FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SEP 21 2015

LAWRENCE PENDLEY, Complainant, v. HIGHLAND MINING CO. AND JAMES CREIGHTON, Respondent.	DISCRIMINATION PROCEEDING Docket No. KENT 2013-606-D MSHA Case No.: MADI-CD 2010-07 & 11 Mine: Highland 9 Mine Mine ID: 15-02709

ORDER GRANTING REMEDIES AND GRANTING ATTORNEYS FEES

This case is before me upon a complaint of discrimination brought by Lawrence Pendley ("Complainant"), a miner, against Highland Mining Co. and James Creighton, ("Respondents"), pursuant to § 105(c)(3) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(c)(3).

On February 12, 2015, I issued a decision finding that Pendley had been discriminated against by the Respondents. However, due to the unique circumstances of the case, I ordered the parties to confer on the appropriate damages. The Complainant, by and through his attorneys, requested specific affirmative relief, as well as payment of attorneys' fees and costs. Specifically, Wes Addington requested fees of $39,140.00 for 157.8 hours at a rate of $250.00 per hour, and Tony Oppegard requested fees of $28,200.00 for 56.4 hours at a rate of $500.00 per hour.[1] Each attorney provided a detailed billing report that showed their use of time in 6-minute increments. In addition to these fees, Mr. Oppegard and Mr. Addington requested a combined total of $3,477.00 in travel and other administrative costs. Following these Position Statements, I ordered the parties to brief a number of questions relevant to making a remedies determination. The parties each submitted two additional briefs, focusing almost entirely on the attorneys' fee issue

Respondent, Highland Mining, took no position concerning the affirmative remedies, but objected to the attorneys' fees as "excessive and/or redundant." *Highland Mining Company LLC's Position Statement on Remedies*. Specifically, Highland argued that the fees should be calculated at the prevailing rate for similar work in the communities where they practice law, and asked the Court to cap the fees at $150.00 per hour. Highland further argues that some of the

[1] The total fees in this case have since been increased due to the Complainant's counsels defense of its attorney's fees.

time billed was for two attorneys, when one attorney would have sufficed. Lastly, Highland argues that the rate for preparing and defending a fee request should be lower than the rate for prosecuting the merits of the case.

With regards to the relief in the underlying discrimination case, I grant the Complainant's request. Highland Mining has closed the Highland 9 Mine, but it is ordered that if Highland ever reopens the mine, it must post the original decision in this case for 60 days and conduct specialized miners' rights training for all management officials, as described in the Order below.

With regards to attorneys' fees and costs, Section 105(c)(3) of the Mine Act provides that:

> 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.

30 U.S.C. §815(c)(3) (emphasis added). The legislative history of the Act makes clear that Congress intended for the Commission to provide "all relief that is necessary to make the complaining party whole and to remove the deleterious effects of the discriminatory conduct," and that such relief includes attorney's fees that ensure that a miner can find adequate counsel. S.Rep. No. 181, 95th Cong., 1st Sess. (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 625 (1978).

The United States Supreme Court has held in other fee-shifting statutes that the court should determine a reasonable attorney fee using the "lodestar method." *See Perdue v. Kenny A., ex rel. Winn*, 559 U.S. 542, 551-552 (2010); *Blum v. Stenson*, 465 U.S. 886 (1984). Using this approach, "the Court must determine: (1) the reasonableness of the hourly rate charged; and (2) the reasonableness of the hours expended on the litigation." *Woodland v. Viacom Inc.*, 255 F.R.D. 278, 280 (D.D.C.2008) (citing *Covington v. District of Columbia*, 57 F.3d 1101, 1107 (D.C.Cir.1995)). Often, "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 Communications 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)). The burden is on the fee petitioner to submit evidence that supports the hours worked, and such evidence must be detailed enough to allow the court to independently assess whether the hours are justified. *Id.*

