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MSHA V. EASTERN ASSOC. COAL
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
WASHINGTON, D.C. 20006
December 18, 1985
SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)
on behalf of ROBERT A. RIBEL

v. Docket No. WEVA 84-33-D

EASTERN ASSOCIATED COAL
CORPORATION

BEFORE: Backley, Acting Chairman; Lastowka and Nelson, Commissioners
DECISION
BY THE COMMISSION:
This discrimination proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. • 801 et seq. (1982)("the Mine Act"), and it involves cross-petitions for review filed by Eastern Associated Coal Corporation ("Eastern") and miner Robert Ribel. The principal issues presented are: (1) whether the administrative law judge correctly held that Eastern unlawfully discharged Mr. Ribel in violation of section 105(c)(1) of the Mine Act, 30 U.S.C. • 815(c)(1); and (2) whether the judge correctly held that attorneys' fees for privately retained counsel are not to be awarded where, as in this case, the discrimination proceeding is initiated on the prevailing miner's behalf by the Secretary of Labor pursuant to section 105(c)(2) of the Act. 30 U.S.C. • 815(c)(2).
On the bases explained below, we affirm the judge's finding of discriminatory discharge and we affirm in part and reverse and remand in part on the attorneys' fees issue. While we recognize a general right to attorneys' fees for privately retained counsel in a Secretary-initiated section 105(c)(2) proceeding, we hold that under the particular facts of this case and the standard that we adopt for determining an award of a fee to private counsel, Ribel's counsel is entitled only to a limited attorneys' fees award.
I. Merits
The issue here is whether Ribel was discharged by Eastern in retaliation for his having made safety complaints to mine management and for his having filed a safety-related discrimination complaint with the Department of Labor's Mine Safety and Health Administration

("MSHA") as the Secretary claims, or whether as Eastern claims, he was discharged
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for sabotaging a telephone on a longwall mining unit. A Commission judge rejected Eastern's charge of sabotage and held that Ribel was fired because of his protected safety activities and his having filed a discrimination complaint with MSHA, i.e., that Eastern had violated section 105(c)(1) the Mine Act. 1/ The judge ordered Eastern to reinstate Ribel to his former (or equivalent) position with full seniority rights and benefits, and to expunge from Ribel's personnel records all references to the discharge. The judge also awarded Ribel back pay from the date of his discharge to the date of Eastern's compliance with the judge's earlier order of temporary reinstatement, issued pursuant to Commission Rule 44, requiring that Ribel be reinstated pending the outcome of this case. 29 C.F.R. • 2700.44. 2/

Upon review of the extensive record in this case, and after having heard oral argument, we conclude that substantial evidence supports the judge's holding that Eastern violated section 105(c)(1) of the Act when it suspended and subsequently discharged Ribel. 30 U.S.C. • 823(d)(2)(A)(ii)(I). Our discussion follows.

1/ Section 105(c)(1) provides

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

30 U.S.C. • 815(c)(1)(emphasis added).

2/ The judge's decision is reported at 6 FMSHRC 2203 (September 1984) (ALJ). Following our direction for review, we remanded the merits

portion of the case for additional findings of fact and analysis. 7 FMSHRC 874 (June 1985). The judge's supplemental decision issued on remand is reported at 7 FMSHRC 1059 (July 1985)(ALJ).
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Prior to his discharge in August 1983, Ribel was employed as a shield setter with a longwall mining unit at Eastern's Federal No. 2 Mine, an underground bituminous coal mine located in Fairview, West Virginia. As a shield setter Ribel's chief duty involved advancing the hydraulic roof supports, or shields, of the longwall miner. Until his discharge, Ribel had worked as a shield setter at the Federal No. 2 Mine for approximately six years. There is no record evidence of any disciplinary action having been taken by Eastern against Ribel during his tenure.

