

INTERIOR BOARD OF LAND APPEALS

Wyoming Outdoor Council

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WYOMING OUTDOOR COUNCIL

IBLA 99-36

Decided July 18, 2001

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

Allowed in part; denied in part; further submissions ordered.

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

Under the appropriate circumstances, in-house counsel employed by a successful participant in an adversary proceeding brought under SMCRA may be eligible for an award of attorney fees under § 525(e) of SMCRA, 30 U.S.C. § 1275(e) (1994).

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

Where an award of attorney fees is sought for services performed by in-house counsel for an organization which is only partially involved in litigation, the award will be limited to the actual costs involved (i.e., salary plus overhead), unless the monies awarded will be placed in a fund maintained for the purpose of supporting litigation. In the latter case, the reasonable value of the attorney's work will be measured by the market value of the services performed.

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

Where an award of attorney fees is sought from OSM under 30 U.S.C. § 1275(e) (1994), attorney fees must be computed at historic rates, i.e., the rates in effect when the services were rendered, without any adjustment to compensate for delay in payment. Where, however, attorney fees are sought from a party other than OSM under 30 U.S.C. § 1275(e) (1994), use of current attorney rates may be appropriate to compensate the successful party for a delay in payment.

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

Under established Departmental precedent, where attorney fees are sought under 30 U.S.C. § 1275(e) (1994) for practice before local OSM offices or before the Hearings Division, the attorneys will normally be compensated at the market values prevailing in the communities where those offices are located, while practice before the Board or the OSM Headquarters office will be compensated at the prevailing rates for the Washington, D.C., area.

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

Where a review of the time sheets submitted with a request for an award of attorney fees under 30 U.S.C. § 1275(e) (1994) discloses either unnecessary or duplicative work, the Board will disallow any award for such work in computing an award for reasonable attorney fees under SMCRA.

APPEARANCES: Steve Jones, Esq., Jackson, Wyoming, for petitioner Wyoming Outdoor Council; Brock Wood, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

In a decision styled Wyoming Outdoor Council, 145 IBLA 63 (1998), this Board reversed a determination of the Assistant Director, Office of Surface Mining Reclamation and Enforcement (OSM), dated March 30, 1995, which had concluded that the Casper Field Office, OSM, had properly denied a request filed by the Wyoming Outdoor Council (WOC) on December 9, 1994, seeking a Federal inspection of an in situ coal gasification project located in Carbon County, Wyoming, which, WOC alleged, constituted a surface mining operation being conducted without a permit.

In denying the requested inspection, the Casper Field Office informed WOC that it had advised the Wyoming Department of Environmental Quality (DEQ) of its determination that Research and Development License No. 17 (R&D 17) had been issued under regulations which were not as stringent nor as effective as the requirements of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 1201-1328 (1994), and that the Field Office was recommending that Wyoming be required to amend its

program so that it was no less effective than the provisions of SMCRA. The Field Office declined to order an inspection, however, because of its view that what was involved was a programmatic issue which should be resolved through the procedures outlined in SMCRA and the applicable regulations. OSM subsequently affirmed the determination of the Casper Field Office on the ground that issuance of R&D 17 had been in accordance with existing Wyoming regulations and was, therefore, valid under those regulations. The Board's decision in Wyoming Outdoor Council, *supra*, reversed this determination, holding that, in fact, issuance of the in situ R&D license did violate provisions of the approved Wyoming program and that OSM's failure to order a Federal inspection was unjustified. Id. at 68.

Together with its original appeal, WOC had filed a petition for an award of costs and expenses as provided by 30 U.S.C. § 1275(e) (1994). In its decision, the Board expressly addressed WOC's entitlement to an award, holding that "WOC has prevailed so as to be entitled to a costs award in this case." Id. The Board noted, however, that the petition was both incomplete and had been filed prematurely (it had been submitted prior to issuance of the Board's decision). Therefore, the Board directed that "WOC should file the required costs itemization with this Board, following which OSM may, if not in agreement with the itemization presented, file any objections thereto within 60 days following receipt of WOC's bill." Id. at 69. The Board noted, however, that "[b]ecause of the conclusion stated herein, only the amount of the award to be made remains unresolved." Id.

On October 21, 1998, WOC filed its revised petition for costs and expenses, providing affidavits and itemized accountings from both Steve Jones, the attorney who had officially represented it before the Board, and for Daniel F. Heilig, who advised the Board that, while he was presently the Executive Director of WOC, he had been a staff attorney employed by WOC during the pendency of the WOC appeal before the Board and that he had been assigned by WOC to work with Jones in prosecuting the case and had done so.

In his affidavit, Jones noted that he was a sole practitioner with approximately 20 years of practice with considerable experience in litigation and environmental and administrative law, whose present practice specialized in public interest issues. See Jones Affidavit at 1-2. He noted that he had agreed to represent WOC on a contingency basis with the understanding that, if successful, he would attempt to collect attorney fees from the Government. Id. at 3. He declared that, based on conversations which he had conducted with other attorneys, the market rate for the work which he performed would, at the present time, be appropriately set at \$175.00 per hour and he further averred that he had expended 217 billable hours from November, 1994, through October 16, 1998, on all aspects of the case. He requested an award of \$37,975. Id. at 3-4.

For his part, Heilig noted he had served as the senior staff attorney and associate director for WOC from the commencement of WOC's involvement until September 20, 1998, at which point in time he became the executive director of WOC. See Heilig Affidavit at 1. He noted that he had been admitted to the Wyoming State Bar in 1991 and that, as a senior staff

attorney for WOC, his practice was entirely focussed on Federal and State environmental and natural resource law questions. He declared that, based on conversations with other attorneys who practice before IBLA, the appropriate fair market value for his services was \$125 per hour and further averred that he had expended a total of 68.45 hours on the case and requested that WOC be compensated in the amount of \$8,556.25 for his services. Id. at 1-2.

