

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Avenue NW, Suite 520N
Washington, D.C. 20004

August 30, 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 REMAND

Appearances: Evan B. Smith, Esq., Wes Addington, Esq., Appalachian Citizens’ Law Center, Whitesburg, Kentucky, on behalf of the Complainant, Tony Oppeward, Esq., Lexington, Kentucky, on behalf of the Complainant, David J. Hardy, Esq., Wm. Scott Wickline, Esq., Hardy Pence, PLLC, Charleston, West Virginia, on behalf of the Respondent.

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”). The Commission has awarded McGlothlin \$88,975.48 in attorney fees. *McGlothlin v. Dominion Coal Corp.*, 38 FMSHRC 401 (Mar. 2016). McGlothlin now seeks reimbursement for additional attorney fees in the amount of \$41,525.00. The Commission has remanded this matter for my consideration of McGlothlin’s request for reimbursement of the additional fees. 38 FMSHRC __, slip op. at 2 (July 15, 2016).

I. Background

In order to evaluate McGlothlin’s current claim for \$41,525.00 in additional attorney fees, it is helpful to review the chronology of events in this proceeding. A June 11, 2015, Decision on Liability resolved the liability at issue without the need for an evidentiary hearing. 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) 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.¹ *Id.* at 1264-1266.

¹ 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 a reduction in pay.

Consistent with longstanding Commission procedure, the Decision on Liability ordered the parties to file either individual or joint petitions for relief. 37 FMSHRC at 1265-66. Despite my order, 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, including his request for reimbursement of \$88,975.48 in attorney fees. *Jt. Mot. to Dismiss*, at 2 (Sept. 2, 2015).

The propriety of the proposed \$88,975.48 in attorney fees in the parties' Joint Motion to Dismiss was problematical as it was based on a mutual agreement to vitiate the previously-issued Decision on Liability through a proposed agreement that would have both insulated Dominion from the adverse history of its 105(c) violation, and released Dominion from the resultant civil penalty liability that was to be imposed by the Secretary as a consequence of its violation.² See 37 FMSHRC at 1266; 30 U.S.C. §§ 814(a), 815(a); 29 C.F.R. § 2700.44(b). In other words, I was concerned that the proposed attorney fees may have been inflated in exchange for the parties' attempt to unilaterally absolve Dominion of a Commission finding of liability.³ 37 FMSHRC 2511, 2513 (Oct. 2015) (ALJ). Consequently, the parties' Joint Motion to Dismiss was denied, as it goes without saying that Commission decisions on liability cannot be undone in exchange for preferable settlement terms. *Id.*

The parties submitted a revised Joint Motion to Approve Settlement on November 11, 2015. In an attempt to rectify the rejection of their September 2, 2015, Joint Motion to Dismiss, the parties replaced the term concerning the absolution of Dominion's liability with a term reflecting that "Dominion[] waive[s] its right to appeal this Court's Decision on Liability." *Jt. Mot. to Approve Settlement*, at 2 (Nov. 11, 2015) (hereinafter "November 11 Proposed Settlement"). The parties' November 11 Proposed Settlement retained the claim for reimbursement for \$88,975.48 in attorney fees. *Confidential Settlement Agmt.*, at 2 (Nov. 11, 2015).

² Dominion has now paid a civil penalty of \$12,500.00 based on an approved settlement agreement with the Secretary in satisfaction of its discriminatory conduct against McGlothlin. 38 FMSHRC 1256 (May 2016) (ALJ).

³ The fact that attorney agreements with respect to fees should be scrutinized in instances where they may be motivated by an agreement to contravene the purpose of the litigation is not a matter of first impression. Such agreements between opposing counsel in fee shifting cases are known as "sweetheart settlements." Sweetheart agreements involve defendants "buying out" plaintiff's lawyers by agreeing to pay them unusually high legal fees in an effort to defeat the deterrent effect of the illegal activity that gave rise to the lawsuit. See Charles W. Wolfram, *The Second Set of Players: Lawyers, Fee Shifting, and the Limits of Professional Discipline*, 47 LAW AND CONTEMPORARY PROBLEMS 293, 301 (1984).

