

CCASE:
ODELL MAGGARD V. CHANEY CREEK COAL,
AND ODELL MAGGARD (MSHA) V. DOLLAR BRANCH,
& CHANEY CREEK COAL
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
March 27, 1990

ODELL MAGGARD

v. Docket No. KENT 86-1-D

CHANEY CREEK COAL COMPANY

and

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)
on behalf of ODELL MAGGARD

v. Docket No. KENT 86-51-D

DOLLAR BRANCH COAL CORPORATION
and CHANEY CREEK COAL COMPANY

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson,
Commissioners

DECISION

BY: Ford, Chairman; Backley and Lastowka, Commissioners

This consolidated proceeding involves two discrimination complaints filed on behalf of Odell Maggard under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)(the "Mine Act"), and is on remand to us from an opinion of the United States Court of Appeals for the District of Columbia Circuit affirming in part and reversing in part our prior decision in this matter. *Chaney Creek Coal Corp. v. FMSHRC, etc.*, 866 F.2d 1424 (1989), rev'g in part, aff'g in part, *Odell Maggard v. Chaney*

Creek Coal Co., etc., 9 FMSHRC 1314 (August 1987). Both discrimination complaints allege that Mr. Maggard was illegally discharged in violation of section 105(c)(1) of the Mine Act, 30 U.S.C. 815(c)(1), and both are based on the same circumstances. The first complaint (Docket No. KENT 86-1-D) was brought by Maggard on his own behalf against Chaney Creek Coal Company ("Chaney Creek") pursuant to section 105(c)(3) of the Act, 30 U.S.C. § 815(c)(3) (n. 1 infra). The second complaint (No. KENT 86-51.D) was brought by the

Secretary of Labor on Maggard's behalf against Chaney Creek and Dollar Branch Coal Corporation ("Dollar Branch") pursuant to section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2). 1/ The complaints allege that Chaney

1/ Section 105(c)(1) of the Act, 30 U.S.C. § 815(c)(1), prohibits various forms of discrimination against miners. Section 105(c)(2) of the Act provides in relevant part:

Any miner ... who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of [section 105(c)] may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. If upon such investigation, the Secretary determines that the provisions of [section 105(c)] 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 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 [t]his paragraph.

30 U.S.C. § 815(c)(2).

Section 105(c)(3) states in relevant part:

Within 90 days of the receipt of a complaint filed under [section 105(c)(2)], the Secretary shall notify, in writing, the miner ... of his determination

whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of [section 105(c)] 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

Creek and Dollar Branch (collectively, "operators") unlawfully discharged Maggard because he refused to perform certain work that he believed to be hazardous. In a decision on the merits and in a supplemental decision regarding remedies, Commission Administrative Law Judge Gary Melick upheld the complaints, ordered Maggard reinstated with back pay, interest and attorney's fees, denied the Secretary's motion to dismiss Maggard's section 105(c)(3) complaint on jurisdictional grounds, and assessed civil penalties against the operators. 8 FMSHRC 806 (May 1986)(ALJ); 8 FMSHRC 966 (June 1986)(ALJ).

The Commission granted the operators' petition for review of the judge's decision. The Commission affirmed the judge's conclusion of illegal discrimination. 9 FMSHRC at 1320 Further on the basis of the Commission's decision in *John A. Gilbert v. Sandy Fork Mining Co., Inc.*, 9 FMSHRC 1327 (August 1987), *aff'd in part, rev'd in part*, *Gilbert v. FMSHRC, etc.*, 866 F.2d 1433 (D.C. Cir. 1989), and the opinion of the United States Court of Appeals for the Fourth Circuit in *Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639 (1987), a majority of the Commission (Commissioners Doyle and Nelson dissented) dismissed Maggard's section 105(c)(3) discrimination complaint and vacated the judge's award of attorney's fees. 9 FMSHRC at 1322-23.

I.

