FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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October 28, 1996

CONTRACTOR'S SAND AND GRAVEL, INC., Applicant	:	EQUAL ACCESS TO JUSTICE PROCEEDING
	:	Docket No. EAJ 96-3
v.	:	
	:	Formerly WEST 93-462-M
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	

FINDINGS AND AWARD OF FEES AND OTHER EXPENSES
UNDER THE EQUAL ACCESS TO JUSTICE ACT

This case is before me on an Application for Award of Attorney's Fees and Other expenses under the Equal Access to Justice Act ("EAJA"), 5 U.S.C. § 504, et seq. filed with the Federal Mine Safety and Health Review Commission ("FMSHRC") on April 24, 1996.

I

The Underlying Proceedings

On June 28, 1993, the Secretary filed a Proposal for the Assessment of Civil Penalty with respect to Citation No. 3911909 (included in Docket No. WEST 93-462-M). The Secretary proposed a $7,000.00 penalty for the alleged violation of the electrical grounding standard set forth at 30 C.F.R. § 12025. In addition, on July 8, 1994, the Secretary filed an action to assess a $6,000.00 penalty against corporate agent Eric Schoonmaker alleging a knowing violation of the same electrical grounding standard 30 C.F.R. § 12025 (Docket No. 94-409-M). These matters were the underlying action that was part of consolidated proceedings against the Applicant which involved nine dockets and 29 total citations.

In October 1995, the parties filed cross-motions for Summary Decision agreeing that there were no material facts in dispute and seeking a Decision on the pleadings on Citation No. 3911909.

On March 25, 1996, I issued my Summary Decision[1] vacating Citation 3911909 in both dockets and dismissing the 110(c) action against Eric Schoonmaker. In that decision I vacated the $13,000 proposed penalties for Citation No. 3911909.

On April 24, 1996, Contractors Sand and Gravel Supply, Inc., ("Applicant") through its counsel Gregory Ruffennach, Esq., filed its Application for an Award of Fees and Expenses Under the Equal Access to Justice Act.

II

The April 24, 1996 Application under EAJA

In the April 24, 1996 Application under the EAJA, Applicant, Contractor's Sand and Gravel, Inc., seeks to recover attorney fees and other expenses from Respondent, Secretary of Labor, Mine Safety and Health Administration. The attorney fees and other expenses were incurred by Applicant when it successfully challenged Citation No. 3911909 in the underlying civil penalty proceeding in Docket No. WEST 93-462-M.

The Secretary does not dispute that Applicant "prevailed" in the underlying proceedings when I issued a Summary Decision in favor of Applicant (then Respondent) on March 25, 1996. The Summary Decision, which vacated Citation No. 3911909, resulted in the dismissal of a $7,000 assessment against Applicant and a $6,000 assessment against Applicant's general manager. The Summary Decision also enabled the parties to negotiate a settlement of the remaining eight consolidated civil penalty dockets.[2]

In the Application, Applicant also seeks to recover attorney fees and other expenses from the Secretary that were incurred in connection with preparing and defending the Application in the instant EAJA proceeding, Docket No. EAJ 96-3. Periodically, during the course of this EAJA proceeding, Applicant moved to amend its April 24, 1996, Application to reflect additional attorney's fees and other expenses that had been incurred as a result of the Secretary's opposition to the Application. I granted each of the motions to amend the April 24, 1996, Application.

As a preliminary matter, I find, and the Secretary has not disputed, that Applicant, having a net worth of less than $7

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[1] My Decision of March 25, 1996, is attached as Appendix A.

[2] The May 28, 1996 "Decision after Remand Approving Settlement" of the remaining eight consolidated penalty dockets is attached as Appendix B.

million and fewer than 500 employees, is "eligible" for an award of attorney fees under the EAJA. 29 C.F.R. § 2704.104. I further find, and the Secretary has not disputed, that the April 24, 1996, Application meets all of the present requirements for an application for an award of attorney fees and other expenses set out by the Commission Rules that presently implement the Equal Access to Justice Act, 29 C.F.R. § 2704.204.

In considering the remaining issues presented by the April 24, 1996, Application, as amended, I am addressing the two dockets, for which Applicant is requesting fees, separately.

