CCASE:
RICKY HAYS v. LEECO, INC.,
DDATE:
19910419
TTEXT:

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

| | |
|---|---|
| RICKY HAYS, COMPLAINANT | DISCRIMINATION PROCEEDING |
| v. | Docket No. KENT 90-59-D<br>MSHA Case No. BARB CD 89-32 |
| LEECO, INC., RESPONDENT | No. 62 Mine |

DECISION

Appearances: Tony Oppegard, Esq., Stephen A. Sanders, Esq., Appalachian Research & Defense Fund of Kentucky, Inc., Lexington and Prestonsburg, Kentucky, for the Complainant;
Timothy Joe Walker, Esq., Reece, Lang & Breeding, London, Kentucky, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding is before me to determine the relief due the complainant, including the payment of costs and attorney's fees, based upon my decision of September 28, 1990, finding that the respondent Leeco, Inc., discriminated against the complainant in violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act." Ricky Hays v. Leeco, Inc., 12 FMSHRC 1850 (September 1990).

Backpay

The parties are in agreement as to the amount of backpay owed the complainant for the period of September 8, 1989, through January 31, 1991, less any interim earnings, and this amount is $12,853.69, less interest. Backpay continues to accrue until this case becomes final and the money is paid. The parties have confirmed their preference for a backpay award with interest to be calculated later pursuant to the formula employed by the Commission.

Other Employment Benefits

Retirement Plan

The parties are in agreement that the respondent has a retirement plan which vests upon the completion of 5 years' employment, and that the respondent acknowledges its responsibility to make retirement payments into the complainant's account as if he had not been discharged.

Medical Expenses

The parties have agreed to a procedure for determining payments for any covered medical expenses incurred by the complainant during his employment with the respondent. In a letter dated January 13, 1991, complainant's counsel Oppegard summarized this procedure as follows:

> Because Mr. Hays' remedy is to file suit under Leeco's health plan if the company declines coverage of these medical expenses, and because the parties do not believe that the Court is in a position to rule on which medical bills Leeco has the responsibility to pay under its medical plan, Mr. Walker and I proposed the following: that the Court simply rule that Leeco is required to give the same consideration to Mr. Hays' submitted medical expenses as it would have done had he not been previously discharged. In other words, that Leeco review the Complainant's medical bills in a non-discriminatory manner, and grant or deny coverage accordingly. If the Complainant prevails on appeal in this matter, and Leeco then denies coverage of some of Mr. Hays' bills, the Complainant would be required to resort to the procedures provided by the Respondent's health plan in the event that insurance coverage is denied.

Attorney Fees and Litigation Expenses

> Section 105(c)(3) of the Act provides in part as follows:
>
> Whenever 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.

The complainant's initial submission of his statement of attorney fees and expenses is for $55,213.52, representing the following claimed expenses for the period September 15, 1989 through November 16, 1990:

1. Principal Attorney Tony Oppegard. 300.4 hours billed at $150 per hour, for a total of $45,060.

2. Co-counsel Stephen A. Sanders. 26.5 hours billed at $150 per hour ($3,975), and 34 hours billed at $75 per hour ($2,550), for a total of $6,525.

3. Other litigation expenses (itemized as mileage and lodging expenses, witness fees & mileage, telephone, expert witness fees and expenses, photocopying and photographic expenses), for a total of $3,628.52.

The complainant's supplemental statement of additional attorney fees for the period November 17, 1990, through March 15, 1991, is for $8,325, representing the following claimed expenses:

1. Attorney Tony Oppegard. 53.8 hours billed at $150 per hour, for a total of $8,070.

2. Attorney Stephen A. Sanders. 1.7 hours billed at $150 per hour, for a total of $255.

The total amount of claimed attorney fees and expenses submitted by the complainant is $63,538.52.

The respondent has filed objections to any award of attorney fees, and the objections and issues raised are as follows:

1. The respondent denies liability for any attorney's fees or costs because the complainant's counsel are employed by a Federally funded, non-profit legal services corporation, and the complainant is not an "eligible client" as defined by the Federal Legal Services Corporation regulations.

2. The amount of attorney fees sought by the complainant is clearly unreasonable in light of the monetary value of the other remedies sought and obtained by the complainant.

3. The hourly billing rate claimed by the complainant's counsel is excessive.

4. The complainant's requested attorney fees are clearly excessive and/or redundant and reflect a duplication of attorney effort.

> 5. The complainant is not entitled to attorney fees and costs incurred for the period from September 15, 1989, through November 1, 1989, during which period he had proceeded under section 105(c)(2) of the Act and was awaiting MSHA's determination as to whether or not the alleged violation had in fact occurred.

The respondent has also filed an objection and opposition to the complainant's motion for post-judgment interest on any attorney fees award, and it has also filed a motion to hold in abeyance any award with respect to attorney fees pending the final disposition of a complaint which the respondent has filed with the Legal Services Corporation challenging the propriety of the Appalachian Research and Defense Fund's representation of the complainant in this case.

The Status of the Appalachian Research and Defense Fund of Kentucky, Inc. (ARDF)

The respondent denies any liability for the payment of attorney fees and maintains that the complainant has incurred no costs for attorney fees because his counsel are employees of a federally-funded, non-profit corporation. The respondent states that it has filed a complaint with the Legal Services Corporation regarding the Appalachian Research and Defense Fund of Kentucky, Inc., (ARDF), and the propriety of its representation of the complainant and seeking attorney fees for its services. The respondent maintains that the regulations of the Legal Services Corporation provide that the "recipient" of funding by that agency may accept a court-awarded fee only under certain circumstances, and that a prerequisite to ARDF's acceptance of a fee in a fee-generating case is that a client be an "eligible client." The respondent takes the position that the complainant was not an "eligible client" when his representation was undertaken by ARDF, because his income exceeded the allowable maximum income level for "eligible clients," and that ARDF therefore should not be permitted to accept any fees which may be awarded in this case.

The complainant takes the position that there is nothing improper in ARDF's representation of the complainant, and that pursuant to the regulations of the Legal Services Corporation, any complaint in this regard, including any resulting sanctions, is for that agency to consider. Citing 42 U.S.C. 2996e(b)(1)(b), the complainant maintains that a trial court is prohibited from affecting the final disposition of a legal proceeding because of an alleged impropriety by a Legal Services Corporation recipient program, and it cites the following cases in support of its argument: Martens v. Hall, 444 F. Supp. 34 (S.D. Fla. 1977); Anderson v. Redman, 474 F. Supp. 511 (D. Del. 1979); Holland v. Steele, 92 F.R.D. 58 (N.D. Ga. 1981); Harris v. Tower Loan of Mississippi, Inc., 609 F.2d 120 (5th Cir. 1980).

