FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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Washington, D.C. 20004

February 8, 2016

SCOTT D. MCGLOTHLIN, Complainant, v. DOMINION COAL CORPORATION, Respondent.	DISCRIMINATION PROCEEDING Docket No. VA 2014-233-D NORT-CD-2013-04 Mine: Dominion No. 7 Mine ID: 44-06499

DECISION ON RELIEF
AND
FINAL ORDER

Before: Judge Feldman

This matter is before me based on a Complaint of Discrimination brought by Scott D. McGlothlin against Dominion Coal Corporation ("Dominion"), pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c)(3) (2006) ("Mine Act" or "the Act"). This Decision on Relief follows a summary decision on liability, issued on June 11, 2015, resolving the liability at issue without the need for an evidentiary hearing. *McGlothlin v. Dominion Coal Corp.*, 37 FMSHRC 1256 (June 2015) (ALJ). The summary decision on liability, based on an undisputed chronology of events, held that Dominion violated the anti-discrimination provisions of section 105(c)[1] by interfering with McGlothlin's right to pay protection under 30 C.F.R. Part 90 when Dominion reduced McGlothlin's pay after McGlothlin sought a determination concerning his eligibility for Part 90 protection.[2] *Id.* at 1264-1266. The decision on liability is incorporated by reference.

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[1] Section 105(c)(1) provides, in relevant part:

> No person shall . . . in any manner discriminate . . . or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner . . . [who] is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 . . . .

30 U.S.C. § 815(c)(1).

[2] Under 30 C.F.R. Part 90, a miner determined to have evidence of the development of pneumoconiosis must be given the opportunity to work in a less dusty area of a mine without loss of pay.

I. Issues

The goal of this proceeding is to award McGlothlin the relief that will make him whole. *See Clifford Meek v. Essroc Corp.*, 15 FMSHRC 606, 617 (April 1993) (citations omitted). The wages lost by McGlothlin are easily ascertainable by multiplying his reduction in pay by the period of his loss. The question of reimbursement of McGlothlin's attorney fees is a different matter. Given the demonstratively duplicative and excessive attorney fees sought to be reimbursed, the dispositive question is whether the Commission is compelled to direct such reimbursement simply because the respondent mine operator found liable in a 105(c)(3) proceeding has agreed to pay legal fees deemed unreasonable. Section 105(c)(3) states, in pertinent part:

> . . . [in] granting such relief as [the Commission] deems appropriate, [the Commission shall award] . . . 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*. . . .

30 U.S.C. § 815(c)(3) (emphasis added).

II. Background

The Decision on Liability ordered the parties to confer in an attempt to reach an agreement on the specific relief to be awarded. The parties were given two options: 1) to file individual petitions on relief if the parties could not agree on a relief proposal; or 2) to file a joint petition on relief if Dominion could agree to the relief proposed by McGlothlin. *Id.* at 1265-66. The parties did neither.

Rather, on September 2, 2015, the parties filed a Joint Motion to Dismiss McGlothlin's complaint based on the parties' proposed settlement. The parties' Joint Motion to Dismiss was predicated upon McGlothlin's agreement that "the parties jointly move the Court to dismiss all claims in this action with prejudice," in exchange for Dominion's agreement to pay the relief sought by McGlothlin's counsel on his behalf, including reimbursement of their claimed attorney fees. Jt. Mot. to Dismiss, at 2 (Sept. 2, 2015). Specifically, Dominion agreed to pay McGlothlin back pay of $45,942.61, in addition to $88,975.48 in reimbursed attorney fees for approximately eight weeks (331.1 hours) of claimed legal services provided by Evan Smith of the Appalachian Citizens' Law Center ("ACLC"), and Tony Oppegard, as private counsel. Confidential Settlement Agreement, at 2 (Sept. 2, 2015).

ACLC is the preeminent non-profit organization providing free legal representation to coal miners regarding matters arising under the Mine Act, including complaints of discrimination. ACLC is funded by foundations, donations, and attorney fees recovered during the course of its litigation. *Financials*, APPALACHIAN CITIZENS' LAW CTR., http://appalachianlawcenter.org/financials/ (last visited February 12, 2016). The principals of

ACLC are Stephen A. Sanders, who has more than 20 years of experience that includes representation of miners in 105(c) discrimination cases, and Wes Addington, who also specializes in mine safety litigation. *Staff and Board*, APPALACHIAN CITIZENS' LAW CTR., http://appalachianlawcenter.org/about-us-3/staff/ (last visited February 12, 2016). Tony Oppegard is a sole practitioner with over 35 years of experience specializing in mine safety matters, including representation of numerous 105(c) complainants. Response to Order to Show Cause, Ex. 1 at 1 (Jan. 13, 2016).

