

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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FALLS CHURCH, VIRGINIA 22041

August 5, 1998

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|-------------------------|---|---------------------------|
| BRYCE DOLAN,            | : | DISCRIMINATION PROCEEDING |
| Complainant             | : |                           |
| v.                      | : | Docket No. CENT 97-24-DM  |
|                         | : | MSHA Case No. SC MD 96-05 |
| F & E ERECTION COMPANY, | : |                           |
| Respondent              | : | Mine ID No. 41-00320-B96  |
|                         | : | Bayer Alumina Plant       |

## **SUPPLEMENTAL DECISION ON RELIEF** **AND** **FINAL ORDER**

Appearances: Errol John Dietze, Esq., Dietze & Reese, Cuero, Texas, for the Complainant;  
James S. Cheslock, Esq., Cheslock, Deely & Rapp, San Antonio, Texas,  
for the Respondent.

Before: Judge Feldman

This discrimination proceeding is before me as a result of a discrimination complaint filed on December 27, 1996, pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 815(c)(3), by the complainant, Bryce Dolan, against the respondent, F&E Erection Company (F&E). On June 12, 1998, I issued a Decision on Liability determining that Bryce Dolan's April 16, 1996, work refusal was protected by the provisions of section 105(c) of the Mine Act, 20 FMSHRC 591. The Decision on Liability provided the parties with an opportunity to file proposed orders for relief with respect to the appropriate back pay, reasonable attorney's fees and incidental litigation expenses to be awarded to Dolan.

Dolan filed a Proposed Order for Relief on July 13, 1998. F&E replied to Dolan's proposed order on July 23, 1998. Although F&E proposed alternative measures of relief, F&E reserved its right to appeal the June 12, 1998, Decision on Liability as well as this decision on relief.

As a general proposition, this Commission has been delegated the broad remedial power to fashion relief for victims of discrimination. In this regard, section 105(c)(2) of the Mine Act states in pertinent part: "The Commission shall have authority . . . to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to . . . [awarding] back pay and interest." 30 U.S.C. § 815(c)(2). Remedies may be tailored to varied and diverse circumstances provided that the remedial relief effectuates the purpose of section 105(c) that seeks to encourage

miners to work with operators to prevent the existence of hazardous conditions and practices. *Secretary of Labor on behalf of Dunmire & Estle v. Northern Coal Co.*, 4 FMSHRC 126, 142 (February 1982); 30 U.S.C. ' 801(e). Thus, back pay awards may be reduced in appropriate circumstances where there is a failure to mitigate damages. 4 FMSHRC at 144. A discussion of the appropriate relief to be awarded in this matter follows.

## **I. Back Pay**

### **a. Calculation of Back Pay**

At the time of Dolan's termination of employment, Dolan was scheduled to work a 50 hour week, that included ten hours overtime. His regular hourly wage paid for a 40 hour work week was \$13.00 per hour, or \$520.00 per week. Dolan was paid \$19.50 per hour overtime for the ten hours of overtime he was scheduled to work each week. Thus, Dolan's weekly compensation totaled \$715.00 per five day 50 hour week (\$520.00 regular pay % \$195.00 overtime). The \$715.00 weekly wages is equivalent to daily wages of \$143.00. In addition to Dolan's \$715.00 weekly wages, Dolan was entitled to a monthly safety bonus of \$100.00.

Although F&E does not dispute Dolan's regular and overtime hourly wage, F&E asserts Dolan's back pay should be calculated on the basis of a 41.7 hourly work week because Dolan had a pattern of absenteeism on many Fridays during the fifteen week period preceding his April 16, 1996, termination.

In resolving disputes concerning the appropriate weekly calculation of back pay, the benefit of the doubt must be afforded to the complainant, rather than the mine operator that is responsible for violation of the anti-discrimination provisions of section 105(c) of the Mine Act. F&E's assumption that Dolan would not have reported to work on Fridays is speculative and does not provide an adequate basis for reducing Dolan's normal weekly wage. Accordingly, the amount for calculation of back pay shall be \$715.00 per week (\$143.00 per day) plus a safety bonus of \$100.00 per month.