The underlying discrimination case here presented a fairly complex and unique set of facts. The case involved one of the "more subtle forms of interference," that Congress sought to address in the Mine Act, which differs from the more standard discrimination cases that employ the usual *Pasula/Robinette* analysis. S. Rep. 95-191, 95th Cong., 1st Sess. 36

(1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 624 (1978). The Secretary of Labor declined to prosecute this case, and it is unlikely that even an attorney that practices regularly before the Commission would have recognized the merits of this case. Indeed, Highland's counsel are highly skilled attorneys with a combined 46 years of experience representing operators, and yet their Post-Hearing Brief did not even contemplate that the Complainant was presenting an interference claim. *Highland Brief in Response*, Ex-3. This fact is raised not to insinuate any defect in Highland's counsel's court performance, but rather to highlight the unusual nature of this case and to show the difficulty in applying the lodestar method. The evidence presented by Complainant's counsel, as well as the facts of this case, show that the community of private attorneys that represent miners in discrimination cases is quite small, and very few are as skilled or experienced as Mr. Oppegard or Mr. Addington.

According to the Affidavit and Curriculum Vitae (C.V.) submitted by Mr. Oppegard, he has over 32 years litigating mine safety issues, and over 28 years of experience litigating mine safety discrimination cases. *Pendley Response*, Ex-1. During this time, he has litigated over 225 cases arising under §105(c) of the Act, at the ALJ, Commission, and Circuit Court levels, making him the most experienced attorney in the nation in representing miners in discrimination cases. *Id.* Similarly, Mr. Addington has over 10.5 years of experience representing miners in discrimination cases. *Pendley Response*, Ex-3. During this time, he has represented 55 miners in more than 110 docketed cases, 100 of which were as co-counsel with Mr. Oppegard. *Pendley Response*, Ex-1, 3. Mr. Oppegard attests in his Affidavit that, aside from him and Mr. Addington, he is not aware of any other attorneys in Kentucky that regularly litigate miner discrimination cases. *Pendley Response*, Ex-1. Indeed, Arthur Traynor, the Associate General Counsel of the United Mineworkers of America, submitted an Affidavit attesting that "Counsel for the UMWA, the Appalachian Citizens' Law Center and Kentucky attorney Tony Oppegard are, to my knowledge, the only lawyers who regularly represent coal miners in proceedings commenced under Section 105(c)(3). *Pendley Response*, Ex-5.

Highland argues that the going rate for an attorney in Lexington, Kentucky (where Mr. Oppegard practices) is between $185.00-$240.00, and the going rate for an attorney in Whitesburg, Kentucky (where Mr. Addington practices) is $150.00 per hour. In support of the Lexington rate, an affidavit was submitted by a private Lexington employment attorney named Katherine J. Hornback, who attests that $200.00 per hour is a reasonable fee for an attorney in the Lexington area. *Highland Brief in Response*, Ex-2. In support of the Whitesburg rate, an affidavit was submitted by a private Whitesburgh civil and criminal attorney named Jenna R.S. Watts, who attests that $150.00 per hour is a reasonable fee for an attorney in the Whitesburg area. *Highland Brief in Response*, Ex-1. However, it appears that neither of these attorneys have ever litigated a case before the Commission, let alone represented a miner in a discrimination case, so their affidavits concerning general hourly rates for the geographic regions are not particularly relevant.

Highland also submitted an affidavit from its counsel, Melanie Kilpatrick, wherein she attested that from the time of the Complaint until the February 12, 2015 Decision, she billed Highland for 181 hours in this matter at a rate of $185.00 per hour, her co-counsel billed

Highland for 11.9 hours in this matter at a rate of $240.00 per hour, and her paralegal billed Highland for 8.65 hours at a rate of $90.00 per hour. *Highland Brief in Response*, Ex-3. These rates are similarly not particularly relevant to determining a reasonable rate for a private attorney representing miners in discrimination cases.[2] It has been the experience of this court that there is a much larger community of attorneys that represent mine operators than those that represent miners. This market for mine operator attorneys, which likely does not require attorneys to take cases on a contingency basis, must certainly lead to more competitive rates among such attorneys. Based upon all the evidence submitted by both sides in this case, no such market exists for attorneys representing miners in discrimination cases.