Findings and Conclusions

Costs and attorney fees have consistently been awarded to counsel who were employed by a union or a private legal services organization such as ARDF. See: Eldridge v. Sunfire Coal Company, 5 FMSHRC 1245 (July 1983); Munsey v. FMSHRC, 701 F.2d 976 (D.C. Cir. 1983); Chaney Creek Coal Corporation v. FMSHRC, 866 F.2d 1424 (D.C. 1989); Robert Simpson v. Kenta Energy, Inc. and Roy Dan Jackson, 11 FMSHRC 2543 (December 1989); Ronald Tolbert v. Chaney Creek Coal Corp., 9 FMSHRC 929 (May 1987). See also: Council of the Southern Mountains, Inc. v. Martin County Coal Corporation, 3 FMSHRC 526 (February 1981), and in particular the cases cited at 3 FMSHRC 549-552, concerning costs and attorneys fees awardable to legal services non-profit corporations.

Prior challenges to the propriety of ARDF's legal representation of miners in discrimination proceedings before the Commission have been rejected. See: Bradley v. Belva Coal, 3 FMSHRC 921, 924 (1981); Eldridge v. Sunfire Coal Company, supra. In addition, eight U.S. Circuit Courts of Appeals have considered and rejected similar challenges concerning the propriety of legal representation provided by such legal services organizations. See: Bonnes v. Long, 599 F.2d 1316 (4th Cir. 1979); Weisenberger v. Huecker, 593 F.2d 49 (6th Cir. 1979); Mid-Hudson Legal Services v. G & U, Inc., 578 F.2d 34 (2nd Cir. 1978); Perez v. Rodriguez Bou, 575 F.2d 21 (1st Cir. 1978); Rodriguez v. Taylor, 569 F.2d 1231 (3d Cir. 1977); Bond v. Stanton, 555 F.2d 172 (7th Cir. 1977), cert. denied, 438 U.S. 916 (1978); Sellers v. Wallman, 510 F.2d 119 (5th Cir. 1975); Brandenburger v. Thompson, 494 F.2d 885 (9th Cir. 1974).

After further consideration of the arguments presented by the parties, I conclude and find that the complainant's position is correct, and the position taken by the respondent is rejected.

Unreasonableness of Attorney Fees in Light of Other Remedies

The respondent asserts that the amount of attorney fees sought by the complainant is clearly unreasonable in light of the monetary value of the other remedies sought and obtained by the complainant in this case. Citing Hensley v. Eckerhart, 103 S. Ct. 1933 (1983), the respondent points out that the amount of money involved in a dispute is a relevant factor in determining the reasonableness of attorney fees to be awarded. Respondent concludes that while the complainant has been awarded reinstatement in addition to back pay, he had already obtained other employment when this litigation was begun and the difference in his wages was not so great as to justify the huge fee sought by his counsel.

Conceding the fact that the monetary amount of a plaintiff's recovery is a relevant factor in determining the reasonableness

of attorney fees to be awarded, the complainant asserts that this is but one factor to be considered, and that the Supreme Court has expressly rejected the proposition that attorney fee awards under civil rights statutes should necessarily be proportionate to the amount of damages a plaintiff actually recovers. Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974); City of Riverside v. Rivera, 106 S. Ct. 2686, 2691, 2694 (1986). The complainant has cited a number of Federal court cases in which attorney fees awarded greatly exceeded the amount of damages recovered by a plaintiff.

Recognizing the fact that the requested attorney fees are almost five times greater than his backpay award, the complainant nonetheless points out that the respondent has been ordered to reinstate him to his former position, and that although he is currently employed by another company, he intends to return to work with the respondent if he prevails on any appeal of this case. Under the circumstances, the complainant asserts that his backpay continues to accrue, will continue to grow pending any appeal, and could increase greatly if he were to lose his present job.

Complainant further argues that the Mine Act is remedial legislation which affects the public interest as well as the interest of the individual miner, and that by prevailing in this case, he has served the public interest by vindicating important federal safety rights. Further, by establishing that the respondent has violated the Act, complainant concludes that his case may also deter the respondent from continuing its unlawful conduct, and thus assure that other miners are not subjected to similar unsafe working conditions.

Citing the Supreme Court's decision in Hensley v. Eckerhart, supra, the complainant believes that since his attorney obtained excellent results in his case, he should recover a fully compensatory fee which normally encompasses all hours reasonably expended on the litigation. Relying on the Commission's consistent holdings in discrimination cases that miners who have suffered discrimination should be made whole, the complainant concludes that he would not be made whole, and the effects of the respondent's unlawful discrimination would not be eliminated, if his counsel are not fully awarded the reasonable fees sought in this matter.

Findings and Conclusions

It seems clear to me that the amount recovered as back pay does not determine the reasonableness of the attorney fee request, Copeland v. Marshall, 641 F.2d 880, 906-908, (D.C. Cir. 1980). See also: Munsey v. Smitty Baker Coal Company, Inc., 3 FMSHRC 2056 (1981); Simpson v. Kenta Energy, Inc., 7 FMSHRC 272 (1985); and Munsey v. Smitty Baker Coal Co., Inc., et al.,

5 FMSHRC 2085 (December 1983), where Judge Melick stated as follows at 5 FMSHRC 2091:

> While the overall attorney fee award in this case is more than seventeen times the damages awarded the actual victim of discrimination, 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. In addition, the success in this case represents a vindication of societal interests incorporated in the mine safety legislation above and beyond the particular individual rights vindicated in the case. Accordingly, I do not find the substantial fee award in this case to be excessive or in the nature of a "windfall."

After careful consideration of the arguments presented by the parties, I agree with the position taken by the complainant, and I conclude and find that any attorney fee award to the complainant in this case should not be reduced simply because his back pay award is relatively small and he had already obtained other employment when this litigation was begun.

The appropriate Hourly Rate

Arguments Presented by the Parties

The complainant's counsel Oppegard has billed at an hourly rate of $150. Co-counsel Sanders has billed at an hourly rate of $75 for claimed work with Mr. Oppegard, and at an hourly rate of $150 for his remaining claimed legal work. In support of the $150 hourly rate, the complainant states that the rate represents the current market rate for legal work performed in order to compensate for delay in payment and in lieu of requesting an enhancement of the "lodestar." The complainant believes that enhancement of the lodestar is fully warranted in this case, and in his interrogatory response to a discovery request by the respondent, complainant asserted that such enhancement was warranted because of the contingent nature of the case, particularly the high risk factor in light of the fact that the case was rejected for prosecution by MSHA, the excellent representation provided and the results achieved, and the certain delay in payment that will occur in view of the respondent's assertion that it intends to appeal the decision in his case.

Complainant asserts that his attorneys have exercised billing judgment with respect to the hours worked in litigating his claim, and that when counsel felt that certain legal work could have been performed in less than the actual hours expended, they did not bill for those additional hours. In addition, complainant asserts that while travel time is compensable,

counsel has not billed for several hours of travel time spent on his case.

