

INTERIOR BOARD OF LAND APPEALS

Skyline Coal Co.

v.

Office of Surface Mining Reclamation and Enforcement

150 IBLA 51 (August 11, 1999)

Title page added by:
ibiadecisions.com

SKYLINE COAL CO.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 95-709

Decided August 11, 1999

Appeal from orders of Administrative Law Judge David Torbett granting costs and expenses including attorney fees pursuant to section 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1275(e) (1994). Hearings Division Docket NX 93-5-PR.

Affirmed.

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

In section 701 of SMCRA "permit applicant" or "applicant" and "permittee" are separately defined as "a person applying for a permit," and "a person holding a permit," respectively. 30 U.S.C. § 1291(16) and (18) (1994). The definition of "person" includes coal companies. 30 U.S.C § 1291(19) (1994). Accordingly, a permit applicant seeking review of the denial of a permit application is a person who may properly petition for an award of costs and expenses including attorney fees under 43 C.F.R. § 4.1294(b).

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

Section 525(e) of SMCRA, 30 U.S.C. § 1275(e) (1994), authorizes an award of "all costs and expenses (including attorney fees) as determined by the Secretary to have been reasonably incurred" for or in connection with a person's participation in an administrative proceeding under the Act. A person seeking attorney fees is not required to record in great detail how each minute of time was expended, but the general subject matter of the expenditure should be identified. A good-faith petition for costs and expenses, including attorney fees, is one which excludes excessive, redundant, or unnecessary hours. The determination of an administrative law judge to grant a petition for costs and expenses, including attorney fees, will not be disturbed on appeal absent a showing of error or abuse of discretion.

APPEARANCES: Charles P. Gault, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Knoxville, Tennessee, and 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; Charles A. Wagner III, Esq., and Joseph N. Clarke, Jr., Esq., Knoxville, Tennessee, for Skyline Coal Company.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

The Office of Surface Mining Reclamation and Enforcement (OSM) has appealed orders dated August 1, 1994, and June 21, 1995, by Administrative Law Judge David Torbett granting \$216,070.13 in costs and expenses including attorney fees to Skyline Coal Company (Skyline) in Hearings Division Docket No. NX 93-5-PR.

The case underlying Skyline's petition for costs and expenses concerned a toxic materials handling plan (TMHP) submitted by Skyline on July 23, 1992, and the denial by OSM of Permit (application) No. 2846 on April 26, 1993. The case is one of four consolidated cases involving two adjacent Skyline surface mining sites near Dunlap, Tennessee. The two mine sites are the Pine Ridge East Mine and the Big Brush Creek Mine. The Pine Ridge East Mine is permitted under Permit No. 2876. A portion of the Big Brush Creek site had earlier been permitted under Permit No. 2895, and that area (within Permit No. 2895) is totally within the application for Permit No. 2846. Common issues of fact in each case concerned previously approved or proposed TMHP's. (OSM Brief at 1-2; Skyline Reply Brief at 1-3.)

Skyline filed a request for review of the denial of the application and a hearing was held between May 10 and June 23, 1993. At the hearing, issues concerning the approvability of the TMHP and its adequacy to avoid acid/toxic mine drainage were litigated. Judge Torbett found that OSM had failed to consider relevant evidence in denying the application for permit. He therefore adjourned the case to June 23 to allow the parties to negotiate. During the adjournment, OSM evaluated the review by outside experts of Skyline's TMHP and concluded that it would work to prevent acid/toxic mine drainage, that the site had been adequately characterized concerning the potential for acid/toxic mine drainage, and that the permit was subject to approval. Consequently, OSM issued Permit No. 2846. On September 18, 1993, the parties submitted an order wherein Skyline's application for review was sustained and the four consolidated cases were concluded. (August 1, 1994, Order at 2-3.)

The case before Judge Torbett, and now before the Board, concerns only Docket No. NX 93-5-PR. In his August 1, 1994, order, Judge Torbett defined the issues as whether Skyline was entitled to costs and expenses including attorney fees as a nonpermittee under 43 C.F.R. § 4.1294(b), and if so, what amount should be awarded.

43 C.F.R. § 4.1294(b) provides that:

Appropriate costs and expenses including attorneys' fees may be awarded * * * [f]rom OSM to any person, other than a permittee or

his representative, 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 such person made a substantial contribution to a full and fair determination of the issues.

