

CCASE:  
SOL (MSHA) V. KITT ENERGY  
DDATE:  
19870113  
TTEXT:

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

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
ON BEHALF OF

RONNIE D. BEAVERS,  
DONALD L. BROWNING,  
ROBERT L. CARPENTER,  
EVERETT D. CURTIS,  
LARRY L. EFAW,  
ROGER LEON ERWIN,  
CHARLES W. FOX,  
LESTER D. FREEMAN,  
LARRY F. HUFFMAN,  
HARRY EDWIN HURST,  
ROBERT HURST,  
GARY C. KNIGHT,  
LARRY LANTZ,  
MICHAEL L. MARRA,  
WILFORD MARSH, JR.,  
DAVID R. MARTIN,  
DANNIE M. MAYLE,  
CHARLES W. MCGEE,  
CHARLES F. MURRAY,  
WALTER F. MURRAY,  
LARRY NORRIS,  
CLARA Y. PHILLIPS,  
KENNETH D. SHOCKEY,  
RICHARD D. SNIDER,  
JESSE L. WARD,  
BEDFORD WILFONG, JR.,

COMPLAINANTS

AND

UNITED MINE WORKERS OF AMERICA,  
INTERVENOR

v.

KITT ENERGY CORPORATION,  
RESPONDENT

SUPPLEMENTAL DECISION

DISCRIMINATION PROCEEDING

Docket No. WEVA 85-73-D

MORG CD 84-1

Kitt No. 1 Mine

SUPPLEMENTAL DECISION

Appearances: Frederick W. Moncrief, Esq., Office of the  
Solicitor, U.S. Department of Labor, Arlington,  
Virginia, for Complainants;  
Mary Lu Jordan, Esq., United Mine Workers  
of America, Washington, D.C., for Intervenor;  
B.K. Taoras, Esq., Kitt Energy Corporation,  
Cleveland, Ohio, for Respondent.

Before: Judge Maurer

I issued a decision on the merits in this case on September 10, 1986. In that decision, I found that the complainants had established that they had been discriminated against by respondent in violation of section 105(c) of the Federal Mine Safety and Health Act of 1977 (the Act). At that time, I ordered the parties, by counsel, to communicate for the purpose of stipulating to the extent possible the amounts of monetary relief due each of the named complainants, as well as the amount of attorney fees that may be awarded to counsel for the intervenor, United Mine Workers of America, who had intervened on the side of the complainants.

The parties were able to stipulate the amounts due the individual complainants if I did not allow any award based on the overtime claim pressed by the UMWA, and for the reasons that follow I will not.

The basis for the UMWA's claim that the complainants are due some overtime pay is that the operator employed part of his workforce on the two weekends which were included within the back pay period in issue. Therefore, UMWA's position is that the operator should reimburse complainants in an amount which reflects the fact that arguably some unspecified portion of the 26 of them would have worked the two weekends in question, or some part thereof. They propose that each complainant be awarded a percentage of his or her Saturday and Sunday pay that exactly matches the percentage of the operator's workforce that worked on that day.

The Secretary of Labor parts company with the UMWA on this issue. While agreeing that reimbursement for lost overtime is generally recoverable, he states that this is an atypical case. The more typical case being one which involves long periods of unemployment where the loss of overtime earnings is clearly demonstrable. Here, he asserts, and I concur, that it is speculative at best whether any overtime opportunities were lost to these complainants.

The operator correctly points out that the burden of proof on damages in this case is on the complainants. They must establish by a preponderance of the evidence that they

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in fact lost wages for overtime during the time they were laid off. There is no evidence in this record of which complainants, if any of them, would have worked overtime on any particular Saturday or Sunday during the layoff, and therefore I find the UMWA's claim that all are entitled to some portion of overtime pay during the two weekends herein involved too speculative. The Secretary of Labor, appearing on behalf of the complainants, does not support this claim for overtime. The UMWA, appearing as an intervenor and a representative of the miners, has failed to carry the burden of proof on this issue. I therefore will award no back pay for overtime.

A second issue the parties were unable to resolve amongst themselves was appropriate attorney fees, if any be appropriate, to be awarded the UMWA, or its staff attorney, for its appearance and participation in this case as an intervenor.

Section 105(c)(3) of 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."