Granting the proposed settlement terms regarding attorney fees in the November 11 Proposed Settlement would have, in effect, credited the terms of the parties' previously discredited Joint Motion to Dismiss. Consequently, on February 8, 2016, I issued a Decision on Relief awarding the full \$45,942.61 in monetary relief sought by McGlothlin, but reduced the attorney fees claimed by McGlothlin's counsel from \$88,975.48 to \$57,229.82, based on a finding that the total attorney fees sought were excessive, in that they were duplicative, unnecessary, and/or unreasonable, and thus not awardable under section 105(c)(3).⁴ 38 FMSHRC 225, 268 (Feb. 2016) (ALJ).

On March 10, 2016, McGlothlin filed a petition for discretionary review ("PDR") with the Commission, challenging only the reduction in attorney fees. Dominion did not oppose McGlothlin's PDR. On March 30, 2016, the Commission issued a decision that did not disturb the Decision on Liability or the monetary relief awarded to McGlothlin. 38 FMSHRC 401 (Mar. 2016). However, the Commission vacated the reduction of attorney fees awarded to McGlothlin and approved the parties' November 11 Proposed Settlement "based upon the agreed upon amount of attorneys' fees." *Id.* at 402. The Commission's Decision did not reach the question of attorney fees incurred after submission of the revised settlement agreement. *Id.* at 403 n.2.

Thereafter, on June 20, 2016, McGlothlin filed a motion seeking an award of \$41,525.00 in additional attorney fees for reported legal services rendered during the period July 1, 2015, through June 20, 2016. This period represents work performed by McGlothlin's counsel to recover the total \$88,975.48 in attorney fees sought in the November 11 Proposed Settlement. This case now has been remanded "for a determination of any further award of attorneys' fees." 38 FMSHRC ___, slip op. at 2 (July 15, 2016).

II. Analysis

a. Reported Settlement Agreement

As stated by McGlothlin:

[t]he threshold question in this fee petition is whether Mr. McGlothlin's counsel are entitled to additional fees for the necessary time incurred to get the parties' settlement approved and to get Dominion Coal to actually pay *the agreed upon amounts*.

⁴ Section 105(c)(3) provides:

. . . [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).

Mot. for Award of Attorneys' Fees, at 10 (June 20, 2016) (emphasis added). However, the rub is that it is now apparent, based on the parties' representations, that McGlothlin's current claim for additional attorney fees is borne out of a conflict between the parties that arose following the issuance of the Decision on Relief. Specifically, despite the \$57,229.82 in attorney fees awarded in the February 8, 2016, Decision on Relief, the following day, on February 9, McGlothlin's counsel requested of Dominion via email:

I want to minimize the impact this [decision] has on both of our clients though and propose that Dominion go ahead and cut checks as contemplated in the settlement. If Dominion will do that, then we won't pursue any further fees against Dominion and our clients could consider their roles in this to be over.

Id. at 7.⁵ Dominion declined this offer, insisting on paying only the \$57,229.82 in attorney fees awarded in the Decision on Relief. *Id.* at 7-8; *Dominion Resp.*, at 3.

Thus, while Dominion did not oppose McGlothlin's PDR, it now appears that, as of the February 8, 2016, Decision on Relief, Dominion was no longer inclined to unilaterally pay McGlothlin \$88,975.48 in attorney fees. Ultimately, Dominion paid the additional \$31,745.66 following the Commission's March 30 decision approving the parties' November 11 Proposed Settlement. *Mot. for Award of Attorneys' Fees*, at 9. Nevertheless, as discussed below, Dominion now asserts that the \$88,975.48 in attorney fees awarded to McGlothlin's counsel by the Commission was excessive and, as such, \$31,745.66 should be applied to offset the additional attorney fees currently sought. *Dominion Reply*, at 3 (July 29, 2016).