As previously noted, section 105(c)(3) authorizes the Commission to "grant[] such relief as it deems appropriate" including monetary relief and reimbursement for reasonable attorney fees, when the Commission determines, based upon "findings of fact," that discrimination has occurred. 30 U.S.C. § 815(c)(3). To determine the appropriate relief to be awarded, longstanding Commission case law has recognized the utility of bifurcating decisions on liability and decisions on relief in section 105(c) proceedings.[3] Bifurcation preserves Commission resources by avoiding the unnecessary development of a record regarding the appropriate relief to be awarded in cases where the discrimination complaint is dismissed after an evidentiary hearing on liability. *See, e.g., Metz v. Carmeuse Lime, Inc.*, 34 FMSHRC 1820 (Aug. 2012), *aff'd Metz v. FMSHRC*, 532 F.App'x 309, 2013 WL 3870733 (3d Cir. 2013). Although bifurcated decisions on liability are not final, in that they are not ripe for Commission appeal until a decision on relief is rendered, the decision on liability is a final disposition on the merits with respect to liability. Thus, absent a petition for discretionary review filed with the Commission, a mine operator that is found liable in a decision on liability following a hearing is collaterally estopped from denying liability in a related civil penalty proceeding.

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[3] *See, e.g., Sec'y of Labor o/b/o Lopez v. Sherwin Alumina, LLC*, 36 FMSHRC 730 (Mar. 2014) (ALJ Bulluck) (decision on liability requesting a follow up petition for relief from the parties); *Descutner v. Newmont USA*, 34 FMSHRC 2838 (Oct. 2012) (ALJ Barbour) (decision on liability), *and Descutner v. Newmont USA*, 35 FMSHRC 504 (Feb. 2013) (ALJ Barbour) (decision on relief); *Jeanlouis v. Morton Int'l*, 25 FMSHRC 536 (Sept. 2003) (ALJ Feldman) (decision on liability), *and Jeanlouis v. Morton Int'l*, 25 FMSHRC 673 (Nov. 2003) (ALJ Feldman) (decision on relief); *Womack v. Gramont W. US*, 25 FMSHRC 235 (May 2003) (ALJ Feldman) (decision on liability), *and Womack v. Gramont W. US*, 25 FMSHRC 469 (Aug. 2003) (ALJ Feldman) (decision on relief); *Gawthrop v. Triplett Bros. Excavating*, 17 FMSHRC 64 (Jan. 1995) (ALJ Feldman) (decision on liability), *and Gawthrop v. Triplett Bros. Excavating*, 17 FMSHRC 359 (Mar. 1995) (ALJ Feldman) (decision on relief); *Adkins v. Ronnie Long Trucking*, 21 FMSHRC 171 (Feb. 1999) (ALJ Hodgdon) (decision on liability), *and Adkins v. Ronnie Long Trucking*, 21 FMSHRC 377 (Mar. 1999) (ALJ Hodgdon) (decision on relief); *Meek v. Essroc Corp.*, 13 FMSHRC 1970 (Dec. 1991) (ALJ Fauver) (decision on liability), *and Meek v. Essroc Corp.*, 14 FMSHRC 518 (Mar. 1992) (ALJ Fauver) (decision on relief), *aff'd Meek v. Essroc Corp.*, 15 FMSHRC 606 (Apr. 1993).

The parties may not mutually agree to vitiate a post-adjudication decision on liability through a mutual agreement that both insulates a mine operator from the adverse history of a 105(c) violation, and releases the operator from the resultant civil penalty liability that must be imposed as a consequence of that violation. 30 U.S.C. §§ 814(a), 815(a); 29 C.F.R. § 2700.44(b). To hold otherwise would render Commission decisions on liability in bifurcated 105(c) proceedings as advisory opinions that are analogous to decisions by non-binding alternative dispute resolution bodies that may be disregarded at the whim of the parties. Additionally, allowing the parties to agree to release the mine operator from its 105(c) transgression is contrary to the deterrent goals of the Mine Act.

Furthermore, the parties' September 2, 2015, Joint Motion to Dismiss was problematical because it conflated the concepts of motions to approve settlement and petitions for relief. There is a significant substantive distinction between determining post-adjudicative relief in bifurcated proceedings through a motion to approve settlement, as the parties suggest, and through a traditional petition for relief. In exercising oversight over motions to approve settlement, the authority of a Commission judge is limited to only approving or denying the settlement terms, as the judge lacks the authority to impose his terms, rather than those proposed by the parties. Thus, giving effect to the parties' proposed settlement would preclude the Commission from exercising its statutory authority to award only attorney fees that have been "reasonably incurred by the miner." In contrast, the appropriate relief to be awarded in this matter must be determined in a decision on relief. As such, the issue of the appropriate monetary relief remains committed to the sound discretion of the judge. *Sec'y of Labor o/b/o Maxey v. Leeco, Inc.*, 20 FMSHRC 707 (July 1998).

Consequently, on October 21, 2015, the parties' September 2, 2015, Joint Motion to Dismiss was denied. At that time, the parties were instructed that, regardless of whether they styled any future agreements on relief as a joint petition, or as a motion to approve settlement, their proposed agreement would be construed as a joint petition for relief. 37 FMSHRC at 2514. McGlothlin's counsel were also instructed to submit fee petitions supporting their requested attorney fee reimbursement. *Id.*

In response to the denial of the parties' initial proposed settlement, on November 11, 2015, the parties submitted a revised Joint Motion to Approve Settlement. In an attempt to rectify the previously-submitted terms for relief in which Dominion sought to absolve itself of liability, the parties stated that their proposed terms now "include[] Dominion's waiver of its right to appeal this Court's Decision on Liability." Jt. Mot. to Approve Settlement, at 2 (Nov. 11, 2015). At that time, ACLC and Oppegard submitted separate fee petitions reflecting a total of $112,465.48 for legal services. For the purpose of settlement, the parties also reiterated their

proposals to both compensate McGlothlin with back pay of $45,942.61 and to reimburse ACLC and Oppegard a total of $88,975.48 in attorney fees.[4] Confidential Settlement Agmt., at 2 (Nov. 11, 2015).