Contrary to the operator's position, attorney fees may be assessed in proceedings under any part of subsection (c) of section 105 of the Act. See, e.g., *Secretary on behalf of Ribel v. Eastern Associated Coal Corp.*, 7 FMSHRC 2015, 2023 (1985), where the Commission held that "private attorneys' fees may be awarded to a prevailing miner in a Secretary-initiated section 105(c)(2) discrimination proceeding, provided that private counsel's efforts are non-duplicative of the Secretary's efforts and further, that private counsel contributes substantially to the success of the litigation."

In *Munsey v. FMSHRC*, 701 F.2d 976 (D.C.Cir.1983), which in turn relied on *Nat'l Treasury Employees Union v. Dept. of the Treasury*, 656 F.2d 848 (D.C.Cir.1981), the Court of Appeals for the District of Columbia held that unions and union attorneys are entitled to costs and attorney fees for representation of union members. The Court also held that if the fees are awarded to the attorney personally (not the union), the attorney is entitled to receive the market value of her services. The fact that the attorney is a salaried employee of the union does not affect the size of the fee to which she is otherwise entitled.

In this case, the UMWA as intervenor was a representative of miners and Mary Lu Jordan, Esq., was the UMWA staff attorney representing the complainants along with counsel for the Secretary, who instituted these proceedings. Ms. Jordan has submitted a petition for attorney fees detailing 36.81 hours of time spent on the case at a requested hourly fee of \$110.00, for a total requested attorney fee of \$4,049.10. The operator, while objecting to the fee in toto and in general has failed to cite with sufficient specificity any portion of it that relates to duplicative or insubstantial efforts on the part of Ms. Jordan. My review of her fee petition and her work product in this case leads me to the conclusion that she did indeed significantly participate in the case and contributed in a substantial way to the success of the litigation. I also find that the hours and market rate claimed by her are reasonable. Accordingly, I am going to award the requested attorney fee of \$4,049.10.

ASSESSMENT OF CIVIL PENALTIES

The Secretary of Labor, by counsel, filed his complaint of discrimination in this case seeking inter alia, "an order assessing appropriate civil penalties against Respondent for its violations of section 105(c)." Since this case was submitted on stipulated facts, I have evaluated evidence concerning the statutory criteria set forth in section 110(i) of the Act only insofar as evidence was available in the record to do so. Where no evidence of certain criteria was included in the stipulated record, such as the operator's history of previous violations, the size of the operator's business and the effect on the operator's ability to continue in business, I have considered these criteria in the light most favorable to the operator. Having done so, I consider a civil penalty of \$1,000 for a violation of section 105(c) of the Act involving 26 individuals a de minimus assessment under the totality of circumstances contained in the stipulated record.

ORDER

1. It is ORDERED that within 30 days of the date of this Supplemental Decision the operator pay:

- a. Complainant R. Beavers the amount of \$974.11.
- b. Complainant D. Browning the amount of \$924.53.
- c. Complainant R. Carpenter the amount of \$856.59.
- d. Complainant E. Curtis the amount of \$924.53.
- e. Complainant L. Efaw the amount of \$851.64.

- f. Complainant R. Erwin the amount of \$851.64.
- g. Complainant C. Fox the amount of \$851.64.
- h. Complainant L. Freeman the amount of \$1,136.09.
- i. Complainant L. Huffman the amount of \$856.59.
- j. Complainant H. Hurst the amount of \$918.21.
- k. Complainant R. Hurst the amount of \$918.21.
- l. Complainant G. Knight the amount of \$924.53.
- m. Complainant L. Lantz the amount of \$828.97.
- n. Complainant M. Marra the amount of \$924.53.
- o. Complainant W. Marsh the amount of \$871.78.
- p. Complainant D. Martin the amount of \$871.78.
- q. Complainant D. Mayle the amount of \$851.64.
- r. Complainant C. McGee the amount of \$1,698.84.
- s. Complainant C. Murray the amount of \$851.64.
- t. Complainant W. Murray the amount of \$851.64.
- u. Complainant L. Norris the amount of \$850.10.
- v. Complainant C. Phillips the amount of \$851.64.
- w. Complainant K. Shockey the amount of \$851.64.
- x. Complainant R. Snider the amount of \$871.78.
- y. Complainant J. Ward the amount of \$1,698.84.
- z. Complainant B. Wilfong the amount of \$924.53.

2. It is FURTHER ORDERED that the operator pay attorney fees of \$4,049.10 to Mary Lu Jordan, Esq., within 30 days of the date of this Supplemental Decision.

3. It is FURTHER ORDERED that the operator pay a civil penalty of \$1,000 to the Secretary within 30 days of the date of this Supplemental Decision.

Roy J. Maurer  
Administrative Law Judge