Both Maggard and Chaney Creek appealed the Commission's decision to the D.C. Circuit. The Court affirmed the Commission's conclusions that Chaney Creek had unlawfully discriminated against Maggard in violation of section 105(c)(1) of the Act. 866 F.2d at 1431-32. However, the Court reversed the Commission's dismissal of Maggard's individual complaint. 866 F.2d at 1429-30. The Court noted that no party had challenged before the Commission the judge's denial of the

interference in violation of [section 105(c)]. The Commission shall afford an opportunity for a hearing ... and thereafter shall issue an order, based upon findings of fact, dismissing or sustaining the complainant's charges and, if the charges are sustained, granting such relief as it deems appropriate, including, but not limited to, an order requiring the rehiring or reinstatement of the miner to his former position with back pay and interest or such remedy as may be appropriate. Such order shall become final 30 days after its issuance. Whenever an order is issued sustaining the complainant's charges under [section 105(c)], 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 ... 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).

Secretary's motion to dismiss Maggard's section 105(c)(3) complaint and that the Commission had not directed review of the issue sua sponte pursuant to section 113(d)(2)(B), 30 U.S.C. § 823(d)(2)(B). Accordingly, the Court concluded that the matter was not before the Commission for review within the meaning of section 113(d) of the Mine Act, 30 U.S.C. § 823(d), and that the Commission therefore exceeded its authority in dismissing Maggard's individual complaint. 866 F.2d at 1429-30.

The Court also reversed the Commission's vacation of the judge's award of attorney's fees to Maggard. The Court held that because Maggard, without successful challenge, had prosecuted his own action before the Commission under section 105(c)(3) of the Act, Maggard "properly was an individual complaining party ... entitled to attorney's fees once he prevailed on the merits." 866 F.2d at 1430. In this regard, the Court stated:

There remains a question ... noted by Commissioners Doyle and Nelson in dissent ... as to whether the fees awarded to Maggard by the ALJ were reasonable, in light of the employer's claim that some of the private counsel's work unnecessarily duplicated work that was being done by counsel for the Secretary. The Commission did not consider this question because it dismissed Maggard's individual complaint. We thus remand to the Commission for its consideration of any issues that may exist regarding the amount of attorney's fees that are reasonably due to Maggard.

866 F.2d at 1430 (emphasis in original).

Finally, the Court noted Maggard's argument on appeal that the operators owed interest in addition to that awarded by the judge, and the Court instructed the Commission to resolve "whether the amount of interest calculated to be paid Maggard was correct" under the legal formula set forth by the Commission in Secretary of Labor on behalf of Bailey v. Arkansas-Carbona Co., 5 FMSHRC 2042 (December 1983). 866 F.2d at 1432-33.

For the reasons set forth below, we reinstate the judge's award of attorney's fees and remand for further proceedings with respect to the matter of interest on back pay.

II.

A. Attorney's Fees.

The administrative law judge awarded Maggard attorney's fees of \$ 16,456.22. 8 FMSHRC at 967-69. As noted, the Court reversed the Commission's conclusion that attorney's fees are not awardable in this case and remanded for consideration of "any issues that may exist regarding the amount of the attorney's fees that are reasonably due to Maggard." 866 F.2d at 1430 (emphasis in original). Although the Court

characterized the operator's objection to the attorney's fee award as a claim that Maggard's private counsel's work partially duplicated work done by counsel for the Secretary, the operator's argument actually is somewhat broader. In addition to arguing that Maggard's private attorney's work was unnecessary and duplicative once the Secretary filed a complaint on Maggard's behalf, the operator also argued that, if fees are awardable, time spent by Maggard's private counsel in communicating with the Secretary's attorney and in opposing the Secretary's motion to dismiss Maggard's individual complaint should not be included in the fees assessed against the operator. Petition for Discretionary Review at 19-23; Reply Brief at 14-15. Also see 9 FMSHRC at 1325 (Commissioners Doyle and Nelson dissenting), cited at 866 F.2d at 1430.

The administrative law judge specifically addressed and rejected the operator's arguments. He rejected the argument that private representation was unnecessary once the Secretary's complaint was filed, finding that Maggard's section 105(c)(1) complaint was "independent" of the Secretary's. 8 FMSHRC at 967. (The Court agreed with the judge, finding that "Maggard[s] ... own action [was] independent of that brought by the Secretary" and that "Maggard was properly an individual complaining party before the Commission ... entitled to seek attorney's fees." 866 F.2d at 1430). As to the operator's further arguments the judge found that "[c]onsultation with the Secretary's counsel and the litigation of issues surrounding the Secretary's motion to dismiss are not unforeseeable consequences of a discriminatory action under the Act." 8 FMSHRC at 968.