In early May of 1983, Ribel and fellow shield setters on the 7-Right Section midnight shift, John Kanosky and Danny Wells, complained to mine management about Eastern's practice at the Federal No. 2 Mine of "double cutting" with the longwall miner. 3/ The three shield setters claimed that they were exposed to unhealthy and unsafe levels of coal dust when advancing the roof supports of the longwall miner during the double cut phase. As a result of the shield setters' complaint, Eastern discontinued the practice of double cutting on the 7-Right Section midnight shift. Eastern, however, continued to double cut on its other shifts, a practice that it had followed during the previous six years while complainant Ribel had been employed at the Federal No. 2 Mine.

On May 18, 1983, an incident occurred on the midnight shift involving Ribel, Kanosky, and Wells and their shift foreman, Jack Hawkins. The three shield setters claimed that on May 18 foreman Hawkins had threatened them, stating that if they did not agree to double cutting on their shift they would be given unfavorable work assignments and no longer would they be permitted to work overtime either during their lunch period or after the completion of their shift. Hawkins denied threatening the shield setters. On May 31, 1983, Ribel, Kanosky, and Wells filed a complaint with MSHA alleging that Hawkins had carried out his threats against them because of their continued refusal to double cut. The Secretary in turn filed a discrimination complaint with the Commission on the shield setters' behalf and the matter was docketed as WEVA 84-4-D. 4/

3/ In double cutting the longwall miner shearer cuts the coal both as it proceeds from the tailgate section of the longwall unit to the headgate section, and as the shearer returns from the headgate back to the tailgate. In single cutting the shearer cuts the coal only as it proceeds from the tailgate to the headgate.

4/ Docket No. WEVA 84-4-D was consolidated by the trial judge for

hearing and decision with the proceeding now before us on review, Docket No. WEVA 84-33-D, inasmuch as Ribel contends in this case that he was fired by Eastern because of the discrimination complaint that he, Kanosky, and Wells had filed with MSHA in May of 1983. In Docket No. WEVA 84-4-D, the judge held in favor of Eastern and dismissed the miners' complaint, concluding that the Secretary had failed to prove that double cutting was either unlawful or unsafe. See 6 FMSHRC 2203, 2271-75 (September 1984)(ALJ). Commission review of the judge's adverse decision in Docket No. WEVA 84-4-D was not sought by the Secretary or by Ribel.

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Following the May 18, 1983 incident between shield setters Ribel Kanosky, and Wells and foreman Hawkins and up until the time of Ribel's discharge, the midnight shift on the 7-Right Section continued to single cut. On August 5, 1983, the events immediately preceding Ribel's discharge occurred.

At the beginning of the August 5 midnight shift Michael Toth, the longwall coordinator responsible for coal production on the 7-Right Section, held a special meeting with that section's longwall mining crew. Toth, who ordinarily worked on the day shift, testified that the purpose of the meeting was twofold: to settle personal differences between members of the crew and foreman Hawkins concerning the manner in which Hawkins conducted his preshift examination of the 7-Right Section; and to discuss what mine management believed was an increasing incidence on the midnight shift of damage to the telephones on the 7-Right Section's longwall unit. The meeting was conducted in the miners' dinner hole and among those present were shield setters Ribel, Kanosky, and Wells, shift foreman Hawkins, and shift mechanic Russel Toothman.

Ribel and Toothman left the August 5 meeting before it was concluded in order to complete their previously assigned task of checking the telephones on the longwall miner prior to the start of the shift. There were seven telephones on the 7-Right Section longwall mining unit, spaced approximately 100 feet apart. Toothman remained at the longwall miner's headgate in order to receive the phone calls from Ribel who had proceeded down the 500-foot longwall unit toward the unit's tailgate. Ribel reported to Toothman that phones No. 52 and No. 89 were not working properly. Upon completing the phone check, Ribel remained at the tailgate section and awaited the start-up of the longwall miner in order to complete another assigned task.

At this time, longwall coordinator Toth arrived at the face and was informed by Toothman that phones No. 52 and No. 89 were reported by Ribel not to be working properly. Toth checked the two phones and claimed that they were in working order. Toth then instructed

Toothman to assist him in rechecking all seven telephones. It was during this second check that a wire inside the No. 32 phone leading to the phone's paging system was discovered to be severed. Toth immediately discussed the matter of the severed wire with Ribel and Toothman. During that discussion Toth charged Ribel with sabotage and suspended him with intent to discharge. Following his dismissal, Ribel filed a grievance under the governing collective bargaining agreement. An arbitrator denied Ribel's grievance and this litigation ensued.

