

**WEST VIRGINIA SURFACE MINE BOARD**

**MARTINKA COAL COMPANY,**

Appellant,

v.

Appeal No. 97-40-SMB

**CHIEF, OFFICE OF MINING AND RECLAMATION  
DIVISION OF ENVIRONMENTAL PROTECTION,**

Appellee,

and

**FRIENDS FOR THE RESTORATION OF GUYSES,**

Intervenors.

**ORDER**

On a former day, to-wit, came the Intervenors, Friends For The Restoration Of GuySES (FROG), and petitioned this Board for an award of attorney and expert witness fees and costs pursuant to the provisions of 38 C.S.R. §§ 2-20.12.a. & 2-20.12.a.1. Having considered the various motions, memoranda of law and responses submitted by the Intervenors, Martinka Coal Company ("Martinka"), and the Division of Environmental Protection ("DEP") and the oral arguments of counsel, the Board makes the following findings of fact and conclusions of law:

**FINDINGS OF FACT**

1. In February and November of 1996, DEP issued Notices of Violation ("NOV") against Martinka on the grounds that the effluent being discharged from Martinka's treatment facility was causing staining and deposition in GuySES Run in violation of W.Va.Code § 22-3-

14(b)(9) and 46 C.S.R. § 1-3.2.b. & 3.2.f. The NOV first issued to Martinka in February of 1996, was extended for a total of one and one half years by DEP in an effort to give Martinka adequate time to abate its unlawful discharges into Guyses Run.

2. After extending the NOV numerous times based on Martinka's assertions that a larger sediment pond and use of new treatment chemicals would abate the violation, DEP found that the effluent from Martinka's treatment facility was still causing staining or deposition in Guyses Run and issued a cessation order pursuant to W.Va.Code § 22-3-17(a) on July 18, 1997.

3. To comply with the requirements of the cessation order and to effectuate the abatement of the NOV, Martinka entered into a consent agreement with DEP on September 2, 1997, whereby Martinka agreed *inter alia* that if the effluent from its treatment facility was still causing deposition or staining of Guyses Run on October 8, 1997, Martinka would cease discharging effluent into Guyses run and implement an alternative treatment plan.

4. Martinka agreed in ¶ 8 of the consent agreement that its failure to comply with the requirements of the consent agreement would result in a nationwide permit block against Martinka and the initiation of revocation and forfeiture proceedings in accordance with 38 C.S.R. § 2-12.4.

5. On October 8, 1997, DEP notified Martinka that the effluent was still causing staining or deposition in Guyses Run in violation of the permit requirements of the consent agreement and that Martinka was to cease discharging effluent from its treatment facility into Guyses Run.

6. Martinka appealed DEP's notification to the Board on the following grounds:  
Whether the Chief of Mining and Reclamation acted arbitrarily and capriciously by not

examining all reasonably available data, reports and information before determining that staining/deposition continued in Guyses Run on October 8, 1997.

Whether the Chief of Mining and Reclamation acted arbitrarily and capriciously by determining that the treatment option in Paragraph 1 of the Consent Agreement was unsuccessful.

7. That appeal was designated Appeal No. 97-40-SMB.
8. From February through April 24, 1998, this Board presided over four days of hearings in Appeal No. 97-40-SMB.
9. This Board conducted site visits of Guyses Run on December 4, 1997, and April 3, 1998.
10. At the conclusion of the evidentiary hearing on April 24, 1998, in Appeal No. 97-40-SMB, this Board rendered an oral decision on the record affirming DEP's October 8, 1997, notification to Martinka under the Consent Agreement that its discharges into Guyses Run must cease because deposition and staining of the stream had not been abated.
11. On May 21, 1998, this Board entered an order setting forth its written findings of fact and conclusions of law.
12. On or about July 4, 1998, Intervenors petitioned this Board for attorneys' and expert's fees and costs pursuant to the provisions of 38 C.S.R. §§ 2-20.12.a. & 2-20.12a.1, which provides for fees against a violator. Intervenors' counsel Mr. Patrick C. McGinley and Ms. Suzanne M. Weise also submitted detailed affidavits and time sheets indicating that they had expended 141.45 hours and 77.75 hours on this litigation respectively.
13. Mr. McGinley's attorney's fees were calculated at an hourly rate of \$195.
14. Ms. Weise's attorney's fees were calculation at an hourly rate of \$125.

15. The petition also included an invoice from FROG's expert John C. Hempel, indicating that he had expended 164 hours working on this case at a rate of \$75.00 per hour.

16. The petition also included a list of expenses FROG incurred during the course of prosecuting this litigation before the Board.

17. Under 38 C.S.R. § 2-20.12.1., the parties had thirty (30) days in which to answer the Intervenors' request for fees and costs.

18. On July 14, 1998, the Division of Environmental Protection ("DEP") filed an answer stating that it would not be taking a position with respect to the Intervenors petition on the ground that the Intervenors were only seeking fees and costs from Martinka.

