

**THE GEILER COMPANY****CONTRACT NO. V539C-654****VABCA-5137E****VA MEDICAL CENTER  
CINCINNATI, OHIO**

***William G. Geisen, Esq.*, Graydon, Head & Ritchey, Florence, Kentucky, for the Applicant.**

***Patrick J. LaMoure, Esq.*, Trial Attorney; *Charlma J. Quarles, Esq.*, Deputy Assistant General Counsel; and *Phillipa L. Anderson, Esq.*, Assistant General Counsel, Washington, D.C., for the Department of Veterans Affairs.**

**OPINION BY ADMINISTRATIVE JUDGE THOMAS**

**The Geiler Company (Geiler or Applicant) filed an Application For An Award Of Attorney's Fees, Expert Fees, and Expenses (Application) pursuant to the *Equal Access to justice Act (EAJA)*, 5 U.S.C. 504, to recover attorney fees and other expenses incurred in connection with the successful prosecution of its appeal before this Board. *The Geiler Company*, VABCA No. 5137, 98-1 BCA ¶ 29,378, *mot. for recon. den.*, 98-1 BCA ¶ 29,585. Familiarity with the opinions is presumed so that recitation of the facts and the bases for our decision therein will not be repeated here.**

Geiler asserts that it is a prevailing party because the Board granted 86% of the amount sought in its Appeal and avers that the Government has failed to meet its burden of proving that its position was substantially justified, and that no special circumstances exist which would make an award unjust. Geiler seeks reimbursement of \$36,862.86 in attorney's fees and expenses and \$3,118.01 in expert fees and expenses, for a total of \$39,980.87. Geiler submitted financial statements for the years ended in 1995 and 1996, as well as its Independent Account Review Report establishing Geiler's net worth to be less than \$7 million. Geiler had 139 employees at the time of the hearing and currently has 138 employees. As such, Geiler asserts that it meets the size and net worth eligibility of a small business as set forth in *EAJA*. The Government does not dispute that Geiler qualifies as a small business and can seek *EAJA* fees.

In its Opposition To Appellants Application For An Award Of Attorney's Fees And Expenses (Opposition), the Department of Veterans Affairs (VA or Government) argues that the Application was untimely as it relates to the Boards' initial decision and further observes that Geiler did not "prevail" in its Motion For Reconsideration of that portion of the decision with which it disagreed. The VA also argues that its opposition to the issues raised in the *MOTION FOR RECONSIDERATION* was substantially justified. Geiler concedes in its Reply To The Government's Opposition that it was not a prevailing party with regard to the issues addressed in its *MOTION FOR RECONSIDERATION*. The VA does not raise the prevailing party or substantial justification arguments as they relate to VABCA-5137 and it does not suggest by what amount they would have us reduce the Applicant's billings associated with the Motion For Reconsideration.

**BACKGROUND**

This Application arises out of a successful appeal relating to the replacement of chilled water lines under Contract No. V539C-654, at the Medical Center in Cincinnati, Ohio. The appeal involved three pipe failures. The first failure occurred on May 23, 1994. Subsequent to its repair, final acceptance occurred, a complete release was signed, and final payment was made on August 4, 1994. The second and third failures occurred on September 29, 1994, and March 8, 1994, respectively. Throughout the appeals process both parties treated the three failures as warranty situations even though the first failure occurred before the warranty was in force.

In our decision dated November 28, 1997, this Board found that the Release of claims barred the Geiler's recovery for the repair of the first failure. For the two subsequent failures, we found that the Government neither showed that the most likely or probable cause of the failures were defects attributable to Geiler nor did they show the Government did not contribute to the failures by their own operation of the system.

Geiler filed a timely Motion For Reconsideration on January 7, 1998. It argued that the Release did not bar the claim because even though all the facts, including the actual break and repair, occurred before the Release was signed, the claim itself was filed after the Release. We found that argument to be without merit. Geiler also argued that the Release was an affirmative defense and, since the Government never raised it, it was not available to the Board. Our February 17, 1998 Decision On Reconsideration found that, even if we assume the Applicant to be correct about the Release status as an affirmative defense, it has not shown any reason it should escape the strict liability language of the Permits And Responsibilities Clause. We received Geiler's EAJA application on July 13, 1998.

### **TIMELINESS**

5 U.S.C. 504(a)(1) states:

(a) (1) 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.

(2) A party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency an application which shows that the party is a prevailing party and is eligible to receive an award under this section, and the amount sought, including an itemized statement from any attorney, agent, or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses

were computed. The party shall also allege that the position of the agency was not substantially justified ....

