IN RE L&C SERVICES, INC.

EAJA Appeal No. 98–1

FINAL DECISION AND REMAND ORDER

Decided January 15, 1999

Syllabus

On April 8, 1993, the United States Environmental Protection Agency Region VII ("Region") filed a complaint under section 113(d) of the Clean Air Act, 42 U.S.C. § 7413(d), against L&C Services, Inc. ("L&C") and Williams Pipeline Company, Inc. ("WPC"), alleging six violations of 40 C.F.R. § 61.145(c)(6)(i) in connection with L&C's asbestos abatement and removal activities at WPC's refinery in Augusta, Kansas. The complaint charged L&C and WPC with six counts of violating the regulation by failing to ensure that regulated asbestos–containing material ("RACM"), which had been removed from piping, was kept adequately wet until collected for disposal.

On January 29, 1997, the charges were dismissed against L&C after a hearing on the merits, WPC having earlier settled its case with the Region. Administrative Law Judge Carl C. Charneski ("Presiding Officer") found that the Region "failed to carry its burden of proof with respect to each of the six counts at issue." *In re L&C Services, Inc.*, Dkt. No. VII–93–CAA–112 (ALJ, Jan. 29, 1997) at 7. On four of the Region's counts against L&C, the Region was unable to conduct laboratory analysis of material suspected to contain asbestos because the inspector did not take samples. Thus, the Region had no direct evidence on those four counts to prove that the materials observed actually contained asbestos. On the remaining two counts, although the inspector sampled the observed materials and laboratory analyses confirmed that they contained regulated asbestos, the Region did not provide probative evidence that the sampled material was friable (i.e., capable of being "crumbled, pulverized, or reduced to powder by hand pressure," *see* 40 C.F.R. § 61.141).

On March 27, 1997, L&C filed an "Application for Award of Fees and Expenses Pursuant to the Equal Access to Justice Act" requesting an award of $69,028.42. On December 22, 1997, the Presiding Officer denied L&C's application for attorneys' fees and expenses. The Presiding Officer's recommended decision held that L&C was a prevailing party within the meaning of the regulation, but the Region's position in initiating the enforcement action was nevertheless substantially justified. Accordingly, the Presiding Officer denied L&C's request for fees and expenses. L&C filed this appeal on January 16, 1998, requesting that the Board consider whether, based on the overall administrative record, the Presiding Officer properly found the Region's position to be substantially justified.

Held: The Presiding Officer's recommended decision is reversed and remanded for a determination of reasonable attorneys' fees and expenses to be awarded to L&C.

1. The Region had no reasonable basis in fact for its position, and thus no substantial justification, where the administrative record reveals that the Region adduced neither direct evidence nor compelling circumstantial evidence in support of key elements of its claim.

2. There is no basis to find special circumstances exist to deny an otherwise appropriate award of attorneys' fees and expenses.

Before Environmental Appeals Judges Scott C. Fulton, Ronald L. McCallum and Edward E. Reich.

Opinion of the Board by Judge McCallum:

Appellant L&C Services, Inc. ("L&C") was charged by Respondent United States Environmental Protection Agency Region VII (the "Region") for alleged violations of the National Emissions Standards for Hazardous Air Pollutants ("NESHAP") for asbestos. Upon dismissal of the complaint,[1] L&C filed an application for award of attorneys' fees and expenses under the Equal Access to Justice Act ("EAJA"), 5 U.S.C. § 504, and the Environmental Protection Agency's implementing regulations, 40 C.F.R. Part 17. Administrative Law Judge Carl C. Charneski (the "Presiding Officer," or ALJ Charneski") denied L&C's request for fees and expenses on December 22, 1997.[2] L&C appeals from the Presiding Officer's denial of fees and expenses. We reverse and remand for a determination of reasonable attorneys' fees and expenses.

I. *BACKGROUND*

A. *Factual Background*

The Williams Pipeline Company ("WPC") owns a largely abandoned, 440–acre oil refinery in Augusta, Kansas ("refinery"). WPC contracted with L&C for the asbestos abatement and demolition of the 400–acre abandoned portion of the refinery. The asbestos abatement work performed

[1] The Region filed an appeal of the Presiding Officer's decision with the Board which was dismissed as untimely on February 27, 1997. *See In re L&C Services*, CAA Appeal No. 97–3 (Feb. 27, 1997) (Order Dismissing Appeal).

