

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 21, 2015

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

ORDER TO SHOW CAUSE¹

Before: Judge Feldman

The summary decision on liability in this matter held that Dominion Coal Corporation (“Dominion”) violated the anti-discrimination provisions of section 105(c) by interfering with Scott D. 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. *McGlothlin v. Dominion Coal Corp.*, 37 FMSHRC 1256, 1264-66 (June 2015) (ALJ). On March 19, 2014, McGlothlin’s wife contacted attorney Tony Opegard regarding her husband’s discrimination complaint. At that time, Opegard contacted Wes Addington, Deputy Director of the Appalachian Citizens’ Law Center (“ACLC”) about a potential client. On March 26, 2014, ACLC contacted McGlothlin to initiate representation. Proposed Confidential Settlement Agreement, Ex. A (Nov. 11, 2015).² Having resolved the liability at issue in this matter, the focus now shifts to the issue of the reasonableness of the attorney fee sought by ACLC, based on the legal services provided by Staff Attorney Evan Smith, and the reasonableness of the attorney fee sought by Opegard as a private practitioner.

ACLC is seeking reimbursement for 212.5 hours of legal services at \$225.00 per hour, amounting to \$47,500.00, in addition to \$3,174.82 in incidental expenses, resulting in a total requested reimbursement of \$50,674.82. Opegard’s fee petition reflects that Opegard is

¹ This Order to Show Cause supersedes the Order to Show Cause issued on December 18, 2015, to correct paragraph two on page one and the ordering clause, to reflect that ACLC is seeking reimbursement at a rate of \$225.00 per hour. This Order to Show Cause also modifies footnote three to reflect the total attorney fees previously proposed and currently sought by the parties.

² The parties’ request for unconditional confidentiality was denied on November 18, 2015. 37 FMSHRC ___, slip op. (Nov. 18, 2015) (ALJ).

seeking reimbursement for 121.6 hours of legal services at \$500.00 per hour, amounting to \$60,800.00, in addition to \$990.66 in incidental expenses, resulting in a total requested reimbursement of \$61,790.66. Thus, ACLC and Opegard seek a total of \$112,465.48 in attorney fees based on a total of 331.1 hours (more than eight weeks) of legal services claimed.³

ACLC and Opegard 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. *Hays v. Leeco, Inc.*, 13 FMSHRC 670, 680 (1991) (ALJ). In addressing the issue of reasonable attorney fees, courts look to the lodestar standard that 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*, 599 U.S. 542, 551-52 (2010); *Blum v. Stenson*, 465 U.S. 886 (1984).

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 R.R.D. 14, 29 (D.D.C. 2010) (citing *Kattan ex rel. Thomas v. District of Columbia*, 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.

With regard to the reasonable number of hours expended, in *Hays v. Leeco, Inc.*, 13 FMSHRC at 690, Judge Koutras explained:

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."

³ The parties have proposed terms providing for the reimbursement of attorney fees calculated at \$200.00 per hour for Smith, and \$350.00 per hour for Opegard, for a total of \$88,975.48. However, the parties' proposed terms may not be adopted. Smith now represents that he and Opegard are seeking a total reimbursement of \$112,465.48 for their legal services at rates of \$225.00 per hour, and \$500.00 per hour, respectively, if the parties' proposed terms differ from the relief ultimately awarded by the Commission in this proceeding. Email from Evan Smith (Dec. 4, 2015).

Such duplication of efforts “inevitably occur[] 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).

The Commission addressed the issue of duplicative private attorney fees in a case brought by the Secretary pursuant to section 105(c)(2) in *Sec’y of Labor o/b/o Ribel v. Eastern Associated Coal Corp.*, 7 FMSHRC 2015 (Dec. 1985). In *Ribel*, the Commission declined to award a private counsel attorney fees for efforts that were “not reasonably incurred” because they were duplicative of the Secretary’s competent representation and prosecution of the claimant’s discrimination complaint. *Id.* at 2023, 2025. Similarly, in *Leeco, Inc.*, 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. *Hays v. Leeco, Inc.*, 13 FMSHRC at 694.

In *Pendley v. Highland Mining Co.*, 37 FMSHRC __ slip op. (Sept. 21, 2015) (ALJ), over the objection of the respondent’s counsel, the judge awarded Addington and Oppegard a total of \$84,125.15, including expenses, for 214.2 hours of legal work. Unlike this case, which was decided by summary decision, *Pendley* was decided after a hearing on the merits. To support the award of attorney fees, the judge determined that the *Pendley* case “presented a fairly complex and unique set of facts.” *Id.* at 2. However, the liability determination in this case was resolved by summary decision because it was straightforward in that it was based on an undisputed chronology of events regarding McGlothlin’s application for Part 90 protection.


Despite the judge’s finding that the issues in *Pendley* were “complex and unique,” the dual legal fees sought by both ACLC and Oppegard appear to be the rule, rather than the exception. In this regard, ACLC and Oppegard have demonstrated a pattern of dual representation in numerous recent section 105(c) discrimination cases. *See, e.g., Pendley v. Highland Mining Co.*, 37 FMSHRC __ slip op. (Sept. 21, 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); *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); *Howard v. Cumberland River Coal Co.*, 32 FMSHRC 983 (Aug. 2010) (ALJ Hodgdon).

ORDER

Without question, both ACLC and Oppegard are competent, if not specialized, in representing claimants in section 105(c) proceedings. Given both attorneys' expertise, **IT IS ORDERED** that McGlothlin's counsel **SHOW CAUSE on or before January 13, 2016**, why the total requested reimbursement for attorney fees of \$112,465.48 for legal services provided should not be significantly reduced. In this regard, McGlothlin's counsel should specifically address:

- Why the \$225 and \$500 hourly rates for ACLC and Oppegard, respectively, are reasonable;
- Why the total 331.1 hours claimed for legal services claimed 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 review 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.

McGlothlin's attorneys may also provide any other documentation, case law or other information, they deem relevant.


Jerold Feldman
Administrative Law Judge

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