

KENTUCKY RESOURCES COUNCIL, INC., ET AL.

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

(ON JUDICIAL REMAND)

IBLA 98-203

Decided January 18, 2000

Petition for award of costs and expenses, including attorney fees, under section 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1275(e) (1994), on judicial remand.

Petition granted; attorney fees and expenses awarded.

1. Surface Mining Control and Reclamation Act of 1977: Attorney Fees/Costs and Expenses: Standards for Award

An award of attorney fees, pursuant to section 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1275(e) (1994), and its implementing regulations, 43 C.F.R. §§ 4.1290 to 4.1296, is guided by the number of hours reasonably expended in prosecuting a citizen's complaint and request for informal review before OSM and an appeal to the Board, all of which resulted in favorable action by OSM, as well as time spent in seeking the award. A fee award is also guided by the reasonable hourly rate for the work of the attorneys who prosecuted these actions.

2. Surface Mining Control and Reclamation Act of 1977: Attorney Fees/Costs and Expenses: Standards for Award

When a petitioner seeking attorney fees achieves substantial success on the merits of his claim, the fee award properly includes all time reasonably expended on the litigation including presentation of an alternative ground for success arising from the same facts and involving a related legal theory even though the alternative argument was rejected.

APPEARANCES: Walton D. Morris, Jr., Esq., Charlottesville, Virginia, L. Thomas Galloway, Esq., Boulder, Colorado, and Thomas J. Fitzgerald, Esq., Frankfort, Kentucky, for Petitioners; Thomas A. Bovard, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE GRANT

This case involving a petition for award of costs and expenses including attorney fees is before the Board on judicial remand. On December 14, 1993, Kentucky Resources Council, Inc., Kentuckians for the Commonwealth, and National Wildlife Federation filed a petition for award of fees and expenses 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. Petitioners claimed they are entitled to such an award as a result of their prosecution of a citizen's complaint before the Office of Surface Mining Reclamation and Enforcement (OSM) which initiated a case that was later resolved when an order of the Interior Board of Land Appeals (IBLA) dismissed the appeal in IBLA 93-669 on November 16, 1993. The factual background of the proceedings resulting from the citizens's complaints filed by petitioners with OSM, including the actions taken by the Lexington, Kentucky, Field Office (LFO) of OSM, the actions taken by OSM on petitioners' request for informal review, and the subsequent appeal to this Board, is set forth in our prior decision in this case, Kentucky Resources Council v. OSM, 137 IBLA 345 (1997), rev'd Kentucky Resources Council, Inc. (KRC) v. Babbitt, 997 F. Supp. 814 (E.D. Ky. 1998).

In their petition for award of attorney fees and expenses under section 525(e) of SMCRA, 30 U.S.C. § 1275(e) (1994), petitioners asserted that a party successfully prosecuting a citizen's complaint filed under section 521 of SMCRA, 30 U.S.C. § 1271 (1994), is entitled to recover fees for administrative proceedings involving successful prosecution of citizen's complaints before OSM and on appeal to this Board regardless of whether the Board ruled on the substantive or procedural issues raised in the complaint. (Petition of Kentucky Resources Council et al. (December 1993) at 13, 15.) In its answer to the petition, OSM argued that under the implementing regulations an appeal before the Board (or an administrative proceeding before an Administrative Law Judge) resulting in a final order after a full and fair determination of the issues is a prerequisite for fee recovery. Further, OSM contended that some degree of success in the appeal to the Board is required and that fees are not properly awarded where the appeal itself has no "causal nexus" to the actions of OSM officials. Conceding that if a complainant had to file an appeal in order to cause OSM to comply with the law it is entitled to compensation for work performed on those issues regardless of whether it was before OSM or the Board, OSM argued that the filing of an appeal which had no bearing on the actions ultimately taken by OSM officials is not compensable.

