UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In re: BKY No. 94-34865
American Coal Corporation,

Debtor. ORDER

This matter came before the Court on September 22, 1997 on application for interim compensation by Molly T. Shields of Doherty, Rumble & Butler ("DRB") as attorney for the Trustee. An objection to the fee application was filed by Tews, Squires, Martin & Martinson, P.A (TSM&M). Appearances are as noted on the record. Based on the Federal Rules of Bankruptcy Procedure, the Court now makes this ORDER.

I.
FACTS

DRB makes this third application for interim compensation for $51,922.45 in compensation and $1,802.17 in expenses.

This bankruptcy case was filed on October 24, 1994 under Chapter 11 of the Bankruptcy Code. It was converted to a Chapter 7 case on April 7, 1995. The Trustee's law firm, DRB, was designated as counsel for the Trustee pursuant to an Order of this Court on April 28, 1995.

On December 20, 1995, this Court approved DRB's first interim fee request for $59,062.50 in compensation and $3,412.69 for expenses. At the time of the first request, the estate had a cash balance of $213,757.83. On September 23, 1996, over the objection of TSM&M, the Court approved additional compensation in the amount of $127,047.65 and expenses in the amount of $6,492.47. The estate had a cash balance as of the date of the second request in the amount of $373,434.21. The estate currently has a cash balance of $233,916.39. Since DRB's second request, the estate has been depleted by the sum of $139,517.82, of which $135,340.12 was payment to DRB pursuant to the second request for interim compensation.(1) The estate has not been fully administered. Other Chapter 7 administrative expenses estimated at $40,500 remain unpaid. Chapter 11 administrative expenses remaining unpaid total $180,561.85.

TSM&M objects to both the substance and timing of the application. TSM&M's specific objections are: that the estate has not received any benefit as a result of DRB's services; DRB has billed for trustee time; and, that there is not enough

information to properly evaluate the charges for certain costs, specifically copy costs, facsimiles, and computer assisted research. TSM&M argues that it would be more appropriate for the Court to fully consider its objections at a hearing on a final fee application, as more information regarding the estate will be available.

DRB asserts that all fees incurred were reasonably necessary to the administration of the estate, and that the estate has benefited from DRB's services. DRB also argues that the charges for the costs are billed at the actual cost to the firm.

II.
DISCUSSION

A. IN GENERAL

Compensation of attorneys is governed by 11 U.S.C. Section 330 which provides that an attorney may receive "reasonable compensation for actual, necessary services rendered . . . and . . .reimbursement for actual, necessary expenses." 11 U.S.C. Section 330 (a)(1)(A) & (B). The appropriate method to calculate reasonable compensation under Section 330 is the lodestar approach, which is determined by multiplying the number of hours reasonably expended in connection with a particular service by a reasonable hourly rate. In re Apex Oil Co., 960 F.2d 728, 730-731 (8th Cir. 1992). Any hours not reasonably expended during the representation are to be excluded from the lodestar calculation. In re Kula, No. 97-6014NE, 1997 W.L. 694299 at *11 (8th Cir.BAP Neb.). The lodestar amount is to reflect: "(1) the novelty and complexity of the issues, (2) the special skill and experience of counsel, (3) the quality of representation, and (4) the results obtained. . .". Apex Oil, 960 F.2d at 731-732. Once made, the lodestar calculation is presumed to be the allowable compensation, and the amount should be adjusted only in rare situations. Kula, at *8.

The burden of proof as to reasonableness of fees rests on the applicant. Initially, the burden is met by the applicant filing an application with the court which sets forth a detailed statement of (1) the services rendered, time expended and expenses incurred; and, (2) the amounts requested. Fed.R.Bankr.P. 2016(a). Additionally, a fee application must list each activity, its date, the attorney who performed the work and a description of the work performed.

Where the application is contested, "[t]he bankruptcy court must make a finding as to whether the number of hours billed were reasonable in light of the complexity of the case, and then multiply that by a reasonable hourly rate for those services. The party seeking an award of fees should submit evidence supporting the hours worked and the rates claimed....If the hours or rate requested by the professional is not reasonable under the

circumstances for the work performed, the bankruptcy court should make such a finding." Kula, at *6 (citation omitted).

The required findings must be based on evidence in the record; not simply upon ad hoc argument of counsel, or on self determined notions of the judge. "The bankruptcy court's decisions must be supported by evidence and the bankruptcy court should issue findings and conclusions which will allow a reviewing court to determine whether the amount awarded was reasonable under the guidelines." Kula, at *8. Ordinarily, this will require evidentiary hearing. Kula, at *12.

B. IN PARTICULAR

1. Benefit To Estate.

TSM&M argues that the application should be denied because DRB's representation produced no benefit to the estate. TSM&M urges that, if the Court is not presently convinced, consideration of the application should be delayed until a final application is submitted along with the trustee's Final Account and Proposed Distribution. According to TSM&M, there will be no distribution to unsecured creditors in this case, and it is likely that Chapter 11 administrative expenses will not be paid in full.

