CCASE:
ODELL MAGGARD V. CHANEY CREEK COAL & SOL (MSHA) V. DOLLAR BRANCH
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

ODELL MAGGARD, COMPLAINANT	DISCRIMINATION PROCEEDING Docket No. KENT 86-1-D
v.	MSHA Case No. BARB CD 85-48
CHANEY CREEK COAL CORPORATION, RESPONDENT	No. 3 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF ODELL MAGGARD,	DISCRIMINATION PROCEEDING Docket No. KENT 86-51-D MSHA Case No. BARB CD 85-48
COMPLAINANT	No. 3 Mine
v.	
DOLLAR BRANCH COAL CORPORATION, AND CHANEY CREEK COAL CORPORATION, RESPONDENTS	

DECISION

Appearances: Tony Oppegard, Esq., Appalachian Research & Defense Fund of Kentucky, Inc., Hazard, Kentucky, for Odell Maggard;
Joseph B. Luckett, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Secretary of Labor;
Thomas W. Miller, Esq., Miller, Griffin & Marks, P.S.C., Lexington, Kentucky, for Respondents.

Before: Judge Melick

By decision dated May 8, 1986, the Chaney Creek Coal Corporation was found to have discharged Odell Maggard in violation of section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act."(FOOTNOTE 1) Based upon that decision the parties subsequently stipulated

that Mr. Maggard would be entitled to net back pay through June 1, 1986, of $31,812. Interest was thereafter computed based on the formula set forth in Secretary v. Arkansas Carbona Co. and Walter, 5 FMSHRC 2042 (1983), at $1,848.19 through June 1, 1986 (excluding 12 days to compensate for an extention in filing the Complainant's brief). The total back pay award is therefore $33,660.19.

The Complainant also seeks an award of attorney's fees and expenses totalling $18,016.22. This request is based upon a claim of 213.4 hours of legal work at $80 per hour plus expenses of $944.22. Section 105(c)(3) of the Act provides that "[w]henever 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."

Respondents object to any attorney's fees arguing that the work performed by the Appalachian Research and Defense Fund of Kentucky, Inc., (Defense Fund) was "totally unnecessary." They suggest that the Complainant would have been "more than sufficiently represented by the Secretary "since the Secretary had also brought action against the Respondents under section 105(c)(2) of the Act and argue that the retention of a private attorney under the circumstances was "totally unreasonable."

While the fees of a true "intervenor" in cases where the government has a statutory obligation to prosecute may be reduced as duplicative (See e.g. Donnel v. United States, 682 F.2d 240 (D.C.Cir.1982) cert. denied, 103 S.Ct. 1190 (1983); and Rollison v. Local 879, 677 F.2d 741, 748 (9th Cir.1982)) the fees awarded in Maggard's 105(c)(3) proceeding, which was parallel in many respects to the Secretary's case but independent of it, should not be reduced. Maggard was not an "intervenor" in these consolidated proceedings and his counsel took the lead role in their prosecution. Under the circumstances I find that attorney fees may properly be awarded to counsel for the Complainant. Such fees were "reasonably incurred by the miner" within the meaning of section 105(c)(3).

In addition the record shows that the Secretary did not even decide to bring his section 105(c)(2) case on behalf of Mr. Maggard and actually did not file his complaint with this Commission until December 26, 1985, nearly 2 months after the notice of hearing had been issued in Maggard's section 105(c)(3) case and only 20 days before the hearings commenced. It is therefore likely that the cases would have been delayed

had Maggard's counsel not taken the prosecutive initiative. The Secretary has also on occasion changed his mind about bringing section 105(c)(2) cases thereafter leaving the miner with no representation. Thus there is always uncertainty as to whether the Secretary will actually follow through on any such decision.

The recognized method of computing the amount of attorney's fees begins by multiplying a reasonable hourly rate by the number of hours reasonably expended. Hensley v. Eckerhart, 103 S.Ct. 1933 (1983); Blum v. Stenson, 104 S.Ct 1541 (1984); Copeland v. Marshall, 641 F.2d 880 (D.C.Cir.1980). The resulting figure is called the lodestar. The lodestar fee may then be adjusted to reflect a variety of other factors.

