the complainant $951.33, an amount he paid as a fee to an employment agency which found him a job after his discharge. Judge Laurenson held that "this employment agency fee is the type of consequential damages which is authorized by section 105(c)(2) of the Act," 3 FMSHRC 926, 938 (April 13, 1981). However, Judge Laurenson denied the complainant's request for reimbursement of $20 paid by him for tape recordings of his unemployment compensation hearing, and in so doing ruled that "Johnson failed to establish a valid reason for the need for these tape recordings as a reimbursable item of consequential damages," 3 FMSHRC 938.

In the Bradley case cited by Judge Morris, Commission Judge Broderick authorized payment of $60.60 to the complainant for the cost of the hearing transcript in his case before this Commission, but denied a claim of $90 for the transcript of the complainant's hearing before the West Virginia Coal Mine Safety Board of Appeals.

In Secretary of Labor, MSHA v. Metric Constructors, Inc., 6 FMSHRC 226 (February 29, 1984, a case brought by MSHA on behalf of seven miners, the Commission affirmed Judge Lasher's findings sustaining their discrimination claims. However, the Commission remanded the case for a determination as to certain remedial aspects of the case, particularly with regard to Judge Lasher's award of $125 per day to five of the complainants for the time spent attending their hearings. The awards were in the amount of $375 to four of the complainants and $250 to the other one for the three day hearings. Judge Lasher noted that in the absence of any specific input from the parties as to the amounts that should be awarded, "an award of $125.00 for each day of hearing attended by a Complainant is fair and reasonable reimbursement," 4 FMSHRC 811 (April 20, 1982).

In remanding the case, the Commission noted as follows at 6 FMSHRC 226, 234 (February 29, 1984):

> Recovery of expenses incurred in bringing a successful claim may be part of the relief necessary to make a discriminatee whole. Northern Coal, 4 FMRHRC at 143-44. The burden of establishing a claim for expenses is upon the Secretary. It is he who must introduce sufficiently detailed evidence so that a determination may be made whether the complaints' claims are justified. When he does not do so and when, as here, the judge's award is without record support, we have no basis for meaningful

> review. We therefore vacate the award of expenses. However, in view of the statutory duty to make these miners whole, we remand in order to afford the parties the opportunity to submit evidence concerning the appropriate amount, if any, of the expenses to be awarded the complainants.

The Metric Constructors, Inc. case was assigned to me on remand. The parties stipulated and agreed to the relief due the complainants, and with regard to hearing expenses, they agreed that three of the complainants should be paid $72 each for the time spent attending the hearing, and that one other complainant should be paid $48. The stipulation and agreement was finalized in my decision of April 26, 1984. A subsequent appeal taken by MSHA in the case was denied by the Commission on June 6, 1984, and Judge Lasher's decision, as well as mine, became final.

In a recent decision by Chief Judge Merlin in Secretary of Labor, MSHA, ex rel Thomas L. Williams v. Peabody Coal Company, 6 FMSHRC 1920 (August 3, 1984), he considered a request for special damages filed pursuant to the "other appropriate relief" clause under section 105(c)(2). In that case, the complainant's privately retained counsel sought money damages, including attorney fees, for losses purportedly incurred in real estate and business ventures after the complainant was laid off. Judge Merlin rejected both claims after finding that the wrongful layoff of the complainant was not the proximate cause of his real estate and business losses and expenses. Judge Merlin also rejected a claimed expense of $1,418.64, purportedly incurred by the complainant while job hunting after his layoff, and he did so after noting that MSHA's brief cited no case law to support an award of such damages, and that the solicitor advised him during the hearing that decisions under the National Labor Relations Act indicated such an award would not be made, 6 FMSHRC 1925.

In the Williams case, the parties agreed that he was entitled to recover for unreimbursed medical expenses in the amount of $710, and for the cost of obtaining recertification as an electrician. In approving payment for these costs, Judge Merlin noted as follows at 6 FMSHRC 1925:

> 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.

In Secretary of Labor, MSHA, ex rel Larry D. Long v. Island Creek Coal Company and Langley & Morgan Corporation, 2 FMSHRC 2640 (September 18, 1980), Commission Judge Fauver awarded compensation to a complainant for costs and expenses incurred in connection with the institution and prosecution of his discrimination claim by MSHA. Judge Fauver awarded compensation for (1) lost wages in the amount of $247.04; (2) mileage expenses in the amount of $199.24; and (3) telephone expenses in the amount of $57.47, and his awards were substantially less than the total amount requested by MSHA on behalf of the prevailing miner. As noted in the October 1, 1981, issue of the CCH Employment Safety and Health Guide, No. 542, page 9, Judge Fauver's decision was upheld on September 4, 1981, in an unpublished opinion (No. 80-1799) by the Fourth Circuit Court of Appeals.