Skyline argued that it was an applicant for a permit, not a permittee, and thus qualified upon a showing that it met the criteria of 43 C.F.R. § 4.1294(b). OSM argued that Skyline was a permittee and therefore required to prove bad faith on the part of OSM in order to qualify for costs and fees under 43 C.F.R. § 4.1294(c).

43 C.F.R. § 4.1294(c) provides that:

Appropriate costs and expenses, including attorneys' fees may be awarded * * * [t]o a permittee from OSM when the permittee demonstrates that OSM issued an order of cessation, a notice of violation [NOV] or an order to show cause why a permit should not be suspended or revoked, in bad faith and for harassing or embarrassing the permittee.

In his August 1, 1994, order, Judge Torbett rejected OSM's argument, noting that an applicant for a permit is not, and does not become, a "permittee" until the applicant is issued a permit. He further found that, as a mining company, Skyline was a "person" under 30 U.S.C. § 1291(19) (1994) and was therefore eligible to petition for and receive an award of costs and fees under 43 C.F.R. § 4.1294(b). Judge Torbett noted that 43 C.F.R. § 4.1294(c) specifically covers enforcement actions taken against permittees, that is, cases involving cessation orders (CO's), NOV's, or orders to show cause why a permit should not be suspended or revoked. That regulation, the Judge observed, makes no mention of denials of permit applications. He ruled that the governing regulation was 43 C.F.R. § 4.1294(b) and that Skyline met the criteria therein. (August 1, 1994, Order at 3-5, 7.)

With respect to the amount of the award, Judge Torbett noted in his August 1, 1994, order that the application submitted by Skyline covered all four consolidated cases and did not particularly identify which work was performed on NX-93-5-PR. He therefore instructed Skyline to resubmit detailed billings demonstrating the work performed for that case.

On October 27, 1994, we declined to exercise interlocutory review of Judge Torbett's August 1, 1994, order ruling that Skyline could receive an award under 43 C.F.R. § 4.1294(b). On October 28, 1994, Skyline filed a revised petition for costs and expenses including attorney fees that deleted charges incurred solely for the benefit of the nonqualifying enforcement cases. OSM filed a reply to the revised petition on February 3, 1995, and Skyline filed a response to OSM's reply on March 13, 1995.

On June 21, 1995, Judge Torbett issued his order granting \$216,070.13 in costs and expenses including attorney fees. Judge Torbett rejected OSM's arguments that Skyline had not properly documented attorney hours, finding that the attorneys' logs were very similar to those we found adequate in Gateway Coal Co. v. OSM, 131 IBLA 212 (1994). He deducted time he found one of the attorneys had spent on one of the enforcement cases and reduced the attorney fee accordingly. He found the case was complex and lengthy enough to justify the fees of two attorneys for Skyline, noting that OSM had also assigned two attorneys to the case. Judge Torbett awarded Skyline \$122,168.49 in attorney fees. In addition, stating that the standard for reimbursing expert fees as other costs and expenses was whether the expert had contributed materially to the applicant's presentation of its case (citing Natural Resources Defense Council, Inc. v. OSM, 107 IBLA 339, 406, 96 I.D. 83, 119 (1989)), Judge Torbett found Skyline entitled to \$93,901.64 for expert fees. He subtracted approximately \$3,700 for work done by Marshall Miller on the Fisher Mining Project because it did not contribute materially. (June 21, 1995, Order at 2.)

Eligibility for Award

OSM contends, as it did before Judge Torbett, that Skyline is not entitled to an award "under 43 C.F.R. § 4.1294(b) because it is the `permittee'" and "must demonstrate that OSM acted in bad faith and for the purpose of harassing or embarrassing it." (Respondent's Brief in Support of its Notice of Appeal at 10.) OSM observes that Skyline was in fact the permittee in the other dockets which were consolidated with NX 93-5-PR for trial. OSM states: "It is only through the ministerial act of artificially isolating the appeal in NX 93-5-PR from the others that [Skyline] is able to argue that it is not a permittee." (Brief at 11.) OSM points out that the permit application in NX 93-5-PR was not for a new mine site but was for an expanded permit area at the Big Brush Mine. OSM contends that Judge Torbett erred when he ruled: "Nothing in the regulations states that a party loses a right to costs and expenses on a permit application review by consolidating that case with cases concerning NOV's or CO's." (August 1, 1994, Order at 4.) OSM contends that because Skyline "was the actual permittee at Big Brush and Pine Ridge East at all times during this litigation, it can only be eligible [for costs and fees] if it meets the standard in 43 C.F.R. § 4.1294(c)." (Brief at 12.)