The 30-day filing period is a jurisdictional prerequisite to an *EAJA* action. ***J.M.T. Machine Co. v. United States***, 826 F.2d 1042, 1047 (Fed. Cir. 1987). In defining the term "final disposition," the United States Court of Appeals for the Federal Circuit and boards have relied upon the parallel *EAJA* provisions applicable to court proceedings [28 U.S.C. § 2412(d) (1) (13)], which measure the *EAJA* application submission period from "final judgment" in the action, which is defined as a judgment that "is final and not appealable, and includes an order of settlement." 28 U.S.C. § 2412(d)(2)(G). The United States Supreme Court has held that "[t]he 30-day *EAJA* clock begins to run after the time to appeal that 'final judgment' has expired." ***Melkonyan v. Sullivan***, 501 U.S. 89, 96 (1990).

Regarding finality and the time to appeal a board decision, *the Contract Disputes Act*, 41 U.S.C. § 601(g)(1), provides:

The decision of an agency board of contract appeals shall be final, except that -

(A) a contractor may appeal such a decision to the [Federal Circuit] within one hundred twenty days after the date of receipt of a copy of such decision, or

(B) the agency head, if he determines that an appeal should be taken, and with the prior approval of the Attorney General, transmits the [board's decision] to the [Federal Circuit] for judicial review under section 1295 of Title 28, within one hundred and twenty days from the date of the agency's receipt of a copy of the board's decision.

Thus, Section 504(a)(2) requires Geiler to file an application for attorney fees "within 30 days of a final disposition in the adversary adjudication." The 30-day period begins to run after the decision has become final and the period for appeal has expired. ***Taylor v. United States***, 749 F.2d 171 (3rd Cir. 1985). A decision becomes final 120 days after the parties have received a copy of the decision. 41 U.S.C. § 607(g)(1); ***John Farquhar Const Co., Inc.***, VABCA No. 1702E et al., 87-2 BCA ¶ 19,789

In this case the Applicant received a copy of the Board's November 28, 1997, decision on December 8, 1997. It filed a timely Motion For Reconsideration on January 7, 1998. The Board issued an Order denying the Motion on February 17, 1998. The Government argues that with respect to that portion of the appeal that was not questioned in the Motion For Reconsideration the period for filing an *EAJA* application began to run when the original decision was received on December 8, 1997. Under this theory the *EAJA* Application had to have been filed within 150 days of receipt of the Board's initial decision (120 + 30) or by no later than, May 7, 1998.

The Government's position is seriously flawed. The central issue here is on what date

did the Board's decision become final? The VAs position would require each separate issue in a decision to be addressed separately with regard to filing an *EAJA* application. The VA provides no citation of authority to establish that a portion of a single appeal can be appealed - let alone become final - while other portions are still being actively considered by the Board in a motion for reconsideration. In this connection see **AAA Engineering & Drafting, Inc. v. Widnall**, 129 F.3d 602, 603 (Fed. Cir. 1997):

The doctrine of "finality," under the historic federal rule, has generally allowed appellate review only when a judgment has *wholly disposed of a case*, adjudicating all rights and ending the litigation on the merits. See, e.g., **Flanagan v. United States**, 465 U.S. 259, 263, 104 S.Ct. 1051, 1053-54, 79 L.Ed. 2d 288 (1984). (Emphasis added)

It is well established that the filing of a motion for reconsideration prevents the decision of the Board from becoming final **K&S Construction v. United States**, 35 Fed. CL 270, *affd* 121 F.3d 727 (Fed. Cir. 1997); **DEW., Inc.**, ASBCA No. 36698, 90-3 BCA ¶ 23,019. Courts have recognized that "[t]he general rule is that the period for appeal or review does not begin to run until the disposition of a timely request for reconsideration, rehearing, or new trial, because such a request suspends the finality of the decision pending a ruling on the application." **Dayley v. United States**, 169 Ct. CL 305, 309 (1965); **Precision Piping, Inc. v. United States**, 230 Ct. CL 741 (1982). The 120 days for appeal ran from the date on which Geiler received a copy of our February 17, 1998 decision denying a timely Motion For Reconsideration and not from the date on which it received the initial decision. Using the actual issuance date of February 17, 1998, the 150 days application period computes to July 17, 1998. Geiler's Application in this case was timely filed on July 13, 1998.