[2] A presiding officer who considers a fee petition brought under the EAJA issues a "recommended decision," which is reviewed by this Board to the same extent and in the same manner as an initial decision. 40 C.F.R. §§ 17.27, 22.30. In this case, the Presiding Officer issued a decision styled as an "initial decision." *See In re L&C Services, Inc.*, Dkt. No. VII–93–CAA–112 (ALJ, Dec. 22, 1997)(Initial Decision on Application for Award of Fees and Expenses Pursuant to the Equal Access to Justice Act)("Rec. Dec.").

by L&C at the refinery included the removal of all regulated asbestos-containing material ("RACM").[3]

L&C filed an Asbestos Notification Form with the Kansas Department of Health and Environment ("KDHE") in March 1992. The form stated that L&C was going 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 vessels, and 5,000 square feet of friable asbestos was to be left in place on dismantled heaters and towers.

On seven occasions, KDHE, Bureau of Air and Radiation, Air and Asbestos Compliance Section inspector, David Branscum, conducted on-site inspections of the refinery to investigate L&C's asbestos abatement and removal work. On April 9, 1992, Inspector Branscum observed the presence of dry residue on metal jacketing that had been removed from pipe and placed on the ground in Zone 39 of the refinery. Inspector Branscum observed that the material had not been wetted or bagged for disposal by L&C. Inspector Branscum did not take samples of the material he suspected was RACM during this investigation. This investigation became the basis for Count I of the Region's complaint against L&C.

Inspector Branscum inspected the refinery again on April 14, 1992. His inspection of Zones 31 and 39 revealed on the ground what he believed was RACM on metal jacketing that had been removed from pipes in a dry condition. He informed L&C that the material had to be bagged for disposal at the time it was removed. Again, no samples of the suspected RACM were taken. This investigation formed the basis for Count II of the Region's complaint.

A third inspection of the refinery was conducted by Inspector Branscum and his supervisor, Inspector Russ Brichacek, on April 22, 1992. Both inspectors observed metal jacketing that contained dry residue on the ground in Zone 39. Neither inspector took a sample of the suspected RACM on this inspection. On May 6, 1992, Inspector Branscum

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[3] Regulated asbestos-containing material (RACM) means:

(a) Friable asbestos material, (b) Category I nonfriable ACM that has become friable, (c) Category I nonfriable ACM that will be or has been subjected to sanding, grinding, cutting, or abrading, or (d) Category II nonfriable ACM that has a high probability of becoming or has become crumbled, pulverized, or reduced to powder by the forces expected to act on the material in the course of demolition or renovation operations regulated by this subpart.

40 C.F.R. § 61.141.

observed the same metal jacketing that had been observed on April 22, lying on the ground in Zone 39, but took no samples of the suspected RACM. These investigations formed the basis for Count III of the Region's complaint.

Inspector Branscum conducted another inspection of the refinery on June 25, 1992. Again, he observed metal jacketing containing dry residue lying on the ground. He took photographs of the metal jacketing and other equipment. He also took samples of the suspected RACM that he observed on the June 25, 1992 inspection. This investigation formed the basis for Count IV of the Region's complaint.

On August 28, 1992, Inspector Branscum conducted an inspection of the boiler house area in Zone 39. He observed metal jacketing with dry residue among the debris in the area. He took photographs and samples of the suspected RACM on the metal jacketing. This investigation formed the basis for Count V of the Region's complaint.

Inspector Branscum conducted the seventh inspection of L&C's abatement and removal activities on August 31, 1992. He testified that he again observed metal jacketing containing dry residue which was not being disposed of properly, but took no samples of the suspected RACM. This investigation formed the basis for Count VI of the Region's complaint. He also instructed L&C to cease all demolition and dismantling activities.

