

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 17, 2001

DYNATEC MINING CORPORATION,	:	EQUAL ACCESS TO JUSTICE
Applicant	:	PROCEEDING
	:	
	:	Docket No. EAJ 2001-3
v.	:	
	:	Formerly WEST 94-645-M
	:	
	:	Magma Mine
SECRETARY OF LABOR,	:	ID. No. 02-00152 WJ6
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Respondent	:	

ORDER DENYING SECRETARY’S MOTION TO STAY

The Secretary filed a motion to stay this Equal Access to Justice Act (“EAJA”) case on the basis that Dynatec appealed the Commission’s decision in the underlying case with respect to Citation No. 4410466 and Order No. 4410468. She states that she is requesting the stay to avoid unnecessary fragmentation of fee petitions and the resultant waste of judicial resources. She requests that this proceeding be stayed until the court of appeals issues its decision with respect to the citation and order.

Dynatec opposes the stay. Dynatec argues that the Secretary is not entitled to a stay and that proceeding with this fee petition will not result in the unnecessary fragmentation of fee petitions. For the reasons set forth below, I agree with Dynatec and deny the motion for a stay.

The Secretary relies, in part, on 29 C.F.R. § 2704.206(b). That rule provides, in pertinent part, that if “review . . . 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.” In this case, the Secretary did not appeal the Commission’s decision. As stated above, Dynatec appealed the Commission’s decision affirming Citation No. 4410466 and Order No. 4410468. The Secretary contends that, as a consequence, this EAJA proceeding should be stayed.

The Secretary’s reliance on section 2704.206(b) is misplaced. Although the regulation does not directly limit its application to situations in which the Secretary appeals a Commission decision, I believe that the Commission did not intend to force an ALJ to stay an EAJA proceeding under the present circumstances. The language of the EAJA provides that when “the United States appeals the underlying merits” in a case, “no decision on an application for fees and other expenses shall be made . . . until a final and unreviewable decision is rendered by the court of appeals. . . . 5 U.S.C § 504(a)(2). The government should not be required to pay

attorney's fees in a case where it has appealed the merits of the adjudicator's decision. The Commission's regulation was designed to implement this statutory provision.

Before the EAJA was amended to allow recovery of attorney's fees in Mine Act cases in situations where the demand by the Secretary is substantially in excess of the decision of the Commission and unreasonable when compared to that decision, it was clear that this stay regulation concerned appeals taken by the Secretary of the underlying decision. The former stay regulation, at section 2704.204(b), applied if review was "sought or taken of a decision on the merits as to which an applicant believes it has prevailed. . . ." Only the Secretary could normally appeal such a decision. The EAJA was amended for the benefit of EAJA applicants to include recovery where the applicant did not prevail but the demand made by the government was substantially in excess of the decision of the adjudicative officer and unreasonable. The language in section 2704.206 implements that change. The change in the statute and the Commission's EAJA regulations was designed to expand the rights of applicants not narrow them. I hold that I am not required to stay this proceeding under section 2704.206(b). My holding is consistent with the language in sections 2704.206(a) and (c).

The Secretary also relies on *Dole v. Phoenix Roofing, Inc.*, 922 F.2d 1202, 1206-07 (5th Cir. 1991). This case arose under the Occupational Safety and Health Act ("OSHA"). The OSHA Commission judge affirmed one citation and vacated another citation. The applicant appealed the judge's decision with respect to the citation that was affirmed. The Secretary did not appeal the citation that was vacated. When the applicant filed its application for attorney's fees after appeal, the Secretary argued that the applicant was time-barred with respect to fees related to the citation that was vacated. The Secretary argued that the applicant was required to file its application for attorney's fees for that citation within 30 days after the judge vacated the citation. The court of appeals rejected the Secretary's argument. It held that the applicant was not required to apply for attorney's fees until the conclusion of all appeals. The court stated that there is no final disposition in a case until the entire decision is final and unappealable.

I find that the court's reasoning does not apply to the facts in this case. The court was protecting the applicant in *Phoenix Roofing* from having its application dismissed. It stated that "Congress intended to make it easier, not harder, for people of limited means to collect their small claims from the government." 922 F.2d at 1207 (citation omitted). The Secretary is attempting to use that decision as a sword to delay possible fee recovery in this case when the court intended to provide a shield to protect applicants from having their claims dismissed. Although some of the language in *Phoenix Roofing*, when taken out of context, appears to support the Secretary's motion, I find that the decision does not apply.

The court in *Phoenix Roofing* was also attempting to avoid "the unnecessary fragmentation of the fee petitions and the waste of judicial resources that would result from filing multiple petitions in different courts for fees incurred in one case." *Id.* Dynatec is seeking attorney's fees and costs on the basis that it prevailed in a significant and discrete substantive portion of the underlying proceeding. It states:

The portion of the underlying proceeding at issue in the EAJA

proceeding is “significant” in that it represents the bulk of the Secretary’s charges in terms of the number of citations (12 of 14) and the amount of fines (\$650,000 of 700,000). The portion of the underlying proceeding at issue in the EAJA proceeding is “discrete” in that it involves separate orders . . . and separate standards . . . , which are not at issue in Dynatec’s appeal to the United States Court of Appeals.

(D. Opposition at 2). Dynatec’s application includes Order No. 4410468. It contends that it is entitled to fees and costs because the penalty for that order was reduced from \$50,000 to \$20,000 and the original penalty was unreasonable. The appeals court will not increase the penalty so there is no risk that requiring the Secretary to proceed will require it to pay more than it would if the case were stayed. In addition, Dynatec maintains that it is “virtually impossible, for purposes of apportionment, to isolate the few substantially justified positions” taken by the Secretary in the underlying proceeding from the “morass of substantially unjustified positions.” (D. Application at 33). Thus, it is arguing that it is entitled to full recovery of fees and expenses.

Based on the above, I find that this case does not present a situation in which the risk of unnecessarily fragmenting fee applications outweighs Dynatec’s interest in proceeding with its application. It is not clear that I even have the authority to stay this case. I find that the Secretary has not presented good cause for a stay.

For the reasons set forth above, the Secretary’s motion to stay this case is **DENIED**. The Secretary’s answer in this case shall be filed on or before **May 24, 2001**.

Richard W. Manning
Administrative Law Judge

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