FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 NEW JERSEY AVENUE N. W., SUITE 9500
WASHINGTON, D.C. 20001

March 10, 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 2020-6-R
MINE SAFETY & HEALTH	:	
ADMINISTRATION (MSHA),	:	Mine ID 15-18711
Respondent	:	No. 1 Mine

DECISION ON LIABILITY/ ORDER TO SUPPLEMENT THE RECORD

This case is before me upon a Motion for Fees and Costs 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 (Oct. 2009) (ALJ). The citation at issue therein alleged a non-"significant and substantial" violation of the standard at 30 C.F.R. § 75.336(c)--which is applicable to sealed mine atmospheres with seals of less than 120 psi strength and requires the withdrawal of miners when certain action levels of methane and oxygen are found in the sealed atmosphere. In my decision, I found that the language of the cited standard was "perfectly clear" and that because Abundance was using seals of 120 psi strength separating its workings from the sealed atmosphere at issue, Section 75.336(c) was, in effect, inapplicable. Accordingly, the citation and related "Section 104(b)" order were vacated. I also noted in my decision that the Secretary (through her designated agent, the District Manager) had, consistent with the cited standard, previously approved Abundance's plan (alternate seal sampling plan-ventilation plan revision) which permitted Abundance to not sample behind its 120 psi seals.

On December 23, 2009, Abundance moved for attorney fees and costs associated with the underlying case in the amount of $13,911.59. Abundance also submitted its financial statement, itemized statements for attorney fees, expert fees, and costs, and a petition for attorney fees at $175 per hour. On January 22, 2009, the Secretary filed her response to Abundance's motion and, on February 2, 2010, Abundance filed its reply to that response.

The Equal Access to Justice Act provides as follows:

> An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special

> circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

5 U.S.C. § 504(a)(1)

The Commission's regulations similarly provide that:

> [A] prevailing applicant may receive an award of fees and expenses incurred in connection with a proceeding . . . unless the position of the Secretary was substantially justified. . . . The burden of proof that an award should not be made to a prevailing applicant because the Secretary's position was substantially justified is on the Secretary, who may avoid an award by showing that his position was reasonable in law and fact.

29 C.F.R. § 2704.105(a)

There is no dispute that the previous litigation was an "adversary adjudication" under 29 C.F.R. § 2704.103, that Abundance was the prevailing party in the previous litigation as defined in 29 C.F.R. § 2704.104 and that Abundance meets the definition of a "party" under the Act. Therefore, the only issue to be determined regarding the issue of liability is whether the Secretary has met her burden of proving that her position at trial was substantially justified.

In support of its motion, Abundance argues that the Secretary's position was not substantially justified for two reasons. First, that the plain language of 30 C.F.R. § 75.336(c) provides that it only applies where the seals are of less than 120 psi strength and the seals at issue were of 120 psi strength. Abundance asserts, therefore, that the regulation is not applicable. Abundance argues, secondly, that because the Secretary had previously approved Abundance's ventilation plan, which explicitly stated that Abundance would not be sampling behind its 120 psi seals, the Secretary's position at trial was contradictory and, implicitly, the Secretary was, for this additional reason, without justification to have cited Abundance for not sampling behind those very same seals.

The Secretary asserts that her position at trial was reasonable, both in law and in fact, and that she was substantially justified under the circumstances. She first argues that because the case presented a novel issue of first impression under a fairly new regulatory requirement, there was no prior case law available. As previously noted however, the language of the cited standard is "perfectly clear" on its face and therefore needs no interpretive "case law". I find that the Secretary's attempt to ignore a cardinal rule of regulatory construction was clearly without justification. I find, moreover, that the so-called novel issue of first impression was solely the creation of the Secretary's imagination and is without rational connection to the plain meaning of the cited standard.

The Secretary also argues that her position was substantially justified based on the facts presented--namely, that the abandoned workings had once been under a single legal identity and that a "Section 103(k)" order had been issued in 2006 for all three mines. These factors are, however,

without relevance to the narrow issue presented in the underlying case i.e. whether Abundance violated 30 C.F.R. § 75.336(c) as charged.

The Secretary next argues that her actions were justified because the situation presented was very serious. The Secretary, however, clearly contradicts herself in this regard by having issued the citation as not "significant and substantial". Even assuming, *arguendo*, that the situation was as serious as the Secretary now alleges, that is no justification to misapply a safety standard. Indeed, there are appropriate remedies, such as "imminent danger" withdrawal orders, available in the case of very serious safety hazards.

Finally, with regard to Abundance's assertion that the Secretary's prior approval of its ventilation plan revision made the Secretary's position unjustified, the Secretary suggests, but without any supportive evidence, that the approval of the ventilation plan revision may have been in error. The credibility of this "suggestion" is also clearly at issue, moreover, since there is no evidence that the Secretary attempted to modify or rescind the ventilation plan in this regard. This further suggests that the Secretary's position was indeed without justification.

Under all the circumstances, I find that I am in agreement with Abundance's position and find that the Secretary has failed to have met her burden of proving that her position in the underlying proceeding was substantially justified. I find, accordingly, that Abundance is entitled to an award under the Equal Access to Justice Act.

Fees and Expenses

Abundance has failed in its motion to comply with the second sentence of 29 C.F.R. § 2704.201(d) and in part, with the second sentence of 29 C.F.R. § 2704.205. Similarly, the Secretary has failed in her response to support her factual allegations as required by 29 C.F. R. § 2704.203(c) Accordingly, no final decision can be rendered at this time regarding the issue of fees and expenses and the parties are directed to file, within 30 days, documentation necessary to comply with the aforesaid regulatory provisions.

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

/lh