### **b. Period of Back Pay**

Dolan contends he is entitled to back pay and bonuses of \$49,576.50 for the period April 17, 1996, through July 25, 1997, when he started receiving Temporary Income Benefits under the Texas Workers Compensation Law, Labor Code ' 401.001 *et seq.*

F&E argues Dolan is entitled to back pay during the period April 17, 1996, through June 5, 1996, when Dolan's physician certified that Dolan was under his care for a significant illness and that Dolan was unable to engage in employment in his usual trade, or in any other form of employment. (Ex. C-8).

Dolan received a total of \$4,221.00 in unemployment benefits for the period from

April 21, 1996 through August 11, 1996.<sup>1</sup> The Commission has determined that unemployment benefits shall not be deducted from back pay awarded to a complainant in a discrimination proceeding. *See Secretary of Labor on behalf of Poddey v. Tanglewood Energy, Inc.*, 18 FMSHRC 1315, 1323-25 (August 1996) (citations omitted).

Dolan was hired by the United Kensington Group as a construction worker on August 11, 1996. Dolan quit the following day on August 12, 1996, because of reported physical problems. Dolan testified that he believes he is totally disabled and that he has been unable to work since quitting his job with the United Kensington Group on August 12, 1996. In this regard, Dolan testified that he has not looked for work since August 12, 1996. Dolan currently does household chores and his wife is employed.

Dolan applied for state workers compensation benefits alleging disability as of August 12, 1996. Dolan has received Texas Workers Compensation Temporary Income Benefits for the period July 25, 1997, to the present. Temporary Income Benefits represent lost wages that are paid until a determination is made regarding eligibility to Impairment Income Benefits, which represent payment for disability. Labor Code, ' ' 408.103, 408.121. Temporary Income Benefits continue until it is determined that the employee has reached maximum medical improvement at which time entitlement to Impairment Income Benefits is determined. *Id.* at ' 408.102.

There is no record evidence of any state agency determination that Dolan has been determined to be disabled, or the effective date of such disability. Dolan's eligibility for workers compensation benefits for the period April 17, 1996, through July 24, 1997, has not been resolved.

As a threshold matter, whether Dolan is disabled is beyond the scope of this proceeding. Although I have concluded that Dolan expressed good faith, reasonable concerns about his exposure to the hazards of lead contamination, this is not the appropriate forum for determining whether Dolan's health was, in fact, adversely affected by his F&E employment. *See* 20 FMSHRC at 605. In any event, Dolan is not claiming back pay as of July 25, 1997, the date Dolan began Temporary Income Benefits under the Texas State Worker Compensation program.

While I am sensitive to the Commission's obligation to endeavor to make a complaining miner whole, Dolan's claim for back wages from August 12, 1996, until July 25, 1997, a period during which he alleges to be totally disabled, and a period during which he admits that he has not looked for work, must be rejected. Back pay cannot be awarded for a period during which Dolan alleges that he has been unable to work. In this regard, the Commission has determined that

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<sup>1</sup> This information is taken from Dolan's answer to the respondent's first set of interrogatories filed on March 21, 1997.

Back pay may be reduced in appropriate circumstances where an employee incurs a **willful** loss of earnings (fails to mitigate damages).<sup>@</sup> *Dunmire & Estle*, 4 FMSHRC at 144 (emphasis added).

In the absence of a medical determination that Dolan was disabled during the period for which back wages have been claimed, Dolan's loss of earnings due to his decision not to look for work must be characterized as voluntary. If his complaints of disability ultimately are substantiated by adequate objective medical findings, his loss of earnings will no longer be considered voluntary. At such time Dolan will be entitled to workers compensation disability benefits from August 12, 1996, through July 24, 1997, the period of back pay claimed.