In response to the parties' November 11, 2015, resubmitted settlement motion, on December 21, 2015, ACLC and Oppegard were ordered to show cause:

- Why the [$200.00 and $350.00] hourly rates for ACLC and Oppegard, respectively, are reasonable;

- Why the total 331.1 hours claimed for legal services are reasonable;

- Why the services rendered were necessary and not duplicative, given the fact that many of the fees are based on individual reimbursement to each attorney for calls and emails to each other, and for the reading and reviewing of filings in this matter; and

- Why either ACLC or Oppegard could not have solely and competently represented McGlothlin, as 105(c) discrimination cases are within each attorneys' area of expertise.

Order to Show Cause, 37 FMSHRC __, slip op. at 4 (Dec. 21, 2015) (ALJ).

ACLC and Oppegard responded to the Order to Show Cause on January 13, 2016.

A. Commission Authority to Direct Reimbursement

As an initial matter, in response to the order to show cause, McGlothlin's counsel objected to Commission oversight of the relief to be awarded in this 105(c) discrimination proceeding. Specifically, McGlothlin's counsel stated:

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[4] ACLC and Oppegard initially claimed $88,975.48 in total legal fees and expenses based on a reported total expenditure of 331.1 hours of legal services billed at rates of $200.00 per hour for ACLC, and $350.00 per hour for Oppegard. *See* Confidential Settlement Agmt., at 2 (Sept. 2, 2015). Upon being required to support the legal fees claimed, ACLC and Oppegard subsequently submitted separate fee petitions that sought a total of $112,465.48 in total legal fees and expenses based on the same total of 331.1 hours of legal services billed at rates of $225.00 per hour for ACLC, and $500.00 per hour for Oppegard. Despite their fee petitions, to resolve this discrepancy, on January 13, 2016, ACLC and Oppegard clearly represented that they are seeking a total of $88,975.48 based on the hourly rates for their services as initially claimed, regardless of whether the parties' proposed settlement terms were approved. Resp. to Order to Show Cause, at 2-3.

> Mr. McGlothlin's counsel first seek to clarify the posture of the case. Counsel have not petitioned your Honor for fees. *We believe the Commission lacks the authority to review the attorneys' fees portion of the parties' settlement.* Counsel for Mr. McGlothlin object to Commission review of their undisputed fees, and specifically, their hours and rates, which were agreed to as a compromise between the parties.
>
> The parties' tendered settlement should be summarily approved as it provides Mr. McGlothlin with all the relief available under the Mine Act. *It is not necessary for your Honor to engage in an analysis of what attorneys' fees are reasonable.* Dominion Coal today confirmed that it has no objection to the hourly rates or hours incurred.

Resp. to Order to Show Cause, at 1-2 (Jan. 13, 2016) (emphasis added).

I am troubled by the dismissive approach taken by McGlothlin's counsel with respect to the Commission's role in ensuring that only reasonable and necessary attorney fees are reimbursed pursuant to the direction of section 105(c) of the Mine Act. While mine operators may be willing to acquiesce to the reimbursement of attorney fees ultimately deemed excessive, the Mine Act sets the parameters for the Commission's award of relief in discrimination matters.[5] In this regard, section 105(c)(3) states, in pertinent part:

> . . . [in] granting such relief as [the Commission] deems appropriate, [the Commission shall award] . . . 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*. . . .

30 U.S.C. § 815(c)(3) (emphasis added). The appropriate relief to be awarded in discrimination matters is committed to the sound discretion of the judge, which, of course, is subject to appellate review by the Commission. *Sec'y of Labor o/b/o Ribel v. E. Assoc. Coal Corp.*, 7 FMSHRC 2015, 2027 (Dec. 1985), *rev'd on other grounds* 813 F.2d 639 (4th Cir. 1987); *see also Reid v. Kiah Creek Mining Co.*, 15 FMSHRC 390 (March 1993); *Maxey*, 20 FMSHRC at 707. McGlothlin's counsel should not be allowed "to seek the benefits of a favorable judicial

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[5] The scope of this decision is limited to the reimbursement of attorney fees that should be authorized under the Mine Act. Obviously, nothing herein precludes Dominion from paying McGlothlin's counsel attorney fees higher than those awarded in this proceeding. However, courts should not give effect to proposed agreements proffered during proceedings that contravene the purpose of the litigation. *See, e.g., Prandini v. National Tea Co.*, 557 F.2d 1015 (3d Cir. 1977) (defendant's agreement to pay higher legal fees to plaintiff's counsel in exchange for an agreement on the merits that is favorable to the defendant). Here, the parties' initial September 2, 2015, proposal impermissibly sought to relieve Dominion of liability for its discriminatory conduct.

decision" on liability, but yet avoid the Commission's exercise of discretion in determining the reasonableness of the relief to be awarded "through an artful attempt at dismissal of the case long past the eleventh hour." *Suntharalinkam v. Keisler*, 506 F.3d 822, 829-30 (9th Cir. 2007) (citations omitted).