In our decision we noted that the implementing regulations specify who may file a petition for award of costs and expenses: "(a) Any person may file a petition for award of costs and expenses including attorneys'

fees reasonably incurred as a result of that person's participation in any administrative proceeding under the Act which results in-- * * * (2) A final order being issued by the Board." 43 C.F.R. § 4.1290(a). The right to recovery from OSM is further limited by regulation to a person other than a permittee who "initiates or participates in any proceeding under the Act, and who prevails in whole or in part, achieving at least some degree of success on the merits, upon a finding that the person made a substantial contribution to a full and fair determination of the issues." 43 C.F.R. § 4.1294(b). We found nothing in the language of the regulations which requires that the final order of the Board address the legal merits of the appeal or approve the terms of a settlement addressing the merits of the appeal. Thus, we held:

If subsequent to the filing of an appeal, but before the Board addresses the merits of the controversy, OSM takes some of the action requested by appellant, OSM concedes fees could be awarded if a causal nexus can be shown between the prosecution of the appeal and the action taken by OSM. We find this to be consistent with the prior Board decision in [Donald] St. Clair [84 IBLA 236, 92 I.D. 1 (1985)]. Allowance of an award of fees where citizens have commenced a proceeding, but the action or inaction which is the subject of the complaint has been corrected without any formal judgment, has been found consistent with the regulatory standard where a showing has been made that the corrective action was taken as a result of the citizens' complaint. Donald St. Clair, supra at 265-66, 270-71, 92 I.D. at 17-18, 19-20.

137 IBLA at 351.

The court reversed our finding that petitioner was not entitled to costs and expenses because it had not shown "a causal nexus between its actions in prosecuting an appeal to the Board and the corrective actions taken by OSM in response to the citizen's complaints" (137 IBLA at 351). KRC v. Babbitt, supra. Holding that a causal connection had been shown and that petitioner was entitled to costs and expenses of both the appeal and the preliminary informal proceedings leading up to the appeal, the court remanded the case for determination of an appropriate award.

Subsequent to receipt of petitioners' Procedural Report on Remand and a reply brief from OSM, petitioners filed an unopposed motion for suspension of the briefing schedule in this case to allow petitioners to file their reply to the OSM brief after the anticipated receipt of a decision by the district court on petitioners' "request for an award of costs and expenses for work performed in that court during judicial review." Thereafter, counsel for OSM filed an unopposed motion that the Board suspend its consideration of this case on judicial remand on the ground that the parties were engaged in settlement negotiations. This motion was granted by order of the Board dated July 19, 1999. Subsequently, the petitioners

advised the Board that negotiations had reached an impasse and made an unopposed motion for an expedited decision in this case. The motion is granted.

Petitioners contend that the issues remaining for resolution on judicial remand include: (1) whether the award should be reduced by half the claimed amount because petitioners failed to prevail on a separate claim involving violations by another mining contractor thought to be related; (2) whether time spent by attorney Galloway in "computerized investigation of the ownership or control link is compensable attorney time"; (3) whether attorney time spent in meetings and telephone conferences with Departmental officials is compensable; (4) whether petitioners have adequately documented the attorney hours claimed; and (5) whether the hourly rates claimed for attorney Morris are reasonable. (Procedural Report on Remand at 2.) Asserting that the first four issues raised in the OSM answer have already been briefed by the parties, petitioners address the reasonable billing rate for attorney Morris in their brief on remand. Petitioners assert that counsel has established a customary billing rate of \$200 per hour (prior to January 1, 1995) and \$225 per hour thereafter for work on cases arising under SMCRA and that this constitutes his reasonable hourly rate. Thus, petitioners note they have amended their claim to reduce the rate claimed for attorney Morris' work from the prevailing market rate in Washington, D.C., reducing the amount claimed for his time. Petitioners contend that the fee petition is based on work in a proceeding before the Board which is in the Washington, D.C., legal market and that attorney Morris' customary billing rates are below the prevailing Washington rate for attorneys of similar experience and skill. In addition, petitioners have presented a supplemental fee request to cover hours spent prosecuting the petition before the Board both prior to our earlier decision and on this judicial remand. Finally, petitioners argue that their claim should not be reduced on the ground that they asserted their claim to fees on alternative arguments, only one of which was accepted by the court, because the alternative theories arose from the same factual context and were related legal theories.

In response, OSM contends on remand that the claim for fees should be reduced by 49.35 percent "to reflect the significant amount of time spent on the unsuccessful claim that participation in 'informal' administrative proceedings, including the very filing of citizens' complaints, should be deemed to be participation in a qualifying 'administrative proceeding' for purposes of fee awards under SMCRA Section 525(e)." (OSM's Response to Petitioners' Report Upon Remand at 2.) It is argued by OSM that a substantial reduction in fees is justified because this case was prosecuted as a test case to determine which of two fee standards would apply to future citizen complaints and, hence, a large portion of time was spent in an unsuccessful attack on the Board's fee regulations. *Id.* at 5-6. A calculation of the percentage of pages in petitioner's briefs before the Board devoted to the unsuccessful argument (49.35 percent) has been submitted. *Id.* at Attachment 1. Further, OSM asserts that it is inappropriate for two attorneys working on the same briefs and pleadings "both to claim rates appropriate to senior partners in major law firms." *Id.* at 3, 8. Additionally, OSM contends that compensation for attorney Morris for

preparation of briefs from his office in Charlottesville which did not involve appearance at any hearings in Washington and for research and preparation of the citizens' complaint is properly determined by fee structures prevailing in Charlottesville or in Kentucky (site of the violations). Id. at 14.