After a considerable delay, counsel for OSM filed a brief in opposition to the requested amounts. Insofar as the fees sought by Jones were concerned, OSM argued that the 217 hours billed were excessive, particularly given the fact that the case had proceeded solely on the written record and did not involve a fact-finding hearing. Dividing the number of pages in WOC's substantive pleading (45) with the total number of hours of work claimed (217), OSM arrived at a figure of 4.8 hours per page of substantive pleading, an expenditure of time which OSM claimed was clearly unjustified. See OSM Response at 3. OSM suggested that, since a productive attorney in the Solicitor's Office could be expected to produce a brief of the length and complexity of that involved herein in 120 hours, it was reasonable to limit Jones' recovery to a similar period of time. Id. at 3-4.

Insofar as calculation of the lodestar, i.e., the hourly value of the attorney's labor multiplied by the number of hours reasonably expended, was concerned, OSM also challenged Jones' claim to payment at the rate of \$175 per hour. OSM noted that a Government attorney at a grade of GS-13, step 1, living and working in the State of Wyoming, would have been compensated at the rate of \$24.38 per hour during calendar year 1995. Id. at 5. OSM argued that, assuming Jones had billed the equivalent of a Federal work year (2080 hours), his total compensation would have been \$364,000, a level of compensation which OSM suggested was common only for partners in major law firms in large metropolitan areas, such as Denver and Washington, not for "a small town in rural Wyoming." Id. at 6. OSM asserted that an hourly rate set at twice the rate of a GS-13 (i.e., \$48.76) would represent a reasonable assessment "of the market value of a sole practitioner with Counsel for Appellant's skills and experience who lives and works in rural Wyoming." Id. Accordingly, OSM suggested that Jones be awarded a reasonable attorney fee award of \$5,851.20.

Insofar as Heilig's fee request was concerned, OSM challenged any award. Relying on the fact that Heilig was now the Executive Director of WOC, OSM argued that the costs incurred by him were not "attorney's fees" but rather were unreimbursable costs incurred by the client. Id. at 2.

The instant petition for an award of fees and expenses raises a number of issues of some complexity which have not, heretofore, been presented to this Board. As an initial matter, we will explore the question of whether or not Heilig is eligible for any award with respect to this appeal and, if so, what standards must be applied in determining the appropriate level of compensation.

[1] That in-house counsel may obtain an award of fees under the various fee-shifting statutes now in effect has been recognized on a number of different occasions. Thus, in PPG Industries v. Celanese Polymer Specialties Co., 840 F.2d 1565 (1988), the United States Court of Appeals for the Federal Circuit noted that, under the Patent Act, 35 U.S.C. § 285 (1994) (which permits the court to award a "reasonable attorney fees" in exceptional cases), attorney fee awards could be made to in-house counsel in the proper circumstances. Similarly, in Proctor & Gamble Co. v. Weyerhaeuser Co., 711 F. Supp. 904 (N.D.Ill. 1989), the District Court noted that "[f]ees for in-house counsel are appropriate where counsel is performing legal work that would otherwise be performed by outside counsel." Id. at 906.

Most compellingly, in Kay v. Ehrler, 499 U.S. 432 (1991), the United States Supreme Court denied an award of attorney's fees to a pro se attorney under the Civil Rights Attorney's Fees Award Act of 1976, as amended, 42 U.S.C. § 1988 (1994). Of particular importance herein is the Court's discussion rejecting one of appellant's arguments. Thus, the Court noted that:

Petitioner argues that because Congress intended organizations to receive an attorney's fee even when they represented themselves, an individual attorney should also be permitted to receive an attorney's fee even when he represents himself. However, an organization is not comparable to a pro se litigant because the organization is always represented by counsel, whether in-house or pro bono, and thus, there is always an attorney-client relationship.

Id. at 436 n.7. Clearly, the Court viewed the utilization of in-house counsel as not creating a bar to recovery of reasonable attorney fees under 42 U.S.C. § 1988 (1994).

The language of 42 U.S.C. § 1988 (1994) merely provides that "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." The applicable provision of SMCRA, 30 U.S.C. § 1275(e) (1994), provides, in relevant part, that:

Whenever an order is issued under this section, or as a result of any administrative proceeding under this chapter, at the request of any person, a sum equal to the aggregate amount of all costs and expenses (including attorney fees) as determined by the Secretary to have been reasonably incurred by such person for or in connection with his participation in such proceedings * * * may be assessed against either party as * * * the Secretary * * * deems proper.

While the language of the two statutes is obviously different, we perceive no basis on which to premise any functional distinction with respect to the question of whether or not reasonable attorney fees may be awarded to in-house counsel employed by a party which has prevailed within the meaning of

43 CFR 4.1294(b). 1/ Accordingly, we expressly hold that, under such circumstances, in-house counsel are eligible for an award of attorney fees under § 525(e) of SMCRA, 30 U.S.C. § 1275(e) (1994).

[2] Having determined that in-house counsel may be eligible for an award of "reasonable" attorney fees under § 525(e) of SMCRA, the next question to be resolved involves the determination of the process by which the Department should ascertain what is reasonable. And, on this question, Federal courts have not spoken with a single voice. Rather, there are a number of discernible lines of precedent relating to this issue. A seminal decision in this regard is that rendered by the United States Court of Appeals for the District of Columbia Circuit in National Treasury Employees Union [NTEU] v. U.S. Department of the Treasury, 656 F.2d 848 (D.C. Cir. 1981), since it serves as the progenitor for two separate approaches.

In its NTEU decision, the Court of Appeals limited compensation to wages paid (plus overhead) for legal representation provided by a union where the union (and not the lawyers) was to receive the award of attorney's fees. 2/ The Court justified this limitation on:

the settled expectation of the union employer and the employed attorneys that all fees recovered belong to the union means that the employing lay organization would capitalize on the attorney's services, reap a profit therefrom, and put the monies thus made to any use it chooses. In the absence of any compelling reason to disregard the ethical considerations implicated - and we discern none here - we believe that an allowance of above-cost fees to the union is inappropriate.