An "attorney's fee award is a matter that lies within the sound discretion of the trial judge." Secretary on behalf of Ribel v. Eastern Assoc. Coal Corp., 7 FMSHRC 2015, 2027 (December 1985), rev'd in part on other grounds, 813 F.2d 639 (4th Cir. 1987). Here, the authorities relied upon by the judge support his determination that Maggard's private counsel's communications with the Secretary's counsel and Maggard's opposition to the Secretary's motion to dismiss his private complaint, can appropriately be included in a fee award against the operator. *Donnell v. United States*, 682 F.2d 240 (D.C. Cir. 1982), cert. denied, 459 U.S. 1204 (1982); 2 *Derfner Court Awarded Attorney Fees Par.* 16.02 at 16-14 n.25.1 (1989). Although our dissenting colleagues cite authority arguably supporting a contrary conclusion, we cannot say that under the remedial make-whole provisions of section 105(c) of the Mine Act the judge abused his discretion in determining that the expenses objected to were "reasonably incurred" and were not "unforeseeable consequences of a discriminatory action under the Act." 8 FMSHRC at 967, 968. Moreover, the litigation giving rise to the instant attorney fee award is traceable back to and occasioned by the underlying violative actions taken by Chaney Creek Coal against Maggard. See *Natural Resources Defense Council v.*

U.S. Environmental Protection Agency, 703 F.2d 700, 713 (3rd Cir. 1983).

Accordingly, the operator's challenge to the fee award is rejected and the judge's award is reinstated.

B. Interest on back pay.

The remaining interest issue arises as a result of developments after the issuance of our prior decision, while this matter was pending on appeal in the Court. The judge had awarded Maggard back pay and interest thereon in the amount of \$33,660.19. 8 FMSHRC at 966-67. The award reflected the parties' stipulation that Maggard was entitled to back pay through June 1, 1986, of \$31,812, and interest of \$1,848.19 on the back pay to that date, computed according to the formula in Arkansas-Carbona, supra. The Commission affirmed this award. 9 FMSHRC at 1323. Following issuance of our decision, the operators did not pay Maggard the backpay and interest found to be due. The Secretary petitioned the court on Maggard's behalf for a court order requiring the operators to either pay Maggard the amount owed or place the money in an interest-bearing escrow account. The operators responded that they would place the award in an escrow account. Maggard's private counsel then moved the Court to order the operators instead to pay Maggard the amount owed plus additional interest. The operators advised the Court that they had placed \$35,523.37 in an escrow account and stated to the Court that the money "represents the full amount due to Odell Maggard, pursuant to the decision of the Commission." Notice at 1 (February 18, 1988). 2/ In turn, Maggard responded that the amount mentioned by the operators represented backpay plus interest only through June 1, 1986, and did not include interest subsequent to that date. Maggard asserted to the Court that the operators owed an additional \$4,663.50 in interest, for a total award of \$40,186.87. Maggard's Response to Operators' Notice at 2 (March 21, 1988).

On April 19, 1988, in response to these various claims, the Court issued an order directing the operators to pay Maggard the backpay awarded by the Commission with "reasonable interest to be agreed upon by the parties." Order at 1. Maggard subsequently moved the Court to modify the order to require the operators to pay interest pursuant to the formula in Arkansas-Carbona. The operators then paid Maggard \$35,940.03, the amount deposited in the escrow account plus the interest that had accrued thereon. However, Maggard advised the Court that the operators owed an additional \$4,246.84 in interest, the difference between the total amount of interest accruing after June 2, 1986, and the amount paid by the operators. Maggard Motion for Modification 2-6 (May 10, 1988). As noted, the Court ultimately remanded the interest question to the Commission to determine the proper amount of interest due. 866 F.2d at 1432-33.

In Arkansas-Carbona, noting that section 105(c)(3) of the Mine Act expressly includes interest on back pay as a form of relief that can be granted a discriminatee, the Commission approved the award of interest on back pay in appropriate cases. 5 FMSHRC at 2049. The Commission adopted

as an appropriate rate of interest the "adjusted prime rate,"

2/ That amount of back pay and interest is larger than the amount awarded by the judge because the judge computed both wages and interest through June 1, 1986, and Maggard was not actually reinstated until June 20, 1986.