### PREVAILING PARTY

In order to recover fees and expenses under *EAJA*, the party must have prevailed. The United States Supreme Court in **Hensley v. Eckerhart**, 461 U.S. 424, 433 (1983) set forth the "typical formulation" of the threshold determination of when plaintiffs may be considered "prevailing parties" for attorney's fees purposes as occurring "if [the plaintiffs] succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." See also **Integrated Clinical Systems, Inc.**, VABCA No. 3745E, 96-2 BCA ¶ 28,425; **Preston-Brady Co.**, VABCA No. 1849E, 89-3 BCA ¶ 22,122.

We note that the Government does not address the issue of whether Geiler was a prevailing party in VABCA-5137. Instead the VA simply focuses on, Geiler's unsuccessful Motion For Reconsideration with respect to the first pipe failure. Geiler concedes it was not a prevailing party on the Motion.

While it is undisputed that Geiler gained nothing in its Motion For Reconsideration, the parties mischaracterize the Board's decision thereon as if it were a separate claim requiring an independent determination under *EAJA* as to whether the Applicant was a prevailing party. The Government does not argue that the MOTION or the claim for

Failure No. 1 are separate and distinct Claims requiring their own determinations of prevailing party and substantial justification. Applicant does not argue that the three claims were so intertwined that it should recover all of its legal fees. Applicant's citations are all prior to ***Hensley and Commissioner, INS v Jean***, 496 U.S. 154 (1990). In *Jean* the Supreme Court stated at page 160:

The single finding that the Government's position lacks substantial justification, like the determination that a claimant is a "prevailing party," thus operates as a onetime threshold for fee eligibility. In EAJA cases, the court first must determine if the applicant is a "prevailing party" by evaluating the degree of success obtained. If the Government then asserts an exception for substantial justification or for circumstances that render an award unjust, the court must make a second finding regarding these additional threshold conditions. As we held in ***Hensley v. Eckerhart***, the "prevailing party" requirement is "a generous formulation that brings the plaintiff only across the statutory threshold. It remains for the district court to determine what fee is "reasonable". Similarly, once a private litigant has met the multiple conditions for eligibility for EAJA fees, the district court's task of determining what fee is reasonable is essentially the same as that described in ***Hensley***. (Citations omitted).

The Government's arguments would have been more properly served by providing us with a proposed fee reduction amount associated with the Applicant's pursuit of Failure No. 1 and the unsuccessful Motion For Reconsideration.

In VABCA-5731, Geiler recovered repair costs for the second and third pipe failures, but not for the first, for a total recovery of \$61,468 of the \$71,701 claimed. Under the circumstances here we find that the Geiler was a "prevailing party" under the standard set forth in 5 U.S.C. 504(b)(1)(B) and explicated in ***Hensley***.

### SUBSTANTIAL JUSTIFICATION

Whether the Government's position was substantially justified is "determined on the basis of the appeal record, as a whole, which was made in the appeal." *EAJA* Rule 14(a). But, it is well established that the Applicant "has no burden to prove that the Government's position was not substantially justified." ***Siska Constmction Company, Inc.***, VABCA No. 3381E, 92-1 BCA ¶ 24,730 at 123,421. The Applicant is only required to allege that the VA's position was not substantially justified, which it has done. 5 U.S.C. § 504(a)(2). Upon the Applicant establishing that it meets the *EAJA* size and net worth requirements and that it has prevailed on at least a portion of its claim, the burden shifts to the Government to establish that its position was substantially justified. ***Marino Construction Co., Inc.***, VABCA No. 2752E, 92-2 BCA ¶ 25,015; ***Blosam Contractors, Inc.***, VABCA No. 2187E, 88-3, BCA ¶ 20,942. The Government is "substantially justified" if, in view of the law and facts, it is clearly reasonable in asserting its position at the agency level and during the adversary adjudication. Therefore, to avoid the

assessment of the Applicant's allowable and reasonable attorney fees and expenses, the Government must prove that its position was reasonable. *Penn Environmental Control, Inc.*, VABCA Nos. 3599E and 3600E, 94-1 BCA ¶ 26,326; *Siska Construction Co., Inc.*, VABCA No. 3381E, 92-1 BCA ¶ 24,730.

We decline here to find the Government's position substantially justified when the Government makes no attempt whatsoever to meet its burden to convince us to do so.

