

CCASE:
THOMAS J. MCINTOSH v. FLAGET FUELS
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TTEXT:

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

THOMAS J. MCINTOSH,
COMPLAINANT

v.

FLAGET FUELS, INC.,
RESPONDENT

DISCRIMINATION PROCEEDING

Docket No. KENT 90-113-D
MSHA Case No. BARB CD 90-06

No. 1 Surface Mine

DECISION

Appearances: Tony Oppegard, Esq., Appalachian Research &
Defense Fund of Kentucky, Inc., Lexington,
Kentucky, for the Complainant.

Before: Judge Koutras

Statement of the Case

This proceeding is before me to determine the relief due the complainant based upon my decision of May 3, 1991, finding that the respondent Flaget Fuels, Inc., discriminated against the complainant in violation of section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq. In response to my Order of May 3, 1991, the complainant has filed his petition for backpay and expenses, and a statement of attorney fees and litigation expenses incurred as a result of his discriminatory discharge by the respondent. The respondent, who failed to appear at the hearing to defend this action, filed no response to the complainant's pleadings for relief.

Backpay

The complainant is claiming backpay for the period of December 1, 1989, through January 15, 1990, a period of 6 work weeks. Based on a wage rate of \$8 per hour for regular time and \$12 per hour for overtime, the complainant's weekly pay rate was \$440 (\$320 regular time and \$120 overtime). Complainant asserts that for the six weeks backpay period, he would have earned \$2,640, had he not been unlawfully discharged.

In addition to backpay, the complainant claims mileage expenses of \$87.97, in conjunction with his search for work during the backpay period, as well as for his meetings with his attorney and his attendance at the hearing in this matter. The complainant has filed a detailed log in support of this claim.

Citing Secretary of Labor on behalf of Bailey v. Arkansas-Carbona Co. and Walker, 5 FMSHRC 2042, 2049 (1983), and 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), the complainant also seeks the payment of interest on the damages owed him by the respondent, and he requests an order requiring the respondent to pay interest pursuant to the computation formula established by the Commission in Arkansas-Carbona and Clinchfield Coal Co., supra.

After due consideration of the complainant's petition for backpay and expenses, I conclude and find that it is reasonable and proper and the petition IS GRANTED. The complainant is due \$2,727.97 (\$2,640 á \$87.97) (less interest) for backpay and expenses.

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 has requested \$7,740 in attorney fees, based on 51.6 hours of work claimed by counsel Oppegard at the rate of \$150 per hour. The complainant also requests \$317.34, for certain enumerated litigation expenses incurred by the Appalachian Research & Defense Fund of Kentucky in pursuit of his case. The total amount of claimed attorney fees and litigation expenses is \$8,057.34.

Included in the 51.6 hours of claimed work by counsel Oppegard is a claim of 20.1 hours for work performed during the period December 11, 1989, to February 16, 1990, prior to the complainant's filing of his complaint with the Commission on March 9, 1990, I conclude and find that the time spent by Mr. Oppegard during the time that the complaint was being pursued and investigated by MSHA, including interviews, phone calls, and contacts with MSHA's special investigator, was non-legal work unconnected with the trial of the case, or preparation for the trial of the case, and that an hourly rate less than \$150 is appropriate in the circumstances. See: Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717 (5th Cir. 1974), and my

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decision of April 19, 1991, in Ricky Hays v. Leeco, Inc., Docket No. KENT 90-59-D. I further conclude and find that \$50 per hour is a reasonable billing rate for this work. Accordingly, I will allow \$1,005 for this work (20.1 hours x \$50).

I have reviewed the remaining claims for work performed by Mr. Opegard from March 5, 1990, through May 9, 1991, and with the exception of 4.4 hours (\$660) claimed for round trip travel from Lexington to Pikeville, Kentucky, I conclude that the charges are reasonable and they are allowed. In view of the allowable mileage, lodging, and meal expenses in connection with the relatively brief hearing held in this case, I conclude that counsel has been adequately compensated for these expenses and that an additional charge of \$660 for counsel's travel time is unreasonable. Accordingly, it is disallowed. I will allow payment for the remaining 27.1 hours of work at an hourly rate of \$150 (\$4,065).

I have further reviewed the claims for other litigation expenses incurred by counsel in the amount of \$317.34, and I conclude and find that they are reasonable and proper, and they are allowed.

ORDER

IT IS ORDERED THAT:

1. My decision in this case, issued on May 3, 1991, 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 December 1, 1989, through January 15, 1990, is \$2,640. Backpay interest will continue to accrue until this matter becomes final and the complainant 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 December 8, 1989.

4. The respondent shall pay the complainant's expenses of \$87.97, incurred during the backpay period. The respondent shall also pay the complainant's attorney fees and other litigation costs and expenses in the amount of \$5,387.34.

5. The respondent shall post a copy of my decision of May 3, 1991, and the instant decision, at its No. 1 Surface 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.

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

George A. Koutras
Administrative Law Judge