19. On July 21, 1998, Martinka filed a motion to dismiss the Intervenors' petition. The only ground asserted by Martinka in support of its Motion to Dismiss was that "Judge MacQueen's ruling that the Surface Mine Board lacked subject matter jurisdiction to challenge the DEP's action under the Consent Agreement is *res judicata* in this matter and the Surface Mine Board lacks subject matter jurisdiction . . . ." **Martinka Coal Company's Motion to Dismiss**, at ¶ 18.

20. On July 27, 1998, Martinka filed a "Motion to Stay and Bifurcate" which sought *inter alia* to allocate any fees and costs awarded between DEP and Martinka.

21. Martinka failed to file an answer to the Intervenors' request for fees and costs within the thirty (30) days provided by 38 C.S.R. § 2-20.12.1.

22. Martinka filed no written answer or objections to the reasonableness of either the hourly rates of Mr. McGinley, Ms. Weise or Intervenors' expert Mr. Hempel, or their respective total fees. Martinka failed to offer any written or oral evidence to rebut the affidavits and

submissions made by Intervenors in support of the request for fees and costs.

23. On August 12, 1998, the Intervenors filed a memorandum in response to Martinka's motion to dismiss asserting that this Board should deny the motion to dismiss on the following grounds:

(1) Martinka's sole ground supporting its' motion is that an order of the Circuit Court of Kanawha County in a different case involving different issues is *res judicata* as to this Board's jurisdiction over appeal No.97-40-SMB; (2) Martinka is itself barred by the doctrine of *res judicata* from arguing, in this collateral proceeding regarding imposition of attorney's fees, that this Board did not have subject matter jurisdiction over the merits of Martinka's own claims in the underlying appeal; (3) the doctrine of quasi-estoppel precludes Martinka from taking a position inconsistent with the one it had taken before this Board on the merits of the underlying proceeding; and (4) this Board has the authority to grant attorney's and expert's fees against Martinka on the basis that the company's pursuit of Appeal No. 97-40-SMB was vexatious and in bad faith.

24. By order entered on August 14, 1998, this Board denied Martinka's "Motion to Stay and Bifurcate" and scheduled a hearing for September 16, 1998, on the Intervenors' petition and Martinka's motion to dismiss.

25. On August 17, 1998, Martinka filed a Petition for Leave to Obtain Discovery seeking, *inter alia*, to depose Intervenors' counsel and expert as well as counsel for DEP, and to obtain documents, notes and other materials used by counsel in preparing for and litigating Appeal No. 97-40-SMB.

26. On August 19, 1998, DEP filed a response to Martinka's Petition for Leave to Obtain Discovery asserting that the motion was being pursued by Martinka "in bad faith and for the purpose of harassing and embarrassing the DEP."

27. By order entered on August 24, 1998, this Board ordered that it would rule on Martinka's Petition for Leave to Obtain Discovery at the hearing scheduled for September 16,

1998.

28. Thereafter, on August 27, 1998, the Intervenors filed a motion for a protective order and memoranda in support thereof, attaching supplemental affidavits specifically addressing the four issues raised by Martinka in its Petition for Leave to Obtain Discovery.

29. By order entered on September 3, 1998, this Board changed the time of the hearing on September 16, 1998, from 10:30 a.m. to 9:00 a.m.

30. On September 16, 1998, a hearing was held before this Board at which time counsel for Martinka, DEP and the Intervenors presented oral argument regarding the issue raised by Martinka in its motion to dismiss and the Intervenors' petition for fees and costs.

31. Martinka did not file any written answer to Intervenors' request for fees and costs prior to or at the hearing challenging any of the hours expended by Intervenors' counsel or the hourly rate charged. However, at the hearing, Martinka made an oral challenge for the first time to the hourly rate charged by Mr. McGinley, arguing that \$195.00 an hour was not a reasonable fee for attorneys in the Charleston area with similar experience. Martinka offered no evidence to support such assertion, other than a conclusory statement by its counsel.

32. At the hearing, Martinka also raised for the first time during oral argument the assertion that this Board could not award attorney and expert fees and costs because there was no violation of the West Virginia Surface Coal Mining and Reclamation Act involved in Appeal No. 97-40-SMB.

33. The DEP's case was notably lacking in any expert testimony; the DEP would never have prevailed solely with the non-expert testimony and evidence it offered; the outcome on

the merits of this appeal is due to the testimony of Intervenors' expert, Mr. Hempel.

### CONCLUSIONS OF LAW

1. The Board unanimously rules that Martinka's motion to dismiss should be denied on the following grounds, as more fully explained in Intervenors' response to said motion: (a) Judge MacQueen's ruling in Civil Action No. 98-MISC.-278 is not *res judicata* as to this Board's jurisdiction over Appeal No. 97-40-SMB; (b) This Board's final unappealed decision on the merits of Appeal No. 97-40-SMB is *res judicata* and Martinka is barred from collaterally attacking this Board's jurisdiction in this ancillary attorney's fees proceeding; and (c) the doctrine of quasi-estoppel precludes Martinka from taking a position inconsistent with one it had previously taken in Appeal No. 97-40-SMB. Further, the issue of the Board's jurisdiction was never raised by any party before the Board in Appeal No. 97-40-SMB, and Martinka has waived the right to raise the issue in response to the Petition for Attorney Fees.

