FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

December 21, 2015

ELLIS & EASTERN COMPANY, Applicant, v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, Respondent.	EQUAL ACCESS TO JUSTICE PROCEEDING Docket No. EAJA 2015-0003 (formerly CENT 2014-0451-M) A.C. No. 39-00008-351487 Z272 Mine: Sioux Falls Quarry Mine I.D. – 39-00008

DECISION GRANTING APPLICATION FOR ATTORNEY FEES AND EXPENSES

Ellis & Eastern Company has applied for an award of fees and expenses pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504, as implemented by the Commission Rules at 29 C.F.R. Part 2704. E&E was the prevailing party in a Summary Decision. *Ellis & E. Co*., 37 FMSHRC 1607 (ALJ Gill)(July 2015).[1] The Secretary did not appeal the Summary Decision. E&E now moves for attorney fees and expenses[2] in the amount of $21,450.96, and also moves to withhold its financial information from public disclosure. E&E submitted its financial statement, itemized statements for attorney fees and costs, and a petition for attorney fees at a rate of $200.00 per hour. For the reasons stated below, I find that E&E is entitled to reasonable attorney fees and expenses, and I approve the requested $200.00 per hour rate.

E&E is Entitled to Attorney Fees and Expenses

The Secretary concedes that the previous litigation was an "adversary adjudication" under 29 C.F.R. § 2704.103, that E&E was the "prevailing party" as defined in 29 C.F.R. § 2704.104, and that E&E meets the definition of a "party"[3] under the Mine Act. (Sec'y. Obj. at 2-3) Therefore, the only issue left to be determined is whether the Secretary has met his burden of proving that his position in the previous litigation was substantially justified. *See Cooper v. United States R.R. Retirement Bd*., 24 F.3d 1414, 1416 (D.C. Cir. 1994); *see Lundin v. Mecham*,

[1] On February 17, 2010, MSHA inspected the railroad shop of E&E and issued two citations, which were contested based on jurisdiction. *Id.* at 1608. MSHA vacated the citations because of concerns that E&E had not received sufficient notice of its jurisdiction. *Id*. On March 19, 2014, MSHA inspected the railroad shop and issued E&E a citation. *Id.* E&E again contested based on jurisdiction. *Id.* at 1608-9. The Summary Decision was based upon the 2014 citation.

[2] The Commission Rules provide that "an award may also include the reasonable expenses of the attorney, agent, or witness as a separate item, if the attorney, agent or witness ordinarily charges clients separately for such expenses." 29 C.F.R. § 2704.

[3] 5 U.S.C. § 504(b)(1)(B) defines "party," for the purposes of this case, as a "corporation […] the net worth of which did not exceed $7,000,000 at the time the adversary adjudication was initiated." E&E has met this criteria.

980 F.2d 1450, 1459 (D.C. Cir. 1992); *see* 29 C.F.R. § 2704.105. "Substantially justified" means that the Secretary's position in the previous litigation had "a reasonable basis in both law and fact." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). The Secretary is not required to show, however, that his decision to litigate was based on a substantial probability of prevailing. *James M. Ray, empl. by Leo Journagan*, 18 FMSHRC 2033, 2039 (Nov. 1996).

The Summary Decision was based on the sole issue of MSHA's asserted jurisdiction over E&E's railroad shop. *Ellis & E. Co*., 37 FMSHRC at 1607. I found that there was "no genuine issue of material fact, and the Respondent [was] entitled to Summary Disposition as a matter of law because MSHA does not have jurisdiction over the railroad shop […]" and I vacated the underlying citation.[4] *Id.* The decision denying MSHA's jurisdiction over the railroad repair shop was based on three reasons:

1) E&E's railroad repair shop was not a mine under the Mine Act, and the Secretary's interpretation, in which he asserted jurisdiction over the shop because its proximity to the railroad tracks made the shop a private way appurtenant to the mine, was unreasonable and not entitled to deference;
2) The equipment E&E maintained in the railroad shop was not mining equipment because it was not used in activities "usually done by the operator" under the plain meaning of the Mine Act; and
3) E&E and Concrete Materials could not reasonably be treated as a single operation run by a parent company because both corporations had sufficiently diverse holdings and interests to merit treatment as distinct companies.

Id. at 1611-13.

The majority of the arguments in the Secretary's Objection are the same as the arguments set forth in the previous litigation, and I will address those first. While it is true that the mere fact that E&E prevailed in the Summary Decisions does not create a presumption that the Secretary's position was not substantially justified, *Contractors Sand and Gravel, Inc.,* 20 FMSHRC 960, 968 (Sept. 1998), I find that none of the theories proffered by the Secretary in the previous litigation were reasonable. Indeed, as the D.C. Circuit has held, "[i]n some cases, the standard of review on the merits is so close to the reasonableness standard applicable to determining substantial justification that a losing agency is unlikely to be able to show that its position was substantially justified." *F.J. Vollmer Co. v. Magaw,* 102 F.3d 591, 595 (D.C.Cir.1996); *Contractor's Sand & Gravel, Inc. v. Fed. Mine Safety & Health Review Comm'n*, 199 F.3d 1335, 1340 (D.C. Cir. 2000). Based upon the reasoning set forth in the Summary Decision, I find that there is no reasonable interpretation of the facts or the law that supports the Secretary's theory that the railroad shop was located in an area where mining occurred, that the shop was a private way appurtenant to the mine, or that the equipment inspected was mining equipment. I also find that there is no reasonable interpretation in law or in fact that MSHA can assert jurisdiction based on a "single operation" theory, i.e. that E&E and Concrete Materials were "integral components of a single operation" run by their parent company Sweetman Construction.

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[4] E&E also requested that its Independent Contractor Identification Number be vacated, but I denied that request.

The Secretary also now argues that the substantial justification standard should not be used to deter the government from bringing cases of first impression, nor should it be used to deter an agency's good faith prosecution of a case of first impression. (Sec'y Obj. at 6-7); *See Magruder Limestone Co., Inc.*, 36 FMSHRC 3288, 3298) (ALJ McCarthy) (Dec. 2014)(*citing S.E.C. v. Zahareas,* 374 F.3d 624, 627 (8th Cir. 2004)); *See Concrete Aggregates, LLC*, 25 FMSHRC 500, 503 (ALJ Manning)(Aug. 2003). The Secretary argued that since railcars are maintained in the railroad shop, and the railcars are used by the mine to load product, the railroad shop that maintained the railcars could reasonably be considered under the Mine Act's jurisdiction. Additionally, the Secretary argued that since there was no case law directly on point, reasonable minds can differ on the application of the cases relied on in the Summary Decision.

I agree that the substantial justification standard should not be used to deter an agency's good faith prosecution of a case of first impression. However, using it as a shield in a circumstance in which MSHA issued a frivolous citation is inappropriate. As set forth in the Summary Decision, E&E daily brings empty railcars into Concrete Materials' Sioux Falls quarry, which are then loaded by Concrete Minerals' miners during the night shift. *Ellis & E. Co*., 37 FMSHRC at 1608. The railroad tracks lie between the E&E railroad shop and Concrete Materials' mining pit, and end in the mine's screening and washing area where the railcars are loaded. *Id.* A public road must be crossed to travel from the mine's quarry and processing areas to E&E's railroad shop. *Id*. None of E&E's railroad vehicles enter the quarry extraction area. *Id.* at 1612. Additionally, E&E's railroad maintenance shop is exclusively dedicated to transportation equipment maintenance, and the transportation equipment is used to deliver finished goods. *Id.* at 1612, 1615. This is a situation in which an MSHA inspector traveled onto E&E's railroad property, far away from the railroad tracks where Concrete Minerals' miners load product from the quarry onto railcars, walked into E&E's maintenance shop, inspected a maintenance pick-up truck, and issued E&E a citation because the truck's parking break was not set. It appears that, based on the facts and circumstances before me, the Secretary did not act in good faith when deciding to prosecute the underlying litigation.

Further, the Secretary also now argues that the Summary Decision was "somewhere in the middle of the parties' positions" because, while the railroad shop was not under MSHA's jurisdiction, E&E's status as a contractor was not removed because of the services it provided the mine. (Sec'y Obj. at 6) Therefore, the Secretary contends, reasonable minds could differ about "where the line was drawn." *Id.* This is simply not true. The underlying litigation centered on the sole issue of whether MSHA had jurisdiction to issue a citation in a railway shop, and my reasoning for denying E&E's request to remove its independent contractor status was distinct from the jurisdictional finding. The fact that E&E requested the additional relief of removing its independent contractor status bears no consequence as to the reason the parties were originally before me. It is a mistake to assume denial of an additional form of relief somehow equates to the Secretary "winning" part of its underlying case, and a reason to deny or decrease E&E's application for attorney fees and expenses.

For the reasons stated above, I find that the Secretary failed to meet his burden to prove his position in the underlying litigation was substantially justified because its position in the previous litigation was not reasonable in fact or in law. I therefore grant E&E's application for attorney fees and costs.

E&E is Entitled to a Rate in Excess of the Statutory Maximum

Under the EAJA, "[n]o award for the fee of an attorney or agent under this part may exceed $125 per hour" plus reasonable expenses. 29 C.F.R. § 2704.106(b). However, a petition can be made to request an increase in the hourly rate set forth within the regulation. In determining the reasonableness of the fee sought for an attorney, the court considers:

1) The attorney's customary fee for similar services;
2) Similar rates charged by attorney's in the community in which the attorney performs services;
3) The time spent in the representation of the applicant and its reasonableness based on the circumstances of the case; and
4) Such other factors as may bear on the value of the services provided.

Id. at 2704.106(c).

Based upon Exhibit A and Exhibit B attached to E&E's Application, I find that the hourly rate of $200.00 per hour charged by Attorney Sar was reasonable and did not exceed the customary rate in the community. Additionally, upon review of the itemized billing of the services rendered by Attorney Sar, I find that the time spent was reasonable given the issues before the court, and I find that the accompanying expenses reasonable as well. Therefore, I find E&E is entitled to a total of $21,450.96 in attorney fees and expenses, as requested.

WHEREFORE, it is **ORDERED** that E&E's financial information be withheld from public disclosure.

It is further, **ORDERED** that the Secretary of Labor pay a total of $21,450.96 in attorney fees and expenses to E&E within 30 days of this decision.

/s/ L. Zane Gill
L. Zane Gill
Administrative Law Judge

Distribution:

Daniel McIntyre, U.S. Dept. of Labor, Office of the Solicitor, 1244 Speer Blvd., Suite 216, Denver, CO 80204

Jeffrey Sar, Baron, Sar, Goodwin, Gill & Lohr, 750 Pierce Street, P.O. Box 717, Sioux City, IA 51102