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then announced semi-annually by the Internal Revenue Service ("IRS") under the then applicable version of 26 U.S.C. § 6621, and also adopted the "quarterly method" of calculating the amount of interest due. 5 FMSHRC at 2050-54.

Following enactment of the Tax Reform Act of 1986, Pub. L. 99-514, 100 Stat. 2085 (1986), we reexamined the subject of an appropriate interest rate and adopted the "short term Federal rate" as the interest rate to be applied on both compensation awards under 30 U.S.C. § 821 and on back pay awards in discrimination cases. Loc. U. 2274, Dist. 28, UMWA v. Clinchfield Coal Co., 10 FMSHRC 1493, 1504 (November 1988), pet. for review filed, No. 88-1873 (D.C. Cir. December 16, 1988). We further announced that the short term Federal rate would become effective January 1, 1987, replacing for periods commencing after December 31, 1986, use of the adjusted prime rate approved in Arkansas-Carbona. 10 FMSHRC at 1504-06. In computing the short term Federal rate, we retained the quarterly method explained in Arkansas-Carbona (5 FMSHRC at 2050-54). 10 FMSHRC at 1506. We also indicated that the Clinchfield formula would apply to all cases in which decisions were issued after the date of the Clinchfield opinion. 10 FMSHRC at 1505. See 54 Fed. Reg. 2226 (January 19, 1989).

As is clear, the parties dispute the proper amount of interest due on the back pay award. Because they have been unable to resolve this problem through stipulation, we must remand the matter to the judge, pursuant to the Court's remand, for any necessary further findings and, if he determines that Maggard is due additional interest, for calculation of the amount of the additional interest due in accordance with the applicable principles of Arkansas-Carbona and Clinchfield and the formula set forth at 54 Fed. Reg. 2226, supra.

III.

For the foregoing reasons, the judge's award of attorney's fees to Maggard is reinstated. We also remand to the judge for necessary findings and calculations regarding the interest due on the back pay award.

Commissioners Doyle and Nelson, concurring in part and dissenting in part:

We join in the majority's decision to remand this case to the administrative law judge for a determination of the interest due on Mr. Maggard's back pay award. We respectfully dissent, however, from the majority's determination that the attorneys' fees awarded by the judge were reasonable and appropriate in their entirety.

In his petition for review, the operator contends that attorneys' fees should be reduced on the grounds that a significant amount of the time spent by Mr. Maggard's private attorney was spent on litigating issues surrounding the Secretary of Labor's Motion to Dismiss Mr. Maggard's section 105(c)(3) action, was unrelated to the anti-discrimination purposes of the Act, and did not pertain to any activities of the operators. Petition for Discretionary Review at 21, 23 & n. 8. We agree that Mr. Maggard is not legally entitled to recover from the operator for time spent by his attorney on collateral issues, i.e., for time spent by the claimant's attorney in defending against the Secretary's Motion to Dismiss. 1/

Some months after Maggard's attorney instituted the private action, the Secretary instituted her section 105(c)(2) action and moved to dismiss the 105(c)(3) action. The operator did not join in or oppose that motion. The judge found against the Secretary and allowed the 105(c)(3) action to continue. The Secretary petitioned for review of the judge's denial of her Motion to Dismiss and a majority of the Commission overruled the judge, found for the Secretary, and dismissed Maggard's 105(c)(3) action. On appeal to the D.C. Court of Appeals, Maggard contested only the retroactive application of the Commission's new Rule 40(b). The Secretary effectively conceded that retroactive application was not appropriate and asserted that she was primarily concerned about the prospective application of Rule 40(b). The operator was, for the most part, a silent observer of these machinations. The majority is of the opinion that the operator should pay for his ringside seat. We disagree.