Id. at 853. Notwithstanding the foregoing, however, the Court suggested that what it termed "full fee awards" to unions might "withstand criticism when the monies are directed into a fund for maintenance of a legal services program," though it expressly declined to intimate any view in

1/ That regulation provides that appropriate costs and expenses, including attorney fees may be awarded:

"From 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."

2/ Where, however, the lawyers themselves, rather than the union, were to receive the award, the Court of Appeals, relying on Wilderness Society v. Morton, 492 F.2d 1026, 1037 (D.C. Cir. 1973), rev'd on other grounds sub nom. Ayleska Pipeline Service Co. v. Wilderness Society, 421 U.S. 230 (1975), held that there was no bar to recovery of the market value of the lawyers' services. But see Central States, Southeast and Southwest Areas Pension Fund v. Central Cartage Co., 76 F.3d 114 (7th Cir. 1996), (relying on Venegas v. Mitchell, 495 U.S. 82, 87 (1990), for the proposition that "it is the party, rather than the lawyer, who is so eligible" for attorney fees under 42 U.S.C. § 1988).

that regard. Id. at 855 and n.61. It is on this possibility that a fault-line has arisen with respect to subsequent decisions.

Shortly after the NTEU decision, the Merit Systems Protection Board (MSPB) issued a decision styled Wells v. Schweiker, 14 M.S.P.B. 175 (1982). Therein, the Board held that "[r]egardless of whether or not [a union] elects to expend its attorney fee awards solely for litigation purposes, the fact remains that the application of the market-value formula would allow it to profit from the underlying activities of its attorneys in this matter." Id. at 180. This decision was subsequently affirmed by the Federal Circuit in Goodrich v. Department of the Navy, 733 F.2d 1578 (Fed.Cir. 1984). Since that decision, the Federal Circuit has consistently upheld agency decisions denying market-based compensation to attorneys employed by unions, notwithstanding the existence of a fund exclusively earmarked for the maintenance of a legal services program. See, e.g., Devine v. National Treasury Employees Union, 805 F.2d 384 (Fed. Cir. 1986). And, as recently as PPG Industries v. Celanese Polymer Specialties Co., supra, the Federal Circuit has justified limiting awards to in-house counsel of costs plus overhead by noting that "[t]he implication of using a private firm market standard is to allow a nonlegal business corporation to use the services of in-house counsel, and to reap a profit therefrom." 840 F.2d at 1570. 3/

At the same time that the MSPB and the Federal Circuit were rejecting awards based on the market value of the attorney's services even where the union had established a separate fund for the maintenance of legal representation, the United States Court of Appeals for the District of Columbia and other Federal courts were proceeding in the opposite direction. Thus, in Jordan v. Department of Justice, 691 F.2d 514 (D.C. Cir. 1982), which issued the year after NTEU, the United States Court of Appeals for the District of Columbia Circuit allowed market value recovery for representation provided by a university-affiliated law institute. While not directly addressed in the body of its opinion, the Court did note in a footnote that it assumed "for the purposes of this appeal that, should the Institute share in any attorneys' fee award beyond recoupment of its own expenses, it will maintain a fund exclusively for litigation, into which its share will be deposited," referencing the NTEU decision. Id. at 516 n.14. 4/

3/ In addition to the United States Court of Appeals for the Federal Circuit, a number of District courts have also refused to allow unions to obtain market-value compensation for attorneys' fees even where a separate litigation fund was maintained. See, e.g., Harper v. Better Business Services, Inc., 768 F. Supp. 817 (N.D.Ga. 1991); Johnson v. Orr, 739 F. Supp. 945 (D.N.J. 1988).

4/ The maintenance of a separate account dedicated exclusively to legal representation was deemed by the Court of Appeals to remove any bar to application of its decision in Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980). Copeland had adopted a market-value approach in determining reasonable attorney fees and rejected a cost-plus approach, expressly noting that one clear result of the cost-plus approach would be to drastically undervalue the true reasonable value of services provided by

This approach soon found favor in other Federal courts. Thus, in Curran v. Department of the Treasury, 805 F.2d 1406 (9th Cir. 1986), the United States Court of Appeals for the Ninth Circuit held that, under the Back Pay Act, 5 U.S.C. §§ 5596(b)(1)(A)(ii) and 7701(g)(1), which authorized "reasonable attorney fees," an award based on market value of the services obtained was available to unions which had established separate accounts for litigation purposes. In doing so, it expressly aligned itself with the D.C. Circuit (referencing the decision in Jordan, *supra*) and declined to follow the Federal Circuit. Id. at 1409-10.

Subsequently, the United States Court of Appeals for the District of Columbia Circuit revisited this issue and, in American Federation of Government Employees v. FLRA, 944 F.2d 922 (D.C. Cir. 1991), it explicitly reaffirmed the implicit holding in Jordan that union lawyers could, under the proper circumstance, obtain market-based fees. In doing so, it re-emphasized the requirement that market-based remuneration was only proper where the monies recovered were placed in a fund maintained for legal representation. Thus, the Court noted:

When, however, the fees sought are to be paid directly to an organization not only furnishing legal services but also conducting other activities, ethical considerations come to the fore. To grant a market-rate fee request is to open the door to fee-splitting, unauthorized law practice and organizational profiteering on the professional services of attorneys. On this account, we have ruled that the measure of the organization's recovery is its financial outlay in the legal-service venture unless there is some guarantee that the amount above the organization's actual cost will ultimately be spent in the provision of legal assistance - as, for example, by placement into a fund maintained exclusively for legal representation. This assurance puts the organization's legal-service project on a par with legal aid societies and other private nonprofit law offices, and no ethical concern arises.

