DAVID RUTH

IBLA 2003-241 Decided January 6, 2005

Petition for award of costs and expenses, including attorney fees, under the Surface Mining Control and Reclamation Act of 1977, in connection with David Ruth v. OSM, 158 IBLA 309 (2003), and related decision by administrative law judge.

Petition granted in part and denied in part.

1. Attorney Fees: Surface Mining Control and Reclamation Act of 1977--Statutory Construction: Generally--Surface Mining Control and Reclamation Act of 1977: Attorney Fees/Costs and Expenses: Generally

   A petition for an award of costs and expenses, including attorney fees, filed pursuant to sec. 525(e) of the Surface Mining Control and Reclamation Act of 1977, will be granted where petitioner establishes his entitlement to an award by showing a causal nexus between his administrative appeal of OSM's determination that his name be placed in the AVS with a recommendation that he be denied future permits and a decision issued by an administrative law judge granting temporary and permanent relief and by the Interior Board of Land Appeals reversing OSM's decision.

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

   Where 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: Regena Triplett, Esq., Pikeville, Kentucky, for Petitioner; John Austin, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

On May 16, 2003, David Ruth (petitioner) filed a petition for attorneys fees, costs, and expenses (petition) with this Board for an award of costs and expenses, including attorney fees, pursuant to 43 CFR 4.1290 and 4.1294, implementing sec. 525(e) of the Surface Mining Coal and Reclamation Act (SMCRA) of 1977, 30 U.S.C. § 1275(e) (2000). Petitioner asserts that he is entitled to an award as a result of his successful administrative appeal of a final agency decision by the Office of Surface Mining Reclamation and Enforcement (OSM) to place him on the Applicant Violator System (AVS) with a permit block and linking him to permittee Bovine Mining. This Board issued its decision on his appeal on March 25, 2003. David Ruth v. OSM, 158 IBLA 309 (2003).

The factual background of the underlying dispute is set out in David Ruth v. OSM, 158 IBLA at 310-13. Ruth was president of Stockton Mining at all relevant times. Stockton Mining did contract work for Bovine Mining. OSM conducted a compliance audit of Bovine in 1985 and found that Bovine had neglected to pay or report reclamation fees on coal produced by mining operations (some performed by Stockton Mining) undertaken on authority of Bovine's permits. When Bovine's permits were revoked, OSM assessed abandoned mine land (AML) fees against Bovine. As a result of these events, Ruth received a letter from OSM's AVS Office dated November 23, 1993, informing him that it had found several documents detailing a permittee/operator relationship between Bovine and Stockton. Ruth was sent a printout of AVS computer files recommending that he be denied future permits to conduct coal mining activities. (Applicant Ex. 1 at 10-31; AR 348-62.) The printout listed AML violations for Stockton Mining. (Applicant Ex. 1 at 15-21.) Ruth was also listed as a "controlling entity" of Stockton Mining. (Applicant Ex. 1 at 26.) The listing contained a "system recommendation" of "deny" for Ruth as of October 8, 1993, citing nine "AML" violations from June 1983 through June 1985. In a June 1, 1994, final decision, OSM linked Ruth with Bovine and, in his words, "placed [him] on the AVS." Petitioner timely appealed that decision.

As part of his appeal, petitioner filed a motion for temporary relief with Administrative Law Judge David Torbett, who, following a hearing, granted his motion on November 29, 1995. Petitioner then filed a motion for permanent relief, which Judge Torbett also granted, following hearing, on October 30, 1997. OSM appealed Judge Torbett's decision to this Board.

In our decision dated March 25, 2003, we rejected the grounds for decision set forth in Judge Torbett's decision and, considering petitioner's appeal de novo, we nevertheless also reversed OSM's decision to place him on the AVS with a recommendation that he be denied future permits. 158 IBLA at 317. Petitioner asserts that, having been successful in the underlying action and having incurred additional costs and attorney fees in the preparation of this petition, he is entitled to an award of costs and attorney fees in the amount of $22,400.92.