Petitioners have filed a reply on remand in which they point out that the district court has now adjudicated their motion for award of fees for work performed on judicial review in which they considered some of the same arguments raised by OSM before the Board with respect to the award of fees for legal work before OSM and the Board. Petitioners note that the court refused to reduce the fee request on the ground that the court rejected one of the petitioners' alternative arguments based on the same facts and a related legal theory. (Petitioners' Reply on Remand at 2-4.) Further, petitioners point out that the district court rejected OSM's assertion that work on the case by attorneys Morris and Galloway constituted improper overlawyering, noting that they spent time on discrete issues and discounted their time to avoid duplication. Id. at 4-5. Petitioners also argue that the evidence presented in this case regarding customary billing rates has been previously recognized as sufficient to establish attorney Morris' customary billing rate. Id. at 6-7. Additionally, petitioners submitted a second supplemental fee request to cover the additional hours spent prosecuting this petition since the remand report was filed. Id. at 10-11.

[1] It has now been established that petitioners are entitled to an award as a result of their participation in the administrative proceedings at issue here. The amount of their entitlement to attorney fees turns primarily on whether the hours spent by petitioners' counsel were reasonably expended and whether the hourly rate, used as the basis for determining the appropriate compensation for that time, is reasonable, since a multiplication of the hours reasonably spent by the reasonable hourly rate produces the "lodestar" amount, which is generally presumed to be fully compensatory. Hensley v. Eckerhart, 461 U.S. 424, 433-34 (1983); Building Service Local 47 Cleaning Contractors Pension Plan v. Grandview Raceway, 46 F.3d 1392, 1401-02 (6th Cir. 1995); Copeland v. Marshall, 641 F.2d 880, 891 (D.C. Cir. 1980); Natural Resources Defense Counsel (NRDC) v. OSM, 107 IBLA 339, 373, 96 I.D. 89, 101-02 (1989).

Petitioners initially claim entitlement to an award of attorney fees for 32 hours expended by their counsel, L. Thomas Galloway and Walton D. Morris, in researching the existence of an ownership/control link between coal mining companies Branham & Baker Coal Company, Inc., and Deep River Mining Company and of Deep River's outstanding violations and unpaid civil penalties, and then in preparing and filing the citizen's complaint based on that research. (Petition, dated Dec. 14, 1993, at 24-25.) They also assert that their counsel together expended an additional 56.25 hours in prosecuting the complaint before OSM. Id. at 25. Petitioners note that this time was exacerbated by OSM's "mishandling" of the complaint, particularly the exorbitant amount of time initially afforded the State to resolve the complaint. Id. They further claim entitlement to an award

for 14 hours of work expended by Morris in preparing, filing, and prosecuting their appeal to the Board. Id. at 25-26. In order to substantiate all of the work performed by their two attorneys before OSM and the Board, petitioners provided time sheets, prepared by counsel, along with their original petition, as well as their subsequent procedural report on remand and reply brief.

Additionally, petitioners seek an award of attorney fees for work performed by their counsel in seeking an award of costs and expenses, in connection with both their original petition and supplemental petitions on remand from the court. In their original petition, they claimed that Galloway and Morris had together expended 16.75 hours in preparing and filing the petition, along with the supporting declarations of Galloway and Morris and attached documentation. (Petition at 26-27.) They now inform us that they expended an additional 77.50 hours prosecuting that petition before the Board, prior to issuance of our January 1997 decision denying the petition:

OSM's extensive briefing of the case required the Petitioners to prepare and file a detailed reply brief. Additionally, the Petitioners' attorneys participated in the preparation of a successful joint motion to expedite the proceeding, and they spent a limited and reasonable amount of time monitoring the progress of the case before the Board.