### COMPUTATION OF FEES AND EXPENSES

After reviewing the invoices, we are satisfied that the fees and expenses claimed relate to the matter which was appealed to the Board. The Government has not challenged the reasonableness of the time expended on this matter. Our review of the Application reveals that Attorney Geisen incurred approximately 4.9 hours time prior to the Contracting Officer's final decision. Fees and expenses incurred prior to the receipt of the Contracting Officer's final decision are not recoverable. *Levernier Construction, Inc. v. United States*, 947 F.2d 497 (Fed. Cir. 1991); *Danrenke Corp.*, VABCA No. 3271E, 94-1 BCA ¶ 26,504; *Fletcher & Sons, Inc.*, VABCA No. 3248E, 93-1 BCA ¶ 25,472. As this Board has stated previously: "[t]he efforts of a contractor or its attorney in presenting a claim which ultimately results in any appeal and subsequent litigation before the Board are 'work performed in connection with routine claims processing,' and are not 'incurred in connection with the adversary adjudication.'" *Delfour Inc.*, VABCA Nos. 2049E, et al., 90-3 BCA ¶ 23,066 at 115,813-14 (citations omitted). Geiler has not offered any explanation as to why the pre-final decision costs should be considered anything but routine claims processing. Based on the foregoing analysis we deduct \$962.50 of attorney fees attorney Geisen performed preceding the final decision.

In *Hensley*, the Supreme Court explained that "[t]he most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate," adding that adjustments could then be made to reflect "other considerations" including the results obtained. *Hensley* at 433-34. Geiler did not improve its position with respect to the Motion For Reconsideration, which was denied. *Danrenke*, VABCA Nos. 3271E et. al., 94-1 BCA ¶ 26,504 (Government filed an unsuccessful motion for summary judgment)

When a prevailing litigant has less than complete success against the not substantially justified Government, the courts and Boards have used various approaches in determining the appropriate amount of an *EAJA* award. One acceptable method of apportionment is based upon the amount of time expended on the issue or issues upon which the litigant prevailed. *Community Heating & Plumbing Co. v. Secretary of the Navy*, 2 F.3d 1143 (Fed. Cir. 1993). Where a party prevails on some, but not all, of the issues or claims, it may be appropriate to apportion any recovery under *EAJA*. *Fanning Phillips & Molnar*, VABCA No. 3856E, 97-2 BCA ¶ 29,008; *Esprit Corp. v. United States*, 15 CL Ct. 491 (1998). We believe that this Board has the discretion to eliminate or discount hours or other expenses that we find would not have been incurred but for the unsuccessful claim. *Hensley* at 436-37. Thus, attorney fees in the amount of \$4,131, which represent fees and expenses associated with drafting and preparing the Motion For Reconsideration, will be deleted from allowable fees.

When the second pipe failure occurred, Geiler presented the Contracting Officer with a claim that also included the costs for repair of the first break. We recognize that the VA denied them both because of its warranty argument. We acknowledge Applicant faced a dilemma in not raising defenses for its opponent. However the problem here is more fundamental because Geiler knew or should have known that the repair costs of Failure No. 1 had been incurred prior to its signing a release and final acceptance of the Contract. It should also have been aware of the Permits And Responsibilities Clause. Geiler's pursuit of its repair costs for the first failure was unsuccessful. After a careful review of the Record and recognizing that some of the arguments transcended all three failures, we believe Geiler spent approximately 15% of its efforts pursuing the repairs for the first failure. Thus, the attorney fees will be reduced by \$4,765.40.

The Application also includes fees and expenses for preparing the *EAJA* Application. These fees and expenses are appropriate since it is well settled that attorney fees and expenses incurred in filing an application under *EAJA* are compensable. *INS v. Jean*, 496 U.S. 154 (1990); *Danrenke* at 131,928. We find these costs to be reasonable.

*EAJA* allows the "reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case." 5 U.S.C. § 504(b)(1)(A). The VA does not contest the amount claimed by Geiler for the fees and expenses of its expert witness. Mr. Couch testified as an expert witness and we find his fees and expenses of \$3,118.01 to be reasonable.

## DECISION

Applicant seeks \$36,862.86 in attorney fees. After deductions for claims processing (\$962.50), the unsuccessful Motion For Reconsideration (\$4,131), and efforts to recover for Failure No. 1 (\$4,765.40), Geiler is awarded \$27,003.96 in attorney fees and \$3,118.01 in expert fees.

DATE: December 10, 1998

---

William E. Thomas, Jr.  
Administrative Judge  
Panel Chairman

We Concur:

---

Guy H. McMichael III  
Chief Administrative Judge

---

Morris Pullara, Jr.  
Administrative Judge