OSM filed its answer to the petition on June 26, 2003. [1/] Citing West Virginia Highlands Conservancy, 152 IBLA 66 (2000), OSM opposes the petition for fees asserting that there is no "causal nexus" between petitioner's prosecution of the appeal at issue and the corrective actions ultimately taken by OSM. (Answer at 6.) OSM notes that for an award of fees and expenses to be granted, among other prerequisites, the appeal must have some bearing on the actions ultimately taken by OSM, citing Kentucky Resources Council, Inc. v. Babbitt (KRC v. Babbitt), 997 F. Supp. 814, 820 (E.D. Ky. 1998). (Answer at 2.) In support of its assertion that petitioner is not entitled to an award of attorney fees and costs, OSM states that its final agency decision was not a decision to link petitioner to Stockton and Bovine, but was instead a decision that he had not rebutted the presumption that he was a controller of Stockton by virtue of his status as its president. Id. at 3. Further, noting that it did not decide to place petitioner on the AVS on June 1, 1994, and that, instead, his name was already in the AVS on that date, OSM claims that its decision was to add a notation that petitioner failed to rebut the presumption of control. Id. at 3-4. OSM denies petitioner's assertion that our March 25, 2003, decision reversed its decision to place him on the AVS and states that it was appropriate for petitioner to be included on the AVS, since SMCRA, as implemented by 30 CFR 773.22(d) and 773.8(b), requires the names of the corporate officer of permittees and operators to be included in the AVS. Id. at 4.

However, OSM concedes that the decision reversed in this case was a decision "to place Ruth's name on the AVS ***with a recommendation that future permits***

[1/] OSM simultaneously filed a request for clarification of this Board's Mar. 25, 2003, decision. That request was treated as a petition for reconsideration, separately docketed as Ruth v. OSM (On Reconsideration), IBLA 98-84R, and rejected as untimely by order dated Oct. 28, 2004.

be denied." (Answer at 4.) OSM argues that it took no corrective action as a result of our decision or the arguments made by petitioner, pointing out that it has not removed petitioner's name from the AVS. However, OSM admits that when AVS is queried for ownership and control information regarding petitioner, a "deny" recommendation is no longer given. Id.

[1] There are three prerequisites for an award of fees and expenses under SMCRA: (1) A final order by an appropriate body or judge; (2) participation in an administrative proceeding; and (3) participation resulting in relief. KRC v. Babbitt, supra. The first two prerequisites have unquestionably been met. The third prerequisite entails a "showing that the appeal had some bearing on the actions ultimately taken by OSM officials." Id. Further, "there must be a causal nexus between the plaintiff's actions in prosecuting the appeal to the Board and the corrective actions taken by OSM." Id. OSM disputes that petitioner has met that requirement.

In KRC v. Babbitt, the Court considered the timing, type, and scope of relief ultimately obtained to determine whether there was a causal nexus between the plaintiff's appeal and the relief obtained. The court specifically noted that the totality of the circumstances, including the many inordinate delays prior to the award of substantive relief, were factors in determining that the appeal by the plaintiff was necessary to obtain the requested relief.

We conclude that there was a causal nexus between petitioner's appeal and the corrective action ordered by this Board, namely, that any permit block be removed from the AVS. While OSM may accurately describe other aspects of its decision to place petitioner's name on the AVS, the most damaging and therefore most fundamental aspect of that action was to block him from receiving future permits to conduct mining operations. His appeal was instrumental in ending that permit block by eliminating the "deny" recommendation.

We do not agree with OSM that petitioner did not receive the relief he requested. OSM asserts that in his petition, petitioner indicated that he was successful in having his name removed from the AVS and that petitioner was not actually granted that relief and therefore did not succeed on the merits. On that basis, OSM argues that the relief requested by petitioner was removal of his name from the AVS and not just elimination of the "deny" recommendation. Clearly, this is a minor misstatement on the part of petitioner. We can hardly rule against petitioner on that basis given that the administrative law judge in this case used the same terminology in his October 30, 1997, decision and ordered "that the final agency decision in this case placing Ruth and Stockton on the applicant/violator system is reversed." (Ruth v. OSM, IBLA 94-516, October 30, 1997). The relief that

petitioner has always sought was to have the permit block rescinded. That relief was granted at all stages of administrative review of the matter, both before Judge Torbett and this Board.

In its brief in the underlying appeal, OSM stated that it sought to have its June 1, 1994, decision reinstated so that (1) petitioner would accurately be shown in the AVS as an owner or controller of Stockton, and (2) Stockton would linked in the AVS to the delinquent AML fees attributed to its operations under Bovine's permits. The plain purpose of such listing was so that petitioner would be denied permits in the future. As previously indicated, our decision set aside Judge Torbett's decision to consider OSM's final agency decision de novo and reverse that decision, finding that the determination that petitioner's name be placed in the AVS with a recommendation that future permits be denied had to be reversed.

OSM asserts that its ownership and control regulations and AVS policies, practices, and procedures, were changed not as a result of the Board's decision, but instead in response to the holdings in National Mining Association v. USDI, 105 F.3d 691, 695 (D.C. Cir. 1997) (NMA I) and, to a lesser extent, in National Mining Association v. USDI, 177 F. 3d 1 (D.C. Cir. 1999) (NMA II).[2/] OSM asserts that no changes to its policies, practices, procedures, or regulations occurred as a result of petitioner's appeal or this Board's decision on March 25, 2003.

