

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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November 14, 1996

SAMUEL J. MCLAUGHLIN, Employed : EQUAL ACCESS TO JUSTICE
by CONSOLIDATION COAL COMPANY : PROCEEDINGS
Applicant :
 : Docket No. EAJ 96-5
v. :
 : Formerly WEVA 94-366
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
Respondent :

ORDER REQUIRING FURTHER SUBMISSIONS

This proceeding arises under the Equal Access to Justice Act (28 U.S.C. § 2412, et seq.) (EAJA). The Applicant, Samuel J. McLaughlin, seeks an award of legal fees and expenses resulting from his defense of the Secretary of Labor's allegation that McLaughlin "knowingly, authorized, ordered, or carried out" a violation of 30 C.F.R. § 75.1101-23, a mandatory safety standard for underground coal mines. The allegation was the subject of a civil penalty proceeding filed by the Secretary pursuant to section 110(c) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. § 820(c); Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Samuel J. McLaughlin, employed by Consolidation Coal Company, Docket No. WEVA 94-366). The proceeding was consolidated with other civil penalty proceedings (Consolidation Coal Company, Docket No. WEVA 94-57, J.T. Straface employed by Consolidation Coal Company, Docket No. WEVA 94-368, and Robert Welch, employed by Consolidation Coal Company, Docket No. WEVA 94-384), and the cases were tried together at a duly noticed hearing.

After the hearing, the Secretary moved to dismiss the section 110(c) allegation against McLaughlin. I granted the motion in a decision on the merits of the consolidated cases. I stated, "[T]he Secretary [has] moved to dismiss the section 110(c) allegation against McLaughlin The case is the Secretary's to bring and the Secretary's to prosecute. I do not question the Secretary's judgement in this regard" (Consolidation Coal Company, 16 FMSHRC 1189, 1238-39, (July 1996)).

The decision was appealed to the Commission, which granted review on August 28, 1996. Because review does not encompass that portion of the decision dismissing the section 110(c) allegation against McLaughlin, I regard the dismissal as final for the purpose of this proceeding (See 29 C.F.R. § 2704.204(c)).

NEED FOR FURTHER SUBMISSIONS

The Commission's rules require determination of an EAJA award to be based on the record of the proceeding for which fees and expenses are sought, except that the judge may order such further proceedings or submissions as are necessary for full and fair resolution of issues arising from the application (29 C.F.R. § 2704.306(B)).

The first prerequisite for EAJA entitlement is that the award be made to a "prevailing party." McLaughlin meets this requirement. He was a "party" to the underlying civil penalty proceeding, and the Secretary's case against him was dismissed on the Secretary's motion.

Second, if a prevailing party is an individual, he or she must have a net worth of no more than \$2 million; or, if a business, must have a net worth of no more than \$7 million with no more than 500 employees (28 U.S.C. § 1412(d)(2)(B)). McLaughlin is an individual and his net worth is less than \$2 million. (The Secretary does not dispute McLaughlin's sworn statement that his net worth (assets less liabilities) is \$115,302.51 (Application for Award of Fees, Exh. A; see Sec.'s Response to Application)).

Thus, McLaughlin meets two of the prerequisites for entitlement, and, under the Commission's rules, the burden shifts to the Secretary to establish that the position taken against McLaughlin was "substantially justified" (29 C.F.R. § 2704.105(a)). However, before the issue of justification can be considered, there is a question that requires further submissions from McLaughlin.

McLaughlin seeks attorneys fees of \$19,695 and costs and expenses of \$13,044.97. He claims this represents "his attorney's fees and expenses in defending the . . . section 110(c) proceeding brought against him by the Secretary" (Id. 4, emphasis added). Appendix B, which is attached to McLaughlin's application, details his claims, but as the Secretary's counsel notes, McLaughlin has not submitted any evidence that "he actually incurred the costs and expenses listed" (Sec.'s Response to Application 15).

The principal purpose of the EAJA is to "to avoid the deterring effect which liability for attorney fees might have on parties' willingness and ability to litigate meritorious civil claims or defenses against the Government" (U.S. v. Paisley, 957 F.2d 1161,1164 (4th Cir. 1992)). Obviously, if another party pays the claimed fees and expenses; or, if the claimant knows, through a formal agreement or otherwise, that another party will pay them, the claimant may not be hindered in the ability to litigate. Obviously, as well, the claimant may subvert the "net worth" prerequisite of § 2412(d)(2)(B), by "standing in" for a business worth more than \$7 million and with more than 500 employees. The claimant may not have "incurred" the costs within the meaning of § 2412(d)(1)(A) (S.E.C. v. Comserv Corp, 908 F2d 1407, 1413-1416 (8th Cir. 1990)).

In such instances, the party seeking reimbursement may have to establish that he or she actually paid or was otherwise responsible for the claimed amounts and was not reimbursed, or was not entitled to reimbursement.

ACCORDINGLY, it is **ORDERED** that within **15 days** of the date of this order McLaughlin submit the following:

1. A copy of the bill for each fee and expense claimed;
2. A copy of the check or receipt showing the identity of the payee, the amount of the payment and the date of Payment for each fee and expense claimed;
3. A copy of any written contract or other written agreement entitling McLaughlin to reimbursement for payment of any fee and expense claimed, or a sworn Written description of any such oral agreement;
4. If McLaughlin has paid any of fees or expense claimed, and has been reimbursed, a sworn statement specifying the fee or expense paid, the date of payment, the amount and date of reimbursement and the identity of the reimbursing entity;
5. If another entity or person has paid any claimed fee or Expense, a sworn statement specifying the fee or expense paid, the identity of the payer and when such payments Were made;

6. If another entity or person has promised or otherwise entered into an obligation to pay any of the claimed amounts but has not yet paid them, a sworn statement Explaining the details of said promise or obligation, include the identity of the entity or person obligated to pay and any contingencies attending the promise or obligation.

David Barbour
Administrative Law Judge

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