2. The Board unanimously rules that Martinka's Petition for Leave to Obtain Discovery should be denied because there is sufficient information in the record of Appeal No. 97-40-SMB in the form of deposition transcripts, hearing transcripts, correspondence, motions, responses, petitions, memoranda, time sheets and supporting affidavits from which this Board can determine the reasonableness of the Intervenors' request for fees and costs. To allow Martinka to conduct such discovery would convert this request for fees and costs into a second major litigation. *Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S.Ct. 1933, 1941, 76 L.Ed.2d 40 (1983) ("A request for attorney's fees should not result in a second major litigation.").

3. Under the provisions of 38 C.S.R. § 2-20.12.a., "[a]ny person may on request be awarded by the appropriate board or court a sum equal to costs and expenses including attorneys'

fees and expert witness fees as determined to have been reasonably incurred."

4. Under 38 C.S.R. § 2-20.12.a.1, costs and expenses including attorneys' fees may be awarded to "[a]ny participating party against a violator upon a finding that there is a violation of the act, the regulations or the permit has occurred, and there is a determination that the party made a significant contribution to the full and fair determination of the issues."

5. The violation of a consent order constitutes a violation of a permit condition, as well as a violation of the regulations promulgated under the West Virginia Surface Coal Mining and Reclamation Act. *See* 38 C.S.R. § 2-12.4.j.

6. Moreover, had Martinka been successful in Appeal No. 97-40-SMB, the effect would have been to withdraw both the notice of violation and cessation order issued it by the DEP; the permit conditions agreed to by Martinka in the consent order would also have been nullified had this appeal been resolved in favor of Martinka.

7. The Board concludes that it has authority under the above regulations to award fees and costs to Intervenor because the consent agreement entered into by Martinka related to an outstanding cessation order and an unabated violation; when agreed to by Martinka, the consent agreement imposed what was in effect a permit condition, the violation of which would give rise to a nationwide permit block and the initiation of revocation and forfeiture proceedings pursuant to 38 C.S.R. § 2-12.4. *See* Findings of Fact, ¶¶ 3-5, *supra*; *see also*, 38 C.S.R. § 2-12.4.j.

8. Applying the provisions of 38 C.S.R. §§ 2-20.12.a. and 20.12.a.1. to the case at bar, the Board makes the unanimous ruling that the Intervenor made a significant contribution to the full and fair determination of the issues and therefore, the Intervenor are entitled to recover

their reasonable attorney's fees and court costs for services rendered before this Board.

9. The Board unanimously rules that the attorney's fees for services in obtaining a writ of prohibition before the Circuit Court of Kanawha County should be disallowed; accordingly, Mr. McGinley's hours should be reduced by 11.40 and Ms. Weise's hours should be reduced by 21.50.

10. The Board concludes, after reviewing the order of the Circuit Court of Kanawha County in Civil Action No. 95-C-1983 awarding fees to Mr. McGinley and Ms. Weise at a rate of \$195 and \$125 per hour respectively, that Intervenors' request for counsel fees at the same rate in Appeal No. 97-40-SMB is reasonable.

11. Martinka is ordered to pay Mr. McGinley attorney's fees in the amount of \$25,359.75 and to pay Ms. Weise attorney's fees in the amount of \$7,031.35, for a total award of 32,390.00, which fees this Board concludes are reasonable.

12. With respect to Mr. John Hempel's expert fees in the amount of \$13,560.38, the Board concludes that the amount is reasonable, having previously found Mr. Hempel's testimony to be very compelling, persuasive and helpful to the Board.

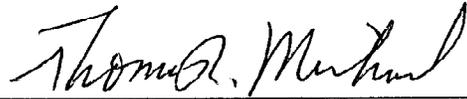
13. The Board, however, concludes that the case presented by DEP was notably lacking in any expert testimony and that DEP would never have prevailed without the testimony of Mr. Hempel. Accordingly, the Board grants Martinka's request to allocate a portion of the expert fees to the DEP, and the Board orders DEP to pay the expert fees of Mr. Hempel in the amount of \$13,560.38.

14. With respect to the costs incurred by the Intervenors, the Board concludes that the costs incurred in prosecuting their intervention were reasonable; accordingly, Martinka is ordered

to pay the Intervenors costs in the amount of \$1,903.64.

This Board notes the objections and exceptions of Martinka Coal Company and the Division of Environmental Protection to this order.

ENTERED this 26<sup>th</sup> day of October, 1998.



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THOMAS R. MICHAEL  
CHAIRMAN