In the final analysis, the parties' reliance on the significance of their agreed-upon terms is misplaced. The Commission has acknowledged that its authority to review the propriety of settlement motions conferred in section 110(k) of the Act extends to settlement agreements arising under section 105(c) of the Act. 30 U.S.C. § 820(k); *Maxey*, 20 FMSHRC at 707. In view of the case law and the Commission's statutory mandate, the parties' agreement on reimbursement does not alter the Commission's responsibility to exercise its delegated authority to determine the reasonableness of the relief to be awarded in this proceeding. At the risk of stating the obvious, agreed-upon terms, whether in motions for approval of settlement, or petitions for relief, are a condition precedent for the Commission's consideration of whether such terms are reasonable and should be approved. The Commission routinely approves or denies such agreements. Thus, while the parties' agreement is relevant, it is not dispositive.

B. Confidentiality

Not only have the parties sought to circumvent the Commission's consideration of the reasonableness of their proposed terms of relief, the parties have also requested that their proposed relief remain confidential. This request was denied in a November 18, 2015, order as public disclosure of the parties' proposed terms is required in instances where the parties' proposed terms of relief, including attorney fees, are either disputed, or not approved by the judge. 37 FMSRHC 2676 (Nov. 2015) (ALJ); *see, e.g.*, *Pendley v. Highland Mining Co. and James Creighton*, 37 FMSHRC 2226 (Sept. 2015) (ALJ). Furthermore, the parties do not have an unfettered right to confidentiality. Commission decisions are public documents that should be available for public review. Confidentiality, which necessitates concealment from the public, should be narrowly approved, for example, in instances where disclosure threatens proprietary interests. Rather, Commission findings of operator liability and the relief to be awarded to litigants in a Mine Act proceeding deserve to see the light of day. Public disclosure fosters the Mine Act's goal of deterring similar discriminatory acts. Disclosure also furthers the Commission's ability to determine if proposed legal fees are reasonable through a comparative analysis of past awards.[6]

[6] I am aware of only two recent Commission cases that specify the attorney fees reimbursed to ACLC and Oppegard pursuant to the fee shifting provisions of section 105(c)(3). *See Pendley*, 37 FMSHRC at 2229 (awarding Oppegard and Addington of ACLC a total of $84,125.15 in attorney fees); *Howard v. Cumberland River Coal Co.*, 32 FMSHRC 1923 (Dec. 2010) (ALJ) (awarding Oppegard and Addington a total of $124,174.00 in attorney fees). Apparently, the attorney fees awarded to ACLC and Oppegard in the majority of other recent 105(c)(3) cases in which they have appeared have not been made public.

III. McGlothlin's Relief

A. Back Pay and Incidental Expenses

In awarding relief to section 105(c) discriminatees, "[t]he Commission endeavors to make miners whole and to return them to their status before illegal discrimination occurred." *Clifford Meek*, 15 FMSHRC at 617 (citations omitted). In doing so, the Commission has stated that monetary relief is awarded "to restore the discriminatees, as nearly as we can, to the enjoyment of the wages and benefits they lost as a result of [the discrimination]." *Sec'y of Labor o/b/o Dunmire v. N. Coal Co.*, 4 FMSHRC 126, 143 (Feb. 1982).

The Decision on Liability noted that McGlothlin's back pay should be computed based on the difference in the compensation paid to McGlothlin and the compensation that he is entitled to as a Part 90 miner, plus interest, and reimbursement for any other relevant incidental expenditures. 37 FMSHRC at 1265-66. The parties propose that the amount of relief to be awarded to McGlothlin should be $45,942.61. This amount constitutes the difference in the compensation that was paid to McGlothlin, and the compensation that he was entitled to as a Part 90 miner between period June 2013 and April 2015, when McGlothlin's employment with Dominion ceased, in addition to incidental expenses incurred.

The total $45,942.61 relief proposed is reasonable, as it is readily supported by the difference in hourly pay that McGlothlin was due as a Part 90 miner during the relevant 22 month period, plus a reasonable amount of claimed additional incidental expenses.

B. Reimbursement of Attorney Fees

Section 105(c)(3) sets forth two requirements for the reimbursement of attorney fees. Namely: 1) that an order be issued "sustaining the complainant's charges"; and 2) that the attorney fees sought to be awarded have been "reasonably incurred." 30 U.S.C. §815(c)(3); *E. Assoc. Coal Corp.*, 7 FMSHRC at 2025. Dominion's liability having been determined, the focus of this inquiry shifts to the reasonableness of the attorney fees sought to be reimbursed. In addressing the issue of reasonable attorney fees, courts look to the lodestar standard, which requires the multiplication of an attorney's reasonable hourly rate by the reasonable number of hours expended. *See Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 551-52 (2010); *Blum v. Stenson*, 465 U.S. 886 (1984). ACLC and Oppegard bear the burden of establishing that the hourly rates charged are reasonable and that the legal services provided by them were necessary and non-duplicative. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

1. Reasonable Hourly Rate

With respect to hourly rate, "an attorney's usual billing rate is presumptively the reasonable rate, provided that this rate is 'in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.'" *Covad Comm'n Co. v. Revonet, Inc.*, 267 F.R.D. 14, 29 (D.D.C. 2010) (citing *Kattan ex rel. Thomas v.*

D.C., 995 F.2d 274, 278 (D.C. Cir. 1993)). A reasonable hourly rate, however, must be one that is adequate to attract competent counsel in the relevant legal market, but yet does not produce a windfall to that attorney. *Blum*, 465 U.S. at 894-95.