(Procedural Report at 13; see id. at 11.) They note that this work was undertaken by both Galloway and Morris in connection with preparation of Petitioners' brief in reply to OSM's answer, filed on November 1, 1994 (Galloway - 37.25 hours; Morris - 24.50 hours), "procedural motions" (Galloway - 0.50 hours; Morris - 1.50 hours), and "related tasks" (Galloway - 8 hours; Morris - 5.75 hours). Id. at 12. They also note that they have, following the February 1998 judicial remand of their petition, spent 11.25 hours in preparing and submitting their procedural report on remand (Galloway - 1 hour; Morris - 10.25 hours) and 12.50 hours, in which Morris prepared and submitted their reply to OSM's response and undertook related matters. Id. at 11; Reply on Remand, dated Mar. 18, 1999, at 10.

Both attorneys Galloway and Morris attest, in declarations attached to the petition and supplemental petitions, that the hours of work reflected on their time sheets accurately reflect the work performed in connection with this case, that the work was allocated among the attorneys in an efficient manner so that no more time was spent than if one attorney had represented petitioners with brief consultations with a second attorney, and that no time which was unproductively spent was included. (Declaration of Galloway, dated Dec. 9, 1993, at 7-8; Declaration of Galloway, dated Mar. 13, 1998, at 1; Declaration of Morris, dated Dec. 14, 1993, at 11; Declaration of Morris, dated Mar. 18, 1998, at 9-10; Declaration of Morris, dated Mar. 18, 1999, at 2-3.) The time sheets disclose the nature of the work undertaken and what was generally accomplished. They thus comply with the Court's directive in Hensley v. Eckerhart: "[C]ounsel * * * is not required to record in great detail how each minute

of his time was expended. But at least counsel should identify the general subject matter of his time expenditures." 461 U.S. at 437 n.12; see Building Service Local 47 Cleaning Contractors Pension Plan v. Grandview Raceway, 46 F.3d at 1402-03; National Association of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319, 1327 (D.C. Cir. 1982); Skyline Coal Co. v. OSM, 150 IBLA 51, 56-59 (1999); Gateway Coal Co. v. OSM, 131 IBLA at 217-18.

It is contended by OSM that costs of pursuing a citizen's complaint regarding the link between Branham & Baker and a third mining company, Mid-Mountain Mining Corporation, which link was never established, are not allowable. We find, however, that we need not address the question whether Petitioners were successful in prosecuting their claim that there was an ownership/control link between Branham and Baker and Mid-Mountain Mining Corporation or whether that claim is sufficiently related to any other successful claim, since it appears that petitioners do not seek an award for work performed in preparing, filing, and prosecuting the citizen's complaint which specifically focused on the purported link between Branham & Baker and Mid-Mountain. See Petition at 24-25. As petitioners stated in their Reply to OSM Answer, at page 34: "Petitioners seek no award whatsoever for any work done on the Mid-Mountain case. Mid-Mountain was a separate citizens complaint, and was handled separately in terms of timekeeping by Petitioners." OSM has provided no evidence to the contrary. See OSM Answer at 38-39; OSM Surreply to Petition (OSM Surreply), dated Dec. 12, 1994, at 22-24.

We, therefore, find that petitioners have established that the hours of attorney time billed represent time reasonably spent on the prosecution of the citizen's complaints including informal review before OSM, an appeal to the Board, and the petitions for costs and expenses as well as supporting briefs. See Hensley v. Eckerhart, 461 U.S. at 433-34; NRDC v. OSM, 107 IBLA at 373, 96 I.D. at 101-02.

[2] It is contended by OSM that the claim for attorney fees should be discounted by 49.35 percent to reflect time spent on the alternative (unsuccessful) argument that participation in informal administrative proceedings, including the filing of citizens' complaints and applications for informal review should be deemed to be participation in a qualifying administrative proceeding for purposes of fee awards under SMCRA. We find that petitioners are entitled to compensation for all of the work spent by their counsel on the petition and reply brief, including advancing their contention that they are entitled to compensation for all of the work before OSM and the Board, regardless of whether their appeal to the Board caused OSM to afford them any of their requested relief. It appears that the essence of petitioners' argument in their petition and reply brief was focused on their contentions that they were entitled to an award for work before OSM in connection with their citizen's complaint, for which they achieved substantive success, and in connection with their informal review requests, for which they achieved initial procedural success with issuance of the April 1993 policy memorandum by the Acting Director, and that it was irrelevant, for purposes of an award, that the Board did not itself make a substantive ruling on the merits. See Petition at 13-23; Reply to OSM