The focus of the hearing before the Commission judge was whether Ribel had cut the No. 32 phone wire. In his initial decision, the judge regarded that inquiry as being the "crucial question" in this case. 6 FMSHRC at 2281. After reciting the evidence in great detail, the judge concluded that Eastern had failed to establish that it was Ribel who sabotaged the No. 32 phone and that Eastern had failed to rebut Ribel's

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prima facie case of discriminatory discharge. 6 FMSHRC at 2285-87. In our subsequent remand order, we directed the judge "to analyze in detail whether a prima facie case of discrimination was established" and "to determine what actually occurred at the August 5, 1983 meeting between longwall coordinator Michael Toth and the miners on the midnight shift, and that meeting's relationship, if any, to the allegation that the decision to suspend Ribel with intent to discharge was a violation of section 105(c)." See n. 2, supra.

On remand, the judge concluded that in suspending Ribel on August 5 1983, longwall coordinator Toth was unlawfully motivated by Ribel's safety complaints concerning double cutting, as well as by Ribel's May 31, 1983 discrimination complaint filed with MSHA against foreman Hawkins which also involved the issue of double cutting. The judge further concluded that the reason given by Toth for suspending Ribel with intent to discharge the allegation of sabotage -- was, in effect, a pretext and that Toth had opportunistically "seized upon" the sabotage incident as a means of getting rid of Ribel, with the intended result being a return to double cutting on the 7-Right Section midnight shift and an increase in coal production. 7 FMSHRC at 1064-65. We hold that the judge's material factual findings regarding the discrimination claim are supported by substantial evidence of record and that his conclusions must be upheld.

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof to establish that (1) he engaged in protected activity, and (2) the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980),

rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not in any part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it nevertheless may defend affirmatively by proving that (1) it was also motivated by the miner's unprotected activities, and (2) it would have taken the adverse action in any event for the unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Co., 4 FMSHRC 1935, 1936-38 (November 1982). The ultimate burden of persuasion does not shift from the complainant. Robinette, 3 FMSHRC at 818 n. 20. See also Boich v. FMSHRC 719 F.2d 194, 195-96 (6th Cir. 1983); Donovan v. Stafford Constr. Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984)(specifically approving the Commission's Pasula-Robinette test). The Supreme Court has approved the National Labor Relations Board's virtually identical analysis for discrimination cases arising under the National Labor Relations Act. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-403 (1983).
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In his initial decision the judge found that "Mr. Toth knew Mr. Ribel was one of the individuals causing 'problems' and filing complaints over safety questions" and that Ribel's safety complaints were "lurking in the background" at the time of his discharge. 6 FMSHRC at 2284-85. On remand the judge further found that it was "abundantly clear" from the record that both Hawkins and Toth were hostile towards Ribel because of Ribel's protected safety complaints concerning the matter of double cutting and his discrimination complaint filed against Hawkins which stemmed from Ribel's refusal to double cut. 7 FMSHRC at 1063. Substantial evidence supports the judge's conclusion that a hostile atmosphere existed between Hawkins, Toth, and the miners of the 7-Right Section midnight shift. The judge found that: (1) Toth was aware of the problems that existed between Hawkins and the midnight shift crew and that those problems adversely affected coal production; (2) Toth had a "definite interest" in the problems between Hawkins and his crew inasmuch as Toth was responsible for coal production on the 7-Right Section; (3) in the past Toth had talked with the United Mine Workers of America safety committee "several times" about double cutting; and (4) Toth had been aware of the fact that Ribel had filed a discrimination complaint against Hawkins with MSHA over the issue of double cutting. 7 FMSHRC at 1061-62.
Further evidencing this hostile atmosphere, the judge recounted the crucial meeting between Toth and the midnight shift crew which