Id. at 934-35 (footnotes omitted).

Thereafter, in Kean v. Stone, 966 F.2d 119 (3rd Cir. 1992), a "mixed" case involving a charge of prohibited discrimination as well as a charge of improper personnel action, the United States Court of Appeals for the Third Circuit sided with the Ninth and D.C. Circuits (though it attempted to distinguish its holding allowing unions to obtain attorney fees so long as

(fn. 4 continued)

public interest law firms. Id. at 898. The Supreme Court's subsequent decision in Blum v. Stenson, 465 U.S. 886 (1984), which expressly authorized the use of the market rates prevailing in the relevant community rather than the fees actually charged for representation by public interest, non-profit law firms in determining a reasonable attorney fee under 42 U.S.C. § 1988 (1994), essentially adopted the Copeland analysis.

the legal fees were segregated from the Federal Circuit's decisions in Goodrich and NTEU on the grounds that, in those cases, what was involved was a "pure" case, *i.e.*, a case involving only adverse personnel action, which was within the Federal Circuit's exclusive jurisdiction (*see* 5 U.S.C. § 7703(b) (1994)). *Id.* at 122-23.

However, the United States Court of Appeals for the Seventh Circuit has recently gone further in its decision in Central States, Southeast and Southwest Areas Pension Fund v. Central Cartage Co. [Central States], 76 F.3d 114 (7th Cir. 1996). Therein, relying on Supreme Court decisions such as Venegas v. Mitchell, 495 U.S. 82 (1990), and Evans v. Jeff D., 475 U.S. 717 (1986) for the proposition that the attorney fee award is the property of the litigant and not the attorney, the Court of Appeals effectively ruled that it was irrelevant whether or not a pension fund which had sought attorney fees for a successful appeal segregated the award into a fund maintained exclusively for legal representation. The Court reasoned that, inasmuch as the winning litigant was not statutorily obligated to remunerate the attorney from the amount received, there was no basis for a "fee-splitting objection." *Id.* at 116.

Notwithstanding the Seventh Circuit's Central States decision, ^{5/} however, we have determined to follow the middle road as charted by the decisions of the Ninth, Third, and D.C. Circuits. Accordingly, we hold that in-house counsel may receive an award of attorney fees for representation work otherwise compensable under 43 CFR 4.1294. Where the application for an award is filed by an organization which is only partially involved in litigation, the award will be limited to the actual costs involved (*i.e.*, salary plus overhead), unless the monies awarded above the actual costs will be placed in a fund maintained for the purpose of supporting litigation. In the latter case, the reasonable value of the work performed will be measured by the market value of the services rendered as delineated below.

[3] The next issue with which we must deal involves the question of whether current or historic attorney compensation rates are properly used in determining the lodestar amount. Counsel have requested that the current attorney rates be used to compensate them for the delay in payment for their services. In support of this request, they cite the Supreme Court decisions in Missouri v. Jenkins, 491 U.S. 274 (1989) and Pennsylvania v. Delaware Valley Citizens' Council, 478 U.S. 546 (1986). *See* Appellant's Memorandum in Support of Petition for Costs and Expenses (Appellant's Memorandum) at 15-16. Counsel's reliance on these two cases is, as we shall show, misplaced.

^{5/} One possible problem which we perceive with the Central States' analysis is that, while it avoids the "fee-splitting" problem identified in decisions such as Curran and AFGE v. FLRA, it does so by essentially increasing the problems associated with the unauthorized practice of law since it is the litigant, presumptively a non-lawyer, which is being paid attorney fees.

At the outset, we note that a number of recent Board decisions have suggested that only historic rates, i.e., the rates in effect when the services were performed, are ever properly used in determining the lodestar in cases arising out of SMCRA. Thus, in Kentucky Resources Council v. OSM, 151 IBLA 324 (2000), the Board opined that "[i]t 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 is sought, was performed." Id. at 332-33. In support of this proposition, the Board cited the seminal Departmental decision in Natural Resources Defense Council (NRDC) v. OSM, 107 IBLA 339, 96 I.D. 89 (1989). This is, indeed, what NRDC holds. See NRDC v. OSM, supra at 396, 96 I.D. at 114. However, as we explain below, there are a limited number of circumstances in which current rates of compensation can be used in computing reasonable attorney fee awards under SMCRA.

We start, of course, with the United States Supreme Court decision in Library of Congress v. Shaw, 478 U.S. 310 (1986). In that decision, the Supreme Court expressly rejected an attempt to increase the lodestar computation by a factor of 30 percent to compensate for the delay in receiving payment for legal services rendered. In affirming the District Court's award, the United States Court of Appeals for the District of Columbia Circuit had agreed that, regardless of whether or not one considered the adjustment a compensation for delay or an assessment of interest, the no-interest rule, applicable to awards against the Government, would generally apply. The Court of Appeals had concluded, however, that the Government had waived its sovereign immunity from interest awards under § 706(k) of the Civil Rights Act, 42 U.S.C. § 2000e-5(k) (1982). See Shaw v. Library of Congress, 747 F.2d 1469, 1475-79 (D.C. Cir. 1984). The Supreme Court reversed, expressly finding that there had been no waiver of sovereign immunity to the assessment of interest under that section. 6/

While the thrust of its decision was primarily directed to the question whether Congress had waived the Government's immunity to the assessment of interest, the Supreme Court also addressed the question of whether the adjustment might be upheld on the theory that it was merely providing compensation for a delay in receiving payment for services. The Court noted that:

Interest and a delay factor share an identical function. They are designed to compensate for the belated receipt of money. The no-interest rule has been applied to prevent parties from holding the United States liable on claims grounded on the belated receipt of funds, even when characterized as compensation for delay. See United States v. Sherman, 98 U.S. 565,

6/ In 1991, however, Congress amended the Civil Rights Act to specifically authorize the assessment of interest against the Government "to compensate for delay in payment." 42 U.S.C. § 2000e-16(d) (1994).