Courts have held that "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 Min., Inc. v. Director, Office of Workers' Compensation Programs*, 522 F.3d 657, 664 (6th Cir. 2008); *See also Eastern Associated Coal Corp. v. Director, Office of Workers' Compensation Program*, 724 F.3d 561, 572 (4th Cir. 2013). Mr. Addington was awarded a rate of $200.00 and Mr. Oppegard was awarded $400.00 in 2010 in *Charles Scott Howard v. Cumberland River Coal Co.*, KENT 2008-736-D (ALJ) (Dec. 8, 2010) and in 2011 in *Charles Scott Howard v. Cumberland River Coal Co.*, KENT 2009-595-D (ALJ) (March 3, 2011). *Pendley's Response to ALJ's Order*, Ex-1, 3, 7. Furthermore, Mr. Addington has submitted evidence that in at least 10 federal black lung benefits cases he has been awarded $225.00 per hour. *Pendley's Response to ALJ's Order*, Ex-3, 6. Considering that some of these attorneys' fee awards were granted up to five years ago, it is not unreasonable that Mr. Addington's rate has increased in the intervening period to $250.00 per hour and Mr. Oppegard's rate has increased to $500.00 per hour. Indeed, even UMWA Associate General Counsel Arthur Traynor attested that based upon his experience litigating miner discrimination claims, $500.00 per hour is a reasonable rate for an experienced lead attorney and $300.00 is a reasonable rate for an assisting attorney. *Pendley's Response to ALJ's Order*, Ex-5.

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[2] In *B & G Min., Inc. v. Director, Office of Workers' Compensation Programs*, 522 F.3d 657, 665-666 (6th Cir. 2008), the Court held that the judge did not err when he did not credit the evidence of what the coal company routinely paid its attorneys. ("B & G further argues that the adjudicators ignored its evidence of market rates. B & G submitted evidence that attorneys performing legal work for insurance companies in these types of cases typically earn $125/hour. Yet, the rates received by those attorneys are undoubtedly affected by several factors, including volume of work and prompt payment. Attorneys who represent claimants, on the other hand, likely do not benefit from the same high volume of work. Moreover, as evidenced by the briefs and letters submitted by claimant's attorney asking for expedited payment, attorneys who represent claimants often face a significant delay in getting paid. A delay in payment can justify a higher hourly rate. *Barnes,* 401 F.3d at 745 (citing *Missouri v. Jenkins,* 491 U.S. 274, 109 S.Ct. 2463, 105 L.Ed.2d 229 (1989) for the proposition that a higher rate to compensate for a delay in payment was "within the contemplation of the attorneys fees statute"). Accordingly, B & G has not shown that the adjudicators abused their discretion in failing to comment upon the company's countervailing evidence.")

With regards to Highland's argument that the amount of time Mr. Oppegard and Mr. Addington expended on the case was excessive, and that the use of two attorneys was redundant, I find that the number of hours billed was reasonable. Between February 5, 2013 and February 12, 2015, Mr. Addington billed a total of 157.8 hours and Mr. Oppegard billed a total of 56.4 hour, for a combined total of 214.2 hours. *Statement Regarding Relief for Lawrence Pendley*, Ex-1. The total amount of hours billed for the difficult underlying discrimination case is not *per se* excessive. Indeed, according to Ms. Kilpatrick's affidavit, Highland's attorneys billed a total of 201.55 hours in defending this case. *Highland's Brief in Response to Court Order*, Ex-3. Furthermore, I have reviewed the detailed billing logs submitted by Mr. Oppegard and Mr. Addington, and they appear to represent an appropriate use of time in litigating this case. *See Statement Regarding Relief for Lawrence Pendley*, Ex-1.