OSM argues that 30 C.F.R. § 701.5, which defines "permittee" as "a person holding or required by the Act or this chapter to hold a permit to conduct surface coal mining and reclamation operations," refers to anyone who should have a permit and clearly includes Skyline. (Brief at 13.)

OSM refers to the legislative history of section 525(e) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act), 30 U.S.C. § 1275(e) (1994), quoting from S. Rep. No. 128, 95th Cong. 1st Sess. 59 (1977):

If private citizens are to be able to assert the rights granted them by this bill, and if those who violate this bill's requirements are not to proceed with impunity, then citizens must have

the opportunity to recover the attorneys' fees necessary to vindicate their rights. Attorneys' fees may be awarded to the permittee or government when the suit or participation is brought in bad faith.

(Brief at 15 (emphasis in the brief).) OSM asserts that Congress intended to differentiate between private citizens and coal company permittees, that it only intended fees to be awarded coal companies when the agency acted in bad faith. (Brief at 15, 16.)

OSM also adverts to comments attending the promulgation of 43 C.F.R. § 4.1294 and argues that § 4.1294(b) is "reserved for private citizens" and a coal company "must present its claim for an award under § 4.1294(c)." (Brief at 18.) OSM urges that permit applicants are not "private citizens" or "persons" and are therefore excluded from the ambit of 43 C.F.R. § 4.1294(b). (OSM Brief at 20.)

Skyline contends that under the SMCRA and the regulatory scheme it was an applicant, and not a permittee. Skyline notes that the Act, 30 U.S.C. § 1291(18) (1994), defines permittee as "a person holding a permit," and that OSM's regulations differentiate between an applicant and a permittee. Thus, under 30 C.F.R. § 701.5, an "applicant" is a "person seeking a permit, permit revision, renewal," etc., whereas a "permittee" is "person holding or required by the Act or this chapter to hold a permit to conduct surface coal mining and reclamation operations." (Reply Brief at 12-13.) Skyline also cites 43 C.F.R. § 4.1361 which accords the right to file for review to the "applicant, permittee, or any person" adversely affected by a decision of OSM. Again, Skyline points out that the drafters differentiated, or recognized as separate entities, "applicant" and "permittee." (Reply Brief at 14.) Skyline denies that the legislative history of SMCRA or the commentary attending promulgation of 43 C.F.R. § 4.1294 offers any support for OSM's position. (Reply Brief at 15-20.)

[1] OSM's arguments construing Skyline as a permittee for purposes of this proceeding do not withstand analysis of the Act and the relevant regulatory provisions. A pertinent canon of statutory construction requires that, because "[a] statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent, * * * each part or section should be construed in connection with every other part or section so as to produce a harmonious whole." Norman J. Singer, 2A Sutherland Stat Const § 46.05 (5th ed. 1992). Earl Williams, 140 IBLA 295, 303-4 (1997). Several definitions in SMCRA are pertinent to our analysis and we construe them in harmony. The Act defines "permit applicant" or "applicant" as "a person applying for a permit," and it defines "permittee" as "a person holding a permit." Finally, it defines "person" as "an individual, partnership, association, society, joint stock company, firm, company, corporation, or other business organization." 30 U.S.C. § 1291(16), (18), and (19) (1994). Thus, the Act clearly differentiates between an applicant for a permit and a permittee. To endorse OSM's arguments would require us to ignore this distinction made by the Act between an "applicant" and a "permittee." The undisputed facts of record are that Skyline,

even though it held other permits at these mine sites, and even though it was seeking an expanded permit area at the Big Brush site, was an applicant for a specific permit, and not a permittee, in Docket No. NX 93-5-PR. Accordingly, Judge Torbett did not err when he ruled that the consolidation of this proceeding (NX 93-5-PR) with others, in which Skyline was a permittee, did not foreclose its right to costs and expenses under 43 C.F.R. § 4.1294(b).