568 (1879). Thus, whether the loss to be compensated by an increase in a fee award stems from an opportunity cost or from the effects of inflation, the increase is prohibited by the no-interest rule.

478 U.S. at 322.

Although the essential predicate of the Court's decision was the sovereign immunity from the assessment of interest enjoyed by the United States and the absence of any expressed waiver of that immunity in § 706(k) of the Civil Rights Act, the Court also addressed an argument that interest was properly considered part of the "reasonable" costs which that statute permitted to be recovered:

[W]e note that the provision makes the United States liable for "costs," and includes as an element of "costs" a reasonable attorney's fee. Prejudgment interest, however, is considered as damages, not a component of "costs." Indeed, the term "costs" has never been understood to include any interest component. A statute allowing costs, and within that category, attorney's fees, does not provide the clear affirmative intent of Congress to waive the sovereign's immunity.

Id. at 321 (citations omitted).

In Utah International Inc. v. Department of the Interior, 643 F. Supp. 810 (D. Utah 1986), a decision which was handed down just months after the Library of Congress v. Shaw decision, the District Court interpreted Shaw as holding that "[b]ecause compensation for delay is the equivalent of interest, * * * such compensation could not be awarded unless specifically mandated by Congress." Id. at 830. As a result, the District Court barred use of current rates in determining the appropriate award against the Government under § 525(e) of SMCRA, 30 U.S.C. § 1275(e) (1994), concluding that the Court's decision in Shaw prohibited use of current rates "either as a means of compensating [fee petitioners] for delay or as a shortcut for computing interest," absent an express waiver of the government's sovereign immunity with regards to interest awards. Id.

Subsequently, in Save Our Cumberland Mountains, Inc. v. Hodel, 857 F.2d 1516 (1988), the United States Court of Appeals for the District of Columbia Circuit, sitting en banc, reached the same conclusion in another appeal interpreting § 525 of SMCRA. The Court adopted a statement from an opinion written by Chief Judge Wald that had been issued in conjunction with the previous panel decision, Save Our Cumberland Mountains, Inc. v. Hodel, 826 F.2d 43 (D.C. Cir. 1987) (Wald, C.J., concurring), which had referenced the Library of Congress v. Shaw decision and concluded that "absent an explicit waiver of sovereign immunity, attorneys' fees awarded against the federal government must be based on historical rates." 826 F.2d at 59. The en banc decision concluded that "we must remand this matter for the limited purpose of new findings as to reasonable hourly rates at the time the services were performed." 857 F.2d at 1525.

It was in this developmental framework that the Board's decision in NRDC v. OSM, *supra*, issued. In that case, NRDC had sought an award of costs and expenses (including attorney fees) under § 525(e) of SMCRA, 30 U.S.C. § 1275(e) (1994), from both OSM and from West Elk Coal Company, which had intervened in the proceedings as the holder of the permit whose issuance NRDC had challenged. After first determining that § 525(e) applied to permit review proceedings, the Board next examined whether West Elk, given the facts of the case, could be held liable under the provisions of 43 CFR 4.1294(a). The Board concluded that, in the absence of any finding that West Elk had violated SMCRA, the regulations, or its permit, it could not be assessed any costs or expenses under 43 CFR 4.1294(a).

The relevance of this conclusion for our present purposes is that, when the NRDC decision subsequently examined the question of whether or not attorney fees under SMCRA could be based on current rates as a means of compensating for the delay in obtaining payment, it did so solely in the context of a claim for attorney fees being prosecuted against the Government. And, on this question, the Board, expressly relying on Library of Congress v. Shaw, *supra*, Utah International, Inc. v. Department of the Interior, *supra*, and Save Our Cumberland Mountains, Inc. v. Hodel, *supra*, concluded that "[w]hile there is some case precedent for applying current rates [citing Ramos v. Lamm, 713 F.2d 546, 555 (10th Cir. 1983)], it is now settled that historic rates are to be applied in computing the lodestar amount." 107 IBLA at 396, 96 I.D. at 114.

While undoubtedly a correct interpretation of all three of these precedents in the context of a claim against the Government, the Board's decision in NRDC v. OSM, *supra*, could not anticipate the Supreme Court decision in Missouri v. Jenkins, *supra*, which was rendered three months after the Board's decision and which clearly established that the bar to recovery under § 525(e) of attorney fees at current rates does not extend to situations in which an award of costs is being sought from non-Federal Governmental entities.

In Missouri v. Jenkins, *supra*, the Supreme Court for the first time directly addressed whether or not an enhancement for delay in payment was, where appropriate, part of a "reasonable" attorney fee under 42 U.S.C. § 1988 (1994). While noting that it had expressly avoided a definitive ruling on this question in its decision in Pennsylvania v. Delaware Valley Citizens' Council, *supra*, the Court pointed out that it had taken care in that decision to state "[w]e do not suggest * * * that adjustments for delay are inconsistent with the typical fee-shifting statute." 491 U.S. at 283, quoting Pennsylvania v. Delaware Valley Citizens' Council, *supra* at 716. The Court continued:

Our cases have repeatedly stressed that attorney's fees awarded under [§ 1988] are to be based on market rates for the services rendered. Clearly, compensation received several years after the services were rendered - as it frequently is in complex civil rights litigation - is not equivalent to the same dollar amount received reasonably promptly as the legal services are performed, as would normally be the case in private billings.

We, agree, therefore, that an appropriate adjustment for delay in payment - whether by application of current rather than historic rates or otherwise - is within the contemplation of the statute.

Id. at 283-84 (citations omitted).