⁵ In fact, McGlothlin had attempted to elicit payment of the full \$88,975.48 in attorney fees prior to the issuance of the Decision on Relief, thus attempting to circumvent the Commission's processes. In this regard, Dominion states:

During the three-month interim between the submission of the [November 11 Proposed Settlement] and the [February 8, 2016, Decision on Relief], the parties both were concerned about potential adverse rulings, primarily because of the Court's unexpected rejection of their initial settlement proposal. The parties held multiple discussions on how to insulate their agreement against a potentially adverse ruling (to either party) by the Court. . . . [T]he parties discussed the possibility of a side-agreement that would hold the parties to the settlement terms, regardless of the Court's ruling.

Dominion Resp., at 3 (June 30, 2016).

b. Parties' Positions

As a threshold matter, McGlothlin asserts that Dominion was required to abide by the terms of the November 11 Proposed Settlement. Thus, McGlothlin argues that the additional \$41,525.00 in fees now sought could have been avoided if Dominion had paid the \$88,975.48 in legal fees without the need for Commission approval. *Mot. for Award of Attorneys' Fees*, at 12-13. In this regard, McGlothlin seeks to justify the additional fees currently sought based on the fact that Dominion “went back on its word” when it refused to pay the full \$88,975.48 without a Commission decision requiring it to do so. *Id.* at 16. Accordingly, McGlothlin argues that Dominion is “directly responsible” for the accrual of the additional \$41,525.00 in fees now being sought. *Id.* at 12.

McGlothlin’s assertion that Dominion’s refusal to abide by the proposed settlement terms is material is based on a fundamental misconception. Proposed terms are just that—proposed terms. It is axiomatic that proposed settlement terms in Commission proceedings are not binding on the parties until approved by the Commission. Notwithstanding the immateriality of unapproved proposed terms, reimbursement of attorney fees under section 105(c)(3) does not depend upon blameworthiness. Rather, it is dependent upon whether the legal fees were “reasonably incurred.”

Dominion contends that McGlothlin is precluded from recovering additional attorney fees based on three paragraphs (Paragraphs 5.1, 5.2, and 8.6) of the November 11 Proposed Settlement that insulate Dominion from liability for additional attorney fees upon its payment of the total \$88,975.48 originally sought. *Dominion Resp.*, at 8-9. Consequently, Dominion argues that its payment of the \$88,975.48 in fees following the Commission’s March 30 Decision relieves it from any liability for additional attorney fees. *Id.*

However, Paragraphs 5.1, 5.2, and 8.6 are proposed settlement terms that were not adopted by the Commission. Specifically, the Commission’s March 30 Decision held that “the Judge erred in rejecting the settlement based upon the [\$88,975.48] *agreed upon* amount of attorneys’ fees.” 38 FMSHRC at 402 (emphasis added).

It is clear that the Commission’s approval was limited to the “agreed upon amount of attorneys’ fees” and was not an adoption of any other provision in the November 11 Proposed Settlement. *Id.* Thus, the Commission’s holding only binds the parties in this discrimination matter with respect to the approval of the reimbursement of \$88,975.48. The enforceability of any other terms of the November 11 Proposed Settlement not approved by the Commission goes beyond the scope of this proceeding. As such, the November 11 Proposed Settlement does not preclude McGlothlin from seeking additional attorney fees.

Having determined that the terms of the November 11 Proposed Settlement do not preclude reimbursement, the focus shifts to whether the additional attorney fees now sought were

reasonably incurred by McGlothlin's counsel.⁶ Consequently, consistent with the Commission's remand, the parties were requested to file additional briefs addressing the reasonableness issue. 38 FMSRHC ___, slip op. at 2 (July 19, 2016).

