

**Commonwealth Court of Pennsylvania**

**Docket No. 449 M.D. 1993, September 5, 1996.**

*Sedat Inc. and Seven Sisters Co. Inc.*

v.

*Commonwealth of Pennsylvania, Department of Environmental Resources and  
Kenneth J. Fisher and Ann Fisher,*

**Before: Honorable George T. Kelton, Senior Judge**

Procedure

On July 9, 1996, we held a hearing on Petitioners' (Sedat Inc. and Seven Sisters Mining Company, Inc.) petition for award of costs and attorney's fees and on their motion to remove party respondents. At the conclusion of that hearing, we made a liability determination against the Department of Environmental Protection (Department) and directed Petitioners to submit a schedule of fees and costs attributable to the period between June 28, 1994 and June 27, 1995, within twenty-one days of the hearing date. Further, we directed the Department to file a memorandum, brief or other documents in opposition to all or any of the fees included within Petitioners' calculation twenty-one days thereafter. Finally, we granted Petitioners' April 17, 1996 unopposed motion to remove party respondents (the Fishers).<sup>1</sup>

Having received both parties' post hearing submissions, we now set forth our reasons for determining liability against the Department and assess as set forth below the attorney's fees and costs against the Department.<sup>2</sup>

BACKGROUND

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<sup>1</sup> The Fishers are the surface landowners of the mine at issue in Seven Sisters Mining Company's application to the Department of Environmental Protection.

<sup>2</sup> On July 12, 1996, the Department filed an application to amend its May 3, 1996 answer to Petitioners' petition for award of costs and attorney's fees, the proposed amended answer and a memorandum of law concerning the alleged untimeliness of the petition for award of costs and attorney's fees. We disallow amendment of the answer at this late date.

The Department could have raised its position at the July 9, 1996, hearing. At the conclusion of that full hearing, we made a liability determination against the Department and the only question remaining open, in our view, was the amount of costs and attorney's fees to be awarded. In any event, we noted at the July 9<sup>th</sup> hearing that in our September 14, 1994, order, we retained jurisdiction over Petitioners' request for damages and attorney's fees and stated that the parties could resubmit a request for a determination of those issues. (N.T. 11-14.)

On October 19, 1993, Petitioners filed a petition for review in the nature of a petition for writ of mandamus and equitable relief with this Court. Therein, they alleged that, on September 9, 1993, Seven Sisters Mining Company submitted an application to the Department seeking to mine the Clever Mine. Further, they alleged that the Department returned the permit application on September 22, 1993 on the grounds that it was incomplete because it did not include a form known as Supplement C, indicating that the surface landowners consented to mining. (Here, husband and wife Fishers are the surface landowners.)

Petitioners' requested relief was that we 1) issue an injunction permanently enjoining the Department from refusing to accept their application for a mining permit on the basis of the absence of a Supplement C; or in the alternative, if we found that a Supplement C was required; 2) issue an order compelling surface landowners to execute it.

On June 28, 1994, this Court by then President Judge Craig overruled the Department's preliminary objections. Judge Craig held that, because Sedat owns the subsurface mineral rights and leased those rights to Seven Sisters, Seven Sisters need not submit a Supplement C form signed by the Fishers as part of its permit application. Sedat, Inc. v. Commonwealth of Pennsylvania, Department of Environmental Resources, 645 A.2d 407 (Pa. Cmwlth. 1994).

On September 14, 1994, this Court by Judge Kelton granted Petitioners' motion for judgment on the pleadings and request for relief in the nature of a writ of mandamus thereby requiring the Department to accept and review Seven Sisters' permit application without requiring that the application include a Supplement C form signed by Fishers. In that order, we retained jurisdiction over Petitioners' request for damages and attorney's fees.

On December 3, 1994, the Pennsylvania Supreme Court entered an order quashing the Department's appeal. On February 15, 1995, the Supreme Court entered an order denying the Department's application for rehearing and reargument. On September 29, 1994, Seven Sisters submitted a permit application to the Department. On June 27, 1995, the Department finally issued the mining permit to Seven Sisters.

On April 17, 1996, Petitioners filed a petition for award of costs and attorney's fees. The Department filed an answer thereto on May 3, 1996. This Court held a full-day evidentiary hearing on July 9, 1996. Below we set forth in greater detail our disposition of the April 17<sup>th</sup> petition.

## DISCUSSION

### I. Liability

#### a. Authority for Imposing Liability:

At the conclusion of the July 9, 1996 hearing, we imposed liability for attorney's fees under Sections 4(b) and 18(c) of the Surface Mining Conservation and Reclamation Act (SMCRA)<sup>3</sup> and under Section 2503(9) of the Judicial Code.<sup>4</sup> In pertinent part, those sections provide as follows:

Section 4(b):

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<sup>3</sup> 52 Pa. S.A. §§1396.4(b) and 1396.18c.

<sup>4</sup> 42 Pa. C.S. §2503(9).

The Environmental Hearing Board, upon the request of any party, may in its discretion order the payment of costs and attorney's fees by such party in proceedings pursuant to this section.  
52 P.S. §1396.4(b).

Section 18c:

(e) The Court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including attorney and expert witness (fees) to any party, whenever the court determines such an award is appropriate.  
52 P.S. §1396.18c

Section 2503(9):

(9) Any participant who is awarded counsel fees because the conduct of another party in commencing the matter or otherwise was arbitrary, vexatious or in bad faith.

