

**Editor's Note: Reconsideration Granted; Decision Set Aside; Matter Referred to Hearings Division**

CITIZENS COAL COUNCIL ET AL.

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 97-89

Decided September 15, 1998

Petition for award of attorney fees and expenses under 30 U.S.C. § 1275(e) (1994) and implementing rules. IBLA 93-618.

Denied.

1. Surface Mining Control and Reclamation Act of 1977: Attorney Fees/Costs and Expenses: Final Order--Surface Mining Control and Reclamation Act of 1977: Citizen's Complaints: Generally

A petition for award of attorney fees and expenses under 43 C.F.R. § 4.1294 is denied when the petitioners fail to show a connection between their participation in administrative proceedings before the Department and a settlement of Federal litigation in a United States District Court.

APPEARANCES: Walton D. Morris, Esq., Charlottesville, Virginia, and Thomas Galloway, Esq., Boulder, Colorado, for Petitioners; John Austin, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

On December 11, 1996, Citizens Coal Council and National Wildlife Federation filed a petition with this Board for an award of \$62,782 for attorney fees and \$2,622.39 for expenses incurred during legal work done on Appellants' behalf during a citizen enforcement action brought against the Pittston Coal Company. Petitioners' complaints sought reclamation of abandoned coal mines and payment of delinquent penalties and fees owed under Departmental regulations 30 C.F.R. §§ 773.5 and 773.15. The claim for attorney fees is made pursuant to section 525(e) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1275(e) (1994), and implementing regulations at 43 C.F.R. §§ 4.1290 through 4.1296.

Under 43 C.F.R. § 4.1290, expenses and attorney fees may be awarded as a result of participation in an administrative proceeding before

the Department that results in a final order issued by this Board. The administrative proceeding upon which Petitioners rely to support their application for fees and expenses is a case docketed as IBLA 95-338 and decided as West Virginia Highlands Conservancy v. Office of Surface Mining Reclamation and Enforcement (OSM), 136 IBLA 65 (1996), recon. denied, IBLA 93-338, (Sept. 3, 1996). Therein, we affirmed a refusal by OSM's Big Stone Gap Field Office to take action on Petitioners' complaints involving 13 Virginia permit sites mined by contract miners allegedly under Pittston control. Our decision affirmed OSM's refusal to take action on Petitioners' complaint while an injunction remained pending in Pittston Co. v. Lujan, No 91-006-A (W.D. Va. 1992) prohibiting OSM from enforcing the applicant/violator system (AVS) rules at 30 C.F.R. Part 773 against Pittston; our opinion in IBLA 95-338 denied all relief sought by Petitioners, holding that they "failed to show error in these decisions wherein OSM refused to enforce 30 CFR 773.5 and 30 CFR 773.15(b)(1), against the Pittston Company, while the injunction issued in Pittston v. Lujan remains in effect." 136 IBLA at 69.

Petitioners now contend that, notwithstanding their lack of success on the merits of the appeal upon which their request for fees and expenses rests, their

complaints secured the comprehensive disclosure of Pittston's contract operations that the Petitioners had sought from the outset of their Pittston compliance effort. Because OSM and state regulators had required Pittston to disclose only its link to Glory [Coal Company, a delinquent contract miner,] in response to previous complaints, the Petitioners correctly perceived that the simultaneous filing of numerous complaints concerning Pittston contract operations, coupled with a demonstration of the Petitioners' capability and commitment to research and file still others, would cause Pittston to divulge most of its contract operations.

(Statement of Reasons (SOR) at 9, 10.) According to Petitioners, the appeal filed with the Board was part of a successful effort that led to an agreed settlement in Pittston v. Lujan. Petitioners allege that:

The enforcement action and permit disclosures that resulted from the Petitioners' citizen enforcement initiative prompted Pittston to negotiate a comprehensive reclamation and fee payment agreement with OSM. During these negotiations, OSM sought Petitioners' views on the adequacy of reclamation at particular contract mine sites identified in the Petitioners' complaints. OSM actively discussed the prospect of a joint motion dismissing the Petitioners' appeals in Pittston cases based upon the relief that OSM expected the anticipated agreement to provide.

(SOR at 12.)

These contentions are disputed by OSM, although it is admitted that a reclamation and fee payment agreement negotiated between Pittston and OSM ended the pending Pittston litigation after Petitioners' appeal to this Board was filed; Petitioners did not, however, participate in the settlement agreement negotiations. Denying that Petitioners' Virginia complaints were a catalyst in the settlement agreement reached in the Federal court litigation, OSM states that the appeal to this Board had no effect on negotiations for settlement of Pittston v. Lujan, which began several months before Petitioners filed their appeal to this Board; OSM also denies that the regulators had limited their investigation of Pittston contract miners to the Glory Coal Company contract before Petitioners brought the existence of other similar contract operations by Pittston to their attention. Invoking language from the fee payment regulations at 43 C.F.R. §§ 4.1290 and 1294, OSM argues that Petitioners failed to prevail on their appeal to this Board, failed to achieve some degree of success on the merits, and have not shown that they made a substantial contribution to a full and fair determination of the issues raised by their appeal to this Board. This is so, OSM concludes, because there is no "causal nexus" between the result obtained by OSM through settlement negotiations with Pittston in connection with Pittston v. Lujan and the appeal to this Board docketed as IBLA 95-338.

Regulations implementing SMCRA section 525(e) require that there must be a "final order" issued either by an administrative law judge or this Board before fees and costs can be awarded. 43 C.F.R. § 4.1290(a). To qualify for an award of costs and fees, 43 C.F.R. § 4.1294(b) requires further that one show "at least some degree of success on the merits," and that one have made "a substantial contribution to a full and fair determination of the issues." It is true that nothing in the fees regulation requires that a final order decide the merits of the dispute. 43 C.F.R. § 4.1290(a)(2); and see Kentucky Resources Council Inc. v. Babbitt, \_\_\_ F. Supp. \_\_\_ (E.D. Ky. Feb. 20, 1998) (KRC). The KRC opinion found that it is a prerequisite for an award of fees under SMCRA that the fee applicant show his appeal to this Board has some bearing on actions taken by OSM officials: "In other words, there must be a causal nexus between the plaintiffs' actions in prosecuting the appeal to the Board and the corrective actions taken by OSM." Id., slip op. at 13.

While the subject of IBLA 95-338 was similar to that in the Pittston v. Lujan litigation, the administrative appeal was not a directly related action. Nonetheless, Petitioners suggest they were indirectly instrumental in forcing Pittston to reveal the extent of the contract coal operations carried on by the company because, in part, counsel for Petitioners discussed possible connections between other sites involving Pittston contractors with OSM. Petitioners argue that, but for their complaints before the Department, OSM would not have required Pittston to reveal the extent of the contract coal mining operations that were subject to regulation under the AVS rules when settlement of Pittston v. Lujan was negotiated.

This interpretation of the case is disputed by OSM. Challenging Petitioners' claim that their administrative appeal had any effect on the

Pittston settlement, OSM states the agency position on the causal nexus question as follows:

OSM and Pittston engaged in protracted settlement discussions which lasted approximately 31 months, from October, 1993, until the settlement agreement was executed in July, 1996. Through those settlement discussions, Pittston disclosed a list of approximately 600 so-called "contract operators" (which became known as "Pittston's Contractor List") which it might have controlled within the meaning of 30 C.F.R. § 773.5.

By agreement of OSM and Pittston, OSM held the Contractor List in strictest confidence and did not disclose its contents to the public or to these Petitioners. Pittston and OSM spent more than two years investigating Pittston's alleged ability to control those contract operators and determining the unabated violations of the Surface Mining Control and Reclamation Act of 1977 which should be attributed to the entities Pittston allegedly control.

Petitioners have alleged the first of their Virginia citizen's complaints was filed on November 18, 1993. The filing of the relevant citizen's complaints (and more importantly, the filing of their formal appeal to the Board) occurred well after OSM and Pittston commenced their settlement discussions. OSM therefore avers that neither the citizen's complaints of Petitioners nor the administrative appeal to IBLA docketed as IBLA 95-338 were catalysts for the Settlement Agreement, and demands strict proof of Petitioners' catalyst theory.

(Answer at 16, 17.)

[1] As the KRC decision points out at page 13 of the slip opinion, it is essential, if attorney fees are to be awarded, that there be a link between the administrative appeal that provides a potential for fee payment and the relief obtained by that appeal which supplies the final element needed for an award to be made. While Petitioners allege the existence of such a linkage, OSM undermines the factual predicate stated by Petitioners and refutes the existence of any such linkage in this case. Given the facts stated above, there is no discernable connection between the administrative appeal taken by Petitioners involving the 13 Virginia sites and the settlement agreement made in the Pittston court case. The contention by Petitioners that, but for their administrative appeal, OSM would not have sought to include more than one contract mining site in the settlement agreement is refuted by OSM, as is the suggestion that the Virginia contract operations were outside the purview of settlement negotiations that were then already in progress or the inference that conversations between counsel for Petitioners and OSM affected the settlement of the Pittston case. Petitioners do not dispute that they must show a link between their appeal and the result obtained by OSM in bargaining with Pittston is dispositive of this petition; without some proof that

the appeal to this Board had some effect on the settlement of the Pittston case, Petitioners' request for fees and expenses cannot be allowed. No such proof appears in the record presently before us.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the petition for attorney fees and expenses is denied.

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Franklin D. Arness  
Administrative Judge

I concur:

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Gail M. Frazier  
Administrative Judge