

RITH ENERGY, INC.

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT  
SAVE OUR CUMBERLAND MOUNTAINS, BLEDSOE COUNTY CHAPTER, INTERVENOR

IBLA 88-519

Decided March 30, 1989

Petition for award of costs and expenses, including attorneys' fees, in accordance with section 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. | 1275(e) (1982), and 43 CFR 4.1290 through 4.1296.

Motion to dismiss denied; filing of new petition directed.

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

The forum in which a petition for an award of costs and expenses, including attorneys' fees, is properly filed is dictated, in accordance with 43 CFR 4.1291, by the forum that issues the "final order." If the Administrative Law Judge's decision becomes final because no party seeks timely review by the Board of that decision, the petition must be filed with the Administrative Law Judge. However, if timely review is sought, the Board's disposition thereof will be considered the "final order" for purposes of 43 CFR 4.1291, and the petition must be filed with the Board.

2. Surface Mining Control and Reclamation Act of 1977: Attorneys' Fees/Costs and Expenses: Generally-- Surface Mining Control and Reclamation Act of 1977: Attorneys's Fees/Costs and Expenses: Final Order

A petition for an award of costs and expenses, including attorneys' fees, must be filed within 45 days of receipt of the decision or order of the Board that

disposes of the case, even if a petition for reconsideration or other motion is filed concerning that decision or order.

3. Surface Mining Control and Reclamation Act of 1977: Attorneys' Fees/Costs and Expenses: Generally--Surface Mining Control and Reclamation Act of 1977: Attorneys' Fees/Costs and Expenses: Final Order

When good cause exists for the failure to file a petition for an award for costs and expenses within 45 days of receipt of a final order, there is no waiver of the right to such an award.

APPEARANCES: Elizabeth S. Tonkin, Esq., and Carol S. Nickle, Esq., Knoxville, Tennessee, for Save Our Cumberland Mountains, Bledsoe County Chapter; Michael W. Boehm, Esq., Chattanooga, Tennessee, for Rith Energy, Inc.

#### OPINION BY ADMINISTRATIVE JUDGE IRWIN

On June 6, 1988, counsel for Save Our Cumberland Mountains, Bledsoe County Chapter (SOCM), Intervenor in Rith Energy, Inc., 101 IBLA 190 (1988), filed a Renewal of Motions for Award of Fees, Costs and Expenses and a supporting memorandum with Administrative Law Judge David Torbett. Counsel had filed motions for their fees, costs, and expenses in Hearings Division Docket Nos. NX 7-169-R and NX 88-9-R with the Administrative Law Judge in September 1987, after a hearing on an application for temporary relief held in August 1987, and in December 1987, after the Administrative Law Judge issued decisions in each of the two cases on November 10, 1987, and after Rith Energy, Inc. (Rith) had filed notices of appeal of each decision with the Board. On February 17, 1988, the Board issued its decision on the consolidated appeals of Rith from the November 10, 1987, decisions of the Administrative Law Judge. Motions to reconsider the Board's decision were denied and a motion to clarify it was granted by Board order of April 18, 1988.

Rith filed a motion to dismiss the renewed motions with the Administrative Law Judge on the grounds that his November 10, 1987, decisions stated any petition for attorneys' fees and expenses "must be timely filed in accordance with 43 CFR | 4.1290 et seq.," and that 43 CFR 4.1291 provides that the petition must be filed with the Board, if the Board issued the final order, within 45 days of receipt of the order. Even if the time is measured from SOCM's receipt of the Board's April 18, 1988, order on April 21, 1988, rather than its receipt of its February 17, 1988, decision, Rith maintains "it is clear that SOCM has not filed its petition with the proper tribunal in a timely fashion."

SOCM filed a memorandum in opposition to Rith's motion to dismiss and Rith filed a response to that memorandum with Judge Torbett before he forwarded all four documents to the Board with a memorandum stating: "I no

longer have jurisdiction in these cases and any action on fees, costs, and expenses must be taken by the Board."

Rith has pursued its motion to dismiss before the Board:

While the intervenor, in a Memorandum in Opposition to one of Rith's motions to dismiss, urged the Administrative Law Judge [ALJ] to transfer the petitions to the Board "[s]hould the ALJ decide that the IBLA would more appropriately determine the fee issue \* \* \*," nothing in the applicable regulations authorizes the intervenor to impose the burden of determining where a pleading should properly be filed on an Administrative Law Judge. Similarly, even if the ALJ felt that a matter pending before him should have been brought before the Board, nothing in the regulations authorizes him to simply forward on to the Board the pleadings filed with him. \* \* \* This Board has previously held that filing with the Office of Hearings and Appeals did not constitute filing with the Board. Monterey Coal Co. v. OSM, IBSMA 80-82, 2 IBSMA 231 (September 5, 1981). The failure to dismiss this "appeal/petition" would mean that the Board would have to ignore the applicable regulations, overrule precedent, and sanction a practice of allowing any pleading and/or notice to be filed with an ALJ and have him direct it to the correct administrative tribunal.

