

The National Coal Museum, Docket No. 99-2240

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER
DISMISSING EAJA APPLICATION

The National Coal Museum (Museum) seeks reimbursement for fees and expenses under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, totaling \$228,664. Its application was filed on November 28, 2001. The court's decision and order vacating two of the alleged violations against Museum became a final order of the Commission on September 28, 2001. Because the EAJA application was not filed within 30 days of becoming a final order, Museum also filed a "Petition for Waiver Under 2204.310," requesting "an approximately 30 day extension" for filing its EAJA application.¹

The Secretary of Labor moves to dismiss Museum's EAJA application and objects to the petition for waiver on the basis that the filing deadline cannot be waived and Museum has not shown good cause to extend the filing time. The Secretary also files a protective answer to Museum's EAJA application. The Secretary asserts that she was substantially justified in pursuing the citations and Museum is not entitled to fees and expenses.

The Review Commission's Order dated December 20, 2001, remanding Museum's EAJA application for consideration, directs the court to construe the petition for waiver as a request to invoke "equitable tolling." See *Tri-State Steel Construction Co.*, 17 BNA OSHC 1769 (Nos. 93-0512 and 93-0513, 1996) (consolidated).²

For the foregoing reasons, the EAJA 30-day time limitation is not tolled and Museum's EAJA application is dismissed. As to the one citation item affirmed (citation 2, item 1, alleged violation of § 5(a)(1) of the Occupational Safety and Health Act) which Museum has petitioned

¹Commission Rule 2204.310 provides:

After reasonable notice to the parties, the Commission may waive, for good cause shown, any provision contained in this part as long as the waiver is consistent with the terms and purpose of the EAJA.

²This court has no authority to invoke the waiver provision set forth at § 2204.310 as requested by Museum. See Commission Rule 2204.108.

the Seventh Circuit Court of Appeals for review, Museum's EAJA application is dismissed pursuant to Commission Rule 2204.302(c).³

Background

Museum, a nonprofit corporation, operated a mine museum for public tours in an abandoned underground coal mine in southern Illinois from August 15, 1996, until January 14, 2000, when it closed. On November 29, 1999, Museum received serious and willful citations from the Occupational Safety and Health Administration (OSHA) alleging two violations of § 5(a)(1) of the Occupational Safety and Health Act (Act) for failing to examine and inspect the underground intake air courses and seals in their entirety (Citation No. 1, item 1) and for failing to adequately support the roof at numerous locations along the underground travelways (Citation No. 2, item 1).⁴ Also, the citations alleged a violation of 29 C.F.R. § 1910.307(b) for having unprotected incandescent light bulbs and electric circuits in the underground tour area (Citation No. 1, item 3).

Museum was represented by its owner and chairman of the board, Dr. Christopher Ledvina. He was assisted by his wife and secretary/treasurer, Janet Howe. The hearing was held in Chicago, Illinois, and lasted seven days in December, 2000. The court's decision and order dated August 17, 2001, vacated the alleged violations of § 5(a)(1) (inspections of seals and intake air courses) and § 1910.307(b) (unprotected incandescent light bulbs and electric circuits). The decision affirmed as serious a § 5(a)(1) violation for failing to adequately provide roof support in travelways and assessed a penalty of \$5,000.

Museum petitioned the Review Commission for discretionary review on September 18 and 28, 2001. The Review Commission did not direct review and the court's decision became a final order on September 28, 2001. Museum was notified by notice of final order dated October 1, 2001.

³According to § 2204.302(c), "[I]f the petition for review in the court of appeals is thereafter withdrawn, the applicant may reinstate its application before the Commission within thirty days of the withdrawal."

⁴An alleged violation of § 5(a)(1) of the Act for failing to equip the hoist skip with a safety catch was withdrawn by the Secretary at the hearing (Citation No. 1, item 2) (Tr. 31).

Museum's application for fees and expenses under EAJA was received by the Commission on November 28, 2001, 30 days beyond the time deadline. Museum's EAJA application seeks fees for Dr. Ledvina and Janet Howe totaling \$219,375 (\$125 per hour for a total of 1,755 hours) and expenses totaling \$9,289 for the period of October 1, 1999, until October 20, 2001.

Discussion

The EAJA was enacted to enable small employers to contest unreasonable governmental action. EAJA applications for reimbursement of fees and expenses are filed after a party has prevailed in litigation with the government and are awarded unless such government action was not shown "substantially justified or special circumstances make an award unjust." *Asbestos Abatement Consultation & Engineering*, 15 BNA OSHC 1252, 1253 (No. 87-1522, 1991). As a procedural element imposed on applicants under EAJA, 5 U.S.C. § 504(a)(2), and adopted by Commission Rules 2204.302(a) and (d)(1)⁵, the EAJA application must be submitted within 30 days after the Commission's final disposition of the proceeding.

30-Day Filing Deadline

The procedural issue presented in this case is whether Museum's EAJA application is jurisdictionally barred because the application was concededly not received by the Commission within 30 days from this court's decision becoming a final order on September 28, 2001, or whether Museum's untimely application can be excused by equitable considerations. There is no dispute that Museum's EAJA application transmitted to the Commission on November 28, 2001, was filed 60 days after the Decision became a final order on September 28, 2000. Museum's EAJA application was 30 days out of time.

⁵Sections 2204.302(a) and (d)(1) state, in pertinent part:

(a) An application may be filed whenever an applicant has prevailed in a proceeding or in a discrete substantive portion of the proceeding, but in no case later than thirty days after the Commission's final disposition of the proceeding.

(d) For purposes of this section, the date of final disposition is:

(1) The date on which the order of the judge disposing of the case becomes final under § 12(j) of the Occupational Safety and Health Act, 29 U.S.C. 666(i).

The Review Commission initially determined that “[T]he thirty day period for filing an EAJA application is jurisdictional and cannot be extended or waived by a court or agency rule.” *Asbestos Abatement Consultation & Engineering*, 15 BNA OSHC at 1254-1256. However, the Review Commission, in *Tri-State Steel Construction Co.*, 17 BNA OSHC at 1773, found an otherwise untimely EAJA application not jurisdictionally barred because of equitable tolling (confusing procedural rules allowed an employer’s application that was mailed on the 30th day following the final order and not received by the Commission until the 34th day to satisfy the time deadline).

Equitable tolling is only applied “sparingly” because the EAJA is an express limited waiver of the United States’ sovereign immunity. *Fanning, Phillips and Molnar v. West*, 160 F.3d 717, 721 (Fed. Cir. 1998). “EAJA renders the United States liable for attorney’s fees for which it would not otherwise be liable, and thus amounts to a partial waiver of sovereign immunity. Any such waiver must be strictly construed in favor of the United States.” *Ardestani v. I.N.S.*, 502 U.S. 129, 137, 112 S.Ct. 515, 516 (1991).

Equitable tolling has been permitted in situations such as where the claimant actively pursued its judicial remedies by filing a defective pleading during the statutory period or where the claimant has been induced or tricked by government misconduct into allowing the filing deadline to pass. Equitable tolling is also justified when a party is induced into believing that it has acted in a timely fashion by an agency’s confusing or misleading rules and pronouncements. *Tri-State Steel Construction Co.*, 17 BNA OSHC at 1773. However, claims of excusable neglect or failure to exercise due diligence in preserving legal rights do not justify tolling the statutory time limitation. *Irwin v. Veterans Administration*, 498 U.S. 89, 111 S.Ct 453 (1990) (absence of attorney from office when right to sue notice received was not a basis for equitable tolling of 30-day time limitation for bringing employment discrimination action against United States). None of the situations justifying equitable tolling exist in this case.

Museum asserts that the late filing of its EAJA application was due to the prolonged hospitalization of its owner and representative Dr. Ledvina and the failure of the Executive Secretary to provide as requested all post-trial procedures. There is no dispute that the Executive Secretary did not specifically provide Museum a copy of the Commission’s EAJA procedures. Also, it is undisputed that Dr. Ledvina was hospitalized during most of 2001. According to the

written statement of Dr. Ira Weiss dated December 14, 2001, Dr. Ledvina was hospitalized from April 19, until October 12, 2001, for epididymitis, a urinary tract infection and osteomyelitis due to a chronic decubitus ulcer. He underwent several surgical procedures, received extensive doses of IV antibiotics, and was treated with narcotics for pain control (Attachment to Museum's Answer to Secretary's Motion to Dismiss). Upon discharge on October 12, Dr. Ledvina returned home and received continuous vacuum therapy on his decubitus ulcer. Dr. Weiss states that Dr. Ledvina "was disabled during this time (convalescence period) as well though some very light activity was occasionally possible." On December 3, 2001, Dr. Ledvina was readmitted to the hospital for epididymitis, severe infection of his heel ulcer and continued treatment of his other decubitus. Dr. Ledvina is expected to remain in the hospital until February, 2002. In addition to Dr. Ledvina's hospitalization, Janet Howe, wife and secretary/treasurer, became pregnant in June, 2001, with twins (Museum's EAJA Application). According to Dr. Ledvina, Howe was confined to bed rest in July because of the high risk pregnancy. She unfortunately has lost one twin but continues to carry the remaining twin.

With regard to the Museum's request of the Executive Secretary for post-trial procedures, there is no requirement that the Executive Secretary furnish such information. It is a courtesy afforded to parties appearing before the Commission. In this case, the Executive Secretary did inform Museum of the procedures for appealing the court's decision in the court of appeals. Based on the information, Museum filed an appeal in the Seventh Circuit Court of Appeals. However, Museum's request of the Executive Secretary was general in nature (information concerning "the next step") and not a specific request as to the procedures for reimbursement of fees and expenses (Executive Secretary's letter dated October 5, 2001, attached to Museum's Answer to Secretary's Motion to Dismiss). Also, the EAJA procedures are published in the Federal Register (46 FR 48080, Sept. 30, 1981, as amended at 52 FR 5456, Feb. 23, 1987, and 62 FR 59569, Nov. 4, 1997) and maintained on the Review Commission's Internet web site (www.oshrc.gov). A person is presumed to know of matters published in the federal register. Dr. Ledvina has a doctorate degree in philosophy and mining engineering. He worked as a coal mine supervisor until his accident in 1978 and presided over the operation of the Museum for four years. Dr. Ledvina's choice of pursuing this matter *pro se* (for himself) does not justify relaxing the Commission rules and statutory deadlines. The Executive Secretary specifically

advised Dr. Ledvina to “contact legal counsel concerning any petition for review that you may file.” Any failure by the Executive Secretary to provide EAJA information does not excuse Dr. Ledvina of his responsibility as designated representative to know the requirements. Dr. Ledvina has shown knowledge of other Commission procedures during this case, such as conducting discovery, filing motions and responses, presenting witnesses and exhibits during the seven-day hearing, and submitting extensive post-hearing briefs.

With regard to his hospitalization, Dr. Ledvina has been a paraplegic confined to a wheelchair since an underground coal mine accident in 1978. He is intelligent, energetic, and personable. He manages to cope and handles matters despite his disabilities. While Dr. Ledvina’s hospitalization in 2001 was unfortunate and prolonged, his health problems were not shown to have prevented him from meeting his obligations under the EAJA, including the 30-day filing deadline. As evidence of Dr. Ledvina’s capabilities despite his hospitalization, the record shows that he managed to file a post-hearing brief on July 13, 2001, including several versions, of approximately 100 pages each. He also filed a petition for discretionary review dated September 28, 2001, including a timely request to extend time dated September 18, 2001, before the Review Commission. Also, while hospitalized, Dr. Ledvina was able to file an action against the U. S. Department of Labor, the Governor of the State of Illinois, and several Federal and State employees seeking in excess of \$255 million. As to the Federal defendants, the matter was dismissed with prejudice on May 25, 2001. Therefore, neither Dr. Ledvina’s hospitalization and home convalescence were shown sufficient to prevent him from pursuing an EAJA application or seeking an extension of time within the required 30-day time limitation.

Dr. Ledvina was released from the hospital on October 12, 2001, well within the 30-day time limitation. Dr. Ledvina was notified that the court’s decision became a final order of the Commission on September 28, 2001. Dr. Weiss’s letter acknowledges that Dr. Ledvina could do some “light work” while in convalescence at home. During the 30-day time limitation, there is no showing that Dr. Ledvina made an attempt to file an EAJA application or seek an extension of time. He failed to express interest in pursuing EAJA in any manner. It is noted that during his home convalescence, Dr. Ledvina filed an appeal to the Seventh Circuit Court of Appeals (Court No. 01-4107) after the Review Commission declined to review the court’s decision. Although

untimely, his EAJA application was also filed during his convalescence. If not personally capable of seeking EAJA, Dr. Ledvina could have engaged an attorney or other representative.

Conditions justifying equitable tolling do not exist in this case. The 30-day EAJA time limitation is not waived.

Museum's EAJA Application

Even though Museum's EAJA application was not timely filed, a review of the application also fails to show that Museum is entitled to an award of fees and expenses. Museum seeks fees for Dr. Ledvina's work in the total amount of \$117,500 (\$125 per hour for 940 hours) and Janet Howe in the total amount of \$101,875 (\$125 per hour for 815 hours) for the period of October 1, 1999, until October 20, 2001. Additionally, expenses are sought for a total of \$9,289.

The purpose of the EAJA is to ensure that an eligible applicant is not deterred from seeking review of, or defending against, unjustified actions by the government. *K.D.K. Upset Forging, Inc.*, 12 BNA OSHC 1857, 1859 (No. 81-1932, 1986).

There can be no dispute that Museum is an eligible applicant. Museum was a non-profit corporation which ceased business on January 14, 2000. While in business, Museum had less than 10 employees (Tr. 981, 1464). The court's decision and order dated August 17, 2001, dismissed Citation No. 1, item 1 (failure to inspect air courses and seals) and item 3 (unprotected light bulbs), reclassified to serious Citation No. 2, item 1 (inadequately supported roof), and approved the Secretary's withdrawal of Citation No. 1, item 2 (coal skip). Museum was the prevailing party.

Therefore, Museum's application is entitled to EAJA consideration if it is shown that the Secretary's actions were not "substantially justified or special circumstances make an award unjust." EAJA does not require as routine an award of fees and expenses merely because a party prevailed in a proceeding. There is no presumption that the Secretary's position was not substantially justified simply because she lost the case. The Secretary's decision to litigate need not be based on a substantial probability of prevailing. *Hocking Valley Steel Erectors, Inc.*, 11 BNA OSHC 1492, 1496 (No. 80-1463, 1983). The test of whether the Secretary's action is substantially justified is essentially one of reasonableness in law and fact. In essence, the Secretary must show that there was a reasonable basis for the facts alleged, a reasonable basis for

the theory propounded, and the facts reasonably support the legal theory. *Mautz & Oren, Inc.*, 16 BNA OSHC 1006, 1009 (No. 89-1366, 1993).

Secretary's Citations Were Substantially Justified

The record in this case establishes that the citations against Museum were substantially justified.

The § 5(a)(1) violations involving the failure to inspect the intake air course and all seals (Citation No. 1, item 1) and the lack of adequate roof support in the travelways (Citation No. 2, item 1) were shown by the testimony of Mine Safety and Health Administration (MSHA) inspectors and the mine inspector for the State of Illinois. For the most part, Museum conceded that not all seals were inspected because the roof was not adequately supported (Tr. 92, 94). Employees were unable to visibly inspect at least 40 seals or walk the perimeter air course (Tr. 1086). As evidence of a hazard, the underground mine was known as a gassy mine because of the excessive amounts of methane gas (Tr. 1138). The court's decision found that the Secretary established the elements for a § 5(a)(1) violation except for feasibility. Also, Museum was performing partial inspections of the air courses. The citation was vacated, not because the Secretary was not justified in pursuing the violation, but because the record did not establish a feasible means to abate without first requiring repairs to the roof support, which violation was affirmed. The inadequate roof support violation was reclassified from willful to serious because Museum showed a good faith attempt to correct the condition. Based on State reports showing locations of inadequate roof support, the Secretary could have reasonably considered Museum's partial efforts of compliance as inadequate, justifying a willful classification.

The Secretary was also justified in citing a violation of 29 C.F.R. § 1910.307(b) (Citation No. 1, item 3) for failing to have safe electrical equipment (light bulbs) for a hazardous location. The violative condition was supported by the testimony of the MSHA inspector and State of Illinois mine inspector. The light bulbs in the tour area were unprotected from contact. Although the electrical equipment was unprotected, the violation was vacated because there was insufficient evidence that the light bulbs were exposed to unexpected contact. The light bulbs were located outside the walking area. Although there was a potential for contact and explosion from coal dust, the Secretary failed to show proximity of exposure and the presence of coal dust in quantities sufficient to cause an explosion. The Secretary's evidence was inadequate based on

credibility and weight of evidence determination by the court. However, the Secretary was justified in pursuing the alleged violation.

Another § 5(a)(1) violation (Citation No. 1, item 2) pertaining to the coal skip was withdrawn at hearing. According to the Secretary, Museum was cited for the coal skip because the Secretary believed that it was used to transport employees without appropriate safety equipment. It was not until the deposition of Dr. Ledvina that the Secretary was informed that the skip may have been equipped with the safety equipment (Secretary's Protective Answer dated December 28, 2001). Despite not receiving verification as requested, the Secretary prudently withdrew the violation. However, the Secretary's initial understanding for issuing the citation, if correct, was sufficient justification to cite.

Therefore, even if Museum's EAJA application was timely filed, fees and expenses cannot be reimbursed because the Secretary was substantially justified in pursuing the citations.

Dr. Ledvina and Ms. Howe not Entitled to Fees

It is further noted that Museum seeks fees for Dr. Ledvina and Ms. Howe in the amount of \$125 per hour. Dr. Ledvina and Ms. Howe are concededly not attorneys or private consultants hired to represent Museum. As co-owners and officers, they represented Museum *pro se*. As recognized by Dr. Ledvina, they were the non-profit corporation (Museum's Answer to Motion to Dismiss).

Commission Rule 2204.107(a) makes clear that fees and expenses are those "customarily charged by persons engaged in the business of acting as attorneys, agents and expert witnesses." In interpreting who can claim fees pursuant to EAJA, courts have held that *pro se* litigants are not entitled to attorney's fees, regardless of whether such representatives are licensed attorneys. *Kay v. Ehrler*, 111 S. Ct. 1435, 1437-1438 (1991).

A rule that authorizes awards of counsel fees to *pro se* litigants - even if limited to those who are members of the bar - would create a disincentive to employ counsel whenever such a plaintiff considered himself competent to litigate on his own behalf. The statutory policy of furthering the successful prosecution of meritorious claims is better served by a rule that creates an incentive to retain counsel in every such case."

Also, “the text of the statute indicates that ‘agents’ are not the mere employees or principals of a prevailing party but rather specialized representatives of litigants in certain proceedings.”

Fanning, Phillips and Molnar, 160 F.3d at 721. “Indeed, it would seem a strange incentive to provide witness fees not for the purpose of reimbursing a litigant for his out-of-pocket costs, but as salary for time spent as a witness in his own litigation.” *Kooritzky v. Herman*, 178 F.3d 1315, 1322 (D.C. Cir. 1999), *cert. denied*, 120 S.Ct 1160 (2000).

Therefore, even if the Museum’s EAJA application was not time barred or the Secretary’s citations were not substantially justified, neither Dr. Ledvina nor Ms. Howe would be entitled to be reimbursed for their time representing Museum as attorneys or agents.

ORDER

Based upon the foregoing decision, it is ORDERED that:

Museum’s EAJA application is DISMISSED.

/s/
KEN S. WELSCH
Judge

Date: February 11, 2002