42 Pa. C.S. § 2503(9).

At the July 9<sup>th</sup> hearing, we stated our agreement with Petitioners' counsel that the threshold standards which must be met in order to secure attorney's fees under SMCRA are set forth in Big B Mining Company v. Commonwealth of Pennsylvania, Department of Environmental Resources, 624 A.2d 713 (Pa. Cmwlth.), petition for allowance of appeal denied, 535 Pa. 649, 633 A.2d 153 (1993). We find that the criteria have been met. (N.T. 129-130.)

1. Issuance of a final order;
2. Applicant for fees and expenses must be prevailing party;
3. Applicant must have achieved some degree of success on the merits; and
4. Applicant must have made a substantial contribution to the full and final determination of the issues.

As for liability under Section 2503(9) of the Judicial Code, we concluded at the July 9, 1996 hearing that the Department's conduct, at least during the period of June 28, 1994 to June 27, 1995, caused an unnecessary delay in processing the application and a needless extension of the litigation. Thus, we concluded that the Department's actions in this matter constituted arbitrary, vexatious or bad faith behavior such as that contemplated by the General Assembly in Section 2503(9) of the Judicial Code, 42 Pa. C.S. §2503(9). (N.T. 129.)

b. Time Period for Liability:

We limited liability for attorney's fees and costs to the period between June 28, 1994 and June 27, 1995. We chose June 28, 1994 as the start date because that is when Judge Craig determined that Seven Sisters need not submit a Supplement C form signed by the Fishers as part of its permit application.<sup>5</sup> We chose June 27, 1995 as the end date because that is when the Department ultimately issued the mining permit.<sup>6</sup>

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<sup>5</sup> Petitioners contended that the time period should have commenced in 1992 when the Superior Court held that Sedat need not obtain the Fishers' written consent in order to submit the application to the Department.

We chose that one-year period in which to impose liability because, during the year, the Department refused to consider the permit without the Supplement C form thereby unduly and fruitlessly protracting the litigation. It is clear that, subsequent to Judge Craig's June 28, 1994 opinion and order, the Department was failing to comply with a clear mandate of this Court.

I do find as fact that the delays were unnecessary after the date of Judge Craig's order. Up to that time the issue of what the Department was to do or not to do with reference to its rights to inspecting the land after the mining commenced was a legitimate interest on the part of the Commonwealth to inquire about as to what the law was there. So up to the time that Judge Craig spoke otherwise, I believe it was appropriate for them to litigate the issue.

(N.T. 133.)

## **II. Assessment of Attorney's Fees and Costs:**

In paragraph 4 of Petitioners' post hearing submission, counsel asserts that they incurred \$18,045.50 in attorney's fees during the period of June 28, 1994 to June 27, 1995. At the July 9, 1996 hearing, the Department stated that it was not contesting the reasonableness of the hourly rate charged by Mr. Klodowski for work performed by Mr. Klodowski. (N.T. 75-76.) As for the other attorneys who worked on the case at Mr. Klodowski's direction and under his supervision, Mr. Klodowski testified as to their experience and the rates charged for their work. (N.T. 76-78.) We accept and find his testimony in that regard credible.<sup>7</sup>

Accordingly, we find the attorney's fees listed in paragraph 4 of Petitioners' post hearing submission to be reasonable and therefore, assess attorney's fees in the amount of \$18,045.50 against the Department.

In paragraph 5 of their post hearing submission, Petitioners set forth \$592.05 as the costs incurred during the relevant time period. That amount includes charges for telephone, facsimile, duplicating and Federal Express costs. (Exhibit C-1 of Petitioners' Post Hearing Submission.) We find those costs to be reasonable and therefore assess costs in the amount of \$592.05 against the Department.

Petitioners cite Sampaolo v. Cheltenham Township Zoning Hearing Board, 629 A.2d 229 (Pa. Cmwlth. 1993) and In re Ciaffroni, 584 A.2d 410 (Pa. Cmwlth. 1990) in

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Sedat, Inc. v. Fisher, 420 Pa. Superior Ct. 469, 617 A.2d 1 (1992). The Department, however, was not even a party to that action. Therefore, we stated at the end of the July 8, 1996 hearing that the Department had a right to seek a clarification or interpretation of the Superior Court's decision and to await a judgment from this Court as to the implications of that decision.

<sup>6</sup> The Department argued that the one-year time period should have been shortened because much of the delay during that year was due to requests by the engineers for additional time. We declined to shorten the one-year period "because had the application been accepted earlier, these issues concerning the engineering questions that were still open could have been addressed much earlier."

<sup>7</sup> I [Mr. Klodowski] have been practicing for almost 17 years now. I have worked at four different law firms. I was a department leader in a big firm, and I do know generally what other attorneys charge of comparable experience, and also I compete against other law firms for work, and I have an idea of what they charge.

(N.T. 78.)

support of their argument that we should award costs and fees associated with their petition for award of costs and attorney's fees. Although we acknowledge that Petitioners would not have filed their petition but for the Department's delay, we conclude that the cases cited by Petitioners do not preclude us from exercising our discretion and declining to award attorney's fees and costs for matters pertaining to Petitioners' attorney's fees request. (N.T. 132-133.)