UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
L & C Services, Inc.,	)	
	)	Docket No. VII-93-CAA-112
	)	(Equal Access To Justice Act)
Respondent	)	

INITIAL DECISION ON APPLICATION FOR AWARD OF FEES AND EXPENSES PURSUANT TO THE EQUAL ACCESS TO JUSTICE ACT

By: Carl C. Charneski

Administrative Law Judge

Issued: December 16, 1997

Washington, D.C.

Appearances

For Complainant: Kent Johnson, Esq.

Henry F. Rompage, Esq.

U.S. Environmental Protection Agency

Region VII

Kansas City, Kansas

For Respondent: D.K. "Kirby" Wright, Jr., Esq.

Hintze & Wright

Seattle, Washington

L&C Services, Inc. ("L&C"), has filed an Application for Award of Fees and Expenses Pursuant to the Equal Access to Justice Act ("EAJA"). 5 U.S.C. § 504 and 40 C.F.R. 17.1 et seq. In its application, L&C requests an award of attorneys' fees and expenses in the amount of $69,028.42 from the U.S. Environmental Protection Agency ("EPA").(1) EPA vigorously opposes the awarding of such fees and expenses. For the reasons set forth below, L&C's EAJA application is denied.

I. Background

L&C filed the present EAJA application after having prevailed in a Clean Air Act enforcement proceeding brought against it by EPA. 42 U.S.C. § 7413(d)(2)(A). In that enforcement proceeding, EPA alleged that L&C committed six violations of the National Emissions Standards for Hazardous Air Pollutants ("NESHAP") for asbestos.(2) Specifically, EPA charged L&C with six counts of violating 40 C.F.R. 61.145(c)(6)(i), for allegedly failing to keep regulated asbestos-containing material ("RACM") wet until its removal.

A decision was issued by this court on January 29, 1997, in which the respondent prevailed on all counts. L&C Services, Inc., Docket No. VII-93-CAA-112. It is upon the basis of this victory that L&C now seeks an award of attorneys' fees and expenses.

II. The Equal Access To Justice Act

Section 504 of the Equal Access To Justice Act allows, under certain circumstances, for a prevailing party to recover from the Federal government certain litigation-related fees and expenses. Section 504(a)(1) provides:

An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

5 U.S.C. § 504(a)(1) (emphasis added).(3)

III. Discussion

The issue to be resolved is whether EPA was "substantially justified" in bringing the enforcement action against L&C. If so, L&C, even though the prevailing party, may not be awarded fees and expenses. In re Biddle Sawyer, 4 E.A.D. 912, 935 (1993). See 40 C.F.R. 17.6(a).

The standard for "substantial justification" within the meaning of the Equal Access To Justice Act is one of simple reasonableness, i.e., whether the government's position had a reasonable basis in law and fact. Frey v. Commodity Futures Trading Com'n, 931 F.2d 1171 (7th Cir. 1991). See Pierce v. Underwood, 487 U.S. 552, 565 (1988)("'justified in substance or in the main' -- that is, justified to a degree that could satisfy a reasonable person."); see also, Reabe Spraying Service, Inc., 2 E.A.D. 54 (1985). The government bears the burden of proving that attorneys' fees and expenses should not be awarded. Management, Inc. v. N.L.R.B., 768 F.2d 1299 (11th Cir. 1985). Moreover, "[n]o presumption arises that the agency's position was not substantially justified simply because the agency did not prevail." 40 C.F.R. 17.6(a).

It is against this standard that L&C's EAJA application is measured. As noted, all six counts at issue in the enforcement proceeding involved an alleged violation of 40 C.F.R. 61.145(c)(6)(i). As to each count, EPA charged that L&C failed to keep regulated asbestos-containing material wet until its removal.

Counts I, II, III, and VI shared what has been referred to in the opinion as a "fatal omission." See Opinion at 7. This omission was the failure of the Kansas Department of Health and Environment ("KDHE") to collect a sample of the suspected RACM in order to show that the material referenced in each count was in fact regulated asbestos-containing material subject to the NESHAP regulations. Opinion at 7-11. Accordingly, these counts were dismissed.