Clearly, taken in isolation, the above language might be seen both as authorizing use of current attorney rates in our present appeal and as repudiating the limitations enunciated in Library of Congress v. Shaw, supra. However, the Court in Missouri v. Jenkins, supra, directly addressed the precedential scope of its decision in Library of Congress v. Shaw, supra, in the course of responding to the State of Missouri's claim that an award of interest under 42 U.S.C. § 1988 (1994) would violate the State's immunity under the Eleventh Amendment. The Court admitted that:

Our opinion in Shaw does, to be sure, contain some language that, if read in isolation, might suggest a different result in this case. Most significantly, we equated compensation for delay with prejudgment interest and observed that "[p]rejudgment interest * * * is considered as damages, not a component of 'costs.' * * * Indeed, the term 'costs' has never been understood to include any interest component." Library of Congress v. Shaw, 478 U.S. 310, 321 (1986). These observations, however, cannot be divorced from the context of the special "no-interest rule" that was at issue in Shaw. That rule, which is applicable to the immunity of the United States and is therefore not at issue here, provides an "added gloss of strictness," id., at 318, only where the United States' liability for interest is at issue. Our inclusion of compensation for delay within the definition of prejudgment interest in Shaw must be understood in the light of this broad proscription of interest awards against the United States. Shaw thus does not represent a general-purpose definition of compensation for delay that governs here. Outside the context of the "no-interest rule" of federal immunity, we see no reason why compensation for delay cannot be included within § 1988 attorney's fee awards.

Id. at 281 n.3.

We believe the foregoing makes it clear that, to the extent that attorney fees are sought from the Federal Government, absent an express waiver of sovereign immunity to an award of interest, attorney fees must be computed at historic rates, i.e., the rates in effect when the services were rendered. However, where attorney fees are sought from a party other than the United States, use of current rates may be appropriate in order to compensate the successful party for the delay in payment. Since § 525(e) of SMCRA, 30 U.S.C. § 1275(e) (1994), and the applicable regulations permit the assessment of attorney fees against non-Federal parties (see, e.g., Gateway Coal Co. v. OSM, 131 IBLA 212, 217 (1994); Save Our Cumberland Mountains, Bledsoe County Chapter, 127 IBLA 245 (1993); NRDC v. OSM,

supra), awards of attorney fees based on current rates of remuneration may be justified as a means for compensating for delay in payment of those fees, consistent with Missouri v. Jenkins, supra. 7/ Where, however, as in the present case, reasonable attorney fees are sought from a Federal entity, the dictates of Library of Congress v. Shaw, supra, require that the fees be computed at historic rates with no adjustment for delay.

[4] As noted above, counsel, purportedly relying upon the decision in Missouri v. Jenkins, supra, provided affidavits establishing only their rates of compensation as of 1998. However, as shown above, use of current rates of compensation, when attorney fees are sought from the Federal Government, runs directly afoul of the Supreme Court's holding in Library of Congress v. Shaw, supra. Thus, it is necessary for counsel to supplement the record, establishing the proper rates of compensation for the periods in which the services were performed. Moreover, review of the submissions also discloses the fact that the rates which Jones sought to establish were those in effect in Jackson, Wyoming, where he maintained his law practice. See Appellant's Memorandum at 15. Counsel for OSM challenged the amount claimed by Jones (\$175 per hour) given that his practice was in "a small town in rural Wyoming," asserting that the amount of compensation sought would only have been available in large metropolitan areas such as Denver or Washington, D.C. 8/ See OSM Response at 5-6. OSM suggested that compensation at double the rate of a GS-13 attorney would constitute reasonable attorney fees.

OSM's assertion that Federal salaries establish market values for attorney fees is simply untenable. One need only recall that the present salary of an Associate Justice of the United States Supreme Court is \$173,600. Dividing this figure by the 2080 hour Federal work-year provides

7/ We wish to caution, however, that even though recourse to current rates might be appropriate where attorney fees are sought from non-Federal entities, there could be situations in which, because of a significant delay in litigation coupled with a dramatic increase in attorney rates over that period, an award of fees at current rates would result in a considerable windfall to the attorneys. See, e.g., Ladd v. Thomas, 47 F. Supp. 2d 236, 239 (D.Conn. 1999). Since the aim of fee-shifting statutes is to allow fair compensation for an attorney's labor, not to obtain windfalls for successful parties, an award of fees at current rates in such situations would not be proper. See Murray v. Weinberger, 741 F.2d 1423, 1433 (D.C. Cir. 1984); New York Association For Retarded Children v. Carey, 711 F.2d 1136, 1152-53 (2nd Cir. 1983). In order to avoid awarding such windfalls, some courts have suggested recourse to historical rates adjusted for inflation rather than use of current rates. See, e.g., Van Ooteghem v. Gray, 774 F.2d 1332, 1338 (5th Cir. 1985); United States v. Washington, 626 F. Supp. 1405, 1518-20 (W.D. Wash. 1985).

8/ In our view, OSM's description of Jackson, Wyoming, as "a small town in rural Wyoming," is similar to describing Vail or Aspen as a small town in rural Colorado. In this instance, the size of the town of Jackson has no necessary relevancy (except, possibly, in an inverse ratio) to the cost of services purchased there, including presumably legal services.

an hourly salary of \$83.46 for an Associate Justice. Presumably, if this figure were deemed to represent the reasonable value of the work of the Supreme Court Justices, this figure would be seen as establishing an absolute cap on the amount which attorneys could claim, absent a showing that their work was more difficult, of greater importance, or of a higher caliber. The simple fact of the matter, however, is that Government salaries, even for so lofty a position as Supreme Court Justice, simply have no relevancy in determining the market value of attorney services. 9/