In his responses to certain discovery requests by the respondent, and in support of the $150 hourly rate, the complainant cites the Supreme Court's holding in Blum v. Stenson, 104 S. Ct. 1541 (1984), that the "prevailing market rate" is the rate "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation," 104 S. Ct. at 1547, n. 11. The complainant asserts that counsel Oppegard and Sanders are the most experienced attorneys in eastern Kentucky in handling safety discrimination litigation under section 105(c) of the Act. Complainant points out that there are few plaintiffs' attorneys in eastern Kentucky who have litigated even one such case, whereas counsel Oppegard has litigated approximately 42 such cases, and Sanders about 9.

The complainant has submitted affidavits from counsel Oppegard and Sanders, and affidavits from seven (7) local plaintiffs' attorneys in support of the reasonableness of the claimed hourly rate of $150. The complainant has also submitted an affidavit from a local attorney who successfully represented a complaining miner in a recent proceeding before Judge Fauver, Charles T. Smith v. Kem Coal Company, 12 FMSHRC 2130 (October 1990). The complainant states that this was the only case ever litigated by the attorney pursuant to section 105(c) of the Act, and that on January 31, 1991, Judge Fauver awarded the attorney $150 per hour for his services after finding that the fee rate was reasonable for comparable cases in the eastern Kentucky area.

In further support of his argument, the complainant, in his discovery responses, states that on December 18, 1989, Judge Broderick approved an hourly rate of $125 for legal work performed by counsel Oppegard and Sanders during the period of December, 1984, through November, 1989, in the cases of Robert Simpson v. Kenta Energy, Inc. and Roy Dan Jackson, 11 FMSHRC 2543 (1989), and that more recently in the case of Odell Maggard v. Chaney Creek Coal Corporation, 12 FMSHRC 1749 (August 1990), Judge Melick awarded counsel Oppegard an hourly fee of $150 for legal work performed during the period June, 1986, through April, 1990. The complainant also cites a case 10 years ago, where former Commission Judge Steffey awarded an attorney an hourly rate of $100, for representing a miner in the only discrimination case ever litigated by the attorney, Elias Mosley v. Whitley Development Corporation, 3 FMSHRC 746, 762 (1981).

In its initial statement objecting to the payment of any attorney fees, the respondent asserted that the complainant bears the burden of establishing the "current market rate," citing Hensley v. Eckerhart, 103 S. Ct. 1933 (1983).

~678

In its subsequently filed objections, the respondent maintains that the claimed hourly billing rate for the complainant's attorneys is excessive. In support of its argument, the respondent asserts that five of the supporting attorney affidavits submitted in support of the requested hourly rate are based, in part, on the supposed "contingent" nature of this case. Under the circumstances, the respondent concludes that it would appear that instead of requesting enhancement of the lodestar, complainant's counsel have incorporated the enhancement into the lodestar by adjusting their hourly rate to account for supposed "delay in payment" and "contingency," and have also subsequently moved for an award of post-judgment interest to be added to their fee.

The respondent argues that contingency should not be a factor which leads to an award of a high hourly attorney fee in this case. The respondent points out that the complainant has been fully employed throughout this litigation and has earned $48,560.90, in substitute employment as of January 31, 1991. The respondent believes that had complainant's counsel been in private practice, they could have entered into an agreement with the complainant providing for payment of their fees, at a lower hourly rate (i.e., one not reflecting "delay in payment" or "risk of non-payment"), and could reasonably have expected to be paid, win or lose. In view of the complainant's arguments that his attorneys are entitled to the same fees as that of counsel in private practice, notwithstanding the fact that they are employed by a non-profit corporation, the respondent concludes that complainant's attorneys clearly should not be awarded additional compensation for delays or risks incurred because their employing organization cannot bill its client directly.

The respondent further believes that the complainant's request for post-judgment interest on its attorney's fees stands on the same footing as the request for an hourly rate based on contingency or delay, and that it seems obvious that counsel cannot be compensated twice, in different ways, for the same thing. The respondent concludes that in the event the complainant's counsel are awarded an hourly billing rate which reflects anticipated delay in payment or risk of non-payment, then an award of interest in addition thereto would be an impermissible redundancy, citing Library of Congress v. Shaw, 106 S. Ct. 2957 (1986) ("delay adjustment" equated with award of interest and therefore not awardable against Federal government).

In further response to the respondent's argument's concerning the "contingent" nature of his case, the complainant asserts that the respondent's argument that he could have entered into a standard attorney fee arrangement with his attorneys if they were in private practice, while at the same time arguing that his attorneys should be treated differently than attorneys in private practice because they are employed by a non-profit organization that does not bill its clients directly, is contradictory,

irrelevant and without merit. The complainant points out that his attorneys are not private, for-profit practitioners, and that the respondent has produced no evidence that miners who retain private, for-profit counsel in section 105(c) discrimination cases in eastern Kentucky have entered into anything other than contingency agreements, and that the affidavits submitted by the complainant indicates that private attorneys in the area uniformly view such cases as contingent in nature.

The complainant further asserts that the respondent's argument that the contingent nature of his case should be overlooked because the ARDF is a non-profit law office ignores the explicit holding of the Supreme Court in Blum v. Stenson, 104 S. Ct. 1541 (1984), where the court stated as follows at 104 S. Ct. 1564:

> Petitioner's argument that the use of market rates violates congressional intent . . . is flatly contradicted by the legislative history of [the statute].
> It is also clear from the legislative history that Congress did not intend the calculation of fee awards to vary depending on whether plaintiff was represented by private counsel or by a nonprofit legal services organization . . . . The statute and legislative history establish that "reasonable fees" under 1988 are to be calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or nonprofit counsel. 104 S. Ct. at 1546-1547 (emphasis added).

Citing a Supreme Court and several lower federal court decisions, the complainant further argues that a contingent fee contract does not impose an automatic ceiling on an award of attorney fees, and that even if private, for-profit attorneys bill their poorer clients at lower than normal (reduced) billing rates because of the financial inability of the client to pay regular rates, the prevailing market rate method should be used to compute the proper attorney fee award.

The complainant points out that in the few instances where the respondent has actually challenged the reasonableness of specific work performed by his attorneys, its objections are nothing more than speculating that, in retrospect, perhaps the work could have been performed by a single attorney. However, the complainant believes that he should be granted some latitude with respect to the legal strategy and techniques employed by his counsel, particularly since he prevailed, and in spite of the difficulty encountered by his attorneys in securing testimony from frightened witnesses. The complainant concludes that the respondent has not rebutted his convincing evidence that $150 per hour is a reasonable fee for both attorneys Oppegard and Sanders,

particularly in light of Judge Fauver's recent award of $150 per hour to an inexperienced attorney practicing his first discrimination case.

Finally, the complainant suggests that the substantial amount of work performed by his attorneys could have been avoided had the respondent engaged in good faith settlement negotiations with him. The complainant asserts that on May 3, 1990, prior to the trial of this case, he offered to wave reinstatement and attorneys fees, and to dismiss his case for the payment of $20,400 by the respondent. However, the respondent rejected his offer, and made a counteroffer of only $3,000. The complainant views this rejection as an extension of the respondent's belief that his case is frivolous, and he believes that the respondent is simply a litigant who does not want to pay the reasonable fees for the work required of his counsel to prove its inlawful conduct.