Results, as a measure of the reasonableness of an estate's attorney's fee, are not determined by ultimate distribution of the estate. A chapter 7 bankruptcy estate can have myriad complex legal issues, involving multiple interests and parties, that must be resolved in an orderly and well documented fashion in connection with the proper administration of the estate. It is sometimes necessary for an estate to incur costs for professional services, even at the expense of distribution to creditors.

Furthermore, an estate's attorney is not a guarantor, and should not be penalized for unsuccessful good faith litigation under a results measure. The "results obtained" factor of the lodestar calculation of an estate's attorney's fee more appropriately involves: analysis of the professional manner of investigation, evaluation, and resolution, of legal issues and conflicts; rather than simply a calculation of the net amount of money produced for, or lost by, the estate.

Finally, the "results obtained" factor is not vacuously applied in the lodestar calculation. Application of the factor is part of a broader consideration that involves the integration of all four lodestar factors in determining benefit to the estate of legal services rendered.

So, there is no need to await conclusion of estate administration to determine the present appropriate fee. Benefit to the estate, or value of the services rendered, can be determined through application of the lodestar factors in arriving at a reasonable rate and reasonable number of hours for

the work done.

2. The Need For Evidentiary Hearing.

The present DRB fee application is for services rendered and costs incurred in ten categories. Four of them, on the face of the application, are questionable; and, are without evidence upon which findings, adequate to support a lodestar calculation, can be made. They are:

a. Branden Capital, H. Enterprises (HEI) litigation, $17,747
b. Ricky Winn litigation, $6,111
c. Peterson, Tewes & Squires, P.A., administrative expense claim, $4,496
d. Pension/Profit Sharing & Employee issues, $2,108

a. Branden Capital, HEI litigation, $17,747. Preferential and fraudulent transfer litigation was brought on behalf of the estate against Branden Capital, an entity controlled by principals of the Debtor; and, against HEI, a secured creditor of the Debtor. The action alleged that both a preferential transfer and fraudulent transfer occured when the Debtor paid approximately $246,000 for a transfer of coal from Branden; that $246,000 being transferred by Branden to HEI in partial satisfication of HEI's security interest in the coal. HEI was a secured creditor of the Debtor, with respect to the property transferred, at the time of the transfers. The Debtor obtained a default judgment against a defunct Branden. HEI obtained summary judgment against the Debtor. The litigation appears to have been ill-conceived, based on clearly erroneous and dubious legal theories; and, doomed to failure from inception. Although an estate's attorney is not a guarantor of the success of litigation commenced in good faith, employment as counsel for an estate does not grant license for unrestrained litigation. Where the trustee is an attorney in the firm submitting the fee application, close scrutiny is warranted. See, In re Allied Computer Repair, Inc., 202 B.R. 877, 882, 883. There is insufficient evidence of record to support a lodestar calculation for these services.

b. Ricky Winn litigation, $6,111. This litigation appears to have involved preference litigation in excess of $120,000 against Winn; breach of contract issues; and, objection to Winn's $6,414,908.43 claim filed in the Debtor's estate. DRB checked on Winn's bankruptcy status prior to commencing the litigation. Although not then a bankruptcy debtor, Winn filed a no asset Chapter 7 case shortly after the litigation was commenced. The Debtor's estate settled with Winn's estate by the Debtor dismissing the litigation in return for Winn's trustee withdrawing Winn's claim. The investigation, evaluation, and manner of resolving the issues presented by this controversy, need to be

explained to provide an evidentiary basis for a lodestar calculation.

c. Peterson, Tewes & Squires, P.A., administrative expense claim, $4,496. More than one year after the case had been converted from Chapter 11 to Chapter 7, the Debtor's Chapter 11 counsel brought a motion for immediate disbursement of its Chapter 11 administrative expense claim for attorney's fees and costs. DRB had its law clerk research the law and prepare a response objecting to the motion. DRB seeks to charge the estate 16.7 hours of the law clerk's time at $80 per hour, along with $395 in CALR costs. The DRB attorney in charge of the matter, who is also the trustee in the case, spent and additional 13.2 hours on the matter for which she seeks compensation as attorney at the rate of $185 per hour. The relative priorities of Chapter 11 administrative expenses in converted Chapter 7 cases is straight forward under the Code; and, the timing of their payment in this district is well known. In light of the application, evidence needs to be presented concerning the matter to provide a basis for a lodestar calculation.

d. Pension/Profit Sharing & Employee issues, $2,108. Nearly all the services described in this category were performed by a legal assistant, who apparently is neither a lawyer nor law clerk. DRB seeks to charge the estate $85.00 per hour for 20.6 hours of work that appears to be more trustee related than lawyer supportive. The record does not support a lodestar calculation for these services.

III.
DISPOSITION

Based on the foregoing, IT IS HEREBY ORDERED: DRB's Application For Interim Compensation, dated August 28, 1997, and filed August 29, 1997, is continued for evidentiary hearing, subject to discovery, to be set by DRB consistent with this order.

Dated: By the Court:

Dennis D. O'Brien
Chief United States
Bankruptcy Judge

(1) Apparantly, no assets of significant value are in the estate other than cash. While the estate holds a number of default judgments, they appear to be uncollectible.