Moreover, notwithstanding both parties' focus on the appropriate rates of compensation for an attorney of Jones' level of experience with a practice in Jackson, Wyoming, Board precedent is clear that the rates which may be obtained in Jackson are simply irrelevant to the determination of reasonable attorney fees under SMCRA. Thus, in NRDC v. OSM, supra, we noted that the relevant community for purposes of determining the market rates was "the community where 'the judicial proceedings were located'" and the "area in which the court sits." Id. at 397, 96 I.D. at 114, citing Utah International Inc. v. Department of the Interior, supra at 830 n.38 and Ramos v. Lamm, supra at 555, respectively. Since that decision, the relevant "area in which the court sits" with respect to SMCRA awards has been refined to mean that, where attorney fees are sought for practice before local OSM offices or before the Hearings Division, OHA, the attorneys will normally be compensated at the market levels in the communities where those offices are located or the hearing was held, while practice before the Board or the OSM Headquarters office will be compensated at prevailing rates for the Washington, D.C., area. See National Wildlife Federation, 152 IBLA 352, 363-64 (2000); Kentucky Resources Council, Inc. v. OSM, supra at 334-35. Applying these holdings to the instant appeal, it is obvious that the relevant market rates are those in Casper, Wyoming, with respect to actions taken with respect to pleadings filed before the OSM Field Office and those in Washington, D.C., for actions undertaken with respect to pleadings filed with respect to WOC's request for informal review before the OSM Director and its subsequent appeal before the Board. 10/

9/ Since the issue is clearly not presented by this appeal, we need not decide whether, in situations in which the Government is attempting to recoup attorney fees under the various fee-shifting statutes (see, e.g., 43 CFR 4.1294(e)), its recovery is constrained by the costs actually incurred in providing those services or whether it, too, may be reimbursed for the market value of the services performed. See Copeland v. Martinez, 435 F. Supp. 1178, 1181 (D.D.C.), aff'd 603 F.2d 981 (D.C.Cir. 1979), cert. denied, 444 U.S. 1044 (1980).

10/ Administrative Judge Burski would note that, while past Board precedent clearly indicates that the relevant market for determining the value of an attorney's services with respect to practice before the Board is that prevailing in Washington, D.C., in his view, this approach seems derived from a relatively uncritical application of numerous Federal court decisions which have determined that the "community" for purposes of determining attorney fees based on practice before a Federal court is the local area in which the court sits.

Insofar as the market rates prevailing in Casper, Wyoming, during the relevant time-frame are concerned, there is simply nothing in the record on which the Board could base an award of fees. Unless an agreement can be reached between petitioners and OSM as to the proper valuation of the services performed by Jones based on the rates obtainable for comparable services in Casper, petitioners must supplement the record with evidence establishing those relevant rates. ^{11/} However, insofar as the applicable

(fn. 10 continued)

The many cases which adopt this standard generally proceed from two considerations. First and foremost, this standard was viewed as relatively easy to administer since the courts would, presumably, be generally in touch with the normal billing practices of the cities in which they were located and would, therefore, be in a position to review fee petitions with a knowing eye. Second, it fostered the policy goal implicit in all fee-shifting statutes of assuring that victorious counsel were remunerated at a level commensurate with the value of the services rendered while lessening the possibility that counsel would be paid disproportionately to the value of their services in the local market. Even so, courts have recognized that "in an unusual case, where the prevailing party used out-of-town counsel whose rates were higher than those charged locally, we have permitted an award based on the higher rates." Gottlieb v. Barry, 43 F.3d 474, 485 n.8 (10th Cir. 1994).

Judge Burski believes that the problem with applying this standard with respect to Board adjudications is two-fold. First, to the extent that the Board is required to award costs for activities conducted before OSM and other agency field offices, the Board is simply in no position to independently ascertain the local market value of the services performed and is forced to completely rely on the submissions of counsel. Second, with respect to many appeals with which the Board deals and for which fees may be obtainable from the Government (e.g., grazing and mining validity hearings), the overwhelming majority of actual practice, even with respect to appeals to IBLA, occurs in the field, not in Washington, D.C. To allow an attorney whose practice is in Pocatello, Idaho, but who handles a number of grazing appeals each year, to obtain attorney fees based on market rates for attorneys in Washington, D.C., where the Board is situated, when, in fact, the attorney never once ventured outside of the Pocatello environs, may be, in effect, to allow a windfall to such an attorney. Yet such is the inevitable consequence of allowing the award of fees based on the "area in which the court sits."

However, until such time as the Board sees fit to revisit this question, Judge Burski feels constrained to follow the prevailing and, thus far, unwavering holding of our precedents that the situs of the Government agency involved is determinative in establishing the community for purposes of computing a reasonable attorney fee.

^{11/} In this regard, the Supreme Court has noted that:

"To inform and assist the court in the exercise of its discretion, the burden is on the fee applicant to produce satisfactory evidence - in addition to the attorney's own affidavits - that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation."

Blum v. Stenson, *supra* at 896 n.11 (emphasis supplied).

Washington, D.C., rates are concerned, we believe the amount requested (\$175 per hour) is within the range of applicable rates for the time period in question. Therefore, no further supplementation with respect to this rate will be necessary.

With respect to the award request for Heilig's services, there is nothing in the record which would indicate that WOC has established that the monies received will be placed in a fund maintained solely for the purpose of litigation. Absent the existence of such a fund, any award for Heilig's services will be limited to the costs actually incurred by WOC with respect to his employment (salary plus overhead). Since there is nothing in the record before the Board as to the existence of a separate fund or the actual costs incurred, WOC is hereby granted 60 days in which to supplement the record with this information.

[5] We note that, in addition to challenging the rates of compensation sought by WOC's attorneys, OSM has also attacked the number of hours that they claim to have expended. But, rather than engage in a line-by-line analysis of the claimed hours, OSM has confined itself to a general allegation that the amount of time which Jones claims to have spent on the appeal (217 hours) was excessive, averaging 4.8 hours per page of substantive pleading. See OSM Response at 3. Counsel argues that 120 hours was a reasonable amount of time to have expended in preparation of the brief in question.