A. **Fees and Other Expenses for the Underlying Proceeding**

In its Application, as amended, Applicant seeks to recover $19,669.72 in attorney fees in connection with the underlying proceeding, Docket No. WEST 93-462-M, and $4,457.83 in total expenses. In his Answer, the Secretary opposed such an award on two basic grounds. First, the Secretary argued that its position in the underlying proceeding was "substantially justified." Second, the Secretary argued that Applicant's fee request was excessive. I address each of the Secretary's arguments in turn.

B. **Substantial Justification**

Under the EAJA, a prevailing party may recover attorney fees "unless ... the position of the United States ... [is] substantially justified." 5 U.S.C. § 504(a)(1). The Supreme Court has stated that "substantially justified" means "justified to a degree that could satisfy a reasonable person," or having a "reasonable basis in both fact and law." Pierce v. Underwood, 487 U.S. 552, 108 S.Ct. 2541, 2550, 101 L.Ed. 490 (1988). To make a showing of substantial justification, the Secretary bears the burden of proving that his position was reasonable in law and fact. 29 C.F.R. § 2704.105.

In the underlying proceeding, I clearly indicated that the Secretary's position was unreasonable. The Secretary argued that the electric motors at issue were not effectively grounded as required by the cited standard (30 C.F.R. § 56.12025) because they used crusher frame as a ground path. Having considered both aspects of this argument, I again find that the Secretary's legal theory was not reasonable and that there was no reasonable connection between the Secretary's legal theory and the undisputed facts.

I find the Secretary's legal interpretation, that the cited standard prohibited frame grounding, an unreasonable one. In my Summary Decision I stated:

> The Secretary should not be permitted through interpretation to expand the regulation beyond its plain meaning. The Secretary's purported longtime interpretation of the regulation to prohibit per se frame grounding constitutes an impermissible expansion of the plain meaning of the standard.

Summary Decision at p. 4-5. Any interpretation that "impermissibly" ignores the plain meaning of a cited standard, is per se unreasonable. Lancashire Coal Co. v. Secretary of Labor, 968 F.2d 388, 393 (3rd. Cir., 1992) ("We cannot conclude that the Secretary's interpretation is reasonable in this case insofar as it conflicts with the language of the statute.") Had the Secretary's legal interpretation been reasonable, I would have considered according it deference. Wamsley v. Mutual Mining, Inc., CA Nos. 95-1130 and 95-1212 (4th Cir. April 3, 1996) ("the Commission should have deferred to the Secretary's interpretation of the Act if it found that interpretation to be a reasonable one.")

Again, on review of the record, I find that there is no reasonable interpretation of the facts that supports the Secretary's theory that the motors were not effectively grounded. I specifically held in my Decision that:

> the motors in question were connected with the ground to make the earth part of the circuit. There is no contrary evidence.

Summary Decision at p. 5 (emphasis added). Because there was "no contrary evidence," i.e. no evidence which could have supported the Secretary's theory that there was not an effective ground, the connection between the facts alleged and the legal theory advanced by the Secretary was unreasonable.

Moreover, in addressing Applicant's fair notice argument, I made a specific finding with respect to reasonableness of the connection between the Secretary's facts and the law. I found:

> With respect to the application of the reasonable, prudent person test, I find that a reasonable, prudent person familiar with the mining industry would have recognized that the two motors, which were connected to earth through a series of metal frame and

> wire connections, were grounded and were, thus, in compliance with requirement of the cited regulation.

Summary Decision at p. 5 (emphasis added).

The Secretary offered nothing in this proceeding to persuade me that my findings of unreasonableness in the underlying proceeding were incorrect. The Secretary merely reiterates arguments that I have previously considered and rejected.

In this connection, I would point out that all the other administrative law judges that have considered the Secretary's legal theory have concluded that it is not reasonable. See e.g. Mulzner Crushed Stone Company, 3 FMSHRC 1238 (Laurensen, May 1981), McCormick Sand Corporation, 2 FMSHRC 21, 24 (Michaels, 1980); Tide Creek Rock, Inc., 18 FMSHRC 390, 396 (Manning, March 25, 1996). While the unappealed decisions of the other administrative law judges are not determinative on the issue of substantial justification, the decisions are strong indicia that Secretary's litigation position was unreasonable. Pierce, 487 U.S. 552, 567-572, 108 S.Ct. 2541, 2551-53, 101 L.Ed. 490 108.