As noted above, ACLC is seeking compensation at an hourly rate of $200.00 per hour, and Oppegard is seeking compensation at an hourly rate of $350.00 per hour. In situations "where there is only a relatively small number of comparable attorneys, like here, an adjudicator can look to prior awards for guidance in determining a prevailing market rate." *B&G Mining, Inc. v. Dir., Office of Workers' Comp. Programs*, 522 F.3d 657, 664 (6th Cir. 2008). With regard to ACLC's claimed reimbursement at a rate of $200.00 per hour for the work performed by Evan Smith, recent cases have awarded ACLC attorneys between $200.00 and $250.00 per hour. *See, e.g., Howard*, 32 FMSHRC at 1923; *Pendley*, 37 FMSHRC at 2229; *see also* Resp. to Order to Show Cause, Ex. 2 (Jan. 13, 2016) (listing black lung benefits cases in which Smith was awarded attorney fees of $225.00 and $250.00 per hour). Considering ACLC's expertise in the field of 105(c) discrimination cases, I find that ACLC's claim for an award of compensation at rate of $200.00 per hour is reasonable.

With regard to Oppegard's claimed reimbursement, I am cognizant that Commission judges have, in the past, granted Oppegard's claims for reimbursement of attorney fees at rates ranging from $400.00 to $500.00 per hour, presumably based on Oppegard's superior expertise in 105(c) discrimination matters. *See, e.g., Howard*, 32 FMSHRC at 1923; *Pendley*, 37 FMSHRC at 2229. However, it is important to distinguish between aspirational hourly rates that attorneys may seek from private clients from those that should be awarded pursuant to the fee shifting provisions promulgated by Congress in section 105(c) of the Mine Act.

It is the reasonable rate, rather than the aspirational rate, that should govern, for it is axiomatic that "[h]ours that are not properly billed to one's client also are not properly billed to one's adversary pursuant to statutory authority." *Copeland v. Marshall*, 641 F.2d 880, 891 (D.C. Cir. 1980). In other words, if it is unreasonable to charge a private client an excessive hourly rate for legal services, then an adversary may not be ordered to reimburse this improper hourly rate pursuant to a federal statute. Charging a miner, a private client, between $400.00 and $500.00 per hour for Oppegard's services in 105(c) proceedings is blatantly unreasonable and unrealistic, even if a miner could afford such rates.

However, I find that Oppegard's current claim for an award of a somewhat lower compensation rate of $350.00 per hour is reasonable. I believe that this additional $150.00 per hour above the $200.00 hourly rate sought by ACLC adequately compensates Oppegard, as contemplated by the Mine Act, for his level of experience in representing miners in Commission proceedings. I also believe that attorney fee rates ranging from $200.00 to $350.00 per hour are sufficient to attract capable legal representation for miners bringing discrimination complaints on their own behalf.

2. Reasonable Hours, Duplication of Services and Multiple Attorneys

With regard to the reasonable number of hours expended, hours may be deemed unreasonable if they are duplicative, wasteful, or merely excessive. *Hensley*, 461 U.S. at 424. On this point, in *Hays v. Leeco, Inc.* Judge Koutras explained:

> In *Johnson v. Georgia Highway Express, Inc.*, [488 F.2d 714, 720 (5th Cir. 1974)], 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."

13 FMSHRC 670, 690 (Apr. 1991) (ALJ) (PDR denied), *rev'd on other grounds* 965 F.2d 1081 (D.C. Cir. 1992). Such duplication of efforts "inevitably occurs when lawyers hold conferences, call each other on the phone, write each other letters and memoranda, or when several lawyers bill for reading the same document received from the defendants or the court." *Chavez v. Mercantil Commercebank, N.A.*, 2015 WL 136388, at *4 (S.D. Fla. Jan. 9, 2015). In *Hays*, Judge Koutras determined that legal fees sought by both Oppegard and Stephen Sanders, who is currently Director of ACLC, were duplicative, and only awarded fees to one attorney.[7] *Hays*, 13 FMSHRC at 694.

a. McGlothlin's Representation by Multiple Attorneys

As noted above, ACLC and Oppegard are seeking reimbursement for 331.1 hours of combined legal services, which equates to approximately two months of five-day work weeks. In support of their dual fee petition, counsel for McGlothlin rely on the fact that it is not uncommon for multiple attorneys to appear on behalf of parties in Mine Act proceedings. *See* Resp. to Order to Show Cause, Ex. 1. This assertion begs the question whether such services are reimbursable. Of course, services by multiple attorneys are reimbursable, provided that they are necessary and non-duplicative. For example, different elements of litigation, such as trial work, discovery, and briefing, may be divided among several attorneys, so long as their efforts

[7] The Commission denied Leeco Inc.'s petition for discretionary review of the initial decision. However, on appeal the D.C. Circuit reversed and remanded Judge Koutras's underlying decision on liability. 965 F.2d 1081 (D.C. Cir. 1992). On remand, the parties reached a settlement, which was apparently approved by the Commission. *See* 1992 WL 533506 (FMSHRC Oct. 21, 1992).

are not duplicative. However, the sum of the parts cannot be greater than the whole. By way of illustration, billing for two fully-qualified attorneys who appear at an eight hour deposition, may not be multiplied by a factor of two resulting in a requested reimbursement for 16 hours, if only one attorney conducts the deposition. Although the deposition tasks may be shared, the total amount billed should not exceed eight hours.