Dominion addressed the reasonableness issue on July 29, 2016. As previously noted, Dominion did not oppose McGlothlin's March 10 PDR. However, in its current July 29 response, Dominion now argues, albeit belatedly, that "[t]he [ALJ's] prior reasonableness analysis still applies to the request for attorney fees." For example, Dominion asserts:

In its *Decision on Relief and Final Order*, this Court conducted a thorough reasonableness evaluation of Respondent's attorney fees sought in the proposed settlement. The Court concluded that the requested fees were "demonstrably duplicative and excessive" and reduced the requested fees by \$31,745.66. *Decision on Relief and Final Order* at 2. In granting the Respondent relief on appeal, the Commission did not reject this Court's reasonableness analysis, and did not vacate the entirety of the *Decision on Relief and Final Order*. Instead, the Commission carefully limited its ruling to "vacate those portions of the Judge's decision rejecting the revised settlement agreement as to attorneys' fees, and [approving] the settlement agreement as to those provisions." *Decision* entered March 30, 2016, at 3. In other words, while the Commission found that the Court erred in applying its reasonableness analysis in the presence of stipulated attorney fees, the Commission did not find substantive error in the Court's reasonableness analysis.

Dominion Br. in Opp., at 2 (July 29, 2016) (emphasis in original). In view of Dominion's current posture that the \$88,975.48 was "demonstrably duplicative and excessive," Dominion now pleads that for "any additional fee . . . considered by the Court, the requested hourly rate should be reduced, [and] the billing entries should be assessed for duplication, and any award should be offset by the \$31,745.66 that Respondent's counsel received *under the guise of a settlement*, in excess of this Court's reasonableness assessment."⁷ *Id.* at 2, 4-5 (emphasis added).

⁶ Dominion's procedural argument that McGlothlin's request for additional attorney fees was untimely was, in essence, rejected by the Commission by virtue of their remand directing further analysis. 38 FMSRHC ___, slip op. at 2 (July 15, 2016).

⁷ In his March 10, 2016, PDR, McGlothlin urged the Commission to approve the parties' November 11 Proposed Settlement. McGlothlin now represents that Dominion backed out of the agreement regarding attorney fees as of February 9, 2016, following the issuance of the *Decision on Relief*. *Mot. for Award of Attorneys' Fees*, at 7, 16. As a consequence of Dominion's failure to oppose McGlothlin's PDR, the Commission was unaware of Dominion's decision to no longer be bound by the entirety of the proposed settlement. While it is clear that the Commission was misinformed, McGlothlin had no affirmative duty to convey to the Commission Dominion's disinclination to adhere to the November 11 Proposed Settlement.

On August 5, 2016, McGlothlin replied to Dominion's assertion that the attorney fees currently sought are duplicative and excessive because they are based on the identical dual representation that was rejected in the Decision on Relief. McGlothlin reiterates his arguments previously made in this proceeding in support of the reasonableness and necessity of the legal fees sought. *McGlothlin Reply*, at 2-6 (Aug. 5, 2016). In so doing, McGlothlin asserts that my previous fee analysis, which rejected the November 11 Proposed Settlement, is inextricably intertwined with the Commission's approval of the proposed settlement terms. *Id.* at 5 n.1. Simply put, McGlothlin argues, in essence, that the reasonableness of its dual representation and fee structure are no longer in issue, having previously been approved by the Commission.

c. Discussion and Evaluation

As previously noted, McGlothlin is seeking attorney fees for services rendered between July 1, 2015, through June 20, 2016. As a threshold matter, it cannot be said that the current request for attorney fees associated with the PDR is frivolous, as McGlothlin prevailed on appeal. In such circumstances, I find that fees-on-fees are compensable. *See, e.g., Contractor's Sand and Gravel, Inc.*, 18 FMSHRC 1820, 1832-33 (Oct. 1996) (ALJ) (holding that fees-on-fees are compensable in a Commission Equal Access to Justice proceeding); *Noxell Corp. v. Firehouse No. 1 Bar-B-Que Rest.*, 771 F.2d 521, 528 (D.C. Cir. 1985) (holding that "[h]ours devoted to a request for fees are compensable" under a federal trademark fee-shifting statute).

I do, however, find it regrettable that, in an attempt to circumvent the Commission's oversight,⁸ a significant portion of the fees currently requested were accrued by McGlothlin's counsel despite my repeated orders, consistent with long-standing Commission practice, that the parties file petitions for relief, rather than motions for approval of settlement.⁹ 38 FMSHRC at 257 (citing to the procedural history of Commission decisions bifurcating the liability and relief phases of discrimination proceedings). However, as discussed below, I am constrained to award attorney fees for such endeavors given the Commission's rejection of my rejection of the parties' motions to approve settlement. Consequently, additional attorney fees now sought by McGlothlin are compensable.