Counts IV and V likewise were dismissed, but for a different reason. While inspection samples were taken by the KDHE in connection with both counts, these samples were held either to have been contaminated and, therefore, unreliable or otherwise not shown to be "friable" asbestos. Accordingly, as to Counts IV and V, EPA was unable to prove a violation of Section 61.145(c)(6)(i). Opinion at 11-14.

Nonetheless, despite the fact that all six counts of the complaint were dismissed, a review of the overall record established at the hearing supports a finding that EPA acted reasonably in initiating the enforcement action.

First, preliminary to its asbestos abatement efforts, L&C filed an Asbestos Notification Form with the KDHE stating that it was going to remove a substantial amount of friable asbestos from a largely abandoned oil refinery known as the Augusta facility. L&C stated that it intended to remove 128,000 lineal feet of friable asbestos from pipe surfaces, 10,000 lineal feet of friable asbestos was to be left in place on pipe removed by dismantling, 40,000 square feet of friable asbestos was to be removed from certain vessels, and 5,000 square feet of friable asbestos was to be left in place on dismantled heaters and towers. Compl. Ex. 1. Thus, when the KDHE began inspecting the Augusta facility it did so with the knowledge that L&C was removing a rather large amount of friable asbestos material.

In addition, as EPA points out, in L&C's "Proposed Asbestos Removal Practices," as set forth in Complainant's Exhibit 1, respondent identified the procedures that it would follow in abating areas admittedly containing friable asbestos. These procedures included the construction of wind barriers, the wet removal techniques and cleaning standards to be used, as well as the procedure for encapsulating the various metal components after the friable asbestos had been removed. EPA Opp. at 8.

Second, because of the size of this asbestos abatement project, it is undisputed that the NESHAP work practice requirements of 40 C.F.R. 61.145(c) applied. Therefore, L&C was subject to the work practice requirement in Section 61.145(c)(6)(i) that RACM be kept wet until its removal. As noted above, as the KDHE conducted its inspections of the Augusta facility it did so with the knowledge that a substantial amount of RACM, or regulated asbestos-containing material, was to be removed from the Augusta facility. Also, as L&C removed the friable asbestos, it followed accepted NESHAP workplace practices.

Third, a rather extensive pre-asbestos removal survey was conducted at the Augusta facility for the Williams Pipeline Company, the owner of the refinery, by Diversified Environmental Technologies ("DETI"). This survey consisted of material sampling and laboratory analysis. The purpose of the survey was to assess and quantify the asbestos problem at the refinery and thereby identify those areas in need of abatement work. While EPA dropped the ball on this point and failed to seek the admission into evidence of the DETI survey results, several witnesses did testify that the survey identified the presence of RACM in certain specified areas of the Augusta facility. Opinion at 9-11.

The above facts support a finding that on the basis of the KDHE's inspection of the Augusta facility, EPA was substantially justified in taking enforcement action against L&C. As to each of the six counts, the KDHE inspectors observed dry residue on metal jacketing that had been removed from pipe and placed on the ground. Taking into account the entire administrative record, in determining that what the KDHE inspectors observed were violations of the Clean Air Act, it can not be said that EPA acted unreasonably. The failure of EPA in this case was one of proof at the evidentiary hearing, and not its decision to proceed against the respondent.

ORDER

Accordingly, for the reasons set forth above, it is held that EPA was substantially justified in bringing the underlying enforcement action against L&C. As a result, L&C is not entitled to an award of fees and expenses under the Equal Access To Justice Act and its application for such an award is denied.(4)

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1. L&C has amended its application by requesting payment for nine fewer attorney hours.

2. EPA also named the Williams Pipeline Company ("WPC") as a respondent in this enforcement proceeding. WPC and EPA entered into a settlement agreement prior to hearing.

3. In addition, Section 504(b)(1)(B) provides that a corporate "party" is eligible for an EAJA award only if, at the time that the adversary adjudication was initiated, the corporation's net worth did not exceed $7,000,000, and it did not have more than 500 employees. EPA does not challenge L&C's assertion that it satisfies this Section 504(b)(1)(B) threshold criteria.

4. In its application for an award of fees and expenses, L&C argues that EPA's prehearing settlement position was unreasonable. Applic. at 10. The opinion in this case that EPA was substantially justified in proceeding against L&C does not address in any way what may, or may not, have transpired during these failed settlement negotiations. It is simply not a relevant area of consideration. See 40 C.F.R. 22.22(a).