As a coal company, Skyline is clearly within the category of "person" under the Act, and as such is not excluded from the ambit of 43 C.F.R. § 4.1294(b) unless it is also a permittee. To accept OSM's argument would virtually eliminate the possibility that a coal company could ever be considered either a "person" or a "permit applicant" under the Act.

Moreover, the regulatory definition of "permittee" in 30 C.F.R. § 701.5 does not support OSM's position—that a permittee is anyone who should have a permit. (OSM Brief at 13.) The regulation (quoted earlier) speaks to two categories of persons, those holding a permit and those required to hold a permit to conduct mining and reclamation operations. This definition does not eliminate the category of "permit applicant," which is also defined in 30 C.F.R. § 701.5 as "any person seeking a permit, permit revision, renewal." Rather, the regulatory definition of "permittee" encompasses persons who, mining without a permit, are immediately subject to the enforcement authority of the Act. 30 U.S.C. § 1271(a)(2) (1994); 30 C.F.R. § 843.11(a)(1).

OSM is correct in its assertion that in SMCRA Congress intended to differentiate between private citizens and coal operators. However, its conclusion that coal operators can recover fees and expenses only if they prove bad faith is not supported by the legislative history, does not follow from that differentiation and is not supportable in view of the fact that a coal company may be a "person" as well as a "permittee." Finally, we find no support in the comments attending promulgation, nor anywhere else, for OSM's argument that 43 C.F.R. § 4.1294(b) is reserved for private citizens and that coal operators must present claims for awards exclusively under 43 C.F.R. § 4.1294(c).

Accordingly we find that 43 C.F.R. § 4.1294(b) is the applicable regulation for Skyline's petition for an award of costs and expenses including attorney fees in this case.

Standards for Award

OSM contends that Skyline fails to meet the standards for an award of costs and expenses, including attorney fees, and that the amount awarded by Judge Torbett must therefore be reduced. OSM notes that in Skyline's supporting documentation there are 15 "entries labeled as either 'telephone conferences' or 'review of documents,' without further explanation or documentation totaling 7.80 hours for attorney Charles Wagner and 3.40 hours for attorney Joe Clarke." (Brief at 24.) OSM contends that award standards are not met in these instances because the subject matter of the

billed hours is not disclosed; therefore, the award should be reduced by "at least ten percent." (Brief at 27.) OSM further contends that certain work should have been billed at lesser rates or excluded from Skyline's fee request entirely. OSM cites a Skyline fee entry for April 15, 1993, which reads: "Meeting at the mine site. Conference with experts and client representatives at mine site. CAW 11.00 JNC 12.00." OSM notes that since the attorneys were located in Knoxville and the mine site is near Dunlap, Tennessee, "it is reasonable to assume that travel time was included, but it is impossible to ascertain how many hours were spent in travel and how many hours were spent at the mine site." (Brief at 29.)

OSM also disputes fee awards to both, rather than just one, Skyline attorney. OSM notes that both Charles Wagner and Joe Clarke attended the hearings, "but only Mr. Wagner actually participated on the record, except for one instance when Mr. Clarke began to question a witness and Mr. Wagner stopped him and took over." OSM states that Mr. Clarke did not participate in the hearing as co-counsel, "and his time should be reimbursed, if at all, at a paralegal rate rather than at an attorney's rate." (Brief at 30.) OSM cites as examples of unallowable "double coverage" Skyline billing items for April 2, 7, and 15, May 4, 5, 6, 15, and 16, June 7, 9, and 10, 1993, and April 5, 1994. (Brief at 31.)

OSM argues that attorneys may not charge the same rate for work that does not involve legal skills. It cites 12 billing instances in which the tasks being billed are described as the preparation of letters, faxes, memorandums, revisions of motions, telephone conferences, trial preparation, and assembling of exhibits. OSM argues that these billing items are examples "where ministerial or mechanical tasks are intermingled with other work so that it is impossible for the Court to make a reasoned determination of what time was involved in each task, or what rate to apply." (Brief at 32-34.)

Next, OSM challenges as not compensable an award of \$14,950.35 for the work of Skyline's "nontestimonial experts." OSM argues that, in the absence of a specific statutory provision, compensation for the work of nontestimonial experts is precluded by 28 U.S.C. §§ 1821 and 1920 (1994). (Brief at 34-36.) Under 28 U.S.C. § 1920 (1994), compensation may be provided to cover fees of witnesses and court-appointed experts. 28 U.S.C. § 1821(b) (1994) limits witness fees to a dollar amount per day for attendance and travel.

Finally, OSM objects to \$3,696.40 billed by Skyline for an information gathering task, "Project 7T08, Fisher Mining Inc.," which was not used in presenting its case due to a lack of comparability between the Big Brush and the Fisher Mining sites. Two further items in Skyline's revised petition, OSM asserts, were for work not connected with NX 93-5-PR and are not compensable. These items, totaling 2-1/2 hours of work by Charles A. Wagner III, are described as obtaining "agreement from OSM with regard to Pine Ridge" and a telephone call with Charles Gault regarding "termination of NOV" on June 29 and September 21, 1993, respectively.

Responding first to OSM's challenge to the 11.20 hours billed for 15 entries labeled as telephone conversations or review of documents (OSM Brief at 24), Skyline contends that its documentation is similar to documentation found qualifying in Gateway Coal Co. v. OSM, 131 IBLA 212 (1994). Skyline asserts that the "specific subject matter" of telephone conversations, consultation with experts or opposing counsel need not be spelled out, and is, in the present case, even more detailed than the documentation found acceptable in Gateway. (Reply Brief at 23-24.)

Skyline defends the award of fees to both its attorneys, Charles A. Wagner III and Joseph N. Clarke, Jr. Skyline asserts that its attorneys divided the trial preparation and presentation tasks, that Clarke was responsible for all examination and cross-examination of witnesses on the subject of blasting and had primary responsibility for discovery documents, motions, and documents other than the original pleadings, while Wagner, as lead counsel, "was responsible for developing overall strategy, drafting the original pleadings in this case and examining all permit review and geochemical witnesses called at trial by either side." (Reply Brief at 24-25.) Skyline denies OSM's allegation that Clarke did not actually participate on the record, noting that the transcript shows that "Mr. Clarke did indeed handle the direct examination and cross-examination of all witnesses who were called by both sides concerning the crucial issue of blasting." Skyline cites the pertinent transcript references. (Reply Brief at 25-26 (footnote omitted).)

With respect to the examples of unallowable "double coverage" billing cited by OSM, Skyline answers that OSM itself was represented by two attorneys throughout, that it appreciated the complexity of the issues in the case, and that the "joint participation of both its attorneys was not only highly advisable but essential." (Reply Brief at 27 (footnote omitted).)

Concerning billing for ministerial and mechanical tasks, Skyline responds that more attorney time would have been consumed by explaining the tasks to a paralegal rather than performing them in the first place in this case, which involves complex and voluminous documentation. (Reply Brief at 29.)

Skyline further asserts it is entitled to an award for the work of its nontestimonial experts. Skyline observes that section 525(e) of SMCRA, 30 U.S.C. § 1275(e) (1994), provides for the recovery of "all costs" reasonably incurred by the successful party.

We find no basis for OSM's objection to the \$3,696.40 billed by Skyline for the "Project 7T08 Fisher Mining, Inc." and for work performed on June 29 and September 21, 1993 (\$113) on an NOV in an enforcement case. As noted above, Judge Torbett disallowed the cost of the work concerning the Fisher Mining Company and reduced the award for Charles Wagner's work on those two dates.

[2] Judge Torbett found, and we agree, that the schedule of attorneys' hours and itemization submitted by Skyline in its revised petition was adequate for a determination of an award of attorney fees. A good-faith petition for costs and expenses, including attorney fees, is one

which excludes excessive, redundant or unnecessary hours, and the trier of fact has the discretion to make those determinations to arrive at a reasonable fee. Hensley v. Eckerhart, 461 U.S. 424, 433, 434, 437 n.12 (1983). A person seeking attorney fees is not required to record in great detail how each minute of time was expended, but the general subject matter of the time expenditures should be identified. Utah International, Inc. v. Department of the Interior, 643 F. Supp. 810, 826 n.31 (D. Utah 1986); Gateway Coal Co. v. OSM, *supra* at 218. We find that Judge Torbett properly determined the amount of that award, based on his evaluation of Skyline's petition.

Finally, we turn to OSM's objection to the award to the extent it allowed \$14,950.35 in fees for the nontestimonial services of experts. This figure represents the amount sought by Skyline for the work of experts who prepared trial exhibits and provided consulting services. (Revised Petition, Tabs 3, 6, and 7.)