B. *Procedural History*

On April 8, 1993, the Region filed a complaint under section 113(d) of the Clean Air Act, 42 U.S.C. § 7413(d), against L&C and Williams Pipeline Company, Inc. ("WPC"), alleging six violations of 40 C.F.R. § 61.145(c)(6)(i) in connection with L&C's asbestos abatement and removal activities at the refinery. Rec. Dec. at 2. The complaint charged that L&C and WPC had on six occasions violated the regulation by failing to ensure that RACM, which had been removed from piping, was kept adequately wet until collected for disposal.[4]

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[4] The regulation provides, in pertinent part:

> Each owner or operator of a demolition or renovation activity to whom this paragraph applies, according to paragraph (a) of this section, shall comply with the following procedures: * * * (6) For all RACM, including material that has been removed or stripped: (i) Adequately wet the material and ensure that it remains wet until collected and contained or treated in preparation for disposal in accordance with § 61.150 * * * .

40 C.F.R. § 61.145(c)(6)(i).

On January 29, 1997, the charges were dismissed against L&C after a hearing on the merits.[5] ALJ Charneski found that the Region "failed to carry its burden of proof with respect to each of the six counts at issue." Ini. Dec. at 7. Uncontested testimony by L&C's asbestos expert established that Polarized Light Microscopy ("PLM") is the method for determining whether asbestos is present in a given material,[6] and that the presence of asbestos cannot be determined by visual observation alone. Ini. Dec. at 6, 8. The KDHE inspector also admitted that he could not identify RACM by visual observation alone. Ini. Dec. at 8. Because the inspector did not take samples, the Region was unable to conduct the PLM analysis for Counts I, II, III and VI, thus the Region did not have any evidence in this case that the specific material observed by the inspector was RACM.

For Counts IV and V, the Presiding Officer found that the Region did not provide sufficient evidence that the sampled material, determined to be RACM through PLM laboratory testing, was friable (i.e., capable of being "crumbled, pulverized, or reduced to powder by hand pressure," *see* 40 C.F.R. § 61.141). Ini. Dec. at 14. The Presiding Officer found the investigator's testimony regarding the sample collected on June 25, 1992, did not adequately support a determination of friability, but rather was relevant to the issue of whether the material was wet or dry.[7] Ini. Dec. at 14. Similarly the investigator testified that he "never physically touched the sample" collected on August 28, 1992. *Id*. Accordingly, the Presiding Officer concluded that because the Region was "unable to prove that the asbestos-containing material initially sampled * * * was friable asbestos, it cannot * * * establish the violations in Counts IV and V." *Id*.

On March 27, 1997, L&C filed an "Application for Award of Fees and Expenses Pursuant to the Equal Access to Justice Act" requesting an award of $69,028.42.[8] On December 22, 1997, the Presiding Officer denied L&C's application for attorneys' fees and expenses. *See* Rec. Dec.

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[5] WPC settled with the Region before the hearing on the merits. *See In re L&C Services, Inc.*, Dkt. No. VII–93–CAA–112 (ALJ, Jan. 29, 1997) at 3 n.2 ("Ini. Dec.").

[6] The regulatory definition for "nonfriable asbestos-containing material" specifies Polarized Light Microscopy as the method to identify the asbestos content of material. *See* 40 C.F.R. § 61.141.

[7] We note that the evidence on the narrow issue of whether the sampled material supporting Count IV was friable may present a closer call than the Presiding Officer's decision suggests. However, since the Board dismissed as untimely the Region's appeal of the Initial Decision, we do not question here the Presiding Officer's evaluation of the investigator's testimony on this issue.

[8] L&C amended its request to reduce the award by $695.00 for attorneys fees that it had incorrectly included in the original request. Rec. Dec. at 1, n. 1.

at 5. The Presiding Officer held that L&C was a prevailing party within the meaning of the regulation, but the Region's position in initiating the enforcement action was nevertheless substantially justified. Rec. Dec. at 3–4. Accordingly, the Presiding Officer denied L&C's request for fees and expenses. This appeal followed.[9]

II. *DISCUSSION*

On appeal, we have been asked to determine whether the Presiding Officer properly found the Region's position in this action to be substantially justified. We review a Presiding Officer's recommended decision on EAJA matters *de novo*, and evaluate the issues raised on appeal to determine whether the factual findings are supported by the record and the legal conclusions are consistent with case law or other applicable legal authority. *See In re Hoosier Spline Broach Corp.*, 7 E.A.D. 665, 682 (EAB 1998).

