

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAY 11 2016

PRODUCTOS DE AGREGADOS DE
GURABO,

Petitioner,

v.

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Respondent.

EQUAL ACCESS TO JUSTICE
PROCEEDING

Docket No. EAJA 2016-0003
Formerly SE-2013-0449-M

Mine ID No.: 54-00316
Mine: Productos de Agregados de Gurabo

DECISION AND ORDER

Before: Judge Lewis

This case is before me upon an Application for Fees and Other Expenses filed by Productos de Agregados de Gurabo (“P.A.G.,” or “Operator,” or “Petitioner,”) pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504 (the “Act”) and the Federal Mine Safety and Health Review Commission’s (the “Commission”) implementing regulations at 29 C.F.R. § 2704.100 *et seq.*

PROCEDURAL HISTORY

On April 12, 2013, MSHA Inspector Isaac Villahermosa conducted an inspection of the Petitioner’s Productos de Agregados de Gurabo surface mine. The inspector issued Citation No. 8723601 for violation of 30 C.F.R. § 56.11001, “Safe Access,” on the same date. *Productos de Agregados de Gurabo*, 37 FMSHRC 2441 (Oct. 2015).

After extensive prehearing discovery and numerous prehearing motions, a hearing was held on April 29 and 30, 2015 in Carolina, Puerto Rico.

On October 28, 2015, I issued a decision and order, vacating Citation No. 8723601, essentially holding that the Secretary had failed to present sufficiently reliable evidence to support a finding of a § 56.11001 violation. *Productos de Agregados de Gurabo*, 37 FMSHRC 2441 (Oct. 2015).

Neither party filed a petition for discretionary review with the Commission following the issuance of said October 28, 2015 decision nor did any party seek review by the Circuit Court.¹

On February 22, 2016, the Petitioner filed the subject application for fees and expenses.² 5 U.S.C. § 504.

¹ The Commission also did not direct the case for review on its own motion, pursuant to 29 C.F.R. § 2700.71.

² The operator's February 22, 2016 motion for fees explicitly stated that it was "**under the inherent power of the court.**" *Resp't Productos de Agregados de Gurabo's Petition for Attorneys' Fees and Litigation Expenses*, at 1 (emphasis in the original).

Notwithstanding the Petitioner's failure to title its claim as an application for EAJA fees, this Decision and Order treats P.A.G.'s February 22, 2016 filing as a petition for EAJA fees.

Despite the operator's insistence that the filing was made under the Court's inherent powers to award fees, the remainder of the filing uses language inseparable from its EAJA context, including terms like "prevailing party," and "adversary proceeding," in addition to arguing that "the position of the agency was not substantially justified." *Id.*, at 2-3. These are all terms specifically associated with EAJA proceedings and indeed, despite the Petitioner's protestations to the contrary, the filing otherwise follows a standard EAJA petition format.

Furthermore, it is unclear as to what "inherent powers," the Petitioner refers to. *Id.*, at 1. The Commission is not a court of general equity, and has no apparent "inherent powers," at least none this Court is comfortable exercising absent controlling Commission precedent. *See Jim Walter Resources*, 15 FMSHRC 782, at 790 (May 1993) (holding that the Commission is not a court of general equity, and that it is a fundamental premise that equity aids only those who have vigilantly pursued their rights). Moreover, as the Commission reasoned in *Kaiser Coal Corporation*, "[w]e begin with the fundamental principle that, as an administrative agency created by statute, we cannot exceed the jurisdictional authority granted to us by Congress." *Kaiser Coal Corporation*, 10 FMSHRC 1165, at 1169 (Sept. 1988). And, "[i]t also is a long-standing rule of law that the consent of the United States to be sued will not be extended beyond its literal terms and will not be implied." *Nibali v. United States*, 634 F.2d 494, 497 (Ct. Cl. 1980), citations omitted.

The Court declines to endorse Petitioner's view, and will not extend the United States' consent to be sued beyond the four corners of the statutes at issue.

In an attempt to have its cake and eat it too, the Petitioner contends in its March 31, 2016 filing that "the Commission will be furthering Congress's policy choice when Congress enacted the EAJA" by awarding P.A.G. attorneys' fees. *Resp't's Reply to the Secretary of Labor's Response and Objections*, at 8. Similarly, the Petitioner attempts to evade the 30-day requirement under EAJA by arguing that these time limits do not apply to the Court's inherent equity powers. *Id.*, at 10. The Petitioner attempts to argue "in the alternative" that the filing should be treated as a properly filed EAJA petition. *Id.*, at 11.