⁸ Despite the Commission's holding in *Leeco, Inc.* that "oversight of proposed settlements in discrimination cases is committed to the Commission's sound discretion," McGlothlin's counsel have previously opined: "We believe the Commission lacks the authority to review the attorneys' fees portion of the settlement." 38 FMSHRC at 259; *Sec'y of Labor o/b/o Maxey v. Leeco, Inc.*, 20 FMSHRC 707, 707 (July 1998); *see also Am. Coal Co., et al.*, 38 FMSHRC ___, slip op. at 5 (Aug. 25, 2016) (affirming that Commission approval of settlement terms requires a finding that they are "fair, reasonable, [and] appropriate under the facts"). "Sweetheart agreements" in fee shifting cases are not immune from judicial scrutiny.

⁹ There is a substantive difference between petitions for relief and motions to approve settlement in discrimination matters. 38 FMSHRC at 228.

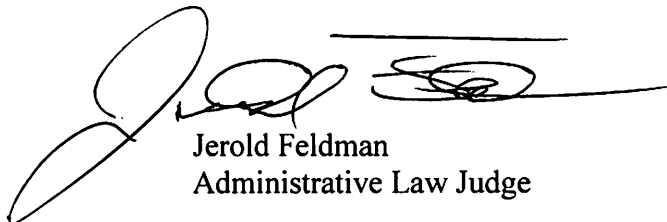
Having determined that reimbursement is permissible, the focus shifts to the reasonableness and necessity of the fees sought. Dominion asserts that the Commission's approval of the November 11 Proposed Settlement did not constitute a finding that the attorney fees sought by McGlothlin were reasonable. Rather, Dominion relies on the rationale in the Decision on Relief that the fees currently sought are duplicative and excessive.¹⁰

However, the Commission's approval of the settlement does not—and could not—constitute an approval of the stipulated attorney fees without a determination, as required by the Mine Act, that the approved fees were reasonably incurred. *See supra* note 4. Consequently, implicit in the Commission's decision is that reimbursement of multiple legal fees for the reported collaborative efforts of two attorneys, each of whom specializes in Commission discrimination cases, is neither duplicative nor unreasonably excessive. It is similar collaborative legal services for which McGlothlin now seeks additional reimbursement. In the final analysis, the Commission's approval of the parties' November 11 Proposed Settlement is, *a fortiori*, a controlling appellate determination that the additional total \$41,525.00 sought for the services reportedly provided by both of McGlothlin's counsel is reasonable.

ORDER

In view of the above, **IT IS ORDERED** that Dominion Coal Corporation pay, **within 45 days of this Decision**, Scott D. McGlothlin's attorneys, Appalachian Citizens' Law Center, Inc. and Tony Opegard, **a total of \$41,525.00 as reimbursement for attorney fees.**¹¹

IT IS FURTHER ORDERED that upon timely payment, the captioned discrimination proceeding in Docket No. VA 2014-233 **IS DISMISSED.**



Jerold Feldman
Administrative Law Judge

¹⁰ Succinctly put, the Decision on Relief held that the legal fees sought by two attorneys each eminently qualified to represent 105(c)(3) complainants before this Commission, based in significant part on their claimed collaborative efforts billed at a combined rate of \$750.00 per hour, were duplicative and excessive. 38 FMSHRC at 263-268. In addition, the Decision on Relief noted that the dispositive issue in this matter was not complex in that it was undisputed that Dominion interfered with McGlothlin's right to seek medical evaluation by lowering his pay during the pendency of his evaluation for Part 90 status. *Id.* at 264; *see* 30 U.S.C. § 815(c)(1).

¹¹ As a result of this Decision, McGlothlin will have been awarded reimbursement of a total of \$130,500.48 for representation in this proceeding, the disposition of which was resolved via summary decision.

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