

CCASE:
SOL (MSHA) v. JIM WALTER RESOURCES
DDATE:
19851122
TTEXT:

~1952

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

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF	DISCRIMINATION PROCEEDINGS
I.B. ACTON,	SE 84-31-D
GRADY ADERHOLT,	SE 84-32-D
FREEMAN BUTLER,	SE 84-33-D
JAMES L. CAMPBELL,	SE 84-34-D
J.D. ELLENBURG,	SE 84-35-D
W.D. FRANKLIN,	SE 84-36-D
BILLY R. GLOVER,	SE 84-37-D
TERRY PEOPLES,	SE 84-39-D
WILLIAM REID,	SE 84-40-D
CHARLES W. RICKER,	SE 84-41-D
TERRY SHUBERT,	SE 84-42-D
THEODORE TAYLOR,	SE 84-43-D
MARVIN WISE,	SE 84-44-D
CHARLES BLACKWELL,	SE 84-45-D
ROBERT BURLESON,	SE 84-46-D
HOUSTON EVANS, AND	SE 84-47-D
KENNETH RANDAL COFER,	SE 84-52-D
COMPLAINANTS	

UNITED MINE WORKERS OF
AMERICA (UMWA),
INTERVENOR
v.

JIM WALTER RESOURCES, INC,
RESPONDENT

DECISION

Appearances: Frederick Moncrief, Esq., and Linda Leasure, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia; for Complainants; Mary Lu Jordon, Esq., and Earl R. Pfeffer, Esq., UMWA, Washington, D.C., for Intervenor; David M. Smith, Esq., Maynard, Cooper, Frierson & Gale, P.C., Birmingham, Alabama; and Robert W. Pollard, Esq., Jim Walter Resources, Inc., Birmingham, Alabama; for Respondent

~1953

Before: Judge Melick

These cases are before me upon remand by the Commission on September 30, 1985, to allow the Secretary of Labor more time, in addition to the 35 days previously given, to submit calculations of interest due on the damages awarded in the decision below (7 FMSHRC at 1355) and similarly to provide additional time for the Intervenor, United Mine Workers of America (UMWA), to submit any petition for attorney's fees.

Interest and Total Awards

Based upon the undisputed submissions by the Secretary of Labor, Jim Walter Resources, Inc., is directed to pay the following amounts to the named Complainants within 30 days of the date of this decision:

Name	Damages	Interest	Total Due
I.B. Acton	523.48	96.56	620.04
Grady Aderholt	485.54	89.56	575.10
Robert Burleson	528.74	112.06	640.80
Freeman Butler	418.40	88.69	507.09
James Campbell	493.88	91.10	584.98
W.D. Franklin	437.54	80.70	518.24
Billy Glover	429.86	79.29	509.15
Terry Peoples	436.54	92.51	529.05
William Reid	425.86	78.55	504.41
Charles Ricker	500.00	92.22	592.22
Terry Shubert	420.14	89.05	509.19
Theodore Taylor	439.74	81.10	520.84
Marvin Wise	404.86	85.81	490.67

Attorney's Fees

Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act", provides that "[w]henver 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." (FOOTNOTE.1) In these cases the UMWA was a representative of miners.

~1954

In *Munsey v. FMSHRC*, 701 F.2d 976 (D.C.Cir.), cert. denied 104 S.Ct. 163 (1983), it was held that the UMWA may be awarded cost-based attorney fees (i.e., salary for in-house counsel plus proportionate overhead) or, alternatively, the in-house counsel may be awarded market-rate fees. As best as can be determined from the application submitted herein, the UMWA is seeking cost-based attorney's fees plus specific costs for trial transcripts and travel expenses totaling \$5,307.01. In determining the eligibility of the UMWA for an award of attorney's fees in these cases consideration must initially be given to its status as an intervenor and to the degree of its success in the instant litigation. See 1 Court Awarded Attorney Fees 7.01.

Intervenors, as recognized parties (see Commission Rule 4, 29 C.F.R. 2700.4), are generally eligible for the award of attorney's fees but only insofar as their participation in the litigation contributed more than that already provided by the parties themselves. 1 Court Awarded Attorney Fees 7.03(1). More particularly, attorney's fees may be reduced to the extent that the intervenor's positions have essentially duplicated those of the plaintiff and its participation has not added significantly in the formulation of remedial measures. *Morgan v. McDonough*, 511 F.Supp 408 (D.Mass1981). In these cases it can not fairly be said that the UMWA intervention added in any significant way to the representation provided through the Secretary of Labor.

On the other hand the essentially de minimus role of the UMWA in this litigation should not totally preclude a fee award because to retrospectively deny such fees because a party's participation proves unnecessary would have the effect of discouraging the intervention of what in future cases could be essential parties. *Seattle School District No. 1 v. State of Washington*, 633 F.2d 1338, 1349 (9th Cir.1980), aff'd, 102 S.Ct. 3187 (1982). In addition, it appears from the record in this case that the UMWA played a role in prompting the Secretary to act on behalf of the individual complainants. See *Thomas v. Honeybrook Mines, Inc.*, 428 F.2d 981 (3rd Cir.1970).

Section 105(c)(3) of the Act also requires for the award of attorney's fees, that an order have been issued "sustaining the complainant's charges". The decision and order in these proceedings did not sustain the primary charges of the Complainants i.e., that the mine operator unlawfully bypassed certain miners seeking reemployment on the grounds that those miners had not obtained certain federally mandated training (and denied entirely the complaints of four of the seventeen Complainants). The