The unreasonableness of the Secretary's position is clearly evident from the plain language of the regulation in the underlying proceeding. Haitian Refugee Center, 791 F.2d 1489, 1497 (D.C. Cir. 1986)(citing Spencer v. NLRB, 712 F.2d 539, 559-60 (D.C. Cir. 1983); see also Jean v. Nelson, 863 F.2d 759, 767 (11th Cir. 1988). As I emphasized in my Summary Decision, the Part 56 regulations, as well as the National Electrical Code, clearly define "grounded" in a manner that does not support the Secretary's legal interpretation of the cited standard. The Secretary's contrary interpretation was never published in MSHA's Program Policy Manual.

Based on all of the foregoing, I conclude that the Secretary's litigation position in this matter was not substantially justified.

Given the unreasonableness of the Secretary's litigation position under the established facts of this case, I do not find it necessary to address the reasonableness of the Secretary's pre-litigation positions. 5 U.S.C. § 504(b)(1) (E). I would point out, however, that I have some difficulty with MSHA's decision not to test the effectiveness of the ground path during the original inspection and the Secretary's subsequent decision to ignore post-citation test results that showed the ground paths in place were effective.

C. **Fee Request**

Having determined that the Secretary's position is not substantially justified, I address the Secretary's arguments that Applicant's fee and expense request is "excessive." The Secretary identified three grounds on which I could find that Applicant's request for fees and expenses is excessive. First, the Secretary argued that Applicant improperly sought to recover attorney fees for work associated with the other consolidated dockets. Second, the Secretary argued that the rate at which Applicant sought to recover attorney fees was "too high." Third, the Secretary argued that Applicant is not entitled to recovery expenses. I address the Secretary's arguments in the order that they were presented.

D. **Apportionment of Work Related to Other Dockets**

The Secretary's primary argument against the amount of the fee request is that Applicant sought to recover attorney fees for work that can be attributed, in part, to the other consolidated dockets. Although Applicant has not sought recovery for work that it categorized as "Other Fees," i.e. work completely attributable to the other consolidated dockets, Applicant has sought recovery for some work related to Docket No. WEST 93-462-M that overlaps with the work on the other dockets.

Before addressing the Secretary's argument, I would first point out that the Secretary has not questioned any specific time entries for which Applicant has sought recovery of attorney fees in connection with Docket No. WEST 93-462-M. The legal invoices that support the Application carefully and meticulously document the work that counsel for Applicant performed in connection with Docket No. WEST 93-462-M. I find that the work performed by counsel for Applicant was reasonable and led to an efficient resolution of the underlying civil penalty proceeding and the other consolidated dockets. I further find that the hours dedicated to the work performed were also reasonable and reflect counsel's proficiency in handling safety and health cases before the FMSHRC.

In this connection, the Secretary has not challenged the work that Applicant has categorized as "Direct Fees." Applicant has requested reimbursement of 96.15 hours for work that was directly attributable to the contest of Citation No. 3911909. I conclude that these Direct Fees, totaling 96.15 hours, were reasonable and hereby award these hours to Applicant.

The Secretary's first point of contention is with the work categorized by Applicant as "Necessary Fees." The Secretary does not apparently dispute that this work would have been performed regardless of the existence of the other consolidated dockets. Rather the Secretary argues that because this work incidentally advanced the other consolidated dockets, Applicant should only received partial recovery for this work. The Secretary's contention is rejected. I credit Applicant's representation and find this work was necessary for Applicant to achieve summary decision in Docket No. WEST 93-462-M. The fact that this work incidentally advanced other dockets is irrelevant. See Jean v. Ellen, 863 F.2d 759, 772 (11th Cir. 1988) ("fee award should exclude time spent on unsuccessful claims except to the extent that such time overlapped with related successful claims.") (quoting Trezevant v. City of Tampa, 741 F.2d 336, 341 (111th, Cir. 1984). I conclude that these Necessary Fees, totaling 38.26 hours, were reasonable and hereby award these hours to Applicant.

The Secretary's second point of contention is with the work categorized by Applicant as "Proportional Fees." Although this work advanced all of the consolidated dockets (similar to the so-called "Necessary Fees"), it took more time for counsel for Applicant to complete due to the number of citations (27 in all) in the other consolidated dockets. Although the parties agree that some type of proportional recovery may be appropriate with respect to this work, they disagree markedly on the formula for making the apportionment.