Highland further argues that it was unnecessary to have both Mr. Addington and Mr. Oppegard working on this case, and that much of their work was duplicative. In support of this position, it cites *Ricky Hays v. Leeco, Inc.*, 13 FMSHRC 670 (ALJ) (April 19, 1991), where Judge Koutras held that the use of two attorneys was unnecessary and discounted the rate of one attorney. The issue of whether it was reasonable to use two attorneys is of course a matter that depends upon the unique facts of the case. Indeed, in Hays, Judge Koutras rejected the Complainant's reliance on cases where multiple attorneys were used because "the difficulty and complexity level of the complainant's case does not rise to the level of the cited cases." *Id.* at 691.

As discussed above, the underlying discrimination case here was unique and complex. Though Mr. Oppegard and Mr. Addington both billed for legal research, reviewing pleadings, reviewing trial transcripts, and writing and reviewing briefs, there is no indication that such efforts were duplicative. It is quite common for attorneys to work together on a case, and collaborate on strategy, especially in a complex case. To do so, each attorney must perform research and review pleadings and court documents. "While duplication of effort is a proper ground for reducing a fee award, 'a reduction is warranted only if the attorneys are *unreasonably* doing the *same* work.'" *Jean v. Nelson*, 863 F.2d 759, 772-73 (11th Cir. 1988), quoting *Johnson v. University College of University of Alabama in Birmingham*, 706 F.2d 1205, 1208 (11th Cir. 1983) (emphasis in original). Simply because two attorneys undertake complementary tasks in the course of litigating a case does not make such effort duplicative. In this case it was not unreasonable.

Highland's argument further suffers from the fact that it utilized three attorneys in this case (with one serving as a paralegal). *Highland's Brief in Response to Court Order*, Ex-3. It is unclear why it would be unreasonable for the miner to have the benefit of two attorneys working on his case, when the operator has at least as many. See e.g. *Lenard v. Argento*, 808 F.2d 1242, 1245 (7th Cir. 1987) ("The defendants should not have wasted our time with this argument, nor with complaining that Lenard was represented by three lawyers. The defendants were also represented by three lawyers, and while we do not lay down a flat rule that it is always reasonable for one side to have as many lawyers as the other side, neither shall we lay down a flat rule of one plaintiff's lawyer per case."). Based upon a careful review of the billing logs

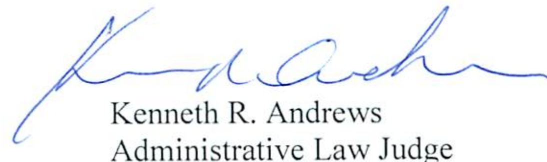
submitted by the Complainant's attorneys, I find that the use of two attorneys in the tasks billed for was not unreasonable.

Lastly, Mr. Oppegard and Mr. Addington are awarded attorneys' fees for the time spent preparing and defending the fee request. "Hours reasonably devoted to a request for fees are compensable." *Noxell Corp. v. Firehouse No. 1 Bar-B-Que Restaurant*, 771 F.2d 521, 528 (D.C. Cir. 1985); see also *Schuenemeyer v. United States,* 776 F.2d 329, 333 (Fed.Cir.1985).

For the foregoing reasons, the Respondent, Highland Mining, is **ORDERED** to pay Complainant's attorney Wes Addington $48,347.15 and attorney Tony Oppegard $35,778.00 within 30 days of this Order.

It is **FURTHER ORDERED** that if Highland ever reopens the Highland 9 Mine, it must post the original decision in this case for 60 consecutive days in conspicuous, unobstructed places where notices to employees are customarily posted.

It is **FURTHER ORDERED** that if Highland ever reopens the Highland 9 Mine, all management officials must undergo comprehensive specialized training by MSHA personnel in the safety rights of miners under §105(c) of the Mine Act.[3]



Kenneth R. Andrews
Administrative Law Judge

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[3] This decision does not constitute the final disposition of KENT 2013-606-D until the Secretary's penalty assessment is resolved, which will be done in a subsequent Order.