

CCASE:
STENSON BEGAY v. LIGGETT INDUSTRIES
DDATE:
19910401
TTEXT:

Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
2 Skyline, 10th Floor
5203 Leesburg Pike
Fassl Church, Virginia 22041

STENSON BEGAY,
COMPLAINANT

v.

LIGGETT INDUSTRIES, INC.,
RESPONDENT

DISCRIMINATION PROCEEDING

Docket No. CENT 88-126-D
DENV CD 88-09

McKinley Mine

DECISION UPON REMAND
ORDER GRANTING ATTORNEY FEES ON APPEAL

Before: Judge Maurer

On March 12, 1991, the Commission remanded this case to me, passing down the instructions from the United States Court of Appeals for the Tenth Circuit contained in Liggett Indus., Inc. v. FMSHRC, ___ F.2d ___, No. 89-9546 (January 9, 1991), aff'g, 11 FMSHRC 887 (May 1989) (ALJ). In its decision, the Court directed that I consider the issue of attorney fees due complainant's counsel for services rendered on the appeal of this case.

Complainant has filed an application for attorney fees and costs on appeal, which has been objected to generally and in two instances, more specifically, by respondent.

To begin with, section 105(c)(3) of the Mine Act provides in part that:

When 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, for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation.

The legislative history of this provision makes it clear that it was intended to make the complainant whole, or in other words, to put him in the position as nearly as possible which he would have been in had the discriminatory activity not taken place. See S. Rep. No. 95-181 at 37 (1977), reprinted in Legislative History of the Federal Mine Safety and Health Act of

The language of the Act, supported by the legislative history plainly requires the reimbursement of attorney fees reasonably incurred in appellate proceedings where such proceedings are necessary to "sustain complainant's charges." Furthermore, "appellate proceedings" consist of those proceedings subsequent to the ALJ Decision, both before the Commission and the U.S. Court of Appeals. See, e.g., *Munsey v. FMSHRC*, 701 F.2d 976 (D.C. Cir. 1983).

Complainant seeks an award of attorney fees for 78.1 hours of services performed during the period from June 2, 1989, through November 5, 1990, at an hourly rate of \$125. He also seeks \$897.84 for costs and expenses. Without further ado, I find the itemized expenses of \$897.84 to be reasonable and reimbursement will be ordered herein.

Turning now to the respondent's objections to the fee petition generally, I find them to be without merit, if not outright mistaken. For example, respondent makes much of a notion that the complainant's application date entries appear out of chronological sequence. But in reality they do, in fact, appear in chronological order beginning June 2, 1989, and ending November 5, 1990.

Respondent also specifically objects to the three entries for work done before the Commission on June 2, 1989, and June 20 and 21, 1989. Respondent mistakenly believes this work was done at or for trial and should have been included in complainant's request before the ALJ Decision and Order was issued. However, this argument overlooks the fact that my decision in this case, including the award of attorney fees for the trial work was issued on May 17, 1989. The legal work objected to was of course performed subsequent to that and had to do with opposing respondent's petition for discretionary review before the Commission. This is considered appellate work and is first claimed herein. See, *Munsey*, supra.

Respondent also objects to the 5.5 hours of legal services performed by complainant's counsel on August 1 and 2, 1990, drafting a document entitled "Cross-application for Enforcement of Administrative Order" which was subsequently filed pursuant to Rule 15(b) of the F.R.A.P. on August 3, 1990. Respondent states that it was untimely filed. I note that it is complainant's right to do so under the rules, but I question the reasonableness of filing this document at that point in time with the appeal pending in the Court of Appeals for a year already, briefing completed and the oral argument just three months away. The Court of Appeals apparently ignored it as I can find no mention of it in the record other than noting that it was filed. Moreover, it is in large part duplicative of the complainant's earlier briefing. I will therefore sustain respondent's objection to the 5.5 hours of attorney time so expended.

~551

Otherwise, having carefully reviewed the entire record including both the complainant's request for attorney fees and costs and the respondent's objections thereto and having found no cause to doubt the validity of the number of hours expended or with the exception noted above, the necessity or propriety of the work described, I will approve 72.6 hours of attorney time for reimbursement. Moreover, as I previously determined for the trial work in this case, I find the requested \$125 per hour to be an appropriate rate of compensation.

ORDER

Based on my consideration of the nature of the issues involved, the high degree of skill with which the complainant was represented, the amount of time and work involved, and other relevant factors, it is considered that the amount of \$9075 constitutes a reasonable attorney fee on appeal and is approved. Furthermore, \$897.84 is hereby found to be a reasonable amount of litigation costs and expense and is likewise approved. Both are assessed against the respondent who is ordered to pay the same to complainant within 30 days of this order.

Roy J. Maurer
Administrative Law Judge