On March 24, 2016, the Secretary of Labor filed a response and objection to the Petitioner's application, contending, *inter alia*, that Petitioner's application was time-barred.

On April 4, 2016, the Secretary filed its sur-reply.

LAW AND REGULATIONS

29 C.F.R. § 2704.100 sets forth the purpose of Commission rules as to applications for Equal Access to Justice Act fees under 5 U.S.C. § 504:

The Equal Access to Justice Act, 5 U.S.C. § 504, provides for the award of attorney fees and other expenses to eligible individuals and entities who are parties to certain administrative proceedings (called "adversary adjudications") before this Commission. An eligible party may receive an award when it prevails over the U.S. Department of Labor, Mine Safety and Health Administration ("MSHA"), unless the Secretary of Labor's position in the proceeding was substantially justified or special circumstances make an award unjust. In addition to the foregoing ground of recovery, a non-prevailing eligible party may receive an award if the demand of the Secretary is substantially in excess of the decision of the Commission and unreasonable, unless the applicant party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust. The rules in this part describe the parties eligible for each type of award. They also explain how to apply for awards, and the procedures and standards that this Commission will use to make the awards. In addition to the rules in this part, the Commission's general rules of procedure, part 2700 of this chapter, apply where appropriate.

29 C.F.R. § 2704.100.

29 C.F.R. § 2704.206 sets forth when an application may be filed:

- (a) An application may be filed whenever the applicant has prevailed in the underlying proceeding or in a significant and discrete substantive portion of that proceeding. An application may also be filed by a non-prevailing party when a demand by the Secretary is substantially in excess of the decision of the Commission and is unreasonable when compared with such decision. In

Given that this Court has no inherent powers to render the relief sought, given the Petitioner's failure to cite a single FMSHRC decision for the proposition supporting the Commission's "inherent power," to award attorneys' fees, and given the Petitioner's initial decision to submit a filing that conformed almost totally to a standard EAJA format, this matter was properly docketed EAJA 2016-0003, and will be treated as such. The Petitioner's arguments to the contrary lack any grounding in Commission precedent, betray a troubling misunderstanding of the separation of powers, and fail to persuade.

no case may an application be filed later than 30 days after the Commission's final disposition of the underlying proceeding, or 30 days after issuance of a court judgment that is final and nonappealable in any Commission adjudication that has been appealed pursuant to section 106 of the Mine Act, 30 U.S.C. § 816.

- (b) If review or reconsideration is sought or taken of a decision on the merits as to which an applicant has prevailed or has been subjected to a demand from the Secretary substantially in excess of the decision of the Commission and unreasonable when compared to that decision, proceedings for the award of fees shall be stayed pending final disposition of the underlying controversy.
- (c) For purposes of this part, final disposition before the Commission means the date on which a decision or order disposing of the merits of the proceeding or any other complete resolution of the proceeding, such as a settlement or voluntary dismissal, becomes final (pursuant to sections 105(d) and 113(d) of the Mine Act (30 U.S.C. §§ 815(d) and 823(d))) and unappealable, both within the Commission and to the courts (pursuant to section 106(a) of the Mine Act (30 U.S.C. § 816(a))).

29 C.F.R. § 2704.206.

ISSUE

Given the above procedural history and applicable law and regulations, must Petitioner's application for EAJA fees be denied on the basis of untimely filing?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In my original, underlying decision I noted that the Petitioner's extensive prehearing challenges to Mine Act jurisdiction were clearly without merit. *See, inter alia, Productos de Agregados de Gurabo*, 37 FMSHRC 2441, at 2441-3 (Oct. 2015).³ Further, my decision in favor of the Petitioner essentially turned upon the Secretary's evidentiary failure to present sufficiently reliable evidence to support a finding of violation (see, *inter alia*, 37 FMSHRC 2441, at 2450-2460.)

I am inclined to agree with the Secretary that the Petitioner's application for EAJA fees should also be rejected on substantive grounds.⁴ However, given the within procedural posture, I

³ In her application for EAJA fees, the Petitioner's counsel indicated that she was not seeking fees and costs related to previous jurisdictional challenges. *Resp't Productos de Agregados de Gurabo's Petition for Attorneys' Fees and Litigation Expenses*, at 2.