(Motion to Dismiss Appeal, filed July 20, 1988, at 2-3).

Counsel for SOCM responded by iterating the reasons why they filed the Renewal of Motions with the Administrative Law Judge, namely, because the petitions for fees "concern work performed and costs expended in proceedings before the ALJ," and because neither counsel represented SOCM in the appeals of the Administrative Law Judge's decisions to the Board. 1/

Additionally, Intervenor moves for clarification from the IBLA as to whether the IBLA is the proper tribunal to determine the attorney fee issue in this case. Because the fees are requested for work performed before the ALJ and the costs were expended at the trial level, Intervenor respectfully submits that the ALJ is the proper tribunal for determining the issue.

(Intervenor's Response to Rith's Motion to Dismiss Appeal and Intervenor's Motion for Clarification, filed Aug. 9, 1988, at 2-3).

[1] 43 CFR 4.1291 provides that a petition for an award of costs and expenses, including attorneys' fees, must be filed with the Administrative Law Judge who issued the final order, or, if the final order was issued by the Board, with the Board, within 45 days of the receipt of such

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1/ SOCM was represented by Thomas J. FitzGerald, Esq., in the appeals to the Board. Rith Energy, Inc., supra at 191.

an order. In Fresa Construction Co. v. Office of Surface Mining Reclamation & Enforcement, 101 IBLA 229, 233 (1988), we dismissed a petition for costs and expenses that was filed with the Board in conjunction with a petition for discretionary review of an order of an Administrative Law Judge disposing of a petition for review of a civil penalty (see 43 CFR 4.1270) as premature because we granted the petition for discretionary review, reversed the Administrative Law Judge's decision, and remanded the case to him for hearing. The Administrative Law Judge's decision did not become a "final order" for purposes of 43 CFR 4.1291 because it was the subject of the petition for discretionary review to the Board, and the Board's decision was not a final order because it reversed and remanded for further proceedings before the Administrative Law Judge. Subsequently, the Board also dismissed a petition from Fresa for costs and expenses associated with filing the petition for discretionary review with the Board, stating:

Fresa's petition is again premature. Our decision reversing Judge McGuire's order of dismissal and remanding the matter for a hearing was not the final order in this proceeding. It reinstated Fresa's petition for review of the civil penalty proposed for Cessation Order No. 87-11-018-01(1). The final order on the petition will be the decision of an Administrative Law Judge after the hearing, if no petition for discretionary review of his decision is filed with the Board, or, if a petition for discretionary review is filed, an order by the Board denying the petition for discretionary review or a decision by the Board on review of the Administrative Law Judge's decision.

(Fresa Construction Co. v. Office of Surface Mining Reclamation & Enforcement, IBLA 88-295, Order of Apr. 18, 1988).

Thus, the forum in which the petition is filed is dictated by the forum that issues the "final order." If the Administrative Law Judge's decision becomes final because no party seeks timely review by the Board of that decision, the petition under 43 CFR 4.1291 must be filed with the Administrative Law Judge. However, if timely review is sought, the Board's disposition thereof will be considered the "final order" for purposes of 43 CFR 4.1291, and the petition must be filed with the Board. This is also true in a case such as this, where, although the award is sought only for work done before the Administrative Law Judge, the Board issued the final order.

The regulations do not address who should rule on a petition. SOCM suggests that since it is seeking an award for work performed before Judge Torbett, he should resolve the petition in the first instance. Had his decision become final, that clearly would be so. However, where review of an Administrative Law Judge's decision or order is sought, the Board may proceed on a case-by-case basis in dealing with a petition for an award that is filed with it. In Natural Resources Defense Council, Inc. v. Office of Surface Mining Reclamation & Enforcement, 107 IBLA 339, 382-88, 96 I.D. \_\_\_, \_\_\_ - \_\_\_ (1989), the Board recently ruled on a petition for an

award of costs and expenses, including attorneys' fees, where the petitioners were seeking an award for work before both an Administrative Law Judge and the Board. The Board did not involve the Administrative Law Judge in reviewing the petition. However, that decision does not mean that we would not in another case, and we reserve the right to do so.

[2] Rith suggests SOCM should have filed its petition with the Board within 45 days after SOCM's receipt of the Board's decision of Feb. 17, 1988, rather than after receipt of the Board's April 18, 1988, order in response to the motions for reconsideration and for clarification because 43 CFR 4.1276 "does not affect the finality of any decision of the Board." (Motion to Dismiss Renewed Motions for Award of Fees, Costs and Expenses, filed June 8, 1988, at 2). The provision Rith refers to provides that "[t]he filing of a petition for reconsideration shall not \* \* \* affect the finality of any decision or order for purposes of judicial review." 43 CFR 4.1276(b). Although it could quite plausibly be maintained that the Board's April 18, 1988, order was its "final order" for purposes of 43 CFR 4.1291, we believe less confusion will be engendered by requiring a petition for costs and expenses to be filed with the Board within 45 days of receipt of the decision or order that disposes of the case, even if that decision or order is the subject of a petition for reconsideration or other later motion. If a party that has filed a petition for an award of costs and expenses incurs further costs and expenses in responding to a petition for reconsideration or other motion, it may file a supplement to its original petition.

[3] Under the circumstances of this case, it would be inappropriate to grant Rith's motion to dismiss SOCM's petition on the grounds it was not filed with the Board, or filed within 45 days of the Board's February 17, 1988, decision. 43 CFR 4.1291 provides that "[f]ailure to make a timely filing of the petition may constitute a waiver of the right to such an award." The language of the regulation was changed from "shall" to "may" in response to comments on the proposed rule urging that failure to make a timely filing for an award should not constitute a waiver of the right to such an award where good cause is shown for such failure. 43 FR 34385 (Aug. 3, 1978). In the absence of any previous ruling by the Board, SOCM's reasons for filing its petition with the Administrative Law Judge, rather than the Board, constitute good cause for its failure to file its petition with the Board, so there is no waiver of the right to an award. Similarly, because it was not clear until today's decision that a petition must be filed within 45 days of the Board decision or order that disposes of a case, rather than within 45 days of the Board's disposition of a petition for reconsideration thereof, SOCM's failure to file within 45 days of receipt of the February 17 decision does not require dismissal of its petition. Rith's motion to dismiss is denied. 2/

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2/ Nor will we dismiss SOCM's petition for costs and expenses on the grounds that it was filed with the Administrative Law Judge more than 45 days after one of the two counsel that represented it before the Administrative Law Judge received the Board's order of Apr. 18, 1988.

In its Memorandum in Support of Renewed Motion for Award of Fees, Costs & Expenses, counsel for SOCM state, at page 5:

Save Our Cumberland Mountains, Bledsoe County Chapter, is entitled to fees and costs for the administrative proceedings in this case pursuant to 43 CFR | 4.1294.

Appropriate costs and expenses including attorney's [sic] fees may be awarded --

\* \* \* \* \*

(b) To any person other than a permittee or his representative from OSM, if the person initiates or participates in any proceeding under the Act upon a finding that the person made a substantial contribution to a full and fair determination of the issue[s].

43 C.F.R. | 4.1294.

This is the language of 43 CFR 4.1294(b) before it was amended in 1985. See 50 FR 47224 (Nov. 15, 1985). The present standard for an award of costs and expenses from the Office of Surface Mining Reclamation and Enforcement requires, in addition to such a finding, that the person "prevails in whole or in part, achieving at least some degree of success on the merits."

Further, in reciting the history of its petitions in the Memorandum, SOCM refers to its September 8, 1987, Petition for Award of Fees, Costs, and Expenses "to be paid by Rith Energy, Inc.," and in the Renewal of Motions itself, SOCM moves "that the Administrative Law Judge award fees, costs and expenses to be paid by Rith Energy, Inc." It is 43 CFR 4.1294(a)(1), not 4.1294(b), that sets forth the standard for when costs and expenses may be awarded to any person from a permittee. That regulation, too, was amended in 1985.

Because it is unclear whether SOCM bases its petition on 43 CFR 4.1294(a) or 4.1294(b), and because the recent decision in Natural Resources Defense Council v. Office of Surface Mining Reclamation & Enforcement, supra, provides important guidance on our interpretation of both these provisions, as amended, as well as 43 CFR 4.1292, SOCM is directed to file a new petition for costs and expenses based on current law with the Board within 45 days from receipt of this decision. It shall serve a copy of the petition on counsel for Rith and counsel for the Office of Surface Mining Reclamation and Enforcement, who shall have 30 days from service to file a response. 43 CFR 4.1293.

Therefore, in accordance with the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the motion to dismiss is denied, and Save Our Cumberland Mountains, Bledsoe County

Chapter, is directed to file a new petition for costs and expenses in accordance with the preceding paragraph.

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Will A. Irwin  
Administrative Judge

I concur:

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Bruce R. Harris  
Administrative Judge