took place prior to the start of the August 5, 1983 shift and which immediately preceded Ribel's discharge. Crediting the testimony of shield setters Wells and Kanosky, the judge found that Toth stated that he was getting tired of safety complaints being filed and that miners could end up losing their jobs if the complaints did not stop. The judge also credited the testimony of miners Steve Reeseman and Larry Hayes concerning Toth's comments to Wells after Toth had observed Wells laughing during the meeting. Reeseman testified that Toth told Wells, "all of this petty stuff that has been going out to the safety department, every day, and every day, is going to stop, or you will be next." Hayes testified that Toth told Wells that "he would be next" and that Wells would "come out on the shitty end of the stick" because of the safety complaints. 7 FMSHRC at 1062. The judge rejected Toth's explanation that his statements to the miners had not been intended as threats. These findings are supported by substantial evidence.

The judge's findings depict a simmering, tense atmosphere on the 7-Right Section's midnight shift at the time of Ribel's discharge because of the continued refusal of Ribel, Kanosky, and Wells to double cut, their complaint to MSHA, and Hawkin's and Toth's frustration as a result of the corresponding decrease in coal production. In fact, the judge specifically found that due to the double cutting dispute Ribel's relationship with mine management was fraught with "animosity and acrimony." 7 FMSHRC at 1063. As the judge noted, "this hostility was the result of the disruptive and protracted safety confrontations between Mr. Hawkins and his crew, and the fact that Mr. Ribel and several of his co-workers

chose to make safety and discrimination complaints over the practice of double cutting and other mining practices 7 FMSHRC at 1064. Thus, the judge's conclusion that Ribel established a prima facie case of discrimination is supported by substantial evidence.

The judge further rejected Eastern's argument that Ribel was fired due to Toth's asserted belief that Ribel had cut the phone wire on the longwall section. In his initial decision the judge reviewed the evidence and stated:

> I cannot conclude that the respondent has established that Mr. Ribel is the guilty party. To the contrary, I conclude and find that at least one or more individuals (Toth, Hawkins, Reeseman) were on the section at the time of the incident at question, and that they had access to the telephone and had as much opportunity to cut the wire as did Mr. Ribel. In short, I reject the motion that strong Circumstantial evidence points only to Mr. Ribel as the culprit, and I conclude that there is reasonable doubt as

to his guilt.
6 FMSHRC at 2287. In his supplemental decision the judge expanded on his previous findings, stating: "Given all of this turmoil ... Mr. Toth seized upon the opportunity to blame the wire cutting on Mr. Ribel, and rather than conducting a thorough investigation into the matter, he made a rather cursory decision that: Mr. Ribel was the guilty party ... [and] somehow hoped to end all of the conflict which had directly affected his operation." 7 FMSHRC at 1065 (emphasis added). We conclude that these findings are supported by substantial evidence.
Accordingly, we affirm the judge's holding that Eastern discharged Ribel in violation of section 105(c) of the Mine Act. Our affirmance is based on the narrow ground that substantial evidence supports the judge's holding that longwall coordinator Toth "seized upon" the phone sabotage incident as a pretext to retaliate against Ribel for his protected activities associated with the double cutting dispute. In reaching that conclusion, the judge made several critical credibility determinations in favor of Ribel and we can find no reason on review for taking the unusual step of overturning them. See William A. Haro v. Magma Copper Company, 4 FMSHRC 1935, 1943 (November 1982).
II. Attorneys' Fees
Although this discrimination proceeding was initiated and litigated on Ribel's behalf by the Secretary pursuant to section 105(c)(2) of the Act, 30 U.S.C. • 815(c)(2), 5/ Ribel also retained private (i.e., non-government) counsel to represent him in this matter. The attorneys' fees
5/ Section 105(c)(2) provides:
Any miner or applicant for employment or representative of miners who believes that he has been discharged,
(footnote 5 continued)
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issue involves the Commission judge's denial of Ribel's application for a fee award for expenses incurred in his retention of private counsel. 6 FMSHRC 2744 (December 1984)(ALJ). Specifically, Ribel had sought $9,065.66 for expenses associated with his retention of attorney Barbara Fleischauer and a total of $1,000.98 for services rendered by two law professors, Professor Robert Bastress and Professor Franklin Cleckley.
Footnote 5 end.
interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt

of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner, applicant for employment, or representative of miners alleging such discrimination or interference and propose an order granting appropriate relief. The Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section) and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The Commission shall have authority in such proceedings 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, the rehiring or reinstatement of the miner to his former position with back pay and interest. The complaining miner, applicant, or representative of miners may present additional evidence on his own behalf during any hearing held pursuant to this paragraph. (Emphasis added.)