In this regard, as previously noted, hours not properly billable to a client are not billable to an adversary through a fee shifting statute such as section 105(c) of the Mine Act. *Copeland*, 641 F.2d at 891. It is implausible that a miner would retain multiple law firms, who are each a competent representative, and yet agree to incur duplicate legal fees as a consequence of dual representation. Simply put, the appearance of multiple attorneys does not, in and of itself, provide a basis for multiplication of fees.

b. Complexity of Representation

In support of their dual fee petition, counsel for McGlothlin also rely on the purported novelty and complexity of this case to justify the number of hours sought to be reimbursed. Resp. to Order to Show Cause, at 14-17. Their novelty and complexity argument is belied by ACLC and Oppegard's dual participation in previous proceedings. In *Pendley*, over the objection of the respondent's counsel that the fees sought were both excessive with regard to the hourly fee claimed and duplicative, the judge awarded ACLC Deputy Director Wes Addington and Oppegard a total of $84,125.15, including expenses, for a combined total of 214.2 hours of legal work. 37 FMSHRC at 2231. Unlike the present case, which was decided by summary decision, *Pendley* was decided after a hearing on the merits. To support the award of dual attorney fees, the judge credited counsel's assertion that the *Pendley* case was "novel" and determined that it "presented a fairly complex and unique set of facts." *Id.* at 2227.

Given the arguments in *Pendley*, the present case is not the first case where McGlothlin's counsel relied on novelty to justify their requested award of dual attorney fees. In any event, the dispositive law in this case was not extraordinarily difficult, in that it only required application of the plain language of section 105(c) that mine operators may not "interfere with the exercise of the statutory rights of any miner . . . [who] is the subject of medical evaluations." 30 U.S.C. § 815(c)(1). As discussed in the Decision on Liability, McGlothlin was transferred to a lower-paying job during the pendency of his pertinent medical evaluation. 37 FMSHRC at 1261. Specifically, McGlothlin prevailed because the irrefutable evidence reflected that he was transferred to a lower paying position on June 3, 2013, during the pendency of his Part 90 evaluation, which spanned from April 30 to June 6, 2013. *Id.* at 1263. Consequently, when viewed in context, counsel's current assertion that this case warrants dual attorney fees based on its novelty and complexity is unpersuasive.

Moreover, McGlothlin's counsel's assertion that case complexity, as a general proposition, necessitates dual representation is further belied by their pattern of appearing as co-counsel in numerous section 105(c) discrimination cases in recent years.[8] *See, e.g., Pendley v. Highland Mining Co.*, 37 FMSHRC 2226 (Sept. 2015) (ALJ Andrews); *Shemwell v. Armstrong Coal Co., Inc.*, 36 FMSHRC 2352 (Aug. 2014) (ALJ McCarthy); *Sec'y of Labor o/b/o Riordan v. Knox Creek Coal Corp.*, 36 FMSRHC 1050 (Apr. 2014) (ALJ Moran); *Shemwell v. Armstrong Coal Co., Inc.*, 35 FMSHRC 726 (Mar. 2013) (ALJ Feldman); *Sec'y of Labor o/b/o Flener v. Armstrong Coal Co., Inc.*, 34 FMSHRC 1658 (July 2012) (ALJ Simonton); *Sec'y of Labor o/b/o Green v. D&C Mining Corp.*, 33 FMSHRC 243 (Jan. 2011) (ALJ Harner); *Gray v. North Fork Coal Corp.*, 33 FMSHRC 2495 (Oct. 2011) (ALJ Rae); *Howard v. Cumberland River Coal Co.*, 32 FMSHRC 983 (Aug. 2010) (ALJ Hodgdon); *Sec'y of Labor o/b/o Wilder v. Private Investigation and Counter Intelligence Servs., Inc., et al*, 33 FMSHRC 1667 (July 2011) (ALJ Gill).[9]

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[8] In the current case, ACLC and Oppegard's dual representation apparently was initiated by Oppegard's suggestion that he and ACLC represent McGlothlin collaboratively. Confidential Settlement Agmt., Ex. A at 5 (Nov. 11, 2015).