My determination that Dolan is not entitled to back pay as of August 12, 1996, is based on his admission that he has removed himself from the labor market as of that date. 20 FMSHRC at 598. While it is true, as F&E contends, that Dolan's physician opined that he has been disabled since June 5, 1996, Dolan looked for work and obtained employment until August 12, 1996. Giving Dolan the benefit of the doubt that he was looking for work prior to August 12, 1996, the period for calculating back pay shall be from April 17, 1996, the day after he severed his F&E employment, until August 11, 1996, the day prior to the date that Dolan alleges he became totally disabled.

There are 83 work days during the period April 17, 1996, through August 11, 1996. Consequently Dolan shall be awarded total back pay of \$12,269.00, plus interest, constituting \$11,869.00 (wages of \$143.00 per day H 83 days) plus \$400.00 in bonuses (\$100.00 per month H four months), less earnings of \$174.40 paid United Kensington Group, Inc., for work performed on August 11 to August 12, 1996.<sup>2</sup> Thus, **F&E shall pay net back pay in the amount of \$12,094.60, less applicable federal, state and local taxes.**

## **II. Reasonable Attorney's Fees**

Section 105(c)(3) of the Act provides, in pertinent part:

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 . . . in connection with [ ] the institution and prosecution of such proceedings shall be assessed against the person committing such violation.

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<sup>2</sup> Dolan reported that he earned \$174.40 at United Kensington Group, Inc., in his answer to the respondent's first set of interrogatories filed on March 21, 1997.

Dolan has claimed attorney's fees of \$23,745.00 as reflected in a detailed itemized statement of services rendered. This total constitutes attorney services of 121 hours @ \$125.00 per hour, and paralegal services of 215~~2~~ hours @ \$40.00 per hour.

F&E does not allege that the attorney and paralegal hours claimed in this matter are unreasonable. Nor does F&E assert that the claimed hourly rates of \$125 and \$40 per hour for attorney and paralegal fees, respectively, are unreasonable. Rather, F&E argues that attorney fees for services rendered prior to November 30, 1997, should be limited to \$5,000.00 based on Dolan's answer to Interrogatory No. 8 in response to F&E's second set of interrogatories that reflects that Dolan had agreed to pay counsel a flat fee of \$5,000.00, win or lose, for services rendered in this litigation.

Thus, F&E contends the appropriate attorney fee to be awarded should be \$9,766.25 calculated by adding \$5,000.00 for services rendered prior to the November 30, 1997, interrogatory response, and \$4,766.25 for the services rendered by Dolan's counsel and his paralegal after November 30, 1997, based on the 89: attorney hours and 31~~3~~ paralegal hours of work that reportedly occurred after November 30, 1997, as detailed in Dolan's itemized bill for services.

As noted above, F&E does not assert that the hourly fees and total hours claimed by Dolan's counsel in this proceeding are exorbitant. In fact, additional discovery and a second hearing in this proceeding were necessitated by F&E's adherence to its assertion that burning was an accepted industry alternative to chipping and grinding as a safe method of lead abatement. While F&E is entitled to advance its defense as it chooses, given the provisions of section 105(c)(3) of the Act that provide for reimbursement of litigation expenses, F&E must bear the burden of reimbursing Dolan for the additional legal services and expert witness fees necessary to rebut F&E's defense. Consequently, the hourly rates and hourly totals claimed by Dolan's counsel are entirely reasonable.

F&E's assertion that it is entitled to rely on Dolan's initial legal fee arrangement of \$5,000.00 is unconvincing. Significantly, F&E is not a party in privity to that fee agreement. Dolan and counsel were free to renegotiate their agreement at any time as circumstances dictated. While it is not uncommon for attorneys to reduce fees based on a client's inability to pay, the fact that attorney fees are recoverable in this proceeding is a legitimate basis for Dolan to disavow his initial reduced fee agreement.

In the final analysis, an operator that violates the anti-discrimination provisions of section 105(c) of the Mine Act cannot rely on a miner's inability to pay reasonable attorney fees to mitigate its statutory obligation to reimburse the miner for reasonable litigation expenses. Having prevailed in this matter, Dolan's counsel, like F&E's counsel, is entitled to reasonable fees for services rendered.

