

**PENN ENVIRONMENTAL  
CONTROL, INC.**

**CONTRACT NO. V513C-220**

**VABCA-3599E/R,  
3600E/R, and**

**3725E/R**

**VA MEDICAL CENTER  
BATAVIA, NEW YORK**

*Frederick J. Condon, Esq.*, Attorney at Law, Solon, Ohio, for the Appellant.

*Kenneth B. MacKenzie, Esq.*, Trial Counsel, Office of General Counsel, Washington, D.C., for the Department of Veterans Affairs. *William E. Thomas, Jr. Esq.*, Assistant General Counsel; and *Phillipa L. Anderson, Esq.*, Deputy Assistant General Counsel, of Counsel.

**OPINION BY ADMINISTRATIVE JUDGE KREMPASKY**

Penn Environmental Control, Inc. ("PEC" or "Applicant"), has timely moved for reconsideration of our decision, issued on August 20, 1993, in VABCA Nos. 3599E, 3600E, and 3725E. In that decision, we awarded PEC fees and expenses under the *Equal Access to Justice Act* ("EAJA"), 5 U.S.C. § 504, in the total amount of \$5,525.25. The recovery allowed in each application was as follows:

<i>APPLICATION NO.</i>	<i>AMOUNT AWARDED</i>
VABCA No. 3599E	\$1725.63
VABCA No. 3600E	1,725.62
VABCA No. 3725E	<u>2,074.00</u>
Total	5,525.25

Familiarity with the principal decision is presumed.

PEC asks the Board to reconsider the amount of the fees and expenses awarded in the principal decision in light of the Board's apparent failure to include the attorney fees claimed for preparation of each its three *EAJA* applications. PEC alleges that the total amount of attorney fees and expenses requested in the three applications cited in the principal decision did not include the amounts, contained in PEC's Replies to the Government's Answers to the original applications, requested for preparation of the *EAJA* applications. Because of the Board's apparent failure to evaluate the application preparation fees in its principal decision, PEC claims the following additional attorney fees for preparation of its *EAJA* applications:

<i>APPLICATION NO.</i>	<i>ADDITIONAL AMOUNT CLAIMED</i>
VABCA No. 3599E	\$1,312.50
VABCA No. 3600E	1,100.00
VABCA No. 3725E	<u>810.00</u>

Total 3,222.50

The Department of Veterans Affairs ("VA" or "Government") contests the Motion on the basis that, since PEC has presented no newly discovered evidence or evidence not readily available at the time of the principal decision, there is no basis for the Board to reconsider the principal decision. In the alternative, if the Board decides to reconsider the principal decision, the VA avers that the amounts claimed by PEC for preparation of the *EAJA* applications are excessive and any additional award should be prorated based on the amounts originally awarded.

### DISCUSSION

PEC's original applications for *EAJA* fees and expenses in VABCA Nos. 3599E, 3600E, and 3725E were received by the Board on May 23, June 11, and June 21, 1993 respectively. The VA's Answers to the applications were filed on June 21, 1993 in the case of VABCA 3599E and July 21, 1993, in the case of both VABCA Nos. 3600E and 3725E. The Board received PEC's Replies to the Answers (styled, in each case, by PEC as "Memorandum Re: Government's Answer to Appellant's *EAJA* Application") on July 13, August 17, and August 10, 1993. The Reply to the Answer in VABCA No. 3599E included, without explanation or introduction, the following table:

#### *Additional Fees -- Frederick J. Condon*

May 3	Research on <i>EAJA</i>	3.0 hrs.
4	Draft Application for <i>EAJA</i>	2.5 hrs.
6	" " " "	2.5 hrs.
7	" " " "	1.0 hrs.
11	" " " "	3.0 hrs.
June 28	Study Government Answer on <i>EAJA</i>	1.0 hrs.
July 3	Draft Memorandum on <i>EAJA</i>	2.0 hrs.
4	" " " "	3.0 hrs.
5	" " " "	<u>1.0 hrs.</u>
		17.5 hr @
		\$150/hr.=
		<b>\$2,625.00</b>

We note that the table lists 19 hours of services rendered by Mr. Condon, not the 17.5 hours listed as the total in the table. In its Motion for Reconsideration, PEC reiterates its claim for an additional \$2,625.00 (17.5 hr. @ \$150/hr) for Mr. Condon's services in preparing the *EAJA* application. Thus, we will use 17.5 hours as the additional number of hours of *EAJA* application preparation fees for which PEC seeks recovery in VABCA No. 3599E.

