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ROBERT SIMPSON V. KENTA ENERGY
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

ROBERT SIMPSON, COMPLAINANT

v.

KENTA ENERGY, INC.

AND

ROY DAN JACKSON, RESPONDENTS

DISCRIMINATION PROCEEDING

Docket No. KENT 83-155-D

PARTIAL DECISION ON REMAND
ORDER PERMITTING DISCOVERY

Before: Judge Broderick

On September 29, 1989, the Commission remanded this case to me "for resolution of whether the attorney's fees being sought for administrative and court appeal proceedings are properly awardable under the Mine Act and, if so, for all appropriate findings of fact relevant to determination of the amount to be awarded." The Commission further found "it appropriate also to determine at this time the amount of additional back pay due since December 17, 1984, with the amount of interest due thereon, calculated according to the procedures set forth at 54 Fed. Reg. 2226 (January 19, 1989)."

I interpret these instructions to mean that I should determine the amount of attorney's fees to be awarded if I conclude that they are "properly awardable," and that I should determine the additional back pay and interest due Complainant at this time.

On October 6, 1989, I issued an order directing Complainant to submit on or before November 13, 1989 (1) a legal memorandum on the question whether attorney fees for administrative and court appeal proceedings are properly awardable under the Mine Act; (2) a statement of attorneys fees claimed after December 17, 1984; and (3) a statement of back pay due Complainant since December 17, 1984, with interest calculated according to the procedures set forth in 54 Fed. Reg. 2226 (January 19, 1989). Respondent was ordered to reply to Complainant's submissions on or before December 1, 1989.

On November 16, 1989, Complainant filed a memorandum on the legal issue presented, a statement of attorney fees and expenses

for work performed from December 18, 1984 through November 15, 1989, and a motion for leave to take discovery on the question of the amount of back pay due Complainant since December 17, 1984. On December 4, 1989, counsel for Roy Dan Jackson replied that my order had been forwarded to Mr. Jackson requesting "his instruction regarding his position on this issue." Jackson did not reply and counsel states that he "is unable to state Mr. Jackson's position."

I. THE ACT

Section 105(c)(3) of the Mine Act provides in 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, for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation.

The legislative history of this provision makes it clear that it was intended to make the Complainant whole, to put him in the position, as nearly as possible, which he would have been in had the discriminatory action not have occurred. See S.Rep. No. 95-181 at 37 (1977), reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977, at 625 (1978).

The language of the Act, supported by the Legislative history plainly requires the reimbursement of attorney fees reasonably incurred in appellate proceedings where such proceedings are necessary to "sustain Complainant's charges."

II. SOME CASES

Although not specifically included in the remand instructions, the question may be raised as to whether the trial judge is the proper tribunal to determine and award attorney fees for appellate proceedings. It can reasonably be argued that the appellate tribunal, Commission or Court, is in better position to determine whether services for which a fee is claimed are necessary, and the worth of those services. For example, in my award of fees following the trial of this case, I made a judgment concerning the necessity for two attorneys being employed to perform certain services. The claim for fees on appeal includes a claim for the services of two attorneys. I have no way, absent a full scale hearing, and probably not then since Respondent has not replied to the claim, to determine the necessity and propriety of two attorneys being utilized on appeal. In Craik v.

Minnesota State University Board, 738 F.2d 348 (8th Cir. 1984), the 8th Circuit Court of Appeals said, "Normally we decide the question of fees and costs on appeal ourselves. We are naturally more familiar than the District Court with the nature and quality of the services rendered on appeal; the case is relatively fresh on our minds; and our decision on the question can furnish guides for the District Court to follow when it decides the amount of fees and costs for services rendered before it." Id., at 348. This holding was based in part on an 8th Circuit Court Rule providing that the Court of appeals may either determine for itself an appropriate attorney fee award for appellate services or remand to the District Court for such a determination. There is no such court rule in the Court of Appeals for the District of Columbia Circuit.

In a private action under section 4 of the Clayton Act, the Supreme Court held that the Act authorized an award of counsel fees for legal services performed at the appellate level and that "the amount of the award for such services should, as a general rule, be fixed in the first instance by the District Court, after hearing evidence as to the extent and nature of the services rendered." Perkins v. Standard Oil Co. of California, 399 U.S. 222, 223 (1970). In Hutto v. Finney, 437 U.S. 678 (1978), the Supreme Court affirmed a Court of Appeals decision which affirmed a District Court's finding that the conditions in a State prison system constituted cruel and unusual punishment in violation of the 8th and 14th Amendments. The District Court issued remedial orders including an award of attorney's fees. The Court of Appeals affirmed and itself assessed an additional attorney fee for services on appeal.