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The judge denied Ribel's fee application on the ground that attorneys' fees are not awardable where, as in this case, the proceeding is initiated and litigated on the prevailing miner's behalf by the Secretary pursuant to section 105(c)(2). 30 U.S.C. 815(c)(2). We disagree and we hold that private attorneys' fee may be awarded to a prevailing miner in a Secretary-initiated section 105(c)(2) discrimination proceeding, provided that private counsel's efforts are non-duplicative of the Secretary's efforts and further, that private counsel contributes substantially to the success of the litigation.

The general principle of what has become to be recognized as the "American Rule" is that absent an express statutory grant allowing for the awarding of attorneys' fees, each party is to bear

his own litigation expenses. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975). The Secretary proceeded in this matter under section 105(c)(2) of the Act. Section 105(c)(2) does not provide specifically for the awarding of attorneys' fees. See n. 5, supra. We note, however, that it is not the Secretary who is seeking a fee award; it is the prevailing miner. 6/ In that regard, the subject of attorneys' fees is mentioned specifically in section 105(c)(3) of the Act. 30 U.S.C. • 815(c)(3). Section 105(c)(3) allows a miner to file a discrimination complaint with this independent Commission on his own behalf if the Secretary declines to do so under section 105(c)(2). 7/ Regarding the awarding of attorneys' fees, section 105(c)(3) states:

... 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 ba assessed against the person committing such violation....

(Emphasis added.)

6/ The Secretary has taken no position on the attorneys' fees issue.

7/ Section 105(c)(3) in part provides:

Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination, or interference in violation of paragraph (1)....

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We conclude that the fee shifting provisions contained in section 105(c)(3) authorize the awarding of private attorneys' fees to a prevailing miner in a Secretary-initiated section 105(c)(2) proceeding. In reaching that conclusion we recognize the interplay between these two key enforcement provisions. While subsection (c)(2) focuses upon the Secretary's prosecution of a miner's discrimination complaint and subsection (c)(3) focuses upon a miner's prosecution of his own complaint, it is clear that these two statutory provisions are but parts of the whole arsenal that Congress intended to be available to miners who have been victims of unlawful discrimination. In fact,

in section 105(c)(2) Congress contemplated that miners could separately participate in Secretary-initiated proceedings by providing, "The complaining miner ... may present additional evidence on his own behalf during any hearing held pursuant to this paragraph." 30 U.S.C. • 815(c)(2).

The Mine Act's legislative history supports the conclusion that a prevailing miner may obtain private attorneys' fees in a section 105(c)(2) proceeding. Regarding the relief provisions contained in section 105(c), the Senate Report on the Mine Act states:

It is the Committee's intention that the Secretary propose, and that the Commission require, all relief that is necessary to make the complaining party whole and to remove the deleterious effects of the discriminatory conduct including, but not limited to reinstatement with full seniority rights, back-pay with interest, and recompense for any special damages sustained as a result of the discrimination. The specified relief is only illustrative....

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)(emphasis added). Thus, it would be inconsistent with the remedial purpose of the Mine Act in general and more specifically with the "make whole" provisions of the Act's legislative history, particularly in view of the express statutory grant of attorneys' fees in section 105(c)(3), to deny a prevailing miner private attorneys' fees solely on the ground that the proceeding was initiated by the Secretary under section 105(c)(2).