In West Virginia University Hospitals, Inc. v. Casey, 499 U.S. 83 (1991), the court decided whether, with regard to both testimonial and nontestimonial expert fees, the term "attorney's fee in [42 U.S.C.] § 1988 [(1994)] provides the 'explicit statutory authority'" for reimbursement of expert fees. *Id.* at 87. 42 U.S.C. § 1988 (1994) provides that in litigation under the Civil Rights Act of 1964, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." Reviewing statutory usage, the Court found that expert fees are "distinct" items of expense, *id.* at 92, and that attorney fees do not embrace fees for experts' services. *Id.* at 97. The Court held that fees for experts' services in civil rights litigation are not part of attorney fees under 42 U.S.C. § 1988 (1994). OSM cites Casey, contending that 28 U.S.C. §§ 1920 and 1821(b) (1994) preclude awards for the services of nontestimonial experts.

The Court in Casey cited Crawford Fitting Co. v. J. T. Gibbons, Inc., 482 U.S. 437 (1987), noting that "[28 U.S.C. § 1920 and § 1821(b)] define the full extent of a federal court's power to shift litigation costs absent express statutory authority to go further." Casey, 499 U.S. at 86. In its analysis, the Court adverted to the Equal Access to Justice Act of 1980, which provides: "'fees and other expenses' includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case and reasonable attorney fees." 28 U.S.C. § 2412(d)(2)(A) (1994). The Court reasoned that "[i]f the reasonable cost of a 'study' or 'analysis' – which is but another way of describing nontestimonial expert services – is by common usage already included in the 'attorney fees' * * * a significant and highly detailed part of the statute becomes redundant." Casey, 499 U.S. at 91.

In this case, 30 U.S.C. § 1275(e) (1994) provides for "the aggregate amount of all costs and expenses (including attorney fees) as determined by the Secretary to have been reasonably incurred." (Emphasis supplied.) The

plain meaning of this language is not only that costs other than attorney fees are compensable, but that all such costs (reasonably incurred) are compensable. OSM's interpretation, which would render without effect the phrase "all costs and expenses" is not supported by Casey, which does not preclude cost shifting for nontestimonial expert services where there is "explicit statutory authority." Casey, 499 U.S. at 86, 87, 91. In SMCRA, the phrase "all costs and expenses" provides such authority. Accordingly, Judge Torbett's award properly included compensation for Skyline's nontestimonial experts.

To the extent not specifically addressed herein, OSM's arguments have been considered and rejected.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, Judge Torbett's August 1, 1994, and June 21, 1995, orders awarding Skyline \$216,070.13 are affirmed.

Will A. Irwin
Administrative Judge

ADMINISTRATIVE JUDGE BURSKI CONCURRING:

While I find myself in agreement with both the result and the reasoning of the lead opinion, I must admit that I concur therein with certain misgivings. First of all, I am not at all convinced that Congress intended to authorize the award of costs and fees to permit applicants from the Office of Surface Mining Reclamation and Enforcement (OSM) simply for obtaining "some degree of success on the merits, upon a finding that such person made a substantial contribution to a full and fair determination of the issues." 43 C.F.R. § 4.1294(b). This standard would seemingly justify an award to an applicant even in those circumstances in which it was ultimately established that the application was properly denied, so long as the applicant managed to show that, on at least one ground relied upon by OSM, the basis given for rejection was in error. It is difficult to believe that this was the intent of those who crafted the statute or those who drafted the regulations, particularly since such an approach could well have an inhibiting effect on OSM's vigorous enforcement of the applicable laws.

Be that as it may, the lead opinion's analysis of the applicable regulations (43 C.F.R. § 4.1294(b) and (c)) is difficult to contravene. Indeed, the element which I find particularly convincing is the opinion's analysis of subsection (c). By its terms, that subsection requires a permittee to demonstrate "that OSM issued an order of cessation, a notice of violation [NOV] or an order to show cause why a permit should not be suspended or revoked, in bad faith and for the purpose of harassing or embarrassing the permittee." 43 C.F.R. § 4.1294(c). If, as OSM now contends, permit applicants were subsumed in the definition of "permittees," surely some reference would have been made in that subsection to the rejection of a permit application. The fact that no such reference was made, together with the broad language of 43 C.F.R. § 4.1294(b), leads me to the same conclusion embraced in the lead opinion, namely, that permit applicants are to be treated as someone "other than a permittee or his representative." While this may not be the result I would have opted for had I been drafting the regulation, it is, nonetheless, the result seemingly desired by those who did so.

