

CCASE:
Wilfred Bryant V. Dingess Mine
DDATE:
19870513
TTEXT:

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

WILFRED BRYANT,
COMPLAINANT

DISCRIMINATION PROCEEDING

Docket No. WEVA 85-43-D

v.

Dingess Mine No. 2

DINGESS MINE SERVICE,
WINCHESTER COALS, INC.,
MULLINS COAL COMPANY,
JOE DINGESS AND JOHNNY
DINGESS,

RESPONDENTS

SUPPLEMENTAL DECISION

Before: Judge Broderick

On February 24, 1987, I issued a decision on the merits of this case. I concluded that Complainant was laid off on April 27, 1984, for activity protected under the Act. I concluded that Dingess Mine Service and Joe and Johnny Dingess were liable for the discriminatory lay off and that Winchester Coals, Inc. and Mullins Coal Company were not liable. I further concluded that the adverse action terminated when Complainant refused the offer to be called back to work, and that he formally resigned on May 9, 1984. I ordered Dingess Mine Service to pay Complainant back pay from April 27, 1984 to May 9, 1984, with interest in accordance with the Arkansas-Carbona formula, and to reimburse him for reasonable attorney's fees and costs of litigation.

On April 28, 1987, counsel for Complainant filed a statement of back pay with interest and a statement of attorney's fees and expenses. Respondents have not replied to the statement. (FOOTNOTE 1)

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BACK PAY AND INTEREST

The back pay claim is for nine regular work days at a daily wage of \$111.00 or a total of \$999.00. Interest calculated under the Arkansas Carbona formula from April 27, 1984 to April 24, 1987, totals \$298.48. Interest shall accumulate thereafter in the amount of .25 per day. The back pay and interest claim conform to my prior decision, and will be approved.

COSTS OF LITIGATION

Complainant's statement shows litigation costs, including travel for counsel and Complainant, in the total amount of \$665.18. I accept this statement of expenses as reasonable and will approve it.

ATTORNEY'S FEES

Section 105(c)(3) of the Act provides:

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.

A reasonable attorney's fee for the institution and prosecution of a case such as this is determined by multiplying a reasonable hourly rate by the number of hours reasonably expended on the lawsuit. See *Lindy Bros. v. American Radiator*, 487 F.2d 161 (3rd Cir.1973); *Johnson Georgia Highway Express*, 488 F.2d 714 (5th Cir.1974); *Copeland v. Marshall*, 641 F.2d 880 (D.C.Cir.1980) ["Copeland III"].

HOURLY RATE

The reasonable hourly rate is the rate prevailing for similar work in the community where the attorneys practice law. *Johnson*, supra. It may vary depending upon such factors as the kind of work involved, the experience and skill of the attorneys, the complexity of the case, the results obtained, the undesirability of the case, and whether the fee is contingent or fixed. The attorneys who represented Complainant here are seeking approval of hourly rates of \$75 (Ms. Fleischauer) and \$65 (Mr. Sheridan). There is no information in the record as to the prevailing rate in the communities where they practiced. There is no information in the record as to the experience of either

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attorney. The case was of average complexity, the fee was contingent, the results obtained were very limited (9 days back pay; no reinstatement). I recognize that it is important that a fee award should reflect the policy of encouraging competent representation for miners claiming discrimination. Based on all the information before me, I conclude that \$65 is a reasonable hourly rate for the hours reasonably expended by each of Complainant's attorneys.

HOURS REASONABLY EXPENDED

Attorney Fleischauer claims compensation for 196 hours; attorney Sheridan claims compensation for 121.3 hours. A substantial number of hours are claimed by each attorney for conversations and discussions with each other. Both claim full compensation for the time spent taking depositions and participating in the trial of the case. Nothing was submitted to show that the participation of both attorneys was required at the depositions or the entire hearing, and I am not aware that it was necessary. I conclude that 100 of the 196 hours claimed by Ms. Fleischauer are properly billable at the hourly rate of \$65; the remaining 96 hours are properly billable at 50 percent of this rate or \$32.50. This totals \$9620. Because of the extremely limited recovery, I believe it proper to reduce this amount by 33 1/3 percent. This reflects my conclusion that a substantial part of the time for which fees are claimed was "spent litigating issues upon which plaintiff did not ultimately prevail", Copeland, supra, at page 902. In fact, much of the time was spent attempting to establish liability in Winchester and Mullins. Therefore, I will approve a total fee for Ms. Fleischauer in the amount of \$6415. Mr. Sheridan's statement shows 75 hours properly billable at \$65 per hour and 46 hours which are duplicative or involve discussions with co-counsel and are properly billable at \$32.50 per hour. This totals \$6370. Reducing it by 33 1/3 percent, I will approve a total fee for Mr. Sheridan in the amount of \$4247.

ORDER

Based on the record in this case and the above conclusions, IT IS ORDERED:

1. The decision issued February 24, 1987 is confirmed.
2. Respondents Dingess Mine Service, Joe Dingess and Johnny Dingess shall within 30 days of the date of this decision pay to claimant the sum of \$1297.48 representing back pay from April 27, 1984 to May 9, 1984, and interest to April 24, 1987. Said Respondents shall pay further interest at the rate of 9 percent per annum from April 24, 1987, until the total amount is paid.