1/ In our earlier dissent, we stated that we would affirm the award of attorneys' fees to the extent that they were incurred in instituting and prosecuting Mr. Maggard's discrimination claim but would disallow such fees to the extent that they were incurred in relation to the jurisdictional issue or coordinating the prosecution of the two cases. While the D.C. Circuit made reference to the issue we had raised, the court characterized it and the operator's argument as a challenge pertaining to duplication of work rather than one pertaining to collateral issues. 866 F.2d 1424, 1430 (D.C. Cir. 1989). In any event, the court's remand requires us to consider the amount of the attorneys' fees that are

reasonably due to Maggard (Id at 1430) and "to resolve any disputes remaining over the reasonableness of attorneys' fees due to Maggard." Id. at 1433. (emphasis added).

We are of the opinion that the majority's reliance on *Ribel v. Eastern Assoc. Coal Corp.*, 7 FMSHRC 2015 (December 1985), to the effect that the attorneys fee award is within the sound discretion of the trial judge (slip op. at 5) is misplaced. In fact, *Ribel* was reversed on the grounds that there was no legal basis for the award of attorneys' fees made by the judge. *Eastern Assoc. Coal Corp. v. FMSHRC* 813 F.2d 639, 644 (4th Cir. 1987).

Similarly, its reliance on *Donnell v. United States*, 682 F.2d 240 (D.C. Cir. 1982) is misplaced. *Donnell* involved a claim for attorneys' fees by defendant intervenors and the court held that "intervenors may be denied fees where their participation was unnecessary in light of the efforts of the prevailing governmental litigant". *Id.* at 246-7, n. 12. The case was remanded for consideration of that issue and of the appellants' specific challenges to time charges, including the challenge to duplicative efforts. *Id.* at 250. The administrative law judge properly distinguished *Donnell* from this case because Mr. Maggard was not an intervenor but rather had an "independent" action. 8 FMSHRC at 967. 2/

Liability for attorneys' fees is limited to those matters litigated between Maggard and the mine operator. Fees generated by the litigation between the Secretary and Maggard over jurisdiction under section 105(c), a separate legal issue warranting entirely different relief, are not appropriately assessed against the operator. See *Smith v. Robinson*, 468 U.S. 992, 1015 (1984). In *United Nuclear Corp. v. Cannon*, 564 F. Supp. 581 (D.R.I. 1983), the court denied fees for time spent by the plaintiff in battling a collateral issue, beyond the defendant's control. "The decision to battle against it was essentially a tactical judgment on plaintiff's part for its own ends" (*Id.* at 585), much like Maggard's decision to oppose the Secretary's Motion to Dismiss here. (emphasis added.) In *Taylor v. Sterrett*, 640 F.2d 663 (5th Cir. 1981), the court found that time spent on a collateral issue should be excluded because "[a]ppellee's opposition to intervention was irrelevant to the goal of obtaining compliance; the attempted intervention was also a circumstance beyond appellants' control" (*Id.* at 670), again much like the case here, where Maggard's attorney opposed the Secretary's motion, not to obtain compliance with the Mine Act's anti-discrimination provisions but to

2/ In its earlier opinion, the majority relied on *Eastern Associated Coal Corp.*, 813 F.2d 639, also dealing with intervention, to support its vacation of attorneys' fees in their entirety. The court found that case to be inapposite because "Maggard, by contrast, did not intervene in the Secretary's action" but rather "prosecuted his own action before the Commission under section 105(c)(3)..." 866 F.2d at 1430.

retain control of the litigation. Fees should not be awarded against a defendant for activities in which it did not oppose the plaintiff. See *Dubose v. Pierce* 579 F. Supp. 937, 957 (D. Conn. 1984), rev'd and remanded on other grounds, 761 F.2d 913 (2d Cir. 1985).

The majority also concludes that the judge did not abuse his discretion when he found that consultation with, and litigation against, the Secretary were not "unforeseeable consequences of a discriminatory action" and hence could be assessed against the operator as attorneys' fees. (slip op. at 5, quoting 8 FMSHRC at 968.) Even were the record to support that finding, it does not convert a wholly separate claim, on a different issue, that requested a totally different type of relief, into a discrimination claim. See *Stickle v. Heublein, Inc.*, 716 F.2d 1550, 1564 (Fed. Cir. 1983). Rather, claims for fees generated by litigation against the Secretary are limited to those fees provided under the Equal Access to Justice Act, 5 U.S.C. 504.

For the foregoing reasons, we would remand to the judge with directions to delete that portion of the claimed fee which stems from litigation between Maggard and the Secretary.

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