PEC's replies to the VA's Answers in VABCA Nos. 3600E and 3725E followed the same format and contained tables similar to the table in the reply in VABCA No. 3599E. The additional request for *EAJA* application preparation fees in the reply in VABCA No 3600E was \$2,200 (9.3 hours application preparation + 5.5 hours reply preparation = 14.8 hrs @ \$150/hr); in VABCA No. 3725E, the request was for \$1,620 (6.3 hours application preparation + 4.5 hours reply preparation = 10.8 hrs. @ \$150.00/hr). In its

Motion for Reconsideration, PEC, recognizing the holding in our principal decision that we are limited to the \$75 per hour rate stated in *EAJA* in awarding attorneys fees, revised the amounts stated in the Replies that it sought to recover for *EAJA* application fees to \$1,312.50, \$1,100, and \$810, in VABCA Nos. 3599E, 3600E, and 3725E respectively.

In reviewing the record, we have determined that we misconstrued the nature and purpose of the tables presenting PEC's application for attorney's fees for preparation of the *EAJA* applications. Because of the manner in which the requests for *EAJA* application preparation fees were made in the Replies, the Board did not treat them as additions to the fee requests made in the original applications. Consequently, the Board, mistakenly, did not include the attorney fees claimed for preparation of the *EAJA* applications in its consideration of PEC's applications in the principal decision.

The VA has correctly noted that we will ordinarily grant a motion for reconsideration only when the movant presents newly discovered evidence or evidence not readily available at the time of the principal decision. *Saturn Construction Co., Inc.*, VABCA No. 2600R, 88-3 BCA ¶ 21,183. However, because of the circumstances present here, the ordinary standard applicable to our consideration of a motion for reconsideration does not preclude our granting this Motion. When the Board's decision is based, to some extent, on its own material mistake or oversight, a motion for reconsideration will ordinarily be granted. *Sentry Insurance, A Mutual Company*, VABCA No. 2617R, 92-3 BCA ¶ 25,147 at 125,360.

We question the wisdom of PEC in increasing its fee applications through the vehicle of a reply to a Government answer to an application without clearly highlighting its intent to the Board. However, there is nothing in the Board's Rules, the Board's procedures for processing *EAJA* applications, or the Board's Order Concerning *EAJA* Application issued in each of the three applications that prevented PEC from increasing the amount of its application in a reply. Upon review of the record, we are convinced, but for our failure to recognize that PEC was increasing the total amount of its fee requests, that the *EAJA* application preparation costs would have been considered by the Board in the principal decision. Therefore, in the interests of justice, we will reconsider the principal decision to include the *EAJA* application preparation fees.

It is well settled that fees for preparation of *EAJA* applications are recoverable. *Commissioner, Immigration and Naturalization Service v. Jean, et al.*, 496 U.S. 154, 110 S.Ct. 2316 (1990); *Scheuenemeyer v. United States*, 776 F.2d 329 (Fed. Cir. 1985). An applicant is entitled to recover only reasonable attorney fees. In determining the reasonableness of fees, the Board is entitled to examine the complexity of the legal work, the results obtained, and the hours expended. *Buckley Roofing Company, Inc.*, VABCA No. 3374E, 92-2 BCA ¶ 24,826 at 123,839, citing *Hensley v. Eckerhart*, 461 U.S. 424, 433, (1983). Thus, we will examine the reasonableness of PEC's application for attorneys fees for the preparation of the *EAJA* application under the *Buckley* standard.

The VA contends that PEC's fee request for payment for 3 hours of services to research *EAJA* in VABCA No. 3599E is excessive. Because of the Board's detailed instructions on the preparation of *EAJA* applications provided to PEC and Mr. Condon's acknowledged expertise in Federal procurement law, the VA asserts that the 3 hours claimed for *EAJA* research is excessive. In addition, in light of the fact that the three

applications and Government answers are virtually identical, the VA asserts that PEC's requests for a total of 24.6 hours to draft the three applications and 17.8 hours to prepare the replies to the Government's answer are unreasonable. Finally, the VA asks us to prorate any amount of additional recovery we determine to be reasonable based on the relationship of the amount originally awarded to the original amount requested.