Findings and Conclusions

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, including the complexity of the case, the experience level of the attorney, the contingent nature of the case, and any anticipated delay in payment of the fee award. See: Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-719 (5th Cir. 1974), where the court established 12 guidelines for establishing attorney fee awards. These guidelines have been followed in the D.C. Circuit. See: Evans v. Sheraton Park Hotel, 503 F.2d 177, 188 (D.C. Cir. 1974); Copeland v. Marshall, supra. The appropriate hourly rate is the rate prevailing for similar work in the community where the attorneys practice law. Johnson v. Georgia Highway Express, Inc., supra; Copeland v. Marshall, supra.

Section 105(c)(3) of the Act provides for an award of attorney's fees which have been reasonably incurred by the prevailing miner in a discrimination case. Thus, the appropriate measure of an attorney's time for establishing his fees is not the actual time spent but the time that should reasonably have been spent. Spray-Rite Service Corporation v. Monsanto Co., 684 F.2d 1226 (7th Cir. 1982); Copeland v. Marshall, supra. In Johnson v. Georgia Highway Express, Inc., supra, the court made the following observation at 488 F.2d 720:

> The trial judge is necessarily called upon to question the time, expertise, and professional work of a lawyer which is always difficult and sometimes distasteful.

> But that is the task, and it must be kept in mind that the plaintiff has the burden of proving his entitlement to an award for attorneys' fees just as he would bear the burden of proving a claim for any other money judgment.

After careful review and consideration of the arguments presented by the parties, and taking into account the applicable case law, I conclude and find that the complainant has met its burden of establishing both the appropriateness and reasonableness of the claimed hourly rate of $150. I am persuaded that the affidavits submitted by the complainant, the experience and competence level of his attorneys, and the recent hourly fee awards made to his counsel in other comparable discrimination cases, which took into account the prevailing local community rate, supports an hourly fee award of $150 per hour in this case. While it is true that complainant's counsel have been awarded lesser hourly rates in the past, taking into account the increased cost of living, inflation, and the added experience level of counsel, I cannot conclude that $150 per hour is unreasonable or unjustified. The respondent's arguments to the contrary are rejected, and I find nothing improper or unreasonable in including contingency and delay in payment of a fee as part of the lodestar rate of $150 per hour in this case.

Attorney Fees for Work Performed Prior to Accrual of Cause of Action before the Commission

The respondent points out that any attorney fees for complaining miners who prevail pursuant to the Act are provided for by section 105(c)(3), which generally creates a private cause of action for any complaints the Secretary has declined to pursue after investigation. The respondent further points out that attorney fees are not provided for by section 105(c)(2) of the Act, and it objects to the payment of any fees incurred for the period from September 15, 1989, through November 1, 1989, when the complainant had proceeded under section 105(c)(2) and was awaiting MSHA's determination as to whether or not an alleged violation had in fact occurred. The fees claimed by attorney Oppegard for the period from September 15, through November 1, 1989, are for 23.3 hours at $150 per hour, for a total of $3,495. The respondent requests that these fees be disallowed.

The respondent takes the position that the time frame for any attorney fees payable in this matter initially began on November 14, 1989, when the complainant's cause of action before the Commission accrued with the receipt of MSHA's adverse determination on November 14, 1989, as alleged in his complaint. In support of its position, the respondent argues that the complainant had a right to pursue a complaint on his own behalf pursuant to section 105(c)(3) only after MSHA declined to prosecute his claim, and it concludes that the Act provides no basis for an

award of attorney fees for time spent by the attorney assisting the complainant in an effort to persuade MSHA to go forward with his claim. At that stage, the respondent believes that the complainant was an intervenor under section 105(c)(2) of the Act, and as such was not entitled to attorney fees. The respondent cites Chaney Creek Coal Company v. FMSHRC, 866 F.2d 1424 (D.C. Cir. 1989); and Eastern Associated Coal Corporation v. FMSHRC, 813 F.2d 639 (4th Cir. 1987), in support of its argument.

The respondent further argues that if MSHA had elected to prosecute the complaint in the complainant's behalf, then the complainant would not have been entitled to any award of attorney's fees. Under the circumstances, the respondent concludes that it would be both ironic and improper to allow the fees in question, for the time spent by the attorney during MSHA's investigation, because the complainant failed to convince MSHA that his claim had merit.

The complainant takes the position that the respondent's objections to the award of attorney fees for work performed prior to MSHA's determination in his case are wholly without merit. In support of his argument that fees are awardable, the complainant cites the language of section 105(c)(3), which authorizes an award to a miner whose complaint is sustained for expenses and fees reasonably incurred for, or in connection with the institution and prosecution of such proceedings.

The complainant maintains that because it is necessary for a miner to first file a discrimination complaint with MSHA prior to the filing of his complaint with the Commission, work performed by the complainant's attorney during this initial, critical phase clearly is "in connection with the institution" of the miner's complaint. Complainant asserts that his attorney performed important work during this stage of the proceeding, including an initial interview with the complainant, other witness interviews, and submissions to MSHA's special investigator. Complainant further asserts that the attorney-client relationship with ARDF had already begun during the relevant period, and all of the work claimed by his attorney was "in connection with" his proceeding against the respondent.

With regard to the respondent's "intervenor" argument, the complainant asserts that the respondent's reliance on Eastern Associated Coal Corporation is misplaced, and that at no time was the complainant an intervenor. The complainant asserts that only 5.7 of the 23.3 hours spent during the period in question was related to MSHA's investigation, and that the remainder of the time was not connected to the investigation, but rather was spent interviewing the complainant and various witnesses. The complainant concludes that in light of the fact that he was required to file a complaint with MSHA to initiate his action, and that MSHA then expects him to cooperate during its investigation of

his complaint, it is clear that the time spent by his attorney was reasonable.

Findings and Conclusions

In my view, if a private attorney agrees to perform work for a complaining miner while the matter is pending an MSHA investigation and determination as to whether a violation of section 105(c)(1) has occurred, the attorney does so at his own risk of not being compensated for his work should MSHA decide to pursue the claim before the Commission. In such a situation, the attorney would not be entitled to an award of attorney's fees. See: Eastern Associated Coal Corporation v. FMSHRC, 813 F.2d 639 (4th Cir. 1987). However, should MSHA decline to file a complaint on the miner's behalf, and the miner does so pursuant to section 105(c)(3), and prevails, his attorney would be entitled to an award of reasonable attorney fees because his work was for or in connection with the institution and prosecution of such proceedings which resulted in an order sustaining the complainant's charges under this subsection.

After careful consideration of the arguments presented by the parties, I conclude and find that the complainant has the better part of the argument. The respondent's contention that the complainant should be treated as an intervenor is rejected, and I agree with the complainant's position that any work performed by counsel during the pendency of his complaint with MSHA was work connected with his discrimination complaint against the respondent. On the facts of this case, I conclude and find that the work performed by complainant's attorney at the time the complainant filed his complaint with MSHA, and while his complaint was being investigated by MSHA, was work connected with the institution and prosecution of a discrimination proceeding which ultimately ripened into a section 105(c)(3) proceeding before the Commission.

In Johnson v. Georgia Highway Express, supra, at 488 F.2d 717, the Court of Appeals stated that "It is appropriate to distinguish between legal work, in the strict sense, and investigation, clerical work, compilation of facts and statistics, and other work which can often be accomplished by non-lawyers but which a lawyer may do because he has no other help available. Such non-legal work may command a lesser rate. Its dollar value is not enhanced just because a lawyer does it."

I conclude and find that the time spent by Attorney Oppegard during the period that the complaint was being pursued and investigated by MSHA, including interviews, meetings, and phone calls with the complainant and MSHA's special investigator, was "non-legal work" unconnected with the trial of the case, or preparation for the trial of the case. The complainant's assertion that only 5.7 of the 23.3 hours spent during the time in

question was related to MSHA's investigation is rejected. I conclude and find that all of the time spent was in connection with the investigation, including the 10.5 hours charged to "interviewing witnesses." I further conclude and find that $50 per hour is a reasonable billing rate for this work. Accordingly, I will allow $1,165, for this work (23.3 hours x $50), and the requested fees are reduced by $2,330.

Complainant has claimed an additional 6.0 of work for the period November 17, 1989, through December 15, 1989, prior to the receipt of the complaint by the Commission on December 18, 1989. With the exception of one day (December 15, 1989) for .4 hours spent in a letter to the complainant, the work claimed for the remaining 6 days includes telephone calls and conversations, either listed separately, or included as part of several activities. Except for the time spent on December 13, 1989, drafting and dictating the complaint of discrimination, I conclude and find that all of the remaining work was "non-legal" work conducted during the investigation stage of the complaint. I will allow 1.0 hour for the drafting of the complaint, which is not complex, at an hourly rate of $150, and 5.0 hours at $50 an hour for the remaining work claimed, for a total of $400. The requested fees ($900), for all of this work, is reduced by $500.

Fee Billing for Work Performed from December 18, 1989, through November 16, 1990

The complainant has billed for 271.1 hours for claimed work performed by attorney Oppegard from December 18, 1989 (the date the complaint was received by the Commission) through November 16, 1990, for a total of $40,665 (271.1 hours x $150).

The complainant has billed 8.3 hours for Mr. Oppegard's claimed work on April 25, 1990, in meeting with the complainant and in the "preparation" and taking of the depositions of respondent's adverse witnesses Clayton Hacker and Clyde Collins during the discovery stage of this case. The amount claimed for this work is $1,245 (8.3 hrs, x $150). The record reflects that both depositions were taken at the ARDF's law offices in Manchester, Kentucky. The deposition of Mr. Hacker began at 3:45 p.m., and except for 10 minutes of "off the record" time, it concluded at 6:05 p.m. The deposition of Mr. Collins began at 6:10 p.m., and concluded at 6:57 p.m. Mr. Oppegard conducted the examination of the witnesses, and respondent's counsel asked no questions. Although Mr. Sanders was present, he asked no questions, and his participation was apparently limited to his appearance.

It would appear from the foregoing that the actual time spent in the taking of the depositions amounted to three (3) hours at most, and the "preparation" required by Mr. Oppegard is not further explained or documented. I conclude and find that the claimed 8.3 hours for this work is excessive. I will allow

$645 for this work (4.3 hrs. x $150), and the requested fees are reduced by $600.

The complainant has billed 5.7 hours for unexplained "research" by Mr. Oppegard on June 23, August 23, and September 7, 1990, and the requested fee is $855 (5.7 hrs. x $150). Additional time charges for unexplained "research" are included among other claimed work items for April 24, May 6, and May 11, 1990. The requested fees for the 5.7 hours are unsupported and they are disallowed. I will also deduct a total of 3.0 hours for the unexplained "research" included with the other work items for April and May, 1990. The requested fees are reduced by $1,305 (8.7 hrs. x $150).

The complainant has billed 10.3 hours for Mr. Oppegard's claimed work on September 14, 1990, in connection with the drafting, dictation, editing, and finalizing of a reply brief and a "letter to client." The time devoted to the letter is included with the work on the brief. The amount claimed for all of this work is $1,545 (10.3 hrs. x $150).

At the conclusion of the trial in this matter, the parties were informed that they would have an opportunity to file simultaneous briefs (Tr. 246, Vol. II), and they did so in accordance with an order which I issued after receipt of the transcripts. Reply briefs were not requested or required by the trial judge, nor did the parties seek leave to file reply briefs. Mr. Oppegard filed the reply brief at his own initiative, and in his accompanying letter of September 14, 1990, he characterized it as "a short reply brief." Indeed, the brief consists of ten (10) double spaced "letter size" (8-1/2 x 10-1/2) pages.

I conclude and find that the initial brief filed by Mr. Oppegard adequately covered his position, and that the reply brief did not materially affect the trial judge's understanding of the factual and legal arguments presented by the parties. Under the circumstances, I conclude and find that the filing of the reply brief was not necessary or essential and that the time charged is excessive and unreasonable. However, since Mr. Oppegard did perform the work which he apparently believed was essential to his case, I will allow $300 for this work (2.0 hours x $150) and the client letter, and the requested fees are reduced by $1,245.

The complainant has billed 14.0 hours for Mr. Oppegard's actual trial participation during the 2-day trial conducted on May 8 and 9, 1990. The record reflects that the trial began at 9:30 a.m., on May 8, recessed an hour for lunch, and concluded at 4:40 p.m. The second day's trial session on May 9, began at 9:15 a.m., recessed an hour for lunch, and concluded at 3:20 p.m. Accordingly, the claimed trial time will be allowed.

The complainant has billed 4.0 hours for claimed work by Mr. Oppegard on May 1, 1990, in connection with his interview of one witness, his dictation of notes, and a telephone conversation with the complainant. Additional phone conversations and interviews with witnesses from May 2, through May 4, 1990, are included among other work items on those days, for a total additional billing of 16.7 hours. The sum total of all of this claimed work a week before the trial is 20.7 hours, and the amount claimed is $3,105 (20.7 hrs. x $150).

The complainant has billed 8.3 hours for May 5, 1990, for Mr. Oppegard's reading of the depositions of the complainant, the depositions of witnesses Clayton Hacker and Clyde Collins, and "other preparation for trial." An additional 13.5 hours is claimed for May 6, 1990, interviewing witnesses, dictating notes, and "preparation for trial," and 15.8 hours is claimed for May 7, 1990, in "preparation of client and witness for trial," phone conversations with opposing counsel and witnesses, and "other trial preparation." Further claims are made for 2.0 hours to "prepare for trial" on May 8, 1990, the first day of the trial, and an additional 5.5 hours is claimed that same day to "prepare for resumption of trial." An additional 1.5 hours to "prepare for resumption of trial" is also billed for May 9, 1990, the second day of the trial, and 1.5 hours is billed for Mr. Oppegard's return to Hazard from the Pikeville trial location. The sum total of all of this claimed work from May 5, 1990, through May 9, 1990, is 48.1 hours, and the amount claimed is $7,215 (48.1 hrs. x $150).