On the basis of the aforementioned cases concerning MSHA instituted discrimination complaints, damage awards have been made for expenses incurred by a complainant while attending his own hearing, including claims for mileage and telephone calls, and the cost of Commission hearing transcripts. Conversely, claims for costs incurred by a complainant in collateral matters such as state unemployment compensation claims and state-filed discrimination complaints have been rejected. In each instance where costs were awarded, the Judge viewed them as consequential or special damages within the meaning of the term "other appropriate relief" language found in section 105(c)(2) of the Act. Except for the Williams case decided by Judge Merlin, none of the other cases concerned private attorney fees for MSHA-initiated complaints.

Except for the Williams case decided by Judge Merlin, none of the other cited cases concerned awards for private attorney fees for MSHA-initiated complaints. In the Williams case Judge Merlin denied a fee request after finding that the requested fees were in connection with claimed business losses which were not the direct result of the discriminatory conduct.

After careful review and consideration of the arguments presented by the parties in support of their respective positions on the issue of attorney fees in MSHA-initiated discrimination complaints, I cannot conclude that such fees are available as special or consequential damages pursuant

to section 105(c)(2). On the facts of this case, I conclude and find that Mr. Ribel's decision to retain private counsel was of his own doing, and that private counsel was not necessary to pursue his complaint before this Commission. Since his complaint was pursued at all stages before me by MSHA's attorneys, I conclude that any fee award to private counsel here would be inappropriate, particularly where the record shows that private counsel did little or no work in the proceedings before me, and made little or no contribution to the outcome of Mr. Ribel's case. Accordingly, Ms. Fleischauer's assertion that she is entitled to attorney fees under section 105(c)(2) of the Act ARE REJECTED, and her claims ARE DENIED.

Even if I were to hold that section 105(c)(2) authorizes an award of private attorney fees as part of the special or consequential damages available to a prevailing complainant, on the facts of this case, I remain unconvinced that Ms. Fleischauer earned the substantial fees that she is claiming for her legal efforts on behalf of Mr. Ribel in the proceedings before me. In any event, in such a case, I would award her the amount suggested by respondent ($1,025) as a reasonable fee for her input in the proceedings which I adjudicated.

With regard to Mr. Ribel's claim for $290.88, for prescription medication expenses incurred by his family during the time he was off the respondent's payroll, I conclude and find that these expenses may be recovered as consequential damages. In this regard, I assume that any such expenses incurred by Mr. Ribel during the period he was off the respondent's employment rolls would have been covered by his company provided medical insurance plan. Had he not been discharged, these expenses would have been paid or at least compensated by any applicable insurance plan. If my assumptions are correct, and assuming the itemized expenses can be verified, RESPONDENT IS ORDERED to compensate Mr. Ribel for these personal expenses.

With regard to Mr. Ribel's claims for $180 in interest charges for personal loans totalling $1500 to cover certain expenses resulting from three months loss of wages, I conclude and find that these expenses are recoverable as consequential damages flowing from the discriminatory conduct. Assuming these amounts can be verified, RESPONDENT IS ORDERED to compensate Mr. Ribel for these personal expenses.

With regard to Mr. Ribel's mileage and meal costs for the periods 8/24/83 to 11/15/83, in the amount of $135.92, as itemized in Attachment 5(A), they are all DENIED. These claims are for expenses preceding Mr. Ribel's hearings before this Commission, and I conclude that they are not recoverable under section 105(c)(2) of the Act.

With regard to Mr. Ribel's long distance telephone call expenses totalling $53.54, as itemized in Attachment 5(B), and encompassing a period from 8/5/83 to 8/11/84, I note that many of the itemized calls were made before and after the hearings which I conducted. Since it is difficult to verify and separate an itemized listing, I will award Mr. Ribel the sum of $35.00, as a reasonable amount to compensate him for his out-of-pocket claimed phone calls, and RESPONDENT IS ORDERED to pay him that amount.

The parties are advised that my findings and conclusions with respect to the requested attorney fees and expenses have been made after careful consideration of all of the arguments presented by Ms. Fleischauer in her memorandum in support of the requested awards, the oppositions and replies filed by the respondent's counsel, and the affidavit filed by Mr. Moncrief. I take particular note of the fact that MSHA has taken no position with respect to the merits of Ms. Fleischauer's claims for fees and damages, and that MSHA Counsel Rooney and respondent's Associate General Counsel Rock have not been heard from.

George A. Koutras
Administrative Law Judge