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RANDY CUNNINGHAM V. CONSOLIDATION COAL
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

RANDY CUNNINGHAM, COMPLAINANT	DISCRIMINATION PROCEEDING
	Docket No. PENN 90-46-D
v.	
	PITT-CD 90-3
CONSOLIDATION COAL COMPANY, RESPONDENT	Dilworth Mine

DECISION

Appearances: Paul H. Girdany, Esq., Healey Whitehill, Pittsburgh, Pennsylvania, for the Complainant; David J. Laurent, Esq., Polito & Smock, P.C., Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Weisberger

Statement of the Case

Subsequent to a hearing on the merits in this case, a Decision was issued on July 12, 1990, finding that Respondent discriminated against Complainant in violation of Section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(1) ("the Act"). The Decision further ordered as follows: "Complainants shall file a statement, within 20 days of this Decision, indicating the specific relief requested. The statement shall be served on respondent, who shall have 20 days from the date service is attempted, to reply thereto."

Pursuant to this order, on August 1, 1990, Complainant's Counsel filed a Request for Relief. Respondent filed a Response to Complainant's Request for Relief on August 20, 1990. On August 30, 1990, a telephone conference call was initiated by the undersigned with Counsel for Complainant and Respondent, to set deadlines to allow Counsel to submit additional Briefs and evidence with regard to the issues raised by Complainant's Request for Relief and Respondent's Reply thereto. Pursuant to the telephone conference call, Complainant filed a Memorandum of Law and Additional Facts in Support of Complainant's Request for Relief. On September 24, 1990, Respondent filed a Reply to Complainant's Memorandum of Law and Additional Facts in Support of Complainant's Request for Relief. In a telephone conference call initiated by the undersigned with Counsel for both Parties,

Counsel were advised that the record still contained insufficient facts with regard to a reasonable hourly rate for attorney's fees, and the Parties were granted until October 5, 1990, to submit a stipulation or evidence on this issue. On October 4, 1990, Complainant's Counsel filed a statement containing the Parties' stipulation in this regard.

Discussion

I.

The Request for Relief requests, inter alia, lost wages of $3,628.29 plus interest, $4.00 for sending a registered notice of his Appeal to the Commission, $4.50 spent on parking to consult with his attorney on March 6, 1990, and $35.40 for mileage (to file his Complaint, to give an affidavit at the MSHA Office, to meet with MSHA Officials, to travel to his attorney's office, and to travel to the hearing), and attorney's costs of $524.70. These items were agreed to by Respondent and hence the request for these items of relief is granted.

II.

Complainant further seeks reimbursement for travel to the Office of Employment Security on five occasions, traveling a total distance of 175 miles. In essence, it is Respondent's position that these expenses should not be allowed, as Section 105 of the Act limits relief to only those costs incurred in connection with the institution or prosecution of a discrimination claim before the Commission. In this connection, Respondent asserts that the claim for unemployment compensation was an alternate remedy. I reject Respondent's argument inasmuch as the legislative history of the Act reveals an intent to require that the scope of relief provided shall encompass ". . . all relief that is necessary to make the complaining Party whole. . . . " (Senate Report on the Act, S. Rep. No. 181, 95th Cong., 1st Sess., at 37, (1977), reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977 ("Legislative History") at 625 (1978)). It is manifest that the expense incurred in pursuing unemployment benefits are the direct consequence of having been terminated by Respondent in violation of Section 105(c) of the Act. As such, Respondent has the obligation to make Complainant whole and reimburse him for these expenses. (See, Christian v. South Hopkins Coal Company, Incorporated, 1 FMSHRC 126 (1979) (ALJ Stewart) (A discharged miner was allowed to recover the cost of his medical expenses, when he lost medical insurance coverage as a consequence of being terminated in violation of the Act); See also, Secretary on behalf of E. Bruce Noland v. Luck Quarries, 2 FMSHRC 954 (1980) (ALJ Merlin) (A miner who was discharged from his employment in violation of Section 105(c) of the Act, could not keep up payments on his truck,

and was forced to sell it, losing equity in the truck. It was held that the amount of the lost equity was recoverable). Hence, Complainant is allowed to be reimbursed for this travel at the rate of 20 cents a mile.

III.

Complainant also seeks relief for travel, on November 2, 1989, to "Masontown District 4 Office." In the itemization of this travel the following is noted: "Conference call with Consol Re: return to work." Respondent did not specifically present any argument why this amount should not be allowed. It would appear that a conference call with Respondent with regard to returning to work, was made as a direct consequence of Complainant having been terminated. As such, Complainant should be made whole by reimbursing him for this travel amount, at the rate of 20 cents a mile for a distance of 70 miles.

IV.

Complainant seek reimbursement for travel, on October 4, 1989, to the Waynesburg MSHA Office, Masontown District 4 Office, and travel on October 5, 1989, to the Masontown District 4 Office, and Dilworth Mine 27. No explanation is provided as to the reasons for this travel. Accordingly, I find Complainant has not established that this travel is in any way related to his having been discharged, and that reimbursement to him for these travel costs would make him whole. Accordingly, relief for travel on these dates is denied.

V.

Complainant seeks reimbursement for travel on October 9, 1989, to the Dilworth Mine, and then "to Masontown District 4 Office." In the itemization of his request for relief, Complainant indicates that this travel was ". . . in connection with the 24-48 hour meeting." However, Complainant did not specifically set forth the subject matter of the 24-48-hour meeting. Thus, there is no basis to conclude that this meeting was held as a consequence of Complainant's termination. As such, relief for reimbursement for travel to this meeting is denied.

