

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE N. W., SUITE 9500

WASHINGTON, D.C. 20001

May 4, 2010

ABUNDANCE COAL, INC.,	:	EQUAL ACCESS TO JUSTICE
Applicant	:	PROCEEDING
	:	
v.	:	DOCKET NO. EAJ 2010-01
	:	Formerly KENT 2010-5-R
SECRETARY OF LABOR,	:	KENT 2010-6-R
MINE SAFETY & HEALTH	:	
ADMINISTRATION (MSHA),	:	Mine ID 15-18711
Respondent	:	No. 1 Mine

DECISION

This case is before me upon an application for fees and expenses filed by Abundance Coal, Inc., (Abundance) pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504, the “Act”, and the Commission’s implementing regulations at 29 C.F.R. § 2704. Abundance was the prevailing party in an expedited contest proceeding, *Abundance Coal, Inc.*, 31 FMSHRC 1241 (October 2009)(ALJ). On March 10, 2010, a decision was issued in these proceedings finding that Abundance was qualified to receive fees and expenses under the Act and that the Secretary was liable for those fees and expenses for failing to sustain her burden of proving that her position at trial was substantially justified. 5 U.S.C. § 504(a)(1); 29 C.F.R. § 2704.105(a).

Abundance failed to support its application for fees and expenses, however, by failing to provide “a written verification under oath or penalty of perjury that the information provided in the application is true and correct”. 29 C.F.R. § 2704.201(d). Abundance also failed to provide an itemized statement of professional services in connection with the underlying proceeding. 29 C.F.R. § 2704.205. Accordingly Abundance was granted 30 days to comply with the noted regulatory provisions.¹

In response, on April 12, 2010, Abundance filed an affidavit by its president, Ray Slone, to the effect that the “motion” for attorneys fees and costs was true and correct. The Commission’s regulation is perfectly clear however that the verification must be specifically directed to the “information” in the application and not merely to the motion itself. This is not a trivial technicality but is a critical distinction to enable a credibility assessment to be made. The affiant should, of course, also have firsthand knowledge of the facts affirmed. Abundance also failed in its response to provide the detailed information required by 29 C.F.R. § 2704.205. It is particularly noted that Abundance failed to distinguish between time spent on the underlying cases and time spent on the consolidated but separate cases involving two imminent danger withdrawal orders (Docket Nos. KENT 2010-28-R and KENT 2010-29-R). The latter cases are not a part of these equal access of

¹ The Secretary was also directed to comply with the provisions of 29 C.F.R. § 2704.302(c) but failed to respond.

justice proceedings and the fees and expenses related to those cases are not compensable in these proceedings.

The failure of Abundance to have complied with the Commission's regulations could be grounds for denial of the entire application. However, to the extent that parts of the application are unopposed or can be reasonably ascertained, a partial award will be granted. Consideration is also given to a presumption of truthfulness accorded representations by members of the bar.

The Secretary first argues that attorney's fees for Abundance should be limited to a rate of \$125.00 per hour as set forth in 29 C.F.R. § 2704.201. Abundance seeks an award at a rate of \$175.00 per hour and cites an increase in the cost of living since the enactment of the 1996 Act and other special circumstances to justify that rate. See 29 C.F.R. § 2704.201(b). Abundance cites the fact that its attorney has a mining engineering degree and has been practicing all aspects of coal mine law for over 20 years, asserts that it would have been unable to obtain a qualified attorney to handle the matter for \$125.00 an hour and maintains that there are only a very few attorneys in eastern Kentucky who would represent coal mine operators in MSHA proceedings. Finally, Abundance notes that the only place eastern Kentucky coal operators can obtain qualified attorneys to defend MSHA administrative proceedings is in Lexington, Kentucky where most charge more than \$175.00 per hour. Under the circumstances, I find that a rate of \$175.00 is appropriate to be awarded in these proceedings.

The Secretary objects to attorney fees for conversations with the attorney representing mine operator Consol of Kentucky in the consolidated but separate contest of an "imminent danger" order. It is essential to note in this regard that initially four expedited contest proceedings were consolidated for trial to commence on October 14, 2009. Two challenged "Section 107(a)" imminent danger withdrawal orders - - one issued against Abundance at its No. 1 Mine and one against Consol of Kentucky at its adjacent Jones Fork mine. These two cases involved an alleged common hazard originating in the adjacent Jones Fork mine and were resolved by settlement on October 14, 2009. They are not in themselves within the scope of any claims for fees and expenses under the Act. The other contests (of Citation No. 8227636 and "Section 104(b)" Order No. 8227637) involved Abundance's seals separating its No. 1 mine from the Jones Fork mine and involved the same alleged common hazard originating in the Jones Fork mine. The latter two cases are those underlying the instant application for fees and expenses. While there was, of necessity, some need for coordination between counsel this rationale provides only a partial explanation for the charges. Accordingly an appropriate reduction in fees of 25% or \$175.00 is warranted..

The Secretary next takes issue with fees and expenses for attendance at the proceedings on October 14, 2009. All four consolidated cases were scheduled for trial on October 14, 2009, but at the suggestion of the undersigned the parties engaged in settlement negotiations. As a result, the "Section 107(a)" imminent danger orders issued to both Consol of Kentucky and Abundance were resolved. As previously noted, since the specific cases (Docket Nos. KENT 2010-5-R and 2010-6-R) on which Abundance prevailed (regarding Citation No. 8227636 and Order No. 8227637) were separate and distinct from the "Section 107(a)" orders which were the primary subject of the settlement conference on October 14, 2009, (Docket Nos. KENT 2010-28-R and 2010-29-R) the

time spent on those orders at that conference is not compensable in these proceedings. An appropriate reduction in fees of 50% or \$1,050.00 is therefore taken from the October 14, 2009 billing.

The Secretary also takes issue with the time charged for conferring with MSHA's district manager following the completion of the hearing on October 15, 2009. While this meeting was at the suggestion of the undersigned judge it was not directly related to the underlying cases but rather for the purpose of avoiding future litigation regarding the mine ventilation plan. It was therefore not an appropriate charge in these proceedings and a fee reduction of \$350.00 from the October 15th billing is warranted.

The Secretary further takes issue with costs associated with obtaining an expedited transcript of the hearing. Expedited hearings were held in the underlying cases because the Secretary had ordered the closure of the Abundance mine and miners were out of work. An expedited transcript was therefore necessary for the parties to prepare expedited briefs. Accordingly the cost for an expedited transcript was appropriate.

Finally, the Secretary takes issue with bills for services from Abundance's experts and consultants. In particular, the Secretary asserts that neither the bill for Alpha Engineering Services, Inc., in the amount of \$900.00 nor the bill to Sure Tech Systems, Inc., in the amount of \$600.00 meet the specificity required by the Commission's regulations. See 29 C.F.R. § 2704.205. I find the Secretary correct in this regard and in spite of the opportunity given to Abundance to supplement the record, it has nevertheless failed to fully comport with the requirements of 29 C.F.R. § 2704.205. It is particularly noted that although some work was devoted by the experts to the "Section 107(a)" orders not compensable in these proceedings it was included in the fees charged herein. Accordingly, Abundance's claim for fees for these consultants is accordingly reduced by 50% to \$750.00.

The Secretary also claims that the Commission's regulations do not permit attorney's fees for preparing and filing an application for fees and expenses under the Act. I find no such authority for the Secretary's position and indeed since the preparation of the fee application is an integral part of these proceedings I find that it is entirely appropriate to include that in the application for attorney's fees herein. Indeed such fees have been approved in other cases under the Act. See *Schuenemeyer v. U.S.*, 776 F.2d 329 (Fed. Cir. 1985); *Fritz v. Principi*, 264 F.3d 1372 (Fed. Cir. 2001); *Black Diamond Construction, Inc.*, 20 FMSHRC 1169 (October 1998) (ALJ).

Under all the circumstances, I find that Abundance is entitled to fees and expenses of \$11,586.59.

ORDER

In accordance with 29 C.F.R. § 2704.108 the Secretary of Labor is directed to pay Abundance Coal Inc., the amount of \$11,586.59 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge
(202) 434-9977

Distribution:(Certified Mail)

Billy R. Shelton, Esq., Jones, Walters, Turner & Shelton PLLC, 151 N. Eagle Creek Drive, Suite 310, Lexington, KY 40509

Mary Sue Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, 618 Church Street, Suite 230, Nashville, TN 37219-2456

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