The three applications for fees and expenses under *EAJA* are essentially identical and are supported by the same evidentiary submissions of fees and costs incurred. PEC's Replies to the Government's Answers, in each of the three applications, specifically addressed the Government's position and arguments in relation to the particular facts and circumstances of each application. The VA, other than expressing its belief that an attorney with Mr. Condon's expertise and experience should have been able to prepare the Applications and the Replies in a shorter time, offers nothing to support its position that the claims for preparation of the replies to the Government's Answers should be reduced to a more reasonable amount. In regard to the effort for *EAJA* research, only the application for VABCA No. 3599E contained a request to recover fees for research.

We find the 17.5 hours of effort to claimed for *EAJA* preparation, preparation of PEC's Reply, and *EAJA* research in VABCA No. 3599E to be reasonable. Thus, we will allow recovery for an additional 17.5 hours of Mr. Condon's services in VABCA No. 3599E.

PEC requests 9.3 hours of effort to prepare the application in VABCA No. 3600E. The issues involved (as well as the amount requested) in VABCA No 3600E were identical to the issues in VABCA No. 3599E. Consequently, we find that the request for 9.3 hours of effort to prepare the *EAJA* application in VABCA No. 3600E to be unreasonable. In our view, the only effort necessary to prepare the application in 3600E was the editing of the application prepared for VABCA No. 3599E. Therefore, we will allow recovery for 2 hours of effort in preparing the *EAJA* application in VABCA No. 3600E. The 5.5 hours of Mr. Condon's services claimed for preparation of PEC's Reply in the VABCA No. 3599E appears reasonable on its face and we will allow recovery for those services. Thus, PEC is entitled to an additional 7.5 hours of effort in VABCA No. 3600E.

The effort and work product to prepare the applications in VABCA Nos. 3599E and 3600E was directly translatable to the application in VABCA No. 3725E. However, VABCA No. 3725E involved additional issues concerning the substantial justification of the Government's position not involved in the other two applications. Consequently, we will allow 3 hours of effort to prepare the application in VABCA No. 3725E; the 4.5 hours of additional attorney effort claimed for preparation of the Reply is reasonable and will be allowed. Thus, we will allow an additional recovery based on 7.5 hours of Mr. Condon's services to prepare the *EAJA* application in VABCA No. 3725E.

The VA urges us to prorate any award for *EAJA* application preparation fees based on the ratio of the Board's award in the principal decision to the amount claimed. We see no reasonable basis for such proration. The reductions to the amounts originally requested by PEC in the principal decision resulted from the Board's application of the \$75 per hour rate for fees to PEC's fee request and from the Board's holding that certain fees requested in the application were either incurred prior to PEC's appeals or were incurred in a period after the Government was substantially justified in its position. None of these circumstances are applicable to the request for *EAJA* application preparation costs.

Therefore, PEC is entitled to recover the additional \$1,312.50 (17.5 hours @ \$75 per hour) claimed for *EAJA* application preparation costs in VABCA No. 3599E. In VABCA Nos. 3600E and 3725E, we will allow additional recovery of \$562.50 (7.5 hours @ \$75 per hour) in each of those two applications.

### DECISION

For the foregoing reasons, Penn Environmental Control, Inc.'s, Motion for Reconsideration of the Board's decision, dated August 20, 1993 in VABCA Nos. 3599E, 3600E, and 3725E is **GRANTED**. Accordingly, the amount of fees and other expenses awarded in the Board's August 20, 1993, decision is **VACATED**.

The Applicant, Penn Environmental Control, is awarded fees and expenses under the *Equal Access to Justice Act* in the applications in VABCA Nos. 3599E, 3600E, and 3725E as follows:

<i>Application No.</i>	<i>Amount of Fees and Expenses</i>
VABCA No. 3599E	\$3,038.13
VABCA No. 3600E	2,288.12
VABCA No. 3725E	<u>2,636.50</u>
<b>TOTAL</b>	<b><u>7,962.75</u></b>

DATE: **November 2, 1993**

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RICHARD W. KREMPASKY  
Administrative Judge  
Panel Chairman

We Concur.

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MORRIS PULLARA, Jr.  
Administrative Judge

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JAMES K. ROBINSON  
Administrative Judge