Excluding the 14.0 hours actually spent in the 2-day trial, and the 1.4 hours travel time to Hazard, complainant has billed a total of 67.3 hours, at a claimed cost of $10,095, for work by Mr. Oppegard in speaking with the complainant and witnesses, reading three depositions, and other "trial preparation" (which is not further explained).

The complainant's deposition is not a part of the record, but based on a claimed cost of $25.60 for a copy of the transcript, I assume that it is not particularly lengthy. The Hacker and Collins depositions are a part of the record. I have read both depositions, and the time consumed in reading them at a moderate rate of speed was less than 1 hour. Under the circumstances, and in light of the unexplained "other preparation for trial" work, I find that the claimed 8.3 hours for May 5, 1990, is excessive. I will allow 2.0 hours for this work, and disallow 5.3 hours. The requested fees are reduced by $945 (6.3 x $150).

In the course of certain pre-trial discovery rulings which I issued on January 25, 1990, I noted my belief that the issues in this case did not appear to be particularly complex. I am still of that opinion. Under the circumstances, I conclude and find that the 59.0 hours claimed for interviews with witnesses who are

not identified, and other unexplained "trial preparation" is excessive and unreasonable. I take note of the fact that during the complainant's testimony on the first day of trial, six of the subpoenaed witnesses called by the complainant gave relatively short and rather repetitive testimony, and four of them were examined by Mr. Sanders. From the submissions by the complainant, it is not clear to me which witnesses may have been contacted and interviewed by phone, and which were personally interviewed in advance of trial, and the unspecified work characterized as "trial preparation" is not explained or further documented. Under all of these circumstances, the claimed 59.0 hours of work is reduced by one-third, and the requested fees are reduced by $2,940 (19.6 hrs. x $150).

In view of the allowable mileage, lodging, and meal expenses while at the hearing, the requested fee payment of 1.5 hours for Mr. Oppegard's return to Hazard is disallowed, and the requested fees are reduced by $225 (1.5 hrs. x $150).

The complainant has billed 27.6 hours for Mr. Oppegard's reading of the transcripts, notetaking, and indexing, ($4,140) and 48.5 hours for his work in preparing his brief ($7,275). The sum total claimed for this work is $11,415. I take note of the fact that the hearing transcript for the 2-day trial is in two volumes totalling 534 pages. Under the circumstances, I cannot conclude that the time charged for reading, notetaking, and indexing of the transcript is excessive or unreasonable. However, I find that the time spent in brief preparation is excessive. As noted earlier, the case was not particularly complex, nor were the issues that difficult so as to require an inordinate amount of time in trial preparation, "research," and brief writing. In this regard, I take note of Mr. Oppegard's affidavit in support of the claimed fees in which he states that he has read virtually every safety discrimination decision issued by Commission Judges, the full Commission, and the U.S. Courts of Appeals since the passage of the 1977 Act, and that he has litigated far more discrimination cases than any other private attorney in the country. Under the circumstances, I have difficulty justifying the claimed 48.5 hours for working on the briefing. Accordingly, the time is reduced by one-third, and the requested fees are reduced by $2,415 (16.1 hrs. x $150).

The complainant has billed for 7.1 hours ($1,065) for claimed time spent by Mr. Oppegard in telephone conversations with the complainant, co-counsel Sanders, and opposing counsel Walker intermittently from January 5, 1990, to November 6, 1990. Additional time is claimed for numerous additional telephone conversations which are included among other claimed work items, and these conversations were with the complainant, Mr. Sanders, opposing counsel, unidentified witnesses, and other individuals

whose connection with this case is unexplained. Selected examples of such telephone conversations are as follows: 4/19/90 - "phone conversations with Herschel Potter . . . John Rosenberg & Steve . . David Griffith . ."; 4/26/90 - "phone conversation with Steve Hoyle (at MSHA Academy); 5/4/90- "phone conversations with Kentucky Department of Mines & Minerals." Since these additional daily telephone calls are not listed separately from the other claimed work, I have no way of knowing how much time Mr. Oppegard spent on the telephone or how much was devoted to the other listed work items. I take note of the fact that many of the calls to the complainant were apparently made to discuss the "status of case," and while some calls are unexplained, I assume that the posthearing calls were in connection with the relief aspects of this case. I take particular note of a claimed charge of .4 hours for Mr. Oppegard to "dictate posthearing thoughts."

Upon review of the detailed itemized listing of the time claimed for telephone calls and conversations, I am not totally convinced that all of these calls and conversations were necessary in this case. However, in the absence of any specific challenge by the respondent, I will allow most of the charges. However, in view of the fact that some of the telephone time is unexplained, I will make a deduction of two (2) hours from the claimed fees and will disallow the .4 hours for Mr. Oppegard's dictation of his posthearing thoughts. The requested fees are reduced by $360 (2.4 hrs. x $150).

Duplicative and Redundant Legal Work

The respondent argues that the complainant has requested attorney's fees for services which are "clearly excessive and/or redundant." As an example, the respondent asserts that numerous entries in the claims for attorney's fees for Mr. Sanders are designated as "work performed simultaneously with co-counsel." Recognizing that Complainant's counsel have billed such services at a lesser rate, the respondent believes that it still would be unfair to require it to pay any amount for duplication of effort by two attorneys. In support of this argument, the respondent maintains that neither the issues nor the proof in this case were so complex, nor was the amount in controversy so great, as to require or justify the presence of two attorneys for one party at depositions, meeting with the client, interviews with witnesses, and the formal hearing.

The respondent argues that the evidence submitted by complainant's counsel in support of their billing rate tends to show that Mr. Oppegard possesses considerable skill and expertise in the area of mine safety law, so it is not consistent with Mr. Oppegard's position that he required assistance with the technical aspects of this case. If, on the other hand, the case was so time consuming as to require a division of labor, respondent concludes that this would not justify the presence of two

attorneys simultaneously for steps taken in the investigation and discovery of the case, or at the hearing.

The respondent asserts that the time spent by attorney Sanders on February 13, 1990, "to review case file," apparently "to bring himself up to speed in the case," is not a service for which an assisting attorney should expect compensation from a client, or, in this case, from the opposing party. Respondent points out that while it appears that Mr. Sanders spent some time on May 7, 1990, reviewing "depositions of Hacker and Collins," an activity which also had been performed by Mr. Oppegard, it is not clear how much time was spent since this item is part of an aggregate entry incorporating several activities.

The respondent maintains that since Mr. Sanders' attendance at the hearing was duplicative, his preparation for the hearing and his travel to and from the hearing should be disallowed, as well. The respondent concludes that the elimination of these redundancies results in a deduction of Mr. Sanders' fees by at least 9.5 hours at $150 per hour and by 34 hours at $75 per hour, for a total reduction of at least $3,975, not including time spent in review of depositions on 5/7/90, which cannot be determined on the basis of complainant's submissions. Charles v. National Tea Co., 488 F. Supp. 270 (W.D.LA. 1980).