The Secretary has proposed a 3 percent apportionment based on a mathematical count of citations in all of the consolidated dockets. The Supreme Court, however, has expressly rejected the method of apportionment advocated by the Secretary. Hensley v. Eckerhart, 461 U.S. 424, 435 n. 11, 103 S.Ct 1933, 1940 n. 11,76 L.Ed.2d 40, 52 n.11 (1983)("We agree with the District Court's rejection of a mathematical approach computing the total number of issues in the case with those actually prevailed upon.); see e.g. Naekel v. Department of Transportation, 884 F.2d 1378, 1379 (Fed.Cir. 1989); Brandeis School v. NLRB, 871 F.2d 5, 7 (2nd Cir. 1989). Given the extent of the arguments submitted in the consolidated dockets, I find it highly unlikely that counsel for Applicant dedicated equal time to each of the 28 citations at issue. Therefore, I do not adopt the Secretary's formula for apportionment.

Applicant, on the other hand, originally proposed a 60 percent apportionment based on the proportion of civil penalties attributable to Citation No. 3911909. Of the approximately $21,000 in civil penalties at issue in the consolidated dockets, $13,000 or roughly 60 percent, were attributable to Citation No.

3911909. Applicant subsequently amended its Application to request an 85 percent apportionment. Applicant, citing Hensley, based the additional 15 percent increase on the overall success achieved by Applicant in negotiating a favorable settlement in the remaining consolidated dockets based on the strength of its victory in the underlying proceeding.

In determining the appropriate apportionment in this case, I note that the determination in the first instance is committed to my discretion. Hensley v. Eckerhart, 461 U.S. at 437, 103 S.Ct at 1941, 76 L.Ed.2d at ___ (1983); See Pierce, 487 U.S. at 571, 108 S.Ct. at ___, 101 L.Ed. at 508. I find that Applicant's motivation in contesting Citation No. 3911909 and the other citations was based, at least in part, on the total amount of the fines assessed by MSHA. As I noted in my Summary Decision, "Citation No. 3911909 is the most significant of the citations" among the consolidated dockets in that it resulted in $13,000 in civil penalty assessments. Summary Decision at p. 3. I further find that when I vacated Citation No. 3911909 it provided Applicant with leverage to expeditiously negotiate a 75 percent reduction in the remaining civil penalty assessments, thereby further demonstrating its importance. Given the relative importance of Citation No. 3911909 and its relation to Applicant's overall success, I find that it is reasonable to assume that counsel for Applicant, having a firm grasp of the stakes involved, dedicated 85 percent of his attention and efforts to Citation No. 3911909 when working on tasks that involved multiple citations. Therefore, I adopt the 85 percent apportionment proposed by Applicant. I conclude that these Proportional Fees, totaling 27.48 hours (85 percent of 32.33 hours), were reasonable and hereby award these hours to Applicant.

E. **Rate For Recovery of Attorney Fees**

Applicant requested that attorney fees be reimbursed at a rate of $121.50 per hour. The Secretary argued that the EAJA and the Commission Rules limit the attorney fee rate to a maximum of $75.00 per hour. Although Applicant acknowledges that both the EAJA and the Commission Rules establish a maximum rate of recovery of $75.00 per hour, Applicant argues that both the statute and the Rules authorize the Commission, through rulemaking, to adjust the maximum attorney fee rate based on increases in the cost of living.

The EAJA does not expressly authorize the Commission to promulgate a legislative type regulation that would have a retroactive effect. I therefore address only Applicant's request for adjudicatory rulemaking.

The EAJA expressly authorizes the Commission to increase the maximum attorney fee rate where "justified." The EAJA provides:

> attorneys fees shall not be awarded in excess of $75.00 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor ... justifies a higher fee.

5 U.S.C. § 504(b)(1)(A) (ii) (emphasis added). The EAJA does not specify whether the agency is required to announce such a "regulation" in an adjudicatory or legislative type rulemaking proceeding.

Similarly, the Commission Rules do not specify how such a "regulation" is to be announced. The Rules merely reiterate the statutory provision:

> If warranted by an increase in the cost of living or by special circumstances (such as limited availability of attorneys qualified to handle certain types of proceedings), the Commission may adopt regulations providing that attorney fees may be awarded at a rate higher than $75 per hour in some or all of the types of proceedings covered by these rules.

29 C.F.R. § 2704.107 (emphasis added). By setting out procedures for filing a petition for legislative type rulemaking, however, the Commission Rules appear to contemplate quasi-legislative rulemaking, 29 C.F.R. S 2704.107(b). On the other hand, there is nothing in the Commission Rules that specifically requires that such "regulations" be promulgated through quasi-legislative rulemaking pursuant to the Administrative Procedures Act ("APA"). See 29 C.F.R. S 2704.107(a). Absent an express statement that formal legislative type rulemaking proceedings are required, I am not inclined to curtail the Commission's discretion to announce such a regulation in an adjudicatory proceeding.