Respondents do not object to the proposed hourly rate of $80. They do object however to what they maintain was time devoted to unrelated activities involving communications with the Secretary and litigating issues surrounding the Secretary's motion to dismiss Maggard's section 105(c)(3) case. Respondents argue that these matters had nothing to do with the anti-discrimination purposes of the Act and did not concern any activities of Respondent. I do not agree. Consultation with the Secretary's counsel and the litigation of issues surrounding the Secretary's motion to dismiss are not unforeseeable consequences of a discriminatory action under the Act. See 2 Court Awarded Attorney Fees 16.02(a) Those matters were, moreover, clearly "in connection with the institution and prosecution of" proceedings within the context of section 105(c)(3).

Respondents also maintain that the 44 1/2 hours spent preparing and writing the post-hearing brief was "totally excessive, particularly where there were no unique or complicated legal issues and where the attorney is well versed in the area of the law." Counsel for Respondents indicates that he spent, in comparison," only 15 hours on all aspects of the brief, research and drafting."

The appropriate measure of an attorney's time for setting his fees is of course not the actual time spent but the time that should reasonably have been spent. SprayÄRite Service Corporation v. Monsanto Co., 684 F.2d 1226 (7th Cir.1982), Copeland v. Marshall, supra. In this regard I observe that the transcript of the proceedings consisted of only 414 pages and the post-hearing issues were factual (credibility) in nature. There were no novel or complex legal issues in the case and counsel is familiar with the relevant law. Under the circumstances I find that the time proffered as expended in this area was excessive and that a reduction to 25 hours is warranted in this regard.

Respondents next argue that the amount of time spent by the Defense Fund was reasonably related to the amount of money in controversy. While the request for attorney fees represents approximately one-half of the damage award in this case it is erroneous to relate a fee award in a case of this nature strictly to the monetary results achieved. Copeland, supra at page 888; Munsey v. Smitty Baker Coal Company, Inc., et al., 5 FMSHRC 2085 (1983). Indeed it is well recognized that market value fee awards in cases such as this take into account the need to assure that miners with bona fide claims of discrimination are able to find capable lawyers to represent them. Moreover the success in cases such as this represents a vindication of societal interests incorporated in the mine safety legislation above and beyond the particular individual rights in the case. Under the circumstances the fee award in this case is not in the nature of an inappropriate "windfall."

Respondents argue, finally, that the Defense Fund should have used paralegals or investigators at a lower billing rate for much of the work. The time an attorney spends on investigating facts is however clearly compensable. 2 Court Awarded Attorney Fees 16.02(b). In any event there is no evidence in this case concerning the availability of paralegals and/or investigators.

Under all the circumstances I find that a reduction in the amount of time reasonably expended of 19 1/2 hours is appropriate. There is no dispute concerning the related expenses of $944.22 and accordingly the total amount of $16,456.22 is awarded as attorney fees.

Wherefore Respondents are hereby ordered jointly and severally, to pay to Odell Maggard within 30 days of this decision damages of $33,660.19 and attorney's fees of $16,456.22.

CIVIL PENALTY

Based upon information available when the initial decision in this case was rendered a civil penalty of $1,000 was deemed appropriate. At subsequent proceedings on the issues of damages and costs, however, it was represented that the Complainant, contrary to that decision, had not been reinstated. In addition, as of May 29, 1986, the date the Complainant's computation of interest was filed, it appears that the Complainant had still not been reinstated.

Accordingly the violation of section 105(c)(1) is continuing and has not been abated. I am therefore directing that, in addition to the $1,000 civil penalty previously

ordered, the Chaney Creek Coal Corporation and the Dollar Branch Corporation jointly and severally pay civil penalties of $1,000 for each day during which they fail to reinstate Mr. Odell Maggard to his former position or similar position (at the same rate of pay) held prior to his discharge on January 10, 1985, up to a maximum of $9,000. Such additional civil penalties shall be incurred commencing on the first day after the receipt of this decision by counsel for Respondents. Respondents are accordingly directed to pay, jointly and severally, a civil penalty of $1,000 and such additional penalties as specified herein within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

1 Following Maggard's refusal to perform what was found to be hazardous work, he was denied alternate work and told to perform the hazardous task "or else." Maggard's subsequent departure from the mine and failure to return was, under the circumstances, a constructive discharge.