The complainant maintains that the participation by Mr. Sanders was vital to the success of his case, and he points out that he had the burden of proof, that his discrimination complaint was rejected by MSHA, and that virtually all of the witnesses were reluctant to talk to his counsel. Complainant concludes that a diligent effort was required in order to uncover the facts and thoroughly present his case at trial, that the successful prosecution of his case required the work of two attorneys, and that he should not be penalized for employing multiple counsel. The complainant cites several federal court decisions awarding attorney fees for more than one counsel in support of his argument.

The complainant asserts that there are only six billing instances, totalling 34 hours, for services performed simultaneously by Mr. Sanders with Mr. Oppegard, and that in each instance Mr. Sanders has billed at only one-half the rate claimed by Mr. Oppegard. The complainant asserts that the trial responsibilities of Mr. Sanders and Mr. Oppegard "were roughly evenly divided." and that Mr. Sanders spent 14 hours at the trial, during which both he and Mr. Oppegard conducted direct and cross-examination of the witnesses. Complainant points out that Mr. Sanders also spent 5.5 hours interviewing an expert witness and inspecting the mine with Mr. Oppegard, and that all of this time was essential for Mr. Sanders' understanding of the case, particularly since he was responsible for the direct examination of the expert witness.

The complainant asserts that Mr. Sanders also spent 9.5 hours in preparing for and attending depositions of key witnesses in the case, including the deposition of one witness (Clayton Hacker), whom Mr. Sanders was responsible for cross-examining at trial, and that he also spent 5 hours interviewing several witnesses with Mr. Oppegard on May 3, 1990. Complainant maintains that Mr. Sanders' interviews was likewise necessary in that he was responsible for questioning some of the witnesses at trial.

Findings and Conclusions

In Johnson v. Georgia Highway Express, Inc., supra, at 488 F.2d 714, the fifth Circuit Court of Appeals stated "If more than one attorney is involved, the possibility of duplication of effort along with the proper utilization of time should be scrutinized. The time of two or three lawyers in a courtroom or conference when one would do, may obviously be discounted." Likewise, in Copeland v. Marshall, supra, at 641 F.2d 891, the D.C. Circuit Court of Appeals, stated ". . . where three attorneys are present at a hearing when one would suffice, compensation should be denied for the excess time." See also: Charles v. National Tea Co., 488 F. Supp. 270 (D.C. W.D. La. 1980), where the court cited Johnson v. Georgia Highway Express, Inc., supra, and stated at 488 F. Supp. 276 that "The time of two (2) lawyers in a courtroom when one would do, may obviously be discounted."

The complainant's argument that two attorneys were necessary because he had the burden of proof, that his discrimination complaint was rejected by MSHA, and that the witnesses were reluctant to speak with his counsel are rejected as a reasonable basis for justifying the need for two attorneys. The burden of proof, MSHA's rejection of initial complaints, and the reluctance of witnesses to speak with counsel are not unique to the instant case, and these arguments can be made in any discrimination case. Indeed, counsel Oppegard has handled prior cases where these factors were present, but only he prepared and tried the case. Although the complainant has filed an affidavit by Mr. Oppegard stating that the respondent's hourly employees were afraid to talk to his counsel and were intimidated prior to trial, there is no suggestion or assertion that Mr. Sanders played any unique or unusual role in eliciting the cooperation or testimony of these employees, all of whom were under subpoena to testify.

The complainant's argument that the trial responsibilities of Mr. Sanders and Mr. Oppegard were roughly evenly divided and that both attorneys conducted direct and cross-examination of the witnesses is rejected as any justification for the need for two attorneys. The issue is not whether the work was done, but rather, whether the use of two attorneys was necessary or crucial to the successful prosecution of the complainant's case. I

conclude and find that it was not. See: Donnell v. United States, 682 F.2d 240, 250 fn. 27 (D.C. Cir. 1982).

The record reflects that Mr. Oppegard conducted the examination of the complainant and four of the witnesses who testified the first day of the trial. Mr. Sanders examined the expert witness (Craft) and four additional witnesses (Marty Lewis, Eldridge, Combs, and Caudill). The direct testimony of these witnesses is relatively brief and uncomplicated, with little cross-examination, and limited redirect of only one witness. The direct testimony of Mr. Lewis consumed six (6) transcript pages; Mr. Eldridge, three (3) pages; Mr. Caudill, four pages; and Mr. Combs, five pages, and seven additional questions on redirect. I find nothing unique or unusual about the testimony of these witnesses, nor do I find any particular unique "trial strategy" that necessitated or required the questioning of these witnesses by Mr. Sanders, rather than Mr. Oppegard. In short, I can find no valid reason why Mr. Oppegard could not have prepared and examined these witnesses.

The record further reflects that Mr. Oppegard handled the cross-examination of two of the three witnesses presented by the respondent during the second day of trial (Garcia and Hacker), and that Mr. Sanders cross-examined one of the witnesses (Collins). Although Mr. Sanders was present at the pre-trial depositions of Hacker and Collins on April 25, 1990, he asked no questions, and Mr. Oppegard conducted the entire questioning of both deponents. Again, I find no valid reason why Mr. Oppegard could not have conducted the cross-examination of Mr. Collins.

I have reviewed the case decisions cited by the complainant at page 9 of his initial response to the respondent's objections to the payment of any attorney fees to Mr. Sanders and I find that the factual basis on which the courts found that more than one attorney was reasonable are distinguishable from those presented in this case. The cases cited involved protracted civil rights class actions, difficult constitutional First Amendment rights issues, a lengthy and complex "abortion rights" case with constitutional issues, and a difficult school desegregation case. In my view, the difficulty and complexity level of the complainant's case does not rise to the level of the cited cases, and his arguments are rejected.

In his fee supporting affidavit, Mr. Oppegard asserts that the presentation of the complainant's case was made more difficult because it concerned a piece of mining equipment, i.e., the continuance haulage system, that is unusual for eastern Kentucky, and required the employment of an expert witness who travelled underground with counsel to inspect this system. In his fee supporting affidavit, Mr. Sanders confirms that the continuous haulage system in question is not in common use in eastern Kentucky and that an understanding of how that equipment operated

was necessary to fully appreciate the dangers which the complainant was subjected to. Mr. Sanders further asserts that any understanding of these dangers required consultation with an expert and a visit to the mine to view the equipment.

The complainant's suggestion that the continuous haulage system utilized by the respondent rendered the case more difficult and complex is rejected. Although I agree that an underground mine visit was necessary to view the system so that counsel and the witness could familiarize themselves with it in an actual working environment, I am not convinced that two attorneys were required to do this. Nor am I convinced that an examination of the continuous haulage system, which was used in conjunction with a conventional continuous-mining machine and roof bolters, required any particular engineering or technical expertise. Indeed, the complainant's "expert" witness William Craft was offered as an expert with respect to the application and interpretation of MSHA's mandatory safety standards and general mine safety matters, rather than any technical or engineering expert on a Long-Airdox continuous haulage system (Tr. 185, Vol. I).

The record reflects that Mr. Craft is the former MSHA District Manager at Madisonville, Kentucky, who retired on disability in 1981, and who has worked since that time as a self-employed consultant. Mr. Craft's testimony and opinion that it would be dangerous for a miner to service the continuous haulage system while it was in operation, did not, in my view, require any particular scientific or technical knowledge of the system, and his opinion testimony concerning the hazards associated with servicing the system while it was moving and in operation could just as well have applied to any piece of underground mining equipment. Indeed, the record reflects that Mr. Craft's knowledge of the continuous haulage system was limited to the mine visit when he viewed the system with counsel, and his review of a rather brief Long-Airdox sales brochure which explains the operation of the system. Aside from his opinion concerning the servicing of the system while it was moving, the critical thrust of Mr. Craft's testimony was that to do so violated at least two MSHA mandatory safety standards (Tr. 201-206, Vol. I). I see no reason why Mr. Oppegard could not have prepared and examined Mr. Craft at the hearing.

As noted earlier, the complainant's justification for the hourly fee of $150 in this case is based on Mr. Oppegard's longstanding expertise in mine safety discrimination cases and his asserted role as a leading nationwide attorney in this area of the law. Under the circumstances, I find it rather contradictory that the complainant would require the additional services of Mr. Sanders to assist Mr. Oppegard in the pursuit of his case, and expect the respondent to pay for this.

~693

In view of the forgoing, and in the absence of any showing of any compelling need or justification for the use of two attorneys in this case, I agree with the respondent's position that the services of Mr. Sanders were not required or justified, and that the fees claimed by the complainant for these services should be denied. Accordingly, they are denied, and the complainant's requested fees are reduced by an additional $6,525.

Other Litigation Expenses

The respondent has filed no objections to the complainant's claims for the itemized other litigation expenses shown in Exhibit C to his initial statement of expenses. Under the circumstances, the claimed expenses are allowed.

Supplemental Attorney Fee Claims for Work Performed from November 17, 1990, through March 15, 1991

Complainant has billed 12.3 hours for the time spent by Mr. Oppegard in telephone conversations with Mr. Sanders and other private attorneys in connection with the question of the reasonableness of the hourly rate charged by Mr. Oppegard. An additional 19.9 hours are charged for research and other work by Mr. Oppegard concerning the attorneys fee issue. Thus, the complainant has claimed $4,830 (32.2 hrs. x $150) for work by Mr. Oppegard justifying his fee rate and responding to the respondent's objections. This is over and above the $675 claimed by Mr. Oppegard for work on November 16, 1990, calculating litigation expenses and preparing the fee statement. An additional amount of $255 is claimed for work by Mr. Sanders in talking with private attorneys about the reasonableness of the attorney fees (1.7 hrs. x $150). The total amount of fees claimed for work connected with defending and justifying the reasonableness of the complainant's attorneys fees is $5,760.

I take note of several court decisions in the D.C. Circuit allowing and disallowing an attorney compensation for time spent on the question of his fees. In Kiser v. Miller, 364 F. Supp. 1311, 1318 (D.D.C. 1973), the court discounted by 30 percent the amount of time spent by attorneys on the question of their fees. In National Ass'n of Regional Medical Programs v. Weinberger, 396 F. Supp. 842, 850 (D.D.C. 1975), the court reduced the number of hours claimed for fee petition work from 475 hours to 150 hours, after finding that the claimed hours were excessive considering the amount of effort and skill expended in seeking the fees. See also: National Council of Community Mental Health Centers, Inc., v. Weinberger, 387 F. Supp. 991 (D.D.C. 1974). In Parker v. Matthews, 411 F. Supp. 1059, 1066-1067 (D.D.C. 1976), the court allowed the full amount of time spent on attorneys fees.

Approximately seventy (70) percent of the 53.8 hours and $8,070, claimed by the complainant for the additional work of Mr. Oppegard, is for work in connection with the issue concerning the reasonableness of Mr. Oppegard's fees. After reviewing the submissions by the parties with respect to this issue, I cannot conclude that the fee issue was so complex as to require the amount of work expended by Mr. Oppegard. Under the circumstances, I conclude and find that the hours and amount claimed in the supplemental filing for fees is excessive, and I have reduced it by one-half and will allow 16.1 hours and $2,415. I will also allow the $675 for fee work claimed by Mr. Oppegard on November 16, 1990. The $255 claimed for fee work by Mr. Sanders on January 22, 24, and 28, 1991, is denied. The requested fees are reduced by $255, and by $2,415 (16.1 hrs. x $150).

On the basis of the foregoing findings and conclusions, including the reductions made to the complainant's requests for attorneys fees, the total requested fees are reduced by $22,060, and I will allow payment of $37,850, for attorney fees in this case, and $3,628.52, for other litigation costs and expenses, or a total of $41,478.52 for attorney fees and litigation costs and expenses ($63,538.52-$22,060).

ORDER

IT IS ORDERED that:

1. My decision in this case, issued on September 28, 1990, is now final

2. The respondent shall reinstate the complainant to his former position with full backpay and benefits, with interest, at the same rate of pay, on the same shift, and with the same status and classification that he would now hold had he not been unlawfully discharged.

The backpay due the complainant for the period of September 8, 1989, through January 31, 1991, less any interim earnings and less interest is $12,853.69. Backpay and interest will continue to accrue until this matter becomes final and Mr. Hays is reinstated and paid. The interest accrued with respect to the backpay will be computed according to the Commission's decision in Local Union 2274, UMWA v. Clinchfield Coal Co., 10 FMSHRC 1483 (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).

3. The respondent shall expunge from the complainant's personnel records and/or any other company records any reference to his discharge of September 7, 1989.

4. The respondent shall adhere to its agreement to make retirement payments into the complainant's account as if he had not been discharged.

5. The respondent shall adhere to the agreed upon procedure for determining any payments due the complainant for covered medical expenses incurred during his employment, and it shall give the same consideration to the complainant's submitted medical expenses as it would have done had he not been discharged.

6. The respondent shall pay the complainant's attorney fees and other litigation costs and expenses of $41,478.52.

7. The respondent shall post a copy of my decision of September 28, 1990, and the instant decision, at its No. 62 Mine in a conspicuous, unobstructed place where notices to employees are customarily posted for a period of 60 consecutive days from the date of this decision and order.

IT IS FURTHER ORDERED that:

1. The respondent shall comply with the aforesaid enumerated Orders within thirty (30) days of the date of this decision.

2. The complainant's request for post-judgment interest on the attorney fee award IS DENIED.

3. The respondent's motion to hold the attorney fee award in abeyance pending determination of its complaint filed with the Legal Services Corporation IS DENIED.

George A. Koutras
Administrative Law Judge