In this connection, I note that it is well established that an agency, such as the Commission, can opt to announce a regulation through adjudicatory rulemaking during ad hoc litigation instead of pursuing legislative type rulemaking under the Administrative Procedures Act (APA). SEC v. Chenery Corp., 332 U.S. 194, 203, 67 S.Ct. 1575, 1580, 91 L.Ed 1995 ___ (1947); NLRB v. Bell Aerospace Co., 416 U.S. 267, 292-93, 94 S.C.t 1757, ___, 40 L.Ed. 134, 153 (1974). Given that cost of living adjustment is a determination that is "varying in nature," in that the cost of

living continually changes, I conclude that it is well within the Commission's discretion to announce a regulation increasing the maximum attorney fee rate in an EAJA proceeding. Chenery, 332 U.S. at 202-03, 67 S.Ct. at 1580, 91 L.Ed. at 2002.

Although it is clear the announcement of a retroactive rule is not generally permitted in legislative type rulemaking, it is permitted in an adjudicatory rulemaking. In Motion Pictures Ass'n of America Inc. v. Oman, 969 F.2nd 1154 (1992), the D.C. Circuit noted:

> In adjudication, retroactivity is the norm; in legislation it is the exception.

969 F.2d at 1155, see also Bowen, 488 U.S. 204, 221, 109 S.Ct. 468, ___, 102 L.Ed. 492, 508 (1988) (J. Scalia concurring) (in agency adjudications "retroactivity is not only permitted by the standard."). Thus, the absence of an express statutory grant of retroactive rulemaking authority in the EAJA does not prohibit the Commission from announcing a retroactive rule in an adjudicatory EAJA proceeding.

It is noteworthy that the federal courts routinely make retroactive cost of living adjustments to the maximum attorney fee rate in EAJA cases involving civil actions. See e.g. Wilkett v. I.C.C., 844 F.2d 867, 875 (D.C. Cir. 1988); Perales v. Casillas, 950 F.2d at 1076 (5th Cir. 1992); Chiu v. United States, 948 F.2d 711, 718 (Fed. Cir. 1991); Garcia v. Schweiker, 829 F.2d 396, 3rd Cir. 1987); Compare Hoffman v. C.I.R., 978 F.2d 1139, 1150 (9th Cir. 1992) (authorizing COLA increase under statute modeled after EAJA which permits recovery of attorney fees in tax cases). These courts have reasoned that in enacting the cost of living provision, Congress intended the EAJA to be "self updating in light of the modern realities of inflation." Perales, 950 F.2d at 1076. There is nothing in the EAJA which would indicate to me that Congress intended the statute to be "self-updating" with respect to participants in "civil actions" but not with respect to participants in "agency adjudications." Compare 28 U.S.C. § 2414(d)(2)(A)(ii) and 5 U.S.C. § 504(b)(1)(A)(ii).

It would appear that any holding to the contrary would, for all practical purposes, make the cost of living provision superfluous. As set out above, the EAJA unambiguously authorizes cost of living adjustments to the maximum rate. 5 U.S.C. § 504(b)(1)(A)(ii). The cost of living provisions was specifically included by Congress to protect the EAJA's maximum attorney fee rates from inflationary pressures. See Action on Smoking and Health v. C.A.B., 724 F.2d 211, 217 (D.C.Cir. 1984)("The cost of

living language reflected congressional awareness that, with inflation, the fee limiting provision could defeat the purpose of the statute."). Since the enactment of the EAJA in 1981, the Commission has not undertaken legislative type rulemaking to adjust the maximum attorney fee rate for increases in the cost of living. Were I to hold that the Commission did not have authority to announce a retroactive rule in this EAJA proceeding, Applicant, having incurred legal expenses at 1995 and 1996 attorney fee rates, would be reimbursed at the attorney fee rate established in 1981. Such a holding would effectively read the cost of living provision out of the statute.