Our holding in this case is consistent with the decision in Secretary, on behalf of Michael J. Dunmire and James Estle v. Northern Coal Company, 4 FMSHRC 126 (February 1982). In Northern Coal, we awarded certain relief specified only in section 105(c)(3) to two miners, even though the proceeding in that case was initiated by the Secretary under section 105(c)(2). We held:

Regarding incidental, personal hearing expenses incurred by Estle and Dunmire in connection with their attendance, Northern argues that because

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section 105(c)(3) of the Mine Act expressly provides for hearing expenses, while section 105(c)(2) does not mention the subject, Congress must have intended that such expenses were outside the scope of a section 105(c)(2) remedial award. We agree with the judge that the differences in language between the two sections are not as significant as Northern argues. Section 105(c)(2) expressly provides that the relief it authorizes is not limited to the reinstatement and back

pay mentioned. Furthermore, the "illustrative" nature of the relief listed in section 105(c)(2) is made clear by the legislative history we quoted above. Estle and Dunmire would not have borne such expenses (and inconvenience) but for Northern's discrimination. We therefore hold that reimbursement of their hearing expenses is an appropriate form of remedial relief.

4 FMSHRC at 143-44 (fn. omitted and emphasis added).

Finally, additional support for the awarding of private attorneys' fees in a section 105(c)(2) proceeding is found in the use of the terms "subsection" and "paragraph" in sections 105(c)(2) and (c)(3). These sections indicate that when Congress referred to the term "subsection" it meant subsection (c) of section 105, and that when Congress referred to the term "paragraph" it meant the numbered paragraph specifically mentioned. Accordingly, Congress' providing for an award of attorneys' fees in section 105(c)(3), "Whenever an order is issued sustaining the complainant's charges under this subsection," (emphasis added) encompasses private attorneys' fees sustained by a miner in an action prosecuted by the Secretary.

Having concluded that private attorneys' fees are awardable in a Secretary-initiated discrimination proceeding our next inquiry is the proper standard for determining the amount of the fee award. Section 105(c)(3) specifically sets forth two requirements: the first is that an order be issued "sustaining the complainant's charges"; the second is that the attorneys' fees awarded be "reasonably incurred." Construing these provisions in the context of a section 105(c)(2) proceeding, we hold that private attorneys' fees are awardable in a Secretary-initiated section 105(c)(2) proceeding only to the extent that the efforts advanced by the prevailing miner's private counsel are non-duplicative of the Secretary's efforts and that private counsel has contributed substantially to the success of the litigation.

This requirement stems from the enforcement scheme of section 105(c) of the Act, 30 U.S.C. • 815(c), which clearly establishes the Secretary as the chief prosecutor in discrimination matters. Section 105(c)(2) places upon the Secretary the primary responsibility for enforcing the anti-discrimination provisions contained in section 105(c)(1). See n. 5, supra. It requires the Secretary to conduct an investigation of a miner's complaint within specified time limits and to proceed on

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the miner's behalf before this Commission if the Secretary determines that unlawful discrimination has occurred. Thus, despite the fact that a miner may present evidence in a proceeding initiated by the Secretary under section 105(c)(2), and may proceed on his own behalf

under section 105(c)(3) if the Secretary declines to prosecute his discrimination claim, the enforcement scheme of section 105(c) clearly establishes the Secretary as the chief prosecutor in discrimination matters.

The standard that we adopt for fixing the fee award for private counsel in a Secretary-initiated section 105(c)(2) proceeding balances Congress' intent that the discriminatee-miner be made whole, with Congress' designation of the Secretary as the chief prosecutor in discrimination cases. Also, it is consistent with the approach followed by the D.C. Circuit in an analogous context in Donnell v. United States, 682 F.2d 240 (1982), cert. denied, 459 U.S. 1204 (1983). Donnell arose under the Voting Rights Act, 42 U.S.C. • 1973c, and it involved a claim for attorneys' fees by private citizens who had intervened in a successful action brought by the United States against a County Board of Supervisors. Regarding the fee award issue, the court held:

Where Congress has charged a government entity to enforce a statutory provision, and the entity successfully does so, an intervenor should be awarded attorneys' fees only if it contributed substantially to the success of the litigation. This inquiry primarily entails determining whether the governmental litigant adequately represented the intervenors' interests by diligently defending the suit. It also entails considering both whether the intervenors proposed different theories and arguments for the court's consideration and whether the work it performed was of important value to the court.