An even more troubling aspect of the instant case is that, notwithstanding the fact that Skyline Coal Company (Skyline) seeks payment of costs and expenses as a permit applicant, Skyline is, in fact, already the permit holder of the Big Brush Creek mine site which was totally included in the lands which it sought to include within its new permit. Compare Permit Application No. 2846 with Permit No. 2895. If Skyline had sought to obtain a permit revision rather than file a new permit application, there seems little question that its request for costs and expenses would have, perforce of logic, arisen out of its status as a permittee and Skyline would, therefore, have been required to establish bad faith on the part of OSM as a precondition to an award. Indeed, Administrative Law Judge Torbett so indicated in his August 1, 1994, order. See Order of August 1, 1994, at 4. In reality, however, since Skyline sought to physically extend the area covered within Permit No. 2895, it

was required by 30 C.F.R. § 774.13(d) to file a new application rather than seek a permit revision. Thus, it was the mandate of the regulations rather than an election on Skyline's part which resulted in the filing of a new permit application and the assumption by Skyline of the status of permit applicant.

OSM strenuously argues that the issue of the adequacy of the toxic materials handling plan (TMHP) was, itself, independently raised in two permit revision orders as well as an NOV issued by OSM to Skyline. From this OSM argues that, even though Skyline may be characterized as a permit "applicant" it was, simultaneously, a permit "holder," and should be forced to recover its costs and expenses under the aegis of 43 C.F.R. § 4.1294(c) as a permittee. But, as both Judge Torbett and the lead opinion herein note, there is nothing which prevents an individual from being both a permittee and a permit applicant at the same time.

Both Judge Torbett and the lead opinion attempt to differentiate between the costs and expenses related to obtaining review of the denial of Skyline's new permit application and those costs and expenses which arose solely from Skyline's challenges to the revision orders and the NOV. All expenses related to the former were granted while those under the latter were denied.

Much of the conceptual difficulty with this last issue arises because the TMHP issues involved in all four proceedings were inextricably intertwined and Judge Torbett, in essence, allowed all costs and expenses unless they arose solely as a result of Skyline's challenge to the order revisions and NOV. In other words, to the extent that there was any overlap between Skyline's challenges to OSM actions and Skyline's appeal from the OSM rejection of its permit application, Judge Torbett allowed Skyline to recoup those costs and expenses as a permit applicant. Since the amount of overlap was very great, the result was to allow Skyline to recoup virtually all of the costs arising out of all four proceedings. The lead opinion adopts this same approach.

Given the specific chronology of events in the instant case, I believe this can be justified. Skyline filed its new permit application which contained the TMHP on July 23, 1992, before OSM had initiated any of the other actions herein. Indeed, it was not until 3 months later that OSM issued the first of its ordered revisions, directing Skyline to include an approved TMHP within Permit No. 2895. Because the record would indicate that Skyline's permit application served as the triggering factor in precipitating all of the subsequent OSM actions, I deem it justifiable to treat all of the costs and expenses which arose from Skyline's challenge to the OSM rejection of its application as arising from the application process even though this same evidence would, given the posture of the various other appeals, necessarily provide a basis for undermining OSM's subsequent determinations.

I recognize that OSM may view the instant decision with some concern. Assuming it does, I would suggest that an easy remedy is available. As the lead opinion demonstrates, the statutory provision authorizing the

Secretary of the Interior to award costs and expenses is expansively written. See 30 U.S.C. § 1275(e) (1994). Doubtless, it would support a number of differing regulatory structures beyond that which presently exists. If OSM is dissatisfied with the result fostered by its present regulations, it need only seek an amendment of those regulations so that they coincide with OSM's interpretation of the underlying policy of the statute. But, so long as the present regulatory language remains in effect, I must agree with both the lead opinion and Judge Torbett that the availability of an award of costs and expenses with respect to permit applicants is properly determined under 43 C.F.R. § 4.1294(b), rather than 43 C.F.R. § 4.1294(c).

James L. Burski
Administrative Judge