To construe the statute in a manner that gives no effect to the cost of living provision would defeat the purpose of the EAJA. The central objective of the EAJA "was to encourage relatively impecunious private parties to challenge unreasonable or oppressive governmental behavior by relieving such parties of the fear of incurring large litigation expenses." Spencer v. N.L.R.B., 712 F.2d 539, 549-50 (D.C. Cir. 1983) (citations to the legislative history omitted). In this case, an award at $75 per hour would not satisfy the Congressional objective. Applicant, a relatively impecunious private party as indicated by its net worth statement, successfully challenged an unreasonable MSHA policy. In so doing, Applicant incurred legal fees totaling approximately $20,878.50. If Applicant is compensated for attorney fees at $75 per hour, the award for attorney fees in Docket No. WEST 93-462-M would only reach $12,144. The difference of $8,734.50 is what I consider "a large litigation expense" that Congress did not intend Applicant, being an impecunious operator, to bear.

Given that the Commission has authority to announce a regulation increasing the maximum attorney fee rate in this EAJA proceeding, I find that increases in the cost of living between September 1981, when the EAJA was enacted, and December 1994, when legal services were first rendered to Applicant, "justify" an increase in the maximum attorney fee rate. Oklahoma Aerotronics, Inc. v. United States, 943 F.2d 1344, 1349 (D.C. Cir. 1991) (citing Wilkett v. I.C.C., 844 F.2d 867, 875 (D.C. Cir. 1988). The Consumer Price Index ("CPI") when counsel for Applicant was first retained in December 1994 was 149.7. United States Department of Labor Bureau of Labor Statistics, CPI Detailed Report, Data for December 1994: Consumer Price Index for All Urban Consumers (CPI-U), All Expenditures at p.7. The CPI when the EAJA went into effect in September of 1981 was 92.2. Id. By dividing the CPI for December 1994 by the CPI for September 1981, I find that the cost of living increased by a multiplier of 1.62. This undisputed increase in the cost of living

justifies a higher rate of $121.50 which is the statutory maximum of $75 per hour adjusted by the 1.62 multiplier.

In light of the foregoing, I find that in connection with the attorney fees incurred in Docket No. WEST 93-462-M, Applicant is entitled to recover the hours awarded above at the rate of $121.50.

F. **Expenses**

Applicant seeks to recover "other expenses" in addition to the attorney fees. The Secretary opposes an award of expenses to Applicant, arguing that such expenses are not authorized under the EAJA.

The EAJA states that "fees and other expenses" can be recovered. 5 U.S.C. 504(a)(1). Although the EAJA does not provide an exhaustive list of expenses that can be included in an award, the examples included the definition of "fees and other expenses" indicate that a large category of expenditures are reimbursable. Jean v. Nelson, 863 F.2d 759, 777 (11th Cir. 1988). The EAJA provides:

> "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the parties' case, ...

5 U.S.C. § 504 (b)(1)(A).

The Commission, through legislative type rulemaking, has interpreted the statutory language to permit recovery of expenses of the type sought by Applicant. The Commission Rules provide:

> ... 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. § 2704.106 (emphasis added); see also 46 Fed. Reg. 15895, 15897-8 (March 10, 1981)("'Reasonable expenses' is intended to include the types of expenses customarily charged to clients, such as travel expenses or photocopying, but not items ordinarily included in hourly fees, such as secretarial services.")

The interpretation set out in the Commission's Rules is consistent with the weight of authority in the federal circuit courts of appeal. The majority of federal courts have construed "fees and other expenses" language in the EAJA to encompass "costs that are ordinarily billed to a client." International Woodworkers of America v. Donovan, 769 F.2d 1388, 1392 (9th Cir. 1985)(telephone, air courier, attorney travel expenses are recoverable); See e.g. Alston v. Secretary of Health and Human Services, 808 F.2d 9,12 (2d. Cir. 1986) (telephone, postage, travel and photocopying expenses are recoverable); Jean v. Nelson, 863 F.2d 759, 777 (11th Cir. 1988)(litigation expenditures recoverable): but see Massachusetts Fair Share v. Law Enforcement, 776 F.2d 1066, 1069-70 & nt.2 (D.C. Cir., 1985).

In this case, Applicant seeks to recover two categories of expenses: "additional charges" and "interest." Both categories of expenses are separately and prominently itemized on the legal invoices that support the Application.

With respect to the "additional charges," I find that long distance calls, postage, duplication, photocopies, fax, express mail, court reporter, and Westlaw are the type of expenses that would ordinarily be billed separately to clients. Counsel for Applicant represented that these charges are ordinarily billed separately to clients and the Secretary has not argued to the contrary. I further find that these additional charges are reasonable expenses of counsel. None of the additional charges appear to be excessive and all of the additional charges were necessary to enable counsel to advance Applicant's case. Therefore, I award $2,118.81 for the expenses identified as additional charges.