[9] ACLC and Oppegard have jointly appeared in numerous 105(c)(2) cases brought by the Secretary. *See, e.g., Sec'y of Labor o/b/o Riordan v. Knox Creek Coal Corp.*, 36 FMSHRC 1050 (Apr. 2014) (ALJ Moran); *Sec'y of Labor o/b/o Flener v. Armstrong Coal Co., Inc.*, 34 FMSHRC 1658 (July 2012) (ALJ Simonton); *Sec'y of Labor o/b/o Wilder v. Private Investigation and Counter Intelligence Servs., Inc., et al*, 33 FMSHRC 1667 (July 2011) (ALJ Gill); *Sec'y of Labor o/b/o Green v. D&C Mining Corp.*, 33 FMSHRC 243 (Jan. 2011) (ALJ Harner). It is well-settled based on long-standing federal appellate and Commission case law that private attorneys are not entitled to any attorney fees in cases brought by the Secretary pursuant to section 105(c)(2) of the Mine Act. *See E. Assoc. Coal Corp. v. FMSHRC* 813 F.2d 639, 644 (4th Cir. 1987); *see also Sec'y o/b/o Gilbert v. Sandy Fork Mining Co.*, 9 FMSHRC 1327, 1339 n.6 (Aug. 1987) (citing *Maggard v. Chaney Creek Coal Co.*, 9 FMSHRC 1314, 1322 (Aug. 1987) (Commission holding recognizing the Fourth Circuit's decision in *Eastern Associated*, that no attorney fees may be awarded to private attorneys in section 105(c)(2) proceedings)). Thus, given *Eastern Associated*, and its Commission progeny, it is noteworthy that private counsel may not collect legal fees from complaining miners in cases brought by the Secretary on the miners' behalf, either in adjudicated section 105(c)(2) proceedings, or in 105(c)(2) proceedings resolved through the Commission's approval of settlement terms. *See Dunmire*, 4 FMSHRC at 143 (monetary relief is awarded "to restore the discriminatees, as nearly as we can, to the enjoyment of the wages and benefits they lost as a result of [the discrimination]"). In other words, a complaining miner is not made whole if he is under the mistaken belief that he is personally liable for legal services deemed, by law, to be unnecessary. Simply stated, monetary relief awarded by the Commission to complaining miners in section 105(c)(2) cases may not be shared with private counsel.

c. Propriety of Submitted Fee Petitions

Having concluded that McGlothlin's counsel's reliance on the appearance of two attorneys and on the purported complexity of the case, do not, alone, justify the reimbursement sought for 331.1 hours of attorney fees, the focus shifts to whether the hours claimed for reimbursement are duplicative. The dual fee petitions submitted by ACLC and Oppegard present the hallmarks of duplicative legal services created by the appearance of two attorneys when one would suffice.

As noted above, both ACLC and Oppegard are eminently qualified to represent discrimination complainants in Mine Act proceedings. Yet a substantial amount of the hours claimed for reimbursement by ACLC and Oppegard are for duplicative services, which results in an effective claimed hourly rate of $550.00 per hour ($200.00 per hour for ACLC plus $350.00 per hour for Oppegard). As a representative sample of duplicative entries in their respective fee petitions, both ACLC and Oppegard billed for time spent on telephone calls with each other (see, as examples, fee petition entries for 3/27/14, 4/1/14, 4/25/14, 7/21/14, 7/30/14, 9/30/14, 10/1/14, 10/20/14, 1/6/15, 1/7/15, 1/21/15, 1/26/15, 2/12/15, 3/18/15, 4/21/15, and 6/12/15). The fee petitions of both counsel also reflect billings for time spent drafting and reading emails between one another (see, as examples, fee petition entries for 7/29/14, 9/21/14, 10/6/14, 10/16/14, 10/23/14, 10/24/14, and 1/8/15), by both counsel for participation in conference calls with the court (see, as examples, fee petition entries for 7/30/14, 10/28/14, and 2/12/15), meetings with McGlothlin (see, as examples, fee petition entries for 10/7/14 and 1/7/15) and depositions (see, as examples, fee petition entries for 1/13/15, 1/14/15, and 1/15/15). Additionally, both counsel billed for time spent reviewing the same document (see, as examples, fee petition entries 7/21/14, 10/1/14, 10/10/14, 10/29/14, 11/7/14, 11/17/14, 1/6/15, 1/21/15, 1/23/15, 4/28/15, 5/12/15, and 6/12/15). Such claims can only reasonably be reimbursed under the Mine Act for the efforts of one attorney, rather than twice for the duplicative efforts of both counsel.

In addition to the duplicative nature of McGlothlin's counsel's fee petitions, claims for reimbursement by both the author and editor of a brief are also problematical (see, as examples, fee petition entries for 9/9/14, 9/17/14, 9/18/14, and 9/19/14; 2/18/15, 2/24/15, 3/17/15, and 3/18/15; 4/24/15, 4/28/15, and 5/1/15). Initially, such claims raise the question of whether reimbursement to the author of the brief is appropriate if the author's efforts were inadequate by virtue of the need for significant editing. Moreover, claims for reimbursement for exchanges of edits between the author and editor are self-serving in that it is impossible to evaluate whether the purported edits were necessary.[10]

[10] Although the reimbursements sought shall be reduced due to duplicity, it is noteworthy that ACLC and Oppegard presented fee petitions containing "block billing." Block billing is the practice of "lumping together multiple tasks into a single entry of time without separating tasks into individual blocks or elaborating on the amount each task took." *Chavez*, 2015 WL 136388, at *4 (citations and quotations omitted). By way of example, Oppegard's fee petition includes the following entry for January 19, 2015:

In sum, I find that 89.55 hours of the total 331.1 hours claimed for reimbursement by ACLC and Oppegard, based on redundant fee petition entries, are "duplicative, wasteful, or merely excessive." *See Hensley*, 461 U.S. at 424. As such, I find that a total of 241.55 hours were reasonably billed by ACLC and Oppegard. Filings in this proceeding, as well as counsel's respective fee petitions, reflect that ACLC has served as lead counsel. Accordingly, billed time by both ACLC and Oppegard that is deemed duplicative shall only be credited to ACLC. Thus, with respect to the total 241.55 hours credited, I find that 210.25 hours were reasonably billed by ACLC, and that 34.3 hours were reasonably billed by Oppegard for services that were not duplicative, such as his efforts with regard to FOIA and discovery. Consequently, applying the lodestar standard, ACLC and Oppegard are entitled to a fee reimbursement totaling $54,055.00, computed at $200.00 per hour, and $350.00 per hour, respectively.

In addition, McGlothlin's counsel are seeking a total of $4,165.48 in incidental expenses. I find that Oppegard's $990.66 in claimed expenses incurred through his attendance at depositions and meetings to be duplicative. Consequently, $3,174.82 in incidental expenses shall be reimbursed. In sum, **I find a total attorney fee reimbursement, including incidental expenses, of $57,229.82 to be reasonable** under section 105(c) of the Mine Act.

As a final matter, it is "always difficult and sometimes distasteful" when courts are called upon to evaluate the reasonableness of attorney fees. *Johnson*, 488 F.2d at 720. I would have preferred that the fee petitions filed by McGlothlin's counsel were reasonable, negating the need for my intervention. I also regret the parties' repeated requests for approval of confidential settlement terms, despite the fact that the parties were ordered to submit petitions for relief. It is unfortunate that the parties' posture in this matter has resulted in an undue delay of the payment of monetary relief to McGlothlin.

[fn.10 cont'd]

> Talk with Alicia re: Tim Thompson interviewing employees after depositions were completed; make notes of conversation; review Judge Feldman's written order granting our motion to quash the subpoena for Sheila Keiser; draft e-mail to Evan re: subpoenaing witness for deposition; review Evan's e-mail to Hardy & Wickline re: notes from Avery Stollings's notebook.

Confidential Settlement Agmt., Ex. A at 22 (Nov. 11, 2015). The practice of block billing makes fee petitions difficult to review, especially in instances where more than one attorney is seeking reimbursement.

In the final analysis, the issue in a 105(c) proceeding is not the amount of reimbursement a mine operator is willing to pay. Rather, the issue is whether the amount of reimbursement the Commission is being requested to direct a mine operator to pay under its delegated statutory authority is reasonable. I decline to legitimize a pattern of dual representation that may have resulted in the recovery of duplicative and unnecessary attorney fees under color of authority of the fee shifting provisions of 105(c) of the Mine Act. *See Blum*, 465 U.S. at 894-95.

ORDER

In view of the above, consistent with the June 11, 2015, Decision on Liability, which held that Dominion Coal Corporation violated the anti-discrimination provisions of section 105(c) of the Mine Act:

1. **IT IS ORDERED** that Dominion Coal Corporation pay Scott D. McGlothlin **$45,942.61** less pertinent federal, state, and local taxes, as compensation for lost wages and incidental expenses **within 45 days of this Decision**;

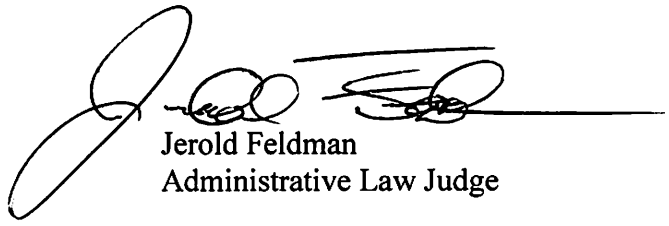
2. **IT IS FURTHER ORDERED** that Dominion Coal Corporation pay Scott D. McGlothlin's attorneys, Appalachian Citizens' Law Center, Inc. and Tony Oppegard, via a joint check, **$57,229.82 within 45 days of this Decision** as reimbursement for attorney fees and the attorneys' incidental expenses;[11]

3. **IT IS FURTHER ORDERED** that Dominion Coal Corporation shall post the June 11, 2015, Decision on Liability in this matter at all of its active mines for 60 consecutive days from the date of this Decision in conspicuous, unobstructed places where notices to employees are customarily posted; and

4. **IT IS FURTHER ORDERED** that Dominion Coal Corporation expunge any reference to this discrimination proceeding, if any, from McGlothlin's employee records, and that Dominion Coal Corporation is prohibited from providing any negative references that would interfere with McGlothlin's ability to obtain future employment.

[11] Although I believe the calculated division of the reimbursable legal services of ACLC and Oppegard to be just and adequate, ACLC and Oppegard are free to divide this total as they see fit.

IT IS FURTHER ORDERED that the Decision on Liability, 37 FMSHRC 1256 (June 2015) (ALJ), and the Decision on Relief constitute the final disposition of this discrimination proceeding. Upon timely satisfaction of the relief ordered above, the captioned discrimination proceeding in Docket No. VA 2014-233 **IS DISMISSED**.



Jerold Feldman
Administrative Law Judge

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