The EAJA is a fee-shifting statute that enables private parties who prevail against the government in certain types of contested proceedings to recover attorneys' fees and expenses when the government's position is not "substantially justified." *See* 1980 Equal Access to Justice Act, Pub. L. No. 96–481, 94 Stat. 2325.[10] The broad purpose of the statute is to ensure that private litigants will not be deterred from challenging questionable government decisions due to the burden and expense of litigating against the government. As Congress explained:

> [B]y allowing an award of reasonable fees and expenses against the Government when the action is not substantially justified, [the EAJA] provides individuals an effective legal or administrative remedy where none now exists. By allowing a decision to contest Government action to be based on the merits of the case rather than the cost of litigating, [the EAJA] helps assure that administrative decisions reflect informed deliberation. In so

[9] This appeal was timely filed with the Board on January 16, 1998.

[10] The EAJA is codified under two statutes covering two distinct types of proceedings: 5 U.S.C. § 504 *et seq.*, which governs adversary administrative adjudications; and 28 U.S.C. § 2412 *et seq.*, which governs civil, non-tort, court actions. Although case law interpreting the EAJA has developed under both statutes, only 5 U.S.C. § 504, relating to administrative adjudications, is at issue in this appeal.

The 1980 EAJA became effective on October 1, 1981, and applied to all adversary adjudications and civil actions pending on or commenced after that date. Pub. L. No. 96–481, § 208, 94 Stat. 2330 (1980).

> doing, fee-shifting becomes an instrument for curbing excessive regulation and the unreasonable exercise of Government authority.

H.R. Rep. No. 1418, 96th Cong., 2d Sess., at 12 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4984, 4991 ("1980 House Report"). The burden of substantial justification is also "to caution agencies to carefully evaluate their case and not to pursue those which are weak or tenuous." 1980 House Report at 4993. Agency action "unsupported by substantial evidence is virtually certain not to have been substantially justified." H.R. Rep. No. 120, 99th Cong., 1st Sess., at 9 (1985), *reprinted in* 1985 U.S.C.C.A.N. 132, 138 ("1985 House Report"). The government bears the burden of proof on the issue of substantial justification. *See* 1980 House Report at 10–11 ("The Committee believes that it is far easier for the Government, which has control of the evidence, to prove the reasonableness of its action than it is for a private party to marshal the facts to prove that the Government was unreasonable."); *see also Green v. Bowen*, 877 F.2d 204, 207 (2d Cir. 1989); *In re Biddle Sawyer Corp.*, 4 E.A.D. 912, 935 (EAB 1993) (citing *Green v. Bowen*).

The term "substantially justified" means that the government's position in the adjudication must have a "reasonable basis both in law and fact." *See*, e.g., *Pierce v. Underwood*, 487 U.S. 552, 568 (1988) ("substantial justification" means "justified in substance or in the main," which is no different from having a reasonable basis in law and fact); *In re Hoosier Spline Broach Corp.*, 7 E.A.D. 665, 681 (EAB 1998) (government position is substantially justified if it has a reasonable basis both in law and in fact) (citing *Pierce*).

Further, the statutory requirement that the substantial justification determination be based on 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)), has been consistently interpreted to mean that a trier of fact must evaluate the government's position in its entirety, and may not focus exclusively on the government's position or conduct during discrete stages of the case. *See, Hoosier*, 7 E.A.D. at 681–82 (citing *Commissioner, INS v. Jean*, 496 U.S. 154, 161–62 (1990); *U.S. v. Rubin*, 97 F.3d 373, 375 (9th Cir. 1996); *Roanoke River Basin Ass'n v. Hudson*, 991 F.2d 132, 139 (4th Cir. 1993); and *Kuhns v. Bd. of Governors of the Fed. Reserve System*, 930 F.2d 39, 44 (D.C. Cir. 1991)).

Substantial justification issues are not matters of first impression for the Board.[11] Here, we find that the Presiding Officer's decision that the Region's position was substantially justified to be in error.

There appears to be no dispute that the Region's position was reasonably based in law. The Region alleged violations of 40 C.F.R. § 61.145(c)(6)(i) and L&C admitted that the regulation applied to its work at the refinery. *See* Ini. Dec. at 8 ("EPA is correct in arguing that the asbestos NESHAP work practice requirements set forth in Section 61.145(c) apply in this case. In fact, L&C concedes this very point."). The Region's enforcement theory that a violation of the NESHAP can be proven by appropriate circumstantial evidence is also not in dispute. *See* App. Brief at 11 ("The EPA may be correct in asserting that it generally can try and prove its case by circumstantial evidence."). Accordingly, we only review whether the record supports the Presiding Officer's determination that the Region had a reasonable basis in fact to initiate this action against L&C.[12]

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[11] The Board has determined whether the Agency's position was substantially justified in two instances. *See Biddle Sawyer,* 4 E.A.D. at 935–37 (EAB 1993) (finding the Region was not substantially justified because it did not advance reasonable interpretations of regulation in the underlying enforcement action); *Hoosier,* 7 E.A.D. at 706–07 (EAB 1998) (holding that Agency position was substantially justified).

We also note that the Agency's Chief Judicial Officer evaluated three EAJA cases involving the issue of whether the Agency's position was substantially justified. *See In re Silver State Aviation, Inc.,* 1 E.A.D. 862 (CJO 1984) (remanding a decision denying fees in FIFRA penalty case where new evidence of an EPA mistake not disclosed to the presiding officer may have been determinative of whether Agency position was substantially justified); *In re Reabe Spraying Service, Inc.,* 2 E.A.D. 54 (CJO 1985) (affirming a denial of fees in FIFRA penalty case where the presiding officer found Agency's position to be substantially justified); *In re E&J Used Tool Co.,* 3 E.A.D. 96 (CJO 1990) (affirming denial of fees in TSCA penalty case where respondent was not a "prevailing party" as defined under the EAJA, and where Agency's position throughout settlement negotiations was substantially justified because respondents had admitted the violations, and the penalty sought was "presumptively substantially justified").

[12] The Region posits, in the alternative, that even if there is no substantial justification for its position, special circumstances exist that would make an award of fees unjust. Reply Brief at 15–16 (citing 40 C.F.R. § 17.1). The Region argues that an award of fees would be unjust because the Region's "credible interpretation of liability" was found by the Presiding Officer to be "not so easily resolved." *See* Reply Brief at 16. The Region mischaracterizes the Presiding Officer's decision. The Presiding Officer was not pointing out the difficulty of analyzing the facts of the case under the Region's interpretation of liability; rather, the Presiding Officer appeared to be appropriately critical of the Region's contention that L&C's liability could be concluded based almost exclusively on evidence relating to the amount of asbestos proposed to be removed and the fact that the asbestos NESHAP applied to the

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It is our conclusion that the Presiding Officer's "review of the overall record" does not support a finding that the Region's position was reasonably based in fact. This is a case where the Presiding Officer should have found "the administrative record to be so deficient that the government would not be substantially justified in relying on it." *See Smith v. Heckler*, 739 F.2d 144, 147 (4th Cir. 1984), citing *Guthrie v. Schweiker*, 718 F.2d 104, 108 (4th Cir. 1983).

As to Counts I, II, III and VI, the Presiding Officer concluded that the Region did not have any evidence to establish a basic element of its case—whether the observed materials contained asbestos. *See* Ini. Dec. at 7. For these four counts, the investigator did not take samples of the observed materials, thus the Region could not conduct PLM laboratory analysis to confirm that the materials contained asbestos. L&C's asbestos expert testified that presence of asbestos could not be confirmed by visual observation alone, and the Region's investigator admitted that he could not confirm the presence of asbestos visually. *Id.* at 8. Simply stated, in this case, the administrative record with respect to these four counts does not provide substantial justification for the Region's position that L&C had violated the asbestos NESHAP because it contains no evidence that the specific material observed by the KDHE investigators was asbestos.

Similarly, for Counts IV and V, the Presiding Officer concluded that the Region had adduced no evidence "to prove that the asbestos-containing material initially sampled * * * was friable asbestos." *Id.* at 14. In view of the Region's failure to offer probative evidence establishing that the observed materials were friable, we can only assume that the Region did not have a reasonable basis in fact for the position that L&C had violated the asbestos NESHAP on these counts.