VI.

Complainant further seeks reimbursement for travel on October 13 and October 30, 1989. In the itemization of the relief request for travel on these dates, the following is the only wording set forth after a listing of the destination and miles traveled: "Arbitration." It is Complainant's position that this travel should be allowed as being provided for in

Section 105(c) of the Act, which requires reimbursement for expenses "in connection with" proceedings before the Commission. Complainant further argues that if it were not for his being terminated in violation of the Act, he would not have incurred expenses pursuing arbitration. There is no evidence that the issues presented for arbitration were in any degree similar to those presented for resolution by Complainant in his Complaint before the Commission.1 I thus conclude that Complainant has not established that any arbitration proceedings were not distinct and separate from the instant proceedings, and instead were related or were in connection thereto. (See, Secretary of Labor on behalf of Robert A. Ribel v. Eastern Associated Coal Corporation, 7 FMSHRC 2015 (1985), rev'd on other grounds, sub nom., Eastern Associated Coal Corp. v. Federal Mine Safety and Health Review Commission, 813 F.2d 639 (4th Cir. 1987) (An award of attorney's fees was sought in connection with proceedings initiated by a discharged miner before the State Bureau of Unemployment Compensation. The Commission agreed with the Trial Judge that there was no basis for the fee award as ". . . those State proceedings are separate and distinct from any remedy available to a miner under the Act." (Ribel, supra, at 2028)).

VII.

Complainant also seeks reimbursement for Local Union 1980, United Mine Workers of America, for lost wages of local committeemen in connection with meeting with management over Complainant's discharge, and preparing, assisting, and testifying in an "arbitration case" and the "MSHA 105(c) hearing." Complainant further seeks to reimburse District 4, United Mine Workers of America for costs expended in traveling "to District 4 Office." Also sought is reimbursement for "arbitrator's compensation," "Ramada Inn (Meeting Room for the Case)," and for miscellaneous costs.

Essentially, Complainant argues that a broad construction is to be used in interpreting Section 105(c)(3) of the Act which provides that, in essence, costs incurred by "representative of miners" shall be assessed against a discriminating operator. A plain reading of the language of Section 105(c)(3), supra, indicates that the costs incurred by a miner or a representative

of miners, which are to be recovered, are those ". . . for, or in connection with, the institution and prosecution of such proceedings. . . . " Complainant has not set forth in any detail the issues that were presented for arbitration. As such, I conclude that it has not been established that any costs incurred in connection with arbitration were for, or in connection with, the instant proceeding. In the same fashion, I conclude that inasmuch as there is no description of the purpose of the travel on October 9, 13, and 30, it has not been established that these costs were incurred for, or in connection with, the instant proceeding. For the same reason, I make the similar finding with regard to the miscellaneous items of cost, as well as the cost of the meeting room at the Ramada Inn.

VIII.

Complainant also submitted costs for Larry Swift, Safety Committee Chairman Local 1980, for preparation for the instant hearing, and for "witness MSHA 105(c) hearing." There is no evidence that Complainant incurred these cost. Further, although these costs were incurred in connection with the instant hearing, the Union did not intervene, and Larry Swift did not appear as representative of Complainant, but merely testified on his behalf. There is no provision in the Act which would require a discriminating operator to pay Complainant's witness for his preparation and appearance as a witness. Accordingly, these costs are denied.

IX.

The law is well settled with regard to the method of computing attorney's fees. As set forth in Glenn Munsey v. Smitty Baker Coal Company Incorporated (5 FMSHRC 2085 (1983) (ALJ Melick) "the recognized method of computing reasonable attorney's fees begins by multiplying a reasonable hourly rate by the number of hours reasonably expended. Hensley v. Eckerhart, 461 U.S. 424, 76 L. Ed. 2d 40, (1983); Copeland v. Marshall, 641 F. 2d 880 (D.C. Cir. 1980). The resulting figure has been termed the "lodestar". The lodestar fee may then be adjusted to reflect a variety of other factors. Copeland, supra." In this connection, Complainant's Counsel initially sought a fee of $6,130 predicated upon an itemization of 61.30 hours at $100 an hour. On October 4, 1990, Complainant's Counsel filed a statement indicating that he and Respondent's Counsel agreed to stipulate ". . . that the appropriate hourly rate for attorney's fees should be eighty dollars ($80.00) per hour." I conclude that the lodestar figure herein for attorney's fees is based on an hourly rate of $80.00 multiplied by 61.30 hours. I find no basis in the record to either increase or decrease this lodestar figure.

ORDER

It is ORDERED that:

1. The Decision in this case issued July 12, 1990, is now FINAL.

2. Respondent shall, within 30 days of this Decision, pay Complainant $9,135.89 with interest computed according to the Commission's decision in Local Union 2274, UMWA v. Clinchfield Coal Co., 10 FMSHRC 1493 (1988), aff'd sub nom. Clinchfield Coal Co. v. FMSHRC 895 F.2d 773 (D.C. Cir., 1990), and calculated in accordance with the formula in Secretary/Bailey v. Arkansas Carbona, 5 FMSHRC 2042 (1984).

Avram Weisberger
Administrative Law Judge

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FOOTNOTES START HERE

1. Inasmuch as the travel for "Arbitration," was subsequent to the filing of the 105(c) Complaint, it can not be concluded that the arbitration proceeding was related to the development of evidence necessary for the instant case. (c.f., Price v. Monterey Coal Company, 11 FMSHRC 1099 (1989) (ALJ Melick), rev'd on other grounds, 12 FMSHRC 1505 (1990)).