Answer at 2-31. The court basically agreed with these contentions. KRC v. Babbitt, *supra* at 818, 820. Although petitioners also argued that they were entitled to compensation for all of their work before OSM and the Board, regardless of whether their appeal to the Board caused OSM to afford them all or any of the relief which they had sought, this was argued as an alternative basis of entitlement. As we noted in NRDC v. OSM, a petitioner may, in good faith, "raise alternative legal grounds for a desired outcome," and be entitled to an award for work performed in that effort, even when those grounds are ultimately rejected and the desired outcome is achieved on some other basis. NRDC v. OSM, 107 IBLA at 371, 96 I.D. at 100 (quoting from Hensley v. Eckerhart, 461 U.S. at 435); see NRDC v. OSM, 107 IBLA at 371-73, 96 I.D. at 100-01. That is what occurred here.

Petitioners' unsuccessful argument that they were entitled to an award for work before OSM and the Board, regardless of whether the appeal to the Board caused any of their success before the agency, is plainly related to their successful argument that they were entitled to such an award where the appeal did, indeed, cause them to obtain some success before the agency. It is clearly not a "distinctly different claim[] for relief that [is] based on different facts and legal theories," justifying exclusion of any award for the work performed in advancing that claim, since it must be "treated as if [it] had been raised in [a] separate [proceeding]." Hensley v. Eckerhart, 461 U.S. at 434-435. Rather, petitioners' unsuccessful argument claims the same relief, which is an award for all of their work before OSM and the Board, and arises from the same facts and advances a related legal theory. See NRDC v. OSM, 107 IBLA at 371-73, 96 I.D. at 100-01. Thus, as the Court stated in Hensley v. Eckerhart, in connection with fee awards in civil lawsuits:

Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation * * *. In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit. * * * The result is what matters.

461 U.S. at 435 (citation omitted). 1/

1/ We note that the court in KRC v. Babbitt determined that petitioners were entitled to an award for all of the work undertaken in connection with their civil lawsuit, even though they also argued before the court, unsuccessfully, the same claim with respect to which OSM now seeks to deny them compensation. See Memorandum Opinion and Order (KRC v. Babbitt, No. 97-9 (E.D. Ky.)), dated Mar. 5, 1999, at 5-8. Because we reject OSM's contention that petitioners' award of attorney fees for their petition and reply brief should be reduced commensurate with the degree of success achieved, we also reject the argument that there should be a like reduction in compensation for expenses incurred in connection therewith. (OSM Response at 9-10.)

We, thus, hold that petitioners are entitled to attorney fees for the work undertaken in seeking an award of costs and expenses, since all of that work was reasonably expended in that effort. 43 C.F.R. § 4.1295(b); NRDC v. OSM, 107 IBLA at 391-92, 96 I.D. at 111. That award will not be limited to any extent, since they achieved virtually complete success in obtaining the award. NRDC v. OSM, 107 IBLA at 391-92, 96 I.D. at 111-12.

We next turn to the question of the reasonable hourly rate for computing the attorney fees properly awarded petitioners. Relying on the prevailing market rate for work by an attorney of reasonably comparable skill, experience, and reputation in the Washington, D.C., area, petitioners seek compensation starting at the rate of \$250/hour, adjusted yearly thereafter, for the work performed by Galloway. (Petition at 27-32 (July 1, 1991, thru June 30, 1992 - \$250/hour; July 1, 1992, thru June 30, 1993 - \$260/hour; July 1, 1993, thru June 30, 1994 - \$270/hour); ^{2/} Procedural Report at 12; Attachment to Ex. 4 to Declaration of Galloway, dated Mar. 13, 1998, at 1-4 (July 1, 1993, thru June 30, 1994 - \$270/hour; July 1, 1994, thru June 30, 1995 - \$280/hour; July 1, 1997, thru June 30, 1998 - \$290/hour).) Petitioners initially sought compensation, for the work performed by Morris, at the prevailing market rate in the Washington, D.C., area, but, following the district court's ruling, amended their petition to seek compensation at his lower customary billing rates for the time periods in question, since they are presumptively the prevailing market rates in that area: \$200/hour prior to January 1, 1995, and \$225/hour thereafter. (Petition at 27-28, 32-35; Procedural Report at 3, 4-11.)

OSM does not generally challenge Galloway's hourly rate. (OSM Answer at 41.) However, as noted previously, OSM does challenge Morris' hourly rate on several grounds. First, OSM objects to the use of Morris' customary billing rates to compute an award, to the extent they are based on rates which he has charged since petitioners originally filed their petition, and thus do not reflect the rates which he charged for his work at the time it was performed: "The case law is clear that the Board awards historical and not current rates to fee applicants." (OSM Response at 15 (citing NRDC v. OSM, 107 IBLA at 396, 96 I.D. at 114).)

It is well established that, in determining the reasonable hourly rate to use in computing an award of attorney fees, the Board must focus on the rates which were in effect at the time the work, for which compensation

^{2/} We note that the time sheet attached to the petition (Attachment A to Declaration of Galloway, dated Dec. 9, 1993, at 1-4) does not always reflect the rates which petitioners stated, in the body of the petition, should be used to compute the appropriate compensation for the various categories of Galloway's work. We will, in the case of prosecution of both the citizen's complaint before OSM and the appeal before the Board, use the rates set forth in the petition.

is sought, was performed. NRDC v. OSM, 107 IBLA at 396, 96 I.D. at 114. Where this consists of the actual billing rate usually charged by an attorney, it will be considered "presumptively the reasonable rate," provided that it is "in line with th[e rates] prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." Kattan v. District of Columbia, 995 F.2d 274, 278 (D.C. Cir. 1993), cert. denied, 511 U.S. 1018 (1994) (quoting from Blum v. Stenson, 465 U.S. 886, 895-96 (1994)).

We first conclude that petitioners have provided adequate proof, with their original and supplemental petitions, that Morris regularly charged his noncontingent fee clients \$200/hour prior to January 1, 1995, and \$225/hour thereafter. (Declaration of Morris, dated Dec. 14, 1993, at 9; Declaration of Morris, dated Mar. 18, 1998, at 1, 3-5; Declaration of Morris, dated Mar. 18, 1999, at 1; Declaration of Gary S. Bradshaw, dated Aug. 9, 1995, at 1-2.) Morris first stated in his December 14, 1993, declaration, attached to the original petition, which had sought compensation for his work at the higher prevailing rate in Washington, D.C., that the \$200/hour rate was the rate he was then receiving in three surface mining cases, noting that he had also received rates ranging from \$125 to \$200 for other nonsurface mining cases much earlier in the decade. (Declaration, dated Dec. 14, 1993, at 3-4, 6 notes 2 and 3, 9.) However, petitioners initially declined to seek compensation at the \$200/hour rate, since it did not then represent Morris' customary rate for surface mining cases. (Petition at 33.) However, with the benefit of his continued billing practice, in the case of noncontingent fee clients, since the petition was filed in December 1993, Morris asserted that this established a customary billing rate, both before and after January 1, 1995. (Declaration, dated Mar. 18, 1998, at 1, 3-5; Declaration, dated Mar. 18, 1999, at 1-2.) We find that this evidence is sufficient, absent anything to the contrary, to establish Morris' customary rates for work performed during each of the relevant time periods. See Harvey A. Catron, 146 IBLA 31, 36 (1998).

OSM argues that the evidence provided, however, yields only a "few concrete examples" of what Morris generally charged before and after January 1, 1995, noting that the court in Shepherd v. American Broadcasting Companies, Inc., 862 F. Supp. 505, 508 (D.D.C. 1994), vacated on other grounds, 62 F.3d 1469 (D.C. Cir. 1995), has rejected the use of "isolated billing" to support a customary billing rate. (OSM Response at 17.) The limited extent of the evidence may be explained by the fact that, as Morris admits, most of his clients in surface mining cases are unable to pay prevailing market rates, and thus he must represent them on a contingent-fee basis. (Declaration, dated Dec. 14, 1993, at 4-6; Declaration, dated Mar. 18, 1998, at 3.) Nonetheless, the examples offered provide sufficient evidence of what Morris, based on his level of skill, experience, and reputation, did, in fact, command in the marketplace in connection with surface mining cases. See People Who Care v. Rockford Board of Education, 90 F.3d 1307, 1312 (7th Cir. 1996) ("[T]here is nothing inappropriate about establishing an attorney's overall rate using only a small sample of the hours that he has billed to other clients"). Thus, they are "presumptively

the reasonable rate[s]" for computing an award of attorney fees. Kattan v. District of Columbia, 995 F.2d at 278. When allied with evidence of the prevailing market rates for practice in the relevant area during the time periods in question, it is clear that Morris' customary billing rates are reasonable.

Next, OSM contends that the relevant community for determining whether Morris' usual billing rates are in line with prevailing market rates is Charlottesville, Virginia, where he works, and not Washington, D.C., with respect to his work before both the Board and OSM. (OSM Answer at 41-42; OSM Response at 13-14.)

In NRDC v. OSM, 107 IBLA at 397-99, 96 I.D. at 114-15, we determined that it is the situs of the proceedings (whether they are before the Board (part of the Appeals Division of the Department's Office of Hearings and Appeals (OHA)) or an administrative law judge (part of the Hearings Division of OHA)), not the location of the attorney's office, which properly determines the prevailing market rate. See OSM Answer at 42 ("The Board has indicated [in NRDC v. OSM] that * * * the relevant community is the situs of the proceedings before the court or the Board"). Thus, in the present case, to the extent that Morris was practicing before the Board, in connection with Petitioners' appeal, and earlier before OSM's Assistant Deputy Director, in connection with their informal review requests (which constituted part of the prosecution of their citizen's complaint), Washington, D.C., is the appropriate community. To the extent that he was practicing before the LFO, OSM, in connection with preparing and filing petitioners' citizen's complaint, Lexington, Kentucky, is the appropriate community.

We further conclude that petitioners have provided satisfactory evidence that Morris' customary billing rates are in line with prevailing market rates, and thus should be the appropriate rates for computing an award of attorney fees. They have met their burden to provide evidence, primarily in the form of a September 1, 1990, National Survey Center "Billing Rate Survey" (Attachment to Declaration of Galloway, dated Dec. 9, 1993), and the affidavits of a number of other practicing attorneys, that the rates which Morris has customarily charged are reasonable, since they were considerably less than the prevailing market rates for an attorney of reasonably comparable skill, experience, and reputation practicing in the Washington, D.C., area. Nowhere does OSM challenge petitioners' evidence regarding the prevailing market rates in the Washington, D.C., area. We note that petitioners themselves do not provide any evidence of the prevailing market rate in Lexington, Kentucky, for the time period involved here. However, the record, as supplemented on remand, now contains some such evidence. (Memorandum Opinion and Order (KRC v. Babbitt, No. 97-9 (E.D. Ky.)), dated Mar. 5, 1999, at 16 (\$225/hour represents high end of prevailing market rates for Lexington, Kentucky, in connection with litigation stemming from the Board's January 1997 decision); Memorandum Opinion and Order (Cornett v. Wayne Supply Co., No. 97-19 (E.D. Ky.)), dated Sept. 16, 1997 (Ex. C attached to Ex. 1 attached to Procedural Report), at 7 (\$200/hour represents high end of prevailing market rates for large

law firms in Lexington, Kentucky, in connection with litigation culminating in August 1997 court order); see Fauri v. Executive Branch Ethics Commission, 20 F. Supp.2d 1071, 1074-75 (E.D. Ky. 1997.) While this evidence relates to a period of time somewhat after the work performed before LFO, in connection with preparing and filing the citizen's complaint, it indicates that Morris' customary rate is not out-of-line with the prevailing market rate for Lexington, Kentucky, for that particular time period. OSM has provided no evidence to the contrary. Thus, we find that Morris' customary billing rate is the appropriate rate for computing compensation for work he performed before LFO. This rate will likewise be used to compute the compensation for Galloway's work before LFO, since Morris and Galloway are of reasonably comparable skill, experience, and reputation. The prevailing market rate for Washington, D.C., is not appropriate as a basis for computing an award for Galloway's efforts before LFO. (Memorandum Opinion and Order (KRC v. Babbitt, No. 97-9 (E.D. Ky.)), dated Mar. 5, 1999, at 12-15.)

This is sufficient, absent any evidence to the contrary, to justify the use of Morris' customary billing rates as the appropriate hourly rates for computing the award of attorney fees. People Who Care v. Rockford Board of Education, 90 F.3d at 1311-14; National Association of Concerned Veterans v. Secretary of Defense, 675 F.2d at 1326 ("[I]n the normal case the Government must either accede to the applicant's requested rate or provide specific contrary evidence tending to show that a lower rate would be appropriate"); Harvey A. Catron, 146 IBLA at 36; Gateway Coal Co. v. OSM, 131 IBLA at 216-17; NRDC v. OSM, 107 IBLA at 393-95, 96 I.D. at 112-13.