In Northcross v. Board of Education, 611 F.2d 624 (6th Cir. 1979), the Court of Appeals remanded the case to the District Court for redetermination of an attorney fee award and for determination of a reasonable fee for time spent "pursuing this appeal." See also Kingsville Independent School District v. Cooper, 611 F.2d 1109 (5th Cir. 1980). In Toussaint v. McCarthy, 826 F.2d 901 (9th Cir. 1981), and Yates v. Mobile County Personnel Board, 719 F.2d 1530 (11th Cir. 1983), the Court of Appeals determined the attorney fee for legal services on appeal.

Finally, the marathon proceeding of Glenn Munsey v. Smitty Baker, et al., may provide a clue as to the law of the Commission and the District of Columbia circuit on this issue. The case arose under section 110(b) of the Coal Mine Health and Safety Act of 1969 and was originally heard in the Department of the Interior. Section 110(b)(3) of the Coal Act provides that when an order is issued finding discrimination, "a sum equal to the aggregate amount of all costs and expenses (including the attorney's fees) . . . reasonably incurred by the applicant for,

or in connection with the institution of such proceedings, shall be assessed . . . " This is almost identical to the language in section 105(c)(3) of the Mine Act. In 1978, the D.C. Circuit remanded the Munsey case to the Commission to determine what Munsey's remedy should be and who must provide it. Munsey v. FMSHRC, 595 F.2d 735 (D.C. Cir. 1978). The Commission remanded the case to the ALJ "for assessment of attorney's fees and other costs incurred by Munsey in this litigation." Munsey v. Smitty Baker, 2 FMSHRC 3463 (1980). The ALJ awarded back pay, attorney fees and legal expenses including fees and expenses in conection with proceedings before the Commission and the Court of Appeals but denied fees for services performed by Munsey's attorney while he was in the employ of Munsey's union as "inappropriate." 3 FMSHRC 2056 (1981). The case returned to the D.C. Circuit which reversed the determination of the ALJ that Munsey could not be awarded costs or attorney fees for the period during which he received free representation by staff counsel of the United Mine Workers, but otherwise affirmed the ALJ. Munsey v. FMSHRC, 701 F.2d 976 (D.C. Cir. 1983). The Commission later remanded the case to an ALJ for further proceedings consistent with the Court's decision. 5 FMSHRC 991 (1983). On remand the ALJ awarded further legal fees for services including services before the Commission and the Court of Appeals. Thus both the D.C. Court of Appeals and the Commission upheld the award made by the Administrative Law Judge of attorney fees for services on appeal to the Commission and from the Commission to the Court of Appeals. Based on the history of the Smitty Baker case and on the Commission's remand of this case to me, I conclude that I can properly determine and award attorney fees for legal services on appeal.

III. FEES AND EXPENSES

Complainant seeks an award of attorney fees for 403.2 hours during the period December 18, 1984 through November 15, 1989. The services are billed at an hourly rate of $125. I have no reason to question this rate as the market rate for the services performed, and Respondent has not objected to it. I note that I approved an hourly rate of $75 for the work performed prior to December 1984. An increase in the rate seems justified on the following bases: (1) the attorneys are more experienced; (2) the work was more complex, involving appeal from an adverse Commission decision; and (3) inflation in attorney fees during the five year interim. Therefore, I find that $125 is an appropriate hourly rate for the services performed after December 17, 1984, and will approve it.

I have carefully reviewed the statement filed by Complainant's attorneys, Tony Oppegard and Stephen A. Sanders. Oppegard claims fees for 316.1 hours, Sanders for 87.1 hours.

There is nothing on the face of the statements which would cause me to doubt the validity of the number of hours expended or the necessity or propriety of the work described. I am not in a position to conclude that there was need for both attorneys to participate in brief preparation, oral argument before the Commission, and oral argument before the Court of Appeals. But neither can I conclude that it was not necessary. The factual and legal isues were complex. The attorney's employment was contingent. The result was very favorable to Complainant. In the absence of any reply to Complainant's statement, I find that Complainant's attorneys reasonably expended 403.2 hours on this case between December 17, 1984 and November 15, 1989.

Complainant claims $2,120.31 as other litigation expenses. The itemized expenses are reasonable and reimbursement is awarded.

ORDER

Respondents Kenta and Jackson are ORDERED to pay Complainant's attorneys the sum of $50,400, as attorney fees and $2,120.31 as litigation expenses. These amounts are in addition to the attorney fees and expenses which I ordered Respondents to pay in my decision issued February 26, 1985.

IT IS FURTHER ORDERED that Complainant's Motion for Leave to Take Discovery on the issue of back pay due Complainant since December 17, 1984, is GRANTED. Following the discovery, Complainant shall file his claim for back pay on or before March 19, 1990. Respondent shall file a reply to said claim on or before April 6, 1990.

James A. Broderick
Administrative Law Judge