This is not a case where the record contains contradictory evidence, which may, in the ultimate judgment of the Presiding Officer, outweigh the evidence upon which the government's position is based, thus providing no basis for an award of EAJA fees. *See Jackson v. Chater*, 94 F.3d 274, 279 (7th Cir. 1996); *see also Williams v. Bowen*, 966 F.2d 1259, 1261 (9th Cir. 1996) (government was substantially justified for EAJA purposes, although ultimately incorrect in denying disability benefits, where evidence was in conflict as to impact of alleged mental impairment on

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removal project. The Region's reliance on *Reabe Spraying*, is also misplaced. As discussed above, there is no dispute that the Region had a reasonable basis in law for its position. Because the Region's position in this case is not one that advances "novel but credible extensions and interpretations of the law," *see Reabe Spraying*, 2 E.A.D. at 59, there is no basis to find special circumstances exist here.

claimant's ability to perform work). Rather, this is a case where the Region put on its case without a shred of direct evidence establishing key elements of the offenses with which it charged L&C. Moreover, the Region lacked any compelling circumstantial evidence to fill the gap left by the complete absence of direct evidence.

The Presiding Officer's reliance on L&C's Asbestos Notification Form, and an asbestos survey[13] of the refinery by Diversified Environmental Technologies, Inc. ("DETI"), an engineering firm hired by WPC, to support a determination of substantial justification is misplaced. *See* Rec. Dec. at 3–4. At best, the notification form and testimony related to the DETI survey lend support to the fact that there was a large amount of asbestos at the refinery; that L&C intended to remove and abate friable asbestos; and that the asbestos NESHAP workplace standards were applicable to L&C's proposed work at the refinery. As ALJ Charneski had found in the underlying decision as to liability, *see* Ini. Dec. at 8–10, this information could not, in itself, prove liability since it does not provide any support, direct or circumstantial, for the factual determinations of whether the specific material observed by the inspector was asbestos or friable.

The Region argues, "[T]his is not a case where it can be said that there was no friable asbestos involved." Reply Brief at 7. That general assertion only supports the legitimacy of conducting a compliance inspection at the refinery. The fact that friable asbestos may be "involved" is not a sufficient basis for the Region to take the additional, more serious step of filing a complaint against L&C, charging it with violations of the law. For that, the Region needed to have proof for each count that the specific material observed by the inspector was actually regulated asbestos and friable, not just that he suspected the material was asbestos or friable.[14] L&C's asbestos notification form and the DETI survey relied upon by the Region merely "provide[] support for the EPA's *belief* that the

[13] The survey was never entered into evidence by the Region during the proceedings and the Region's attempt to make DETI laboratory results part of the record, post-hearing, was denied by the Presiding Officer by Order dated May 30, 1996. *See* Ini. Dec. at 10.

[14] There is no evidence in the record to suggest that all of the metal jacketing in the areas inspected at the refinery was coated with friable asbestos at the time of removal. In fact, the record reflects testimonial evidence by DETI employee, Rodney Hill, that there was "almost as much non-asbestos material in the areas involved here as there was asbestos-containing material." Ini. Dec. at 10.

The Region also makes much of the fact that L&C presumably had decided to treat all insulation in work areas as if it contained asbestos (Reply Brief at 7); but even if this were true, L&C's decision to treat all materials as if they contained asbestos does not logically lead to the conclusion that they actually contained asbestos.

material being removed was friable asbestos." Reply Brief at 9 (emphasis added). They are not adequate to support a determination that the Region had a reasonable basis in fact for its position that L&C had violated the asbestos NESHAP.

When we review the underlying case "as a whole," we are convinced that the Region's position in this action was not reasonably based in fact because the administrative record was so lacking of evidence that the specific materials observed by the inspector were either asbestos or friable.

III. *CONCLUSION*

Accordingly, we reverse the Presiding Officer's recommended decision denying L&C's application for attorneys' fees and expenses, and remand for a determination of reasonable attorneys' fees and expenses to be awarded to L&C, unless the parties settle pursuant to 40 C.F.R. § 17.24.

So ordered.