Initially, we must point out that OSM's simple division of the total number of pages in WOC's substantive brief (45) by the total number of hours claimed (217), to achieve a result which purportedly shows that each page of substantive briefing consumed 4.8 hours of counsel's time, fundamentally distorts Jones' claim for compensation. Of the 217 hours for which compensation was claimed, 65.2 hours were expended before the issuance of the decision of the Assistant Director which was the subject of the appeal (and the statement of reasons) and another 45.3 hours were expended after issuance of the Board's decision. Thus, insofar as preparation of WOC's statement of reasons for appeal is concerned, the maximum amount of time which could properly be ascribed thereto is 106.7 hours, which, we would point out, is less than the 120 hours which even OSM counsel agreed was "a reasonable amount of time to have expended on this matter." Id. at 4. OSM's generalized assault on the hours submitted by Jones as excessive must be rejected. 12/

12/ Insofar as any disparity with respect to the time spent by opposing counsel is concerned, the United States Court of Appeals in Shaw v. AA Engineering & Drafting, Inc., 213 F.3d 538 (10th Cir. 2000), noted:

"Evidence of the hours expended by opposing counsel may be helpful in determining whether time expended on a case was reasonable, but the opponent's time is not an 'immutable yardstick of reasonableness.'" Id. at 543, quoting Robinson v. City of Edmond, 160 F.3d 1275, 1284 (10th Cir. 1998).

There are, however, two elements in counsels' petition for fees which we do wish to examine in greater detail: (1) the amount of time claimed for preparation of the Memorandum in Support of WOC's Petition for Costs and Expenses; and (2) the question of duplicative billing with respect to hours claimed by Heilig. We will examine the hours billed for preparing WOC's Memorandum first.

In his affidavit, Jones itemized various time expenditures associated with preparation of WOC's Petition for Costs and Expenses and associated filings (WOC's Memorandum in support thereof, and Jones' affidavit and that of Heilig). Jones claimed a total of 42 hours of work preparing these documents. While we recognize that the costs associated with recovering attorney fees are compensable (see, e.g., Hernandez v. George, 793 F.2d 264, 267 (10th Cir. 1986)), we believe the amounts claimed by Jones with respect to this element is distinctly excessive. In particular, we note that in our prior decision we specifically found that "WOC has prevailed so as to be entitled to a costs award in this case" and that "only the amount of the award to be made remains unresolved." Wyoming Outdoor Council, *supra* at 68.

Notwithstanding this clear holding, more than half of WOC's Memorandum was directed to a reiteration of the factual history of the case and an analysis of why WOC was entitled to an award. WOC is, of course, free to gild the lily as much as it desires; we do not, however, feel it appropriate to require OSM to pay for the paint. See, e.g., Searles v. Van Bebber, 64 F. Supp. 2d 1033, 1037 (D. Kan. 1999). Accordingly, we hereby reduce the compensable hours for preparation of the Petition for Costs and Expenses in half, from 42 hours to 21 hours. However, in all other aspects, Jones' declaration as to the number of hours spent on this appeal is accepted as a reasonable expenditure for which recovery may be made.

Insofar as an award of attorney fees to Heilig is concerned, we have already held that in-house counsel may obtain an award of attorney fees, though in the instant case, in the absence of a fund specifically maintained for litigation, we have held that compensation for Heilig's services must be limited to WOC's actual costs. However, where a party avails itself of both in-house and outside counsel, it is appropriate to scrutinize the work performed by the in-house attorney for which compensation is sought to make sure that it is neither duplicative of the work performed by outside counsel nor simply involves "performing the role of a client, i.e., keeping abreast of what was happening in the litigation, providing counsel with information known to the client, and advising counsel of client's views as to litigation strategy." Proctor & Gamble Co. v. Weyerhaeuser Co., *supra* at 907.

We have reviewed Heilig's time sheet with these considerations in mind and find that two items are properly disallowed. Heilig claimed 19.2 hours for telephone conferences and discussions with Jones, occurring over a 4-year period. A review of Jones' time sheet showed that he, too, claimed this time and that these phone calls generally consisted of obtaining Heilig's view as to litigation strategy. Heilig's actions here are, as the court indicated in the Proctor & Gamble decision, merely the

performance of the role of any client, advising the outside counsel as to the client's view of strategy. Double billing is not properly allowed for these conversations and we hereby disallow Heilig's claim for compensation for these hours. In addition, Heilig claimed 3 hours for drafting the factual background for the petition for an award of costs and expenses. For the reasons provided above with reference to Jones' claim, these 3 hours are disallowed as unnecessary. Insofar as Heilig's remaining claimed hours are concerned (46.25), however, we have reviewed them and found them to be otherwise allowable.

In summary, we hereby find that WOC may receive an award for Jones' work at the rate of \$175 for 181.6 hours of work performed before the OSM Director and this Board in the amount of \$31,780. Additionally, WOC may receive an award for Jones' work at a rate to be determined based on the market value of his services in Casper, Wyoming, for the period from November 1, 1994, to December 12, 1994, aggregating 14.4 hours. Also, WOC may receive compensation for its actual expenses (salary plus overhead) with respect to the 46.25 hours of creditable work performed by Heilig. WOC is directed to submit information to establish both the applicable rates of compensation in Casper during the period in question as well as its actual expenses with respect to Heilig's employment within 60 days of receipt of this decision.

Inasmuch as this decision resolves the overwhelming majority of the issues raised by this petition, it is hoped that the parties will be able to reach a settlement on those few issues remaining. Parties are urged to do so. Should an agreement be reached which negates the need for any further Board review, the parties are requested to promptly notify the Board so that the instant matter may be concluded.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the petition for an award of costs and expenses is allowed in part, denied in part, and further submissions are ordered as delineated above.

James L. Burski
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge