CCASE:
ROBERT SIMPSON V. KENTA ENERGY
DDATE:
19850226
TTEXT:

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

ROBERT SIMPSON, COMPLAINANT	DISCRIMINATION PROCEEDING
v.	Docket No. KENT 83-155-D MSHA Case No. BARB CD 83-06
KENTA ENERGY, INC., & ROY DAN JACKSON, RESPONDENTS	No. 1 Mine

DECISION

Appearances: Tony Oppegard, Esq., Hazard, Kentucky, and Stephen A. Sanders, Esq., Prestonsburg, Kentucky, for Complainant;
Stephen D. Cundra, Esq., and Michael R. Gottfried, Esq., Thompson, Hine & Flory, Washington, D.C. for Respondents.

Before: Judge Broderick

In my decision of June 1, 1984, I concluded that Complainant Simpson was discharged for activity protected under the Mine Act and that therefore, his discharge was a violation of section 105(c) of the Act, 6 FMSHRC 1454 (1984). With respect to the operator of the mine, I stated that "It was decided at the hearing that the issue of the personal liability of Jackson would await a determination of whether a violation of section 105(c) was established. If such a violation was found, the parties would be afforded the opportunity of submitting additional evidence on the question of Jackson's liability." Id., 1455. This followed a lengthy colloquy between Court and counsel on the record at the hearing on January 11, 1984 (Tr. 344-355).

Section 105(c)(1) of the Act provides that "no person" shall discharge or discriminate against a miner for activity protected under the Act. Liability under this section was imposed against a successor mine operator in Munsey v. Smitty Baker Coal Company, 2 FMSHRC 3463 (1980). The Munsey decision was based on the case of Golden State Bottling Co. v. NLRB, 414 U.S. 168 (1973), in which the Supreme Court upheld a remedial order against a successor employer for an unfair labor practice committed by its predecessor. Liability under section 105 of the Mine Act is not excluded even

in a case against one who never employed the miner affected. Local 9800 UMWA v. Secretary of Labor, 2 FMSHRC 2680 (1980). Ordinarily, however, relief is only available from the mine operator. The term operator is defined in section 3(d) of the Act as "any owner, lessee or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine."

Complainant argues that "Jackson was the owner and operator of the Black Joe Mine, that he was the alter ego of Kenta Energy, Inc., and that Jackson should therfore be held personally liable for the relief due Simpson. . . ." Respondent argues that Complainant has failed to carry "his burden of showing sufficient unfairness to justify piercing the corporate veil, and imposing personal liability on [Kenta's] former employee Jackson." Although much of the post-decision evidence, much of Complainant's post-decision brief, and all of Respondent's post-decision brief are directed to the questions whether the corporate veil should be pierced and whether Jackson was the alter ego of Kenta, my view of the issue is a broader one: The question is, who was the person responsible for the discrimination? Or, perhaps, who was the operator of the mine at the time the discrimination took place? Who ought to be subject to "an order granting appropriate relief?" (Section 105(c)). I have found that Complainant was discharged in violation of the Act. I am now obliged to determine who was responsible for the discharge and who must provide appropriate relief. My obligation to make these determinations is not limited, as Respondent implies, to deciding "the issues framed by Complainant's June 27, 1984, Statement of Claim."

Following my decision of June 1, 1984, Complainant submitted a Statement of Claim against Roy Dan Jackson, a Statement Claiming Back Pay with Interest, and a Statement of Attorneys' Fees and Expenses. Objections were filed to each of these statements by Respondents. Further discovery was permitted by order issued July 30, 1984. Interrogatories and Requests for Admission were served on Respondents which were responded to. Depositions of William R. Forester, Karl Forester, Paul Bell, Shirley Powell, Barry Rogers, Roy Dan Jackson, Stanley Gilbert, Danny Noe, Dewey Middleton and Robert Cox were taken by Complainant.

Pursuant to notice, a hearing was convened in Hazard, Kentucky, on October 24, 1984. Robert Simpson testified on behalf of Complainant. No witnesses were called by Respondent. Respondent Jackson did not appear at the

hearing, but his deposition was admitted without objection as Complainant's Exhibit 43.

Following the hearing, Complainant and Respondents filed written affidavits and other submissions bearing on the appropriate hourly rate for the attorneys' fees claim. Each side then filed posthearing briefs on the issue of Jackson's liability. Complainant filed a supplemental statement of attorneys' fees and expenses, and Respondent filed a statement in opposition thereto.

I. THE ISSUE OF JACKSON'S LIABILITY

A. JACKSON'S RELATIONSHIP TO KENTA

The subject mine, designated as the No. 1 Mine, was also known as the Black Joe No. 1 Mine. It was operated by the Black Joe Coal Company, of which Jackson was 50 percent owner, and began producing coal in about 1977. At some time before September, 1980, the Black Joe Coal Company "went broke" and mining was discontinued. At that time Jackson owned or controlled the Helen Ann Coal Company, Inc., Penelee Coal Company, Inc., Sugar Rock Coal Company, Inc., and Doile Coal Company, Inc.

On September 26, 1980, Jackson, Helen Ann, Penelee, Sugar Rock and Doile entered into a contract with Kenta Energy Inc. and Associates, described as a limited partnership, wherein Kenta agreed to purchase all the transferrable assets of Helen Ann, Penelee, Sugar Rock and Doile, including coal mining equipment and coal leases, in return for the payment of $6,000,000, to be paid in specified installments. Jackson agreed to enter into a "management agreement" for 2 years as the President of Kenta. The agreement was signed by Jack Allen, President of Helen Ann, Jack Allen, President of Penelee, Keston Sturgill, President of Sugar Rock and Glenn Doile Vandagriff, President of Doile. It was signed by Jackson as "Guarantor" for the four corporations, and by Jackson as President of Kenta Energy, Inc., and Associates. The employment contract wherein Kenta agreed to hire Jackson as its President

for a period of 2 years and pay him a salary of $100,000 per year, was signed by Jackson as President for the first party, Kenta, the employer, and again by Jackson as the second party, the employee. The agreement states that Jackson was a principal stockholder in Helen Ann and Penelee, and the managing officer of Sugar Rock. Doile had a contract, signed for Doile by Jackson as President, to supply coal through the Virginia Fuel Company to the Florida Portland Cement Company. Doile did not mine coal but sold the production of Helen Ann, Penelee and Sugar Rock pursuant to this contract. Doile agreed with Kenta to assign its interest in the coal sales contracts to Kenta. This agreement was signed by Doile Vandagriff, President of Doile and by Jackson, President of Kenta.

In the event of Kenta's default on payment of the purchase price installments, the contract provided that Jackson could repossess the assets sold. Neither the Black Joe Mine nor the Black Joe Coal Company was named in the contracts between Jackson and Kenta.

Some time in 1981, the Black Joe Mine was reopened (on February 24, 1981, Jackson applied to the State agency for a license to operate an underground coal mine). In early 1982, the Sugar Rock Mine was worked out, and the Black Joe Mine was "leased" to Kenta as a substitute. The lease was not produced, nor was any other documentary evidence of an agreement between Jackson and Kenta to substitute Black Joe for Sugar Rock. Respondents' statement (p. 4 post-trial Brief) that "In keeping with the Sales Agreement, which was based upon coal production rather than upon coal contained in a particular mine, see Sales Agreement at p. 3(g), Jackson substituted his lease on Black Joe Mine for the lease on the now non-producing mine" is speculative. In any event, the equipment and miners from Sugar Rock were transferred to Black Joe. Jackson applied for a 1982 license to operate Black Joe as Kenta Energy, Inc.

The contract provides (V, 5, (n), Comp.Exh 16) that if Kenta does not meet its principal or interest payments under the contract, Sellers (Helen Ann, Penelee, Sugar Rock, Doile) shall notify Purchaser (Kenta) of the default and if payments are not received within 30 days, Jackson as President of Kenta is authorized to transfer back to the sellers sufficient assets to pay the delinquent principal and interest as liquidated damages. In January, 1981, Kenta was notified by attorney William R. Forester (one of the original Directors of Kenta) that it was in default (one of the original Directors of Kenta) that it was in default in its payments. In April, Forester notified Kenta that it was in default on the January 26, 1981, payment, though the payments due in September and November 1980 "have been paid in full, either by the payment of moneys or the retransfer of equipment to the various coal companies" (Com.Exh. 19). In June 1981, separate letters from Helen Ann, Sugar Rock, Penelee and Doile were sent to Kenta notifying it that it was in default respecting the May 1981 payment. (Comp.Exhs. 20-23). Jackson testified that thereafter, he met with Kenta representatives and "they paid up until June of 81, I think." (Comp.Exh. 43, p. 60). He also stated that the next payment was not due until June, 1982. However, the contract entered into September 26, 1980, provides for payments on the contract date, with subsequent payments 2 months, 4 months, 8 months, and 16 months after the contract date (the last date would thus be January 26, 1982), and the balance payable 24 months after the contract date. At any rate, Kenta made no payments after June 1981, and at some time in 1981 or 1982, Jackson began to repossess the assets in accordance with the terms of the contract. (Deposition of Jackson August 15, 1983, p. 4). It is not a simple matter to determine legal ownership of the mine in question as of September, 1982 in view of these facts, but I conclude that (1) the evidence does not establish that Black Joe (the subject mine) was ever transferred from Jackson to Kenta; (2) Kenta was in default under the

contract, and repossession had been instituted, although all the assets had apparently not been repossessed, before the facts giving rise to this proceeding occurred. Although Kenta is a Respondent, and has appeared herein by counsel, its identity and presence in the evidence in this proceeding is very shadowy. Jackson was hired as its President, (by a contract signed by himself for both parties), but denied knowing whether he was formally appointed as a corporate officer, denied knowing who the officers or directors were, and denied any knowledge of the internal affairs of the corporation. The Respondents' attorneys, in support of their motion to withdraw as counsel for Kenta filed on October 3, 1984, state that they have been unable to contact any officer, director or authorized agent of Kenta.

B. OPERATION OF BLACK JOE MINE

Jackson was the operator of the Black Joe Mine as Black Joe Coal Company, before he had any dealing with Kenta. Whether or not the mine was transferred to Kenta after Sugar Rock was worked out, the overall operation of the mine continued under Jackson. In dealings with the government mining agency officials, in deciding how to recover the coal, in hiring and firing miners, Jackson was in charge. At one time (and the dates are uncertain) the miners were paid by checks from a Kenta account. The "German investors" who were or represented Kenta came to the mine office in the early years under the contract, but there is no evidence that they had or exercized any direction or control over the mining operations at Black Joe or any of the other Jackson mines. I conclude that Jackson was the operator of the mine in which Complainant worked as a miner at all times relevant to this proceeding.

C. THE DISCHARGE OF SIMPSON

Whatever Jackson's relation to Kenta, and whether or not he was the mine operator,

there is no dispute that he was the "person" who discharged Simpson in violation of section 105(c) of the Act. Jackson argues that he was only acting as manager of Kenta pursuant to his employment contract. However, he testified that his salary as Kenta's president had been discontinued and he was operating the mine in order to get his equipment returned. This was the situation when Complainant was discharged. The wraith-like German investors had nothing to do with Simpson's discharge: Jackson clearly did.

BACK PAY AND INTEREST

At the time of his discharge, Complainant was earning $10.64 per hour, and was working 40 hours per week. I accept the information concerning interim earnings contained in the statements of back pay and interest filed July 2, 1984 and December 21, 1984.

The following is the back pay and interest due as of December 17, 1984, the interest being calculated in accordance with the formula approved by the Commission in Secretary/Bailey v. Arkansas-Carbona, 5 FMSHRC 2042 (1983).

1. First Quarter, 9/21/82 to 9/30/82

Gross back pay	$ 680.96
Interim Earnings	.00
Net back pay	680.96
Interest to 12/17/84	198.32

2. Second Quarter, 10/1/82 to 12/31/82

Gross back pay	$5,617.92
Interim Earnings	.00
Net back pay	5,617.92
Interest	1,355.27

3. Third Quarter, 1/1/83 to 3/31/83

Gross back pay	$5,447.68
Interim Earnings	.00
Net back pay	5,447.68
Interest	1,095.72

4. Fourth Quarter, 4/1/83 to 6/30/83

Gross back pay	$5,532.80
Interim Earnings	2,019.01
Net back pay	3,513.79
Interest	566.21

5. Fifth Quarter, 7/1/83 to 9/30/83

Gross back pay	$5,617.92
Interim Earnings	2,868.58
Net back pay	2,749.34
Interest	367.05

6. Sixth Quarter, 10/1/83 to 12/31/83

Gross back pay	$5,532.80
Interim Earnings	1,000.00
Net back pay	4,532.80
Interest	479.13

7. Seventh Quarter, 1/1/84 to 3/31/84

Gross back pay	$5,532.80
Interim Earnings	2,500.00
Net back pay	3,032.80
Interest	237.19

8. Eighth Quarter, 4/1/84 to 6/30/84

Gross back pay	$5,617.92
Interim Earnings	2,500.00
Net back pay	3,117.92
Interest	158.12

9. Ninth Quarter, 7/1/84 to 9/30/84

Gross back pay	$5,617.92
Interin Earnings	3,000.00
Net back pay	2,617.92
Interest	60.78

10. Tenth Quarter, 10/1/84 to 12/17/84

Gross back pay	$4,341.12
Interim Earnings	3,612.75
Net back pay	728.37
TOTAL net back pay due	$32,039.50
TOTAL Interest due	4,517.79
TOTAL	$36,557.29

ATTORNEYS FEES AND EXPENSES

Section 105(c)(3) of the Act provides that "whenever an order is issued sustaining the Complainant's charges . . ., 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 . . . for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation." Three issues are raised in this case: (1) the appropriate hourly rate; (2) the hours reasonably expended by the attorneys for Complainant; (3) whether all the hours expended represented attorney's work and are properly compensated at the appropriate hourly rate for attorneys.

A. THE APPROPRIATE HOURLY RATE

The appropriate hourly rate is the rate prevailing for similar work in the community where the attorneys practice law. Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir.1974); Copeland v. Marshall, 641 F.2d 880 (D.C.Cir.1980). It may, however, vary, depending on such factors as the kind of work involved, the experience and skill of the attorneys, the complexity and difficulty of the case, the results obtained, the undesirability of the case, and whether the fee is contingent or fixed. The attorneys for Complainant are requesting approval of an hourly rate of $75 for legal services performed in connection with the case. Respondents contend that $75 per hour is unreasonably high and should be drastically reduced. Respondents submitted a copy of a survey conducted by the Kentucky Bar Association showing that in the counties in which

> Complainant's attorneys are located, approximately 73 percent of the responding attorneys charged less than $60 per hour, while less than 7 percent charged more than $75 per hour. They also submitted an affidavit from an attorney in Harlan County, Kentucky to the effect that $45 to $55 per hour is "a reasonable rate for attorneys with experience of those working for the Appalachian Research and Defense Fund of Kentucky, Inc." Complainant's attorneys submitted affidavits detailing their education and experience; and affidavits from four attorneys in Eastern Kentucky to the effect that $75 per hour is a reasonable rate for discrimination cases under the Mine Safety Act.
>
> Mr. Sanders has been a member of the Kentucky Bar since 1978; Mr. Oppegard since 1980. Both have had extensive experience in mine safety matters and in other matters involving employee rights. The Court of Appeals in Johnson, supra, stated that a young attorney who has demonstrated skill and ability should not be penalized because he only recently was admitted to practice. I believe this case was complex, legally and factually. It was hard--fought and complicated by the Respondents' failure or inability to cooperate in discovery. The Complaint had been investigated by the Labor Department and rejected. Based on all these factors, I conclude that $75 is a reasonable hourly rate for the hours reasonably expended by Complainant's attorneys in this case.

HOURS REASONABLY EXPENDED

Respondents object to Complainant's claim for attorneys fees and expenses because (1) much of the work for which compensation is claimed is not strictly legal work and should not be billed at the attorney's hourly rate; (2) the two attorneys for Complainant have in some instances both performed work which could have been performed and billed by one of them; (3) much of the work performed was unnecessary; (4) the total fee requested is wholly disproportionate to the amount recovered by Complainant.

A. Non-Legal Work

The Court of Appeals in Johnson v. Georgia Highway Express, supra, at page 717 stated: "It is appropriate to distinguish between legal work, in the strict sense, and investigation, clerical work, compilation of facts and statistics and other work which can often be accomplished by non-lawyers but which a lawyer may do because he has no other help available. Such non-legal work may command a lesser rate. Its dollar value is not enhanced just because a lawyer does it."

A substantial portion of the work described in the Statements of Attorneys' Fees and Expenses appears to be "non-legal work" as described above. I conclude that the work described in the statements as interviewing witnesses (when it is or appears to be part of investigation rather than preparing for trial), contacts with MSHA or State mining officials and the Safety Academy, reviewing documents, talking with possible or potential witnesses, serving subpoenas, and inspecting reports is non-legal work. My review of the statements shows that 50.7 of the 411 hours billed by Mr. Oppegard between December 5, 1982 and June 5, 1984, were for such work; 7 of the 160.5 hours billed by Mr. Sanders from May 12, 1983 to April 19, 1984, were for such work; 38.9 of the 47.8 hours billed for joint work between May 11, 1983 and September 9, 1983, were for such work; 16.1 of the 191.9 hours billed in Mr. Oppegard's supplemental statement were for such work; 4 of the 102.8 hours billed in Mr. Sanders supplemental statement were for such work. I judge this work to be properly billable at $25 per hour. The total hours affected is 116.7. The reduction in the fee because of this factor is thus, $5,835.

B. DUPLICATION OF WORK

As the Court said in Copeland, supra, at 891, ". . . where three attorneys are present at a hearing when one would suffice, compensation should be denied for the excess time."

Complainant's two attorneys were present at the hearings in this proceeding, and at many of the depositions. They interviewed witnesses together, but have billed for the hourly rate of only one attorney for such work. It has been a difficult matter to decide whether the presence of two attorneys at the hearings and depositions was reasonably necessary. I conclude that it was not, and that the time of only one attorney is properly billable at attorney's fee rates. The presence of the second attorney was of value, however, and I will allow billing at the rate of $25 per hour for the services of second attorney. Further, where each attorney has billed at the rate of $75 per hour for discussions in person or by phone with each other, I have reduced the total billable rate to $100 for both attorneys. (Not all of the discussions between counsel are billed by both). The following items in the Statements are affected:

1. Oppegard Statement 8/11/83; Sanders Statement 8/11/83. I conclude that 2 hours were billed by each for discussions

2. Oppegard Statement 1/7/84, item: Phone conversation with Steve; Sanders Statement 1/7/84, item: phone call to Tony. One-half hour billed by both for discussion

3. Oppegard Statement 8/15/84; Sanders Statement 8/15/84 One-half hour billed by both for discussion

4. Oppegard Statement 10/19/84, Sanders Statement 10/19/84. One hour was billed by both for discussion

5. Oppegard Staement 8/15/83;
Sanders Statement 8/15/83:
8 hours billed by both for depositions.

6. Oppegard Statement 9/8/83; Sanders Statement 9/8/83. 8 hours billed by both for hearing.

7. Oppegard Statement 9/9/83; Sanders Statement 9/9/83. 3 hours billed by both for hearing.

8. Oppegard Statement 1/11/84; Sanders Statement 1/11/84. 5 hours billed by both for hearing.

9. Oppegard Statement 1/12/84; Sanders Statement 1/12/84. 7 hours billed by both for hearing.

10. Oppegard Statement 10/15/84; Sanders Statement 10/15/84. 6.5 hours billed by both for depositions.

11. Oppegard Statement 10/24/84; Sanders Statement 10/24/84. 7.5 hours billed by both for hearing.

Thus a total of 49 hours were billed at $150 per hour (75 per hour for each attorney) for this partially duplicated work. I judge that the fee is $50 per hour too high. The reduction in fee because of this factor is $2,450.

C. NECESSARY LEGAL WORK

Respondents contend that the number of hours charged by counsel for discovery, and for the preparation of briefs was excessive

> and fees should be reduced. Respondents contend that much of the discovery was unnecessary. I take notice that a considerable part of the discovery undertaken by Complainant resulted from and was made necessary because of Respondents' lack of cooperation and the absence of adequate records and documents. However, I agree with Respondents that some of the extraordinary amount of time devoted to discovery was unnecessary and unproductive, and that the amount of time devoted to the posthearing brief was excessive. Mr. Oppegard billed for 102.7 hours and Mr. Sanders for 36 hours in preparing the brief subsequent to the January 1984 hearing. Mr. Oppegard billed for 33 hours and Mr. Sanders for 19 hours following the October 1984 hearing. I will reduce by 50 the number of hours allowed for discovery and other trial preparation, and will reduce from 190.7 hours to 150 hours, the allowable and billable time for preparation of briefs. Therefore, the reduction in fee because of this factor is $6,802.50

D. DISPROPORTION BETWEEN RECOVERY AND FEES REQUESTED

> Respondents argue that the fees requested are "wholly disproportionate to Complainant's claim for back pay and interest of $36,557.29. . . ." This overlooks the fact that Complainant was awarded job reinstatement as well as back pay and interest. The amount recovered as back pay does not determine the reasonableness of the fee request. See Copeland, supra, at 906-908.

The total fees requested amount to $69,550. I am deducting $15,087.50 and approving fees in the amount of $54,462.50.

EXPENSES

Complainant's attorneys have requested reimbursement in the amount of $2,616.72 for expenses, including mileage, copying, witness fees and service fees, telephone calls, transcripts. Respondents object to these expenses, but my review of the statements persuades me that they are reasonable. Reimbursement for the expenses will be allowed.

ORDER

1. Respondent Jackson is ORDERED to reinstate Complainant to the position he held on September 20 1982, or to a similar position at the same rate of pay and with the same employment benefits.

2. Respondents Kenta and Jackson are ORDERED to pay to Complainant the sum of $36,557.29 for back wages and interest through December 17, 1984. They are FURTHER ORDERED to pay to Complainant back wages at the rate of $425.60 per week with interest, less interim earnings from December 17, 1984, until he is reinstated.

3. Respondents Kenta and Jackson are ORDERED to pay Complainant's attorneys the sum of $54,462.50 as attorneys' fees and $2,616.72 for expenses of litigation.

James A. Broderick
Administrative Law Judge