We note that, since OSM's underlying decision was effectively set aside by Judge Torbett starting in November 1995 when he granted temporary and permanent relief, which action was not stayed pending appeal and was subsequently affirmed by this Board, petitioner gained relief long before the NMA decisions. Petitioner was granted full relief by Judge Torbett and later by this Board, and OSM opposed petitioner's requests for relief at every opportunity. Prior to our March 25, 2003, opinion, OSM never informed this Board, nor, presumably, petitioner, that the NMA II decision was applicable to petitioner's case and that in response to that decision, OSM would remove the "deny" recommendation from petitioner's AVS listing. Because OSM continued to oppose petitioner's requests for relief and did not indicate at any time that the matter was moot as a result of the NMA I and NMA II decisions (or as a result of regulatory changes OSM made in response to those decision), the ultimate corrective action must be deemed to have been taken by our

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[2/] OSM indicates that, after NMA I, it issued emergency ownership and control rules in April 1997 and undertook a wholesale revision of the ownership and control regulations, policies, practices, and procedures. NMA II overruled certain aspects of the interim emergency rules. On Oct. 29, 1999, OSM issued System Advisory Memorandum 20, stating that system recommendations were being eliminated.

March 25, 2003, decision, which rendered OSM's permit block invalid with administrative finality. See 43 CFR 4.1.

Furthermore, even if we could agree that the corrective action was taken solely in response to the NMA I and NMA II cases, the agency decision appealed from predated those decisions and the Agency's revisions of the ownership and control rules. Essentially, OSM argues that the only appellants who could be entitled to attorney fees are those who reach the courthouse first and obtain a ruling in their favor (in this case the National Mining Association), and that any others with appeals pending administrative review, even if OSM failed to take corrective action, would not be entitled to attorney fees or costs when they obtain a favorable ruling. We reject that stance.

Petitioner was faced with an action by OSM that was, when initiated, unquestionably prejudicial, in that it barred him from receiving permits under authority of SMCRA. By appealing, he preserved his rights both to have that permit block removed and to have the stigma of OSM's action in taking it removed upon successful prosecution of that appeal. The corrective action here constitutes not only removal of the permit block notation from the AVS but also a finding that petitioner was never properly placed on the AVS with a permit block as a result of Stockton's relationship with Bovine. It is worth noting that petitioner could not have anticipated that OSM's permit block standards would be set aside as a result of a successful judicial action prosecuted by an unrelated third party. Plainly, petitioner had no way of anticipating such when he hired counsel to pursue his administrative appeals.

[2] OSM argues that there is no basis to compensate petitioner for costs associated with presenting alternative theories such as his statute of limitations argument, the arguments put forth before Judge Torbett, and the argument that Stockton was not responsible for AML fees assessed on the coal it produced for Bovine. As we noted in Natural Resources Defense Council v. OSM, 107 IBLA 339 (1989), claims will be considered related where they were "integrally related to the central issue, 'involved a common core of facts' and were 'based on related legal theories.'" See American Academy of Pediatrics v. Heckler, 580 F. Supp. 436, 439 (D.D.C. 1984) (quoting from Hensley v. Eckerhart, 461 U.S. 424, 435 (1983)). We find that petitioner's presentation involves a common core of facts and related legal theories that were integrally related to the central issue. Accordingly, the fact that alternate theories were not expressly addressed on administrative review is not dispositive of whether petitioner is entitled to reimbursement for fees incurred in presenting them. See National Wildlife Federation, 152 IBLA 352 (2000).

To summarize, in this case, petitioner was informed that a recommendation that he be denied future permits was attached to his name in the AVS. After a

lengthy administrative review for which it was necessary for him to retain legal counsel, petitioner was granted the relief he sought, specifically, removal of the "permit block" attached to his AVS listing. Thus, OSM's decision to list petitioner in the AVS along with a recommendation that he be denied any future permits was reversed in our March 25, 2003, decision. Therefore, the type and scope of relief obtained supports a finding that a causal nexus exists between petitioner's appeal and the corrective action taken.

OSM asserts that certain fees and costs claimed by petitioner are not permissible. With one exception discussed below, we reject that contention.

OSM specifically objects to awarding petitioner reimbursement of $140.40 for two trips he took to Frankfort, Kentucky, prior to 1993, to meet with Kentucky authorities. We agree that petitioner has not demonstrated a causal nexus between these expenses and the corrective action order issued by this Board in this particular and deny petitioner reimbursement for those expenses.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, petitioner's request for fees and expenses is granted in the amount of $22,260.52.

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David L. Hughes
Administrative Judge

I concur:

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T. Britt Price
Administrative Judge