Before the
Administrative Hearing Commission
State of Missouri

FOWLER LAND COMPANY, INC., and MARGARET LEIST REVOCABLE TRUST, SANDRA RUNNELS and LINDA HENDERSON, TRUSTEES	)	
Petitioners,	)	
vs.	)	No. 15-1332
DEPARTMENT OF NATURAL RESOURCES, LAND RECLAMATION PROGRAM,	)	
Respondent.	)	

RECOMMENDED DECISION

This Commission recommends that the Missouri Mining Commission (Mining Commission), formerly the Land Reclamation Commission (LRC),[1] grant Fowler Land Company, Inc., and Margaret Leist Revocable Trust, Sandra Runnels and Linda Henderson, Trustees' (collectively, "Petitioners," separately "Fowler" and "Leist") application for fees and expenses. Petitioners are entitled to an award of $106,402.50 in attorney fees and $18,707.48 in expenses incurred in the underlying case.[2]

[1]The LRC's name has been changed to the Mining Commission.

[2] *Fowler Land Company & Margaret Leist Revocable Trust, Sandra Runnels and Linda Henderson, Trustees v. Department of Natural Resources, Land Reclamation Comm'n,* (AHC No. 11-2490 Feb. 28, 2012)

Procedure

Petitioners filed their application for fees and expenses on August 21, 2015. On December 10, 2015, we issued a decision granting the motion to dismiss filed by the Department of Natural Resources (hereinafter, "the Department" or "DNR," also collectively with LRC "the Department") finding that we lacked jurisdiction to act as the hearing officer for another agency in a fees and expenses case. Petitioners appealed that decision. On September 18, 2018, the Circuit Court of Barton County reversed our decision and remanded the case to this Commission with orders to conduct an evidentiary hearing and render a recommended decision.[3] On August 29, 2019, and January 30, 2020, we held a hearing. Jeffrey K. Elnicki, with the Law Office of Jeffrey K Elnicki, represented Petitioners. Assistant Attorney General Timothy P. Duggan represented the Department and the LRC. The matter was ready for our decision on April 13, 2020.