By providing for attorneys' fees to be awarded in actions brought to vindicate the civil rights laws, Congress did not intend to allow private litigants to ride the back of the Justice Department to an easy award of attorneys' fees. Obviously, if an intervenor did nothing but simply show up at depositions, hearings, and the trial itself and spend lots of time reading the parties' documents, an award of attorneys' fees would be inappropriate. The same would be true if the intervenors' submissions and arguments were mostly redundant of the government's or were otherwise unhelpful.

682 F.2d at 248-49 (emphasis added). See also Alabama Power Co. v. Gorsuch, 672 F.2d 1 (D.C. Cir. 1982); Seattle School Dist. No. 1 v. Washington, 633 F.2d 1338 (9th Cir. 1980), aff'd, 458 U.S. 457 (1982); and Johnson v. Georgia Hwy. Express, 488 F.2d 714, 717-19 (5th Cir. 1974).

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Insofar as the present case is concerned, the judge correctly anticipated the applicability of a Donnell-type standard. Applying

Donnell, the judge stated that he "remained unconvinced that [Ribel's private counsel's] limited participation in the proceedings before me contributed in any meaningful way to the adjudication of [Ribel's] case." 6 FMSHRC at 2756. The judge noted that Ribel's complaint was "pursued at all stages before me by MSHA's attorneys" (6 FMSHRC at 2762) and stated that "it is clear from the record in this matter that [private counsel] provided no active input at the hearings which I conducted, asked no questions of witnesses, presented no evidence, did not participate in any cross-examination, and filed no post-hearing briefs or proposed findings and conclusions." 6 FMSHRC at 2754. Based on his assessment of private counsel's non-duplicative substantive contribution to the proceeding before him, the judge denied Ribel attorneys' fees stemming from private counsel's participation. 6 FMSHRC at 2756. The judge nevertheless proceeded to make an alternative finding stating that, if any attorneys' fees were due, the appropriate amount would be $1,025. The judge awarded Ribel reimbursement for certain other costs and expenses incurred following his discharge.

For the reasons that follow we affirm the judge's denial of the major portion of the claimed attorneys' fees, but find that an award for a very limited portion of the claimed fees is appropriate. Also, we vacate the judge's alternative attorneys' fees award and remand for further limited proceedings.

An attorneys' fees award is a matter that lies within the sound discretion of the trial judge. Webb v. Board of Education of Dyer County, 471 U.S. , 85 L.Ed. 2d 233, 243 (1985)(reviewing court must evaluate the reasonableness of district court's fee award "with appropriate deference"); Hensley v. Eckerhart, 461 U.S. 424, 437 (1983) (district court has discretion in setting fee award in view of "superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters"). Applying this standard of review, examining the judge's application of the Donnell standard, and reviewing the entire record, we must uphold the judge's assessment of private counsel's non-duplicative contribution to the merits of the proceedings before him.

It is clear from the record, including the materials submitted in support of the attorneys' fee request, that the bulk of the attorneys' fees claimed were incurred in preparation for a separate state discrimination claim and other state administrative proceedings. Furthermore, insofar as Ribel's federal claim under the Mine Act is concerned, the record demonstrates, as the judge found, that MSHA promptly and fully discharged its statutory obligation to investigate Ribel's discrimination complaint and to vigorously prosecute it at all necessary stages, including the temporary reinstatement proceeding,

the proceeding on the merits before the judge and the appeal to the Commission. At each of these stages the

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Secretary appropriately represented Ribel's interests and, in fact, prevailed. Thus, we conclude that under the standard we adopt for determining whether private attorneys' fees are awardable to a miner in a discrimination proceeding brought by the Secretary of Labor the judge, with one minor exception, correctly denied an award for the private attorney fees claimed. Our only disagreement with the judge's decision is that it fails to take into account that private counsel's participation resulted in his award of certain costs and expenses to Ribel, totalling approximately $605.00, that had not been requested as relief by the Secretary. Thus, to the extent that the claimed private attorneys' fees were incurred in connection with successfully obtaining this non-duplicative portion of Ribel's claim, a fee award is due. We remand for an expedited determination of this limited amount. 8/

Regarding the attorney's fees incurred in connection with proceedings initiated by Ribel before the West Virginia Coal Mine Safety Board of Appeals and the West Virginia Bureau of Unemployment Compensation, the judge found no basis for a fee award inasmuch as those state proceedings are separate and distinct from any remedy available to a miner under the Mine Act. 6 FMSHRC at 2756. We agree. As the judge suggested Ribel's recourse, if any, is in the state forum in which the attorneys fees were incurred.