Having concluded that it has neither been contended nor shown that the attorney fees claimed are unreasonable, **F&E shall pay Dolan's legal fees in the total amount of the \$23,745.00** as claimed. While I am aware that the attorney fees awarded are approximately double the back pay awarded to Dolan, it is the reasonableness of the attorney fee request in a given case, rather than the proportionality of the request, that governs the appropriate fee to be awarded. Moreover, the potential deterrent value of this case, that hopefully will heighten industry awareness to the dangers associated with the lead abatement process, must also be considered. *See Copeland v. Marshall*, 641 F.2d 880, 906-08 (D.C. Cir. 1980); *see also Munsey v. Smitty Baker Coal Company, Inc.*, 3 FMSHRC 2056 (1981); *Simpson v. Kenta Energy, Inc.*, 7 FMSHRC 272 (1985).

### **III. Miscellaneous Litigation Expenses**

Dolan has also claimed total miscellaneous litigation expenses of \$7,790.021 for such items including, *inter alia*, expert witness fees, court reporter and transcript fees incidental to trial and depositions, postage, telephone bills and service of subpoenas. With the exception of the \$662.00 claimed for telephone bills, and the \$161.00 claimed for Afax@expenses that are not documented expenses, F&E does not specifically contest any of the other litigation expenses claimed.

Having been a participant in several telephone conferences initiated by counsel, and having been the recipient of telephone inquiries and facsimiles, I am aware that long-distance telephone and facsimile expenses have been incurred. However, it is true that the exact amount of these expenses has not been documented. Thus, on balance, I am awarding reasonable reimbursement of \$250.00 for telephone and facsimile expenses rather than the \$823.00 claimed. Accordingly, **F&E shall pay total miscellaneous litigation expenses of \$7,217.21.**

### **ORDER**

In view of the above, **IT IS ORDERED THAT:**

1. The Decision on Liability issued on June 12, 1998, and this Supplemental Decision on Relief constitute the final decision in this proceeding.
2. F&E Erection Company **SHALL PAY** the complainant, Bryce Dolan, back pay plus bonuses of **\$12,094.60, less applicable federal, state and local taxes, plus accrued interest until payment of back pay is made**, for the period April 17, 1996 through August 11, 1996. The interest accrued with respect to back pay shall be computed according to the Commission's decision in *Local Union 2274, UMWA v. Clinchfield Coal Co.*, 10 FMSHRC 1483 (1988), *aff'd sub nom. Clinchfield Coal Co. v. FMSHRC*, 895 F.2d 773 (D.C. Cir. 1990), and calculated in accordance with the formula in *Secretary o/b/o Bailey v. Arkansas Carbona*,

5 FMSHRC 2042 (1984). Using this formula, the applicable interest rate for April 17, 1996, through June 30, 1996, is 8% (.0002222 daily interest factor); the applicable interest rate for July 1, 1996, through March 31, 1998, is 9% (.0002500 daily interest factor); and the applicable interest rate for April 1, 1998, through September 30, 1998, is 8% (.0002222 daily interest factor).

3. F&E Erection Company **SHALL PAY** Bryce Dolan's **attorney's fees of \$23,745.00.**

4. F&E Erection Company **SHALL PAY** Bryce Dolan's **miscellaneous litigation expenses of \$7,217.21.**

5. F&E Erection Company **SHALL EXPUNGE** from Bryce Dolan's personnel records, and/or company personnel records, all references to Dolan's complaints that ultimately resulted in his April 12, 1996, termination of employment and all references to the fact that Dolan has filed the subject discrimination complaint in this matter.

6. F&E Erection Company **SHALL POST** a copy of the June 12, 1998, Decision on Liability and this Supplemental Decision on Relief at ALCOA's Point Comfort Plant in a conspicuous, unobstructed location where notices to employees are customarily posted for a period of 60 consecutive days from the date of this Supplemental Decision and Final Order.

7. F&E Erection Company **SHALL COMPLY** with the above enumerated orders within 30 days of the date of this decision.

8. Upon timely compliance with the orders enumerated above, this discrimination complaint **IS DISMISSED.**

Jerold Feldman  
Administrative Law Judge

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