In considering Applicant's request for "interest," I am mindful that as a general rule, interest awards are not available against the United States. See Library of Congress v. Shaw, 478 U.S. 310, 106 S.Ct. 2957, 2961, 92 L.Ed. 250 (1960). Applicant, however, is not seeking an award of interest against the United States. Specifically, Applicant is not asking for compensation from the United States for delay in payment by the United States. Rather, counsel for Applicant seeks compensation from Applicant for delay in its payment of legal invoices in the form of "interest on overdue balances." I find that the interest expense, which has resulted from Applicant's delay in payment, is a reasonable cost of providing legal or any type of service. I further find, as Counsel has represented and the Secretary has not disputed, that such interest is ordinarily billed separately to clients. Although it is true that Applicant could have avoided the interest expense by paying its legal invoices in a timely manner, I note that Applicant would not have had to pay

any legal invoices whatsoever but for the Secretary's unreasonable attempt to enforce the underlying citation. Therefore, I award $2,339.02 for the expenses identified as interest.

III

Fees and Other Expenses for EAJ 96-3

In addition to seeking fees and expenses incurred in connection with the underlying civil penalty proceeding, Applicant has also sought to recover fees and expenses incurred in presenting and defending its Application. In this connection, Applicant has moved to amend its original Application to request reimbursement for fees and expenses incurred in preparing, defending the Application. I have granted the motions to amend the Application. In the Application, as amended, Applicant seeks to recover $17,027.50 in attorney fees in connection with its preparation and defense of the Application in this proceeding, Docket No. EAJA 96-3.

A. Fees for Fees

In considering Applicant's unopposed request, I adopt the position of D.C. Circuit and hold that a victorious EAJA applicant is entitled to recover fees and expenses incurred in connection with its EAJA application in an EAJA proceeding, regardless of whether the Secretary's opposition to the application was substantially justified or not. Cinciarelli v. Reagan, 729 F.2d 801, 810 (D.C. Cir. 1984); see also Trichilo v. HHS, 823 F.2d 702, 707 (2nd Cir. 1987); Jean v. Nelson, 148, 155 (3rd Cir. 1987); but see Rawlings v. Heckler, 725 F.2d 1192, 1196 (9th Cir. 1984). As the D.C. Circuit pointed out:

> if we require every victorious EAJA plaintiff to make a separate claim for fees for bringing the first EAJA suit, and permit the government to claim that its first EAJA defense was substantially justified on the merits, we face the distinct possibility of an infinite regression of EAJA litigation.

729 F.2d at 810. Given that the Commission Rules are silent on the issue of fees for fees, I view Applicant's fees and expenses incurred presenting and defending its Application "as part of the government's cost of taking positions that are not substantially justified." Trichilo, 823 F.2d at 707. I note that my holding appears to be consistent with the Secretary's position set out in

his July 15, 1996, Prehearing response. ("The Secretary agrees that if the Court finds that the Secretary's position in the underlying proceeding was not substantially justified, Respondent can recover reasonable attorney fees including those incurred in the presentation of its [sic] application for fees.")

By so holding, however, I do not exempt Applicant's request for fees and expenses associated with this docket from review. The EAJA provides:

> The adjudicative officer of the agency may reduce the amount to be awarded, or deny an award, to the extent that the party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy.

5 U.S.C. § 504(a)(3); cf. 29 C.F.R. § 2704.105(b). Thus, I review Applicant's request for fees and expenses in connection with this EAJA proceeding under a standard of reasonableness.

In this proceeding alone, counsel for Applicant has expended over 128 hours of legal work. Although at first blush, it would seem that these hours are excessive, particularly considering that Counsel spent only 162 hours getting the citation vacated in Docket No. WEST 93-462-M, I nonetheless find that hours expended by counsel were reasonable.

First, I note that much of the work performed by counsel for Applicant focused on the substantial justification issue. Given that the Secretary argued that his position was substantially justified despite my summary decision in Docket No. WEST 93-462-M, I think that it was reasonable for counsel for Applicant to fully rebut the Secretary's arguments on this essential threshold issue.

Second, the instant proceeding raised numerous issues of first impression before the Commission. It appears that in the 15 years since the EAJA's enactment no other mine operator has ever won an award of attorney's fees and expenses against MSHA. I am aware of only one other EAJA decision issued by the Commission. Russell Collins and Virgil Kelley v. Secretary of Labor (MSHA), 5 FMSHRC 1339 (July 1983). The Collins case involved Section 110(c) proceedings and did not reach the issues of apportionment, rate, and expenses raised by the Secretary in this proceeding. Because of the numerous issues of first impression raised by the Secretary in this proceeding, counsel for Applicant acted reasonably in thoroughly researching and briefing these

issues. I additionally note that the research focused on complex issues of federal administrative law and conflicting federal circuit law.

Third, I further note that the "fees for fees" and the "adversary adjudication" issues addressed in this section also required counsel for Applicant to undertake considerable research and analysis.

In summary, I find that Applicant has not unduly or unreasonably protracted these EAJA proceedings. I hold that an award for the 136.22 hours requested in the Amended Application, pertaining to Docket No. EAJ 96-3, is just.

B. **Adversary Adjudication**

The final issue that I must address is the rate at which fees will be awarded for the hours requested in connection with the instant EAJA proceeding. On March 29, 1996, Congress amended the EAJA to raise the statutory maximum attorney fee rate to $125 per hour. Pub.L. 104-121. The Amendments apply to "adversary adjudications commenced on or after the date of the enactment of this subtitle." Id. Although both parties agree that the new rate does not apply to the underlying proceeding, Docket No. WEST 93-462-M, Applicant argued that the new rate does apply to the instant EAJA proceedings while the Secretary argued that it does not apply.

I find that the instant EAJA proceeding is an "adversary adjudication" as defined by the EAJA. 5 U.S.C. § 504(b)(1)(c). An "adversary adjudication" is an adjudication "required by statute to be determined on the record after opportunity for an agency hearing." 5 U.S.C. § 554(a); see Escobar Ruiz v. INS, 838 F.2d 1020, 1023 (9th Cir. 1988). The EAJA requires EAJA proceedings, such as Docket No. EAJ 96-3, to be determined on the record after an opportunity for a hearing. 5 U.S.C. § 504(a); 29 C.F.R. § 2704 et seq.

I find no merit to the Secretary's arguments to the contrary. Although the instant EAJA proceeding, Docket No. EAJ 96-3, is admittedly related to the underlying civil penalty proceeding, Docket No. WEST 93-462-M, it is, nonetheless a separate and distinct adjudication. Compare 5 U.S.C. § 504(a) and 30 U.S.C. § 815; compare 29 C.F.R. § 2700 et seq. and 29 C.F.R. § 2700 et seq. and 29 C.F.R. § 2704 et seq. Moreover, because I have already decided that the substantial justification defense is not available with respect to a request for fees for fees, my treatment of the instant EAJA proceeding as an adversary adjudi-

cation, as that term is defined in the EAJA, will not create "an endless litigation loop" as the Secretary argues.

Given that the instant adversary adjudication, Docket No. EAJ 96-3, was commenced on April 24, 1996, after the effective date of the EAJA Amendments, I hold that the $125 per hour rate applies to all fees incurred by Applicant in connection with Docket No. EAJ 96-3.

IV

CALCULATION OF AWARD

Based on the foregoing, I calculate the Applicant's award as follows:

Fees:	$36,697.22	
WEST 93-462-M:	$19,669.72	
Direct:		$11,682.25 (reflects 96.15 hours @ $121.50)
Necessary:		$4,648.59 (reflects 38.26 hours @ $121.50)
Proportional:		$3,338.88 (reflects 85% of 32.33 hours @ $121.50
EAJ 96-3:	$17,027.50 (reflects 128.38 hours @ $125.00)	
Expenses:	$4,457.83	
Additional Charges:	$2,118.81	
Interest:	$2,339.02	
Total Award:	$41,155.05	

ORDER

In view of the foregoing, Applicant is **AWARDED** $41,155.05 in attorney fees and other expenses in connection with Docket Nos. WEST 93-462-M and EAJ 96-3. Pursuant to 29 C.F.R. § 2704.310, the Secretary of Labor is hereby **ORDERED TO PAY** $41,155.05 to Ruffennach Law Offices COLTAF c/o Contractor's Sand and Gravel, Inc., 1675 Broadway, Suite 1800, Denver, CO 80202 within 15 days of the date of this Order.

August F. Cetti
Administrative Law Judge

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