⁴ *See* the Solicitor's response and objections to the Petitioner's application for fees, wherein, *inter alia*, the Solicitor avers that its offer to reclassify the citation from S&S to non-S&S with a penalty reduction from \$873.00 to \$131.00 had been rejected by the Petitioner prior to hearing. *See also* the Solicitor's arguments that Petitioner's EAJA application should be denied on the

need not address the substantive merits of Petitioner's claim in that its application is clearly time-barred.

5 U.S.C. §504(a)(2) plainly provides that a party seeking EAJA fees shall submit "within thirty days of a final disposition in the adversary adjudication" its application. 5 U.S.C. § 504(a)(2).

29 C.F.R. § 2704.206 also clearly and unambiguously provides that "in no case may an application be filed more than 30 days after the Commission's final disposition of the underlying proceeding, or 30 days after the issuance of a court judgment that is final and unappealable in any Commission adjudication that has been appealed pursuant to section 106 of the Mine Act, 30 U.S.C. § 816." 29 C.F.R. § 2704.206.

Petitioner's February 22, 2016 EAJA fee application was inarguably far beyond the mandated 30 day deadline.

Circuit Court case law holds that courts may not, by local rule, shorten or extend the time for filing in EAJA petition. *Al-Harbi v. I.N.S.*, 284 F.3d 1080, 1082 (9th Cir. 2002).

My decision issued on October 28, 2015 became final and unappealable on or around November 30, 2015.⁵ The Petitioner failed to file its application until February 22, 2016 – almost two months after the statutory deadline of December 30, 2015.

The Commission has consistently held that untimely applications under EAJA must be rejected.⁶ See *Signature Mining Services v. Secretary of Labor*, 18 FMSHRC 3261, n. 1 (Dec.

merits. *Sec'y's Response and Objections to Pet'r's Application for Fees and Expenses Pursuant to the Equal Access to Justice Act*, at 4.

The Undersigned is reminded of the Supreme Court's reasoning in *Ardestani v. I.N.S.*, 502 U.S. 129: "[t]he clearly stated objective of the EAJA is to eliminate financial disincentives for those who would defend against *unjustified* governmental action and thereby to deter the *unreasonable* exercise of Government authority." *Ardestani v. I.N.S.*, 502 U.S. 129, at 138 (1991), emphasis added.

⁵ 29 C.F.R. § 2700.70 provides that a party adversely affected or aggrieved by a judge's decision may file with the Commission a petition for discretionary review *within 30 days* after issuance of the decision.

⁶ The Petitioner has not presented any Commission precedent to the contrary. Likewise, the Petitioner has cited no Commission case law supporting the application of equitable tolling to the EAJA context (instead, citing an irrelevant 10th Circuit opinion regarding equitable tolling and miners' rights to file discrimination complaints under § 815(c)(2) of the Mine Act). *Resp't's Reply to the Secretary of Labor's Response and Objections*, at 13, citing *Olson v. Fed. Mine Safety & Health Review Comm'n*, 381 F.3d 1007 (10th Cir. 2004).

2014) (wherein ALJ McCarthy found that *Signature* was ineligible to be award EAJA fees due to its failure to apply for such within 30 days of the Commission's final disposition of the underlying proceeding); *See also James M. Ray v. Secretary of Labor*, 18 FMSHRC 2037 (Nov. 1996) (wherein ALJ Fauver acknowledged that an application for EAJA fees could be rejected for untimely filing, but rejected Secretary's motion to dismiss because the 30 day period, after excluding the day of decision's issuance and a Sunday, had not, in fact, elapsed.)

Therefore I am constrained to find that the Petitioner's application must be denied because it was filed beyond the statutory deadline.

ORDER

It is the decision of the undersigned that Petitioner's application for fees and expenses under the Equal Access to Justice Act was untimely filed and Petitioner's application is hereby **DENIED**.


John K. Lewis
Administrative Law Judge

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Even if equitable tolling were a possibility in EAJA matters, the length of delay in filing and the problematic nature of the Petitioner's EAJA claim on-the-merits, would not qualify this for such tolling. As the Supreme Court noted in *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, equitable tolling is extended only in exceptional cases:

“Federal courts have typically extended equitable relief only sparingly. We have allowed equitable tolling in situations the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass. We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights.” *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96, (1990).

The Petitioner has alleged nothing resembling the circumstances described in *Irwin* to merit the relief asked for.