Finally, we affirm the judge's denial of attorneys' fees for services rendered by two law professors. The judge noted that it appeared that the services performed by the law professors were in connection with the state proceedings discussed above. The judge added, "In any event, these individuals are totally unfamiliar to me, and they entered no appearance and did not participate on the record in any proceeding before me." 6 FMSHRC at 2756. Accordingly, given the standard for the awarding of private attorneys' fees in a Secretary-initiated section 105(c)(2) proceeding that we set forth earlier, and given the judge's assessment of the services rendered by the two law professors, we find no abuse of discretion in the judge's decision not to award attorneys' fees.

III. Miscellaneous

On review Ribel raises two additional points which warrant our consideration. First, Ribel argues that the judge erred in denying a claim of $135.92 for mileage and meal costs for the period from August 24, 1983 to November 15, 1983. The judge held that the expenses were not recoverable under the Mine Act because they were incurred prior to the initiation of the present Commission proceedings. 6 FMSHRC at 2762. Ribel also claims that the judge

erred in awarding only $35 for telephone
8/ We express the hope that this determination can be made by agreement of the parties thereby avoiding further protraction of the final resolution of these administrative proceedings. We vacate the judge's alternative fee award of $1,025 because it apparently was not determined in accordance with the test set forth in the judge's decision and adopted here.
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expenses of a total of $53.54 that had been sought. The judge noted that many of the itemized telephone calls were made "before and after" the proceedings before the Commission. 6 FMSHRC at 2763. We have reviewed the record and we find no basis for overturning the judge's holding as to these matters.
The second point raised by Ribel concerns the tone of the Commission judge's decision involving the attorneys' fees aspect of the case. Ribel, through private counsel takes exception to what counsel characterizes as the judge's ' "duly condescending and patronizing tone." Upon a review of the judge's opinion, as well as counsel's response filed on review, we find no basis to support counsel's assertion and we perceive no reason to further pursue this matter.
IV. Conclusion
In sum, we hold that substantial evidence supports the judge's findings that Mr. Ribel was discharged because of his safety complaints involving double cutting with the longwall miner and his related discrimination complaint against shift foreman Hawkins, and that his firing for the phone-sabotage incident was a pretext. Accordingly, the judge's decision on the merits is affirmed.
Insofar as the remedy aspects of the case at issue before us are concerned, we reverse the judge and we hold that attorneys' fees for privately retained counsel may be awarded in a Secretary-initiated section 105(c)(2) discrimination proceeding, provided that private counsel has not duplicated the efforts of the Secretary and further, that services of private counsel have contributed substantially to the success of the litigation. As measured against this fee award standard, we reverse and vacate the judge's alternative attorney's fee award of $1,025 for services rendered by private counsel, we affirm the judge's denial of attorneys' fees for services rendered by two law professors, we affirm the judge's denial of Mr. Ribel's claim of S135.92 for mileage and meal expenses, as well as the judge's partial award of telephone expenses, and we remand to the judge for the limited purpose of determining the fee award due in connection with the services performed by private counsel in obtaining for Ribel an award of certain costs and
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expenses. The judge shall afford the parties the opportunity to file promptly additional pleadings or stipulations in this regard and shall enter his finding on an expedited basis. 9/

9/ Commissioner Doyle assumed office after this case had been considered at a Commission decisional meeting and took no part in the decision. A new Commissioner possesses legal authority to participate in pending cases but such participation is discretionary and is not required for the Commission to take official action. The other Commissioners reached agreement on the disposition of the case prior to Commissioner Doyle's assumption of office, and participation by Commissioner Doyle would therefore not affect the outcome. In the interest of efficient decision making Commissioner Doyle elects not to participate in this case.

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