Next, OSM generally objects to using "rates appropriate to senior partners in major law firms" for both attorneys, where both Galloway and Morris worked on a brief or other pleading. (OSM Response at 3.) It asserts that this practice constitutes "overlawyering," which warrants a discount in either the rates used or the hours claimed. (OSM Response at 10.)

We do not find overlawyering in the instant case. No evidence of this is cited by OSM, asserting that this will become apparent from a comparison of the attorneys' respective time sheets. (OSM Response at 12.) While there may be some overlap in the work performed by the two attorneys (Declaration of Galloway, dated Dec. 9, 1993, at 7; Declaration of Galloway, dated Mar. 13, 1998, at 1), it apparently stems from the fact that they often conferred regarding the preparation of filings and reviewed each other's written work product before it was filed with OSM or the Board. As Galloway states: "We allocated the work between ourselves in an efficient fashion so that no more time would be expended than had one experienced attorney handled the matter with brief consultations with a second attorney." (Declaration, dated Dec. 9, 1993, at 8; see Declaration of Galloway, dated Mar. 13, 1998, at 2.) Morris further explains: "After conferring initially on all of the issues in the case, we divided the work of researching and briefing on an issue-by-issue basis so that neither of us duplicated the work performed by the other." (Declaration, dated Mar. 18, 1998, at 9; see Declaration of Morris, dated Mar. 18, 1999,

at 3.) We do not find that evidence of overlawyering has been established. (KRC v. Babbitt, No. 97-9 (E.D. Ky.), dated Mar. 5, 1999, at 8-10.)

We, therefore, hold that the "lodestar" amount, or the number of hours reasonably expended on qualifying work by petitioners' counsel multiplied by the reasonable hourly rate, is \$50,295. We reach this holding based on the following computation: First, we multiply the 113.5 hours spent by Morris preparing, filing, and prosecuting the citizen's complaint before OSM; preparing and filing the appeal to the Board; and preparing, filing, and prosecuting the petition and supplemental petitions before the Board times the rate of \$200/hour for work performed prior to January 1, 1995 (89 hours X \$200/hour = \$17,800) and the rate of \$225/hour for work undertaken thereafter (24.50 hours X \$225/hour = \$5,512.50). This yields a total value for Morris' compensable time of \$23,312.50. Next, we multiply the 106.75 hours spent by Galloway times the rate of \$200/hour for preparing and filing the citizen's complaint with LFO (29 hours X \$200/hour = \$5,800); the rate of \$260/hour for prosecuting the complaint before the Assistant Deputy Director (20.25 hours X \$260/hour = \$5,265); the rate of \$270/hour for preparing, filing, and prosecuting the petition before the Board in the time period from July 1, 1993, thru June 30, 1994 (19.25 hours X \$270/hour = \$5,197.50); the rate of \$280/hour for prosecuting the petition before the Board in the time period from July 1, 1994, thru June 30, 1995 (37.25 hours X \$280/hour = \$10,430), and the rate of \$290/hour for preparing and filing the first supplemental petition with the Board (1 hour X \$290/hour = \$290). This yields a total value for Galloway's compensable time of \$26,982.50. Adding together the total values of Morris' and Galloway's compensable time yields an overall total of \$50,295. We hold that petitioners are entitled to the lodestar amount. Save Our Cumberland Mountains, Inc., 111 IBLA 197, 199 (1989).

We also deem petitioners entitled to \$1,070.41 in expenses incurred in preparing and submitting their citizen's complaint, informal review requests, appeal, and petition, supplemental petitions, and supporting documents, because they have attested to the fact that such costs are normally passed along to their counsel's clients and because we generally find, absent any evidence to the contrary, that they were "reasonably incurred," as required by 43 C.F.R. § 4.1295(b). NRDC v. OSM, 107 IBLA at 407-08, 96 I.D. at 120; see Declaration of Galloway, dated Dec. 9, 1993, at 8; Declaration of Morris, dated Dec. 14, 1993, at 11-12; Declaration of Morris, dated Mar. 18, 1998, at 10; Declaration of Morris, dated Mar. 18, 1999, at 3.

Except to the extent that they have been expressly or impliedly addressed in this decision, all other errors of fact or law raised by OSM are rejected on the ground that they are contrary to the facts and law or are immaterial.

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 is granted, and petitioners are awarded costs and expenses, including attorney fees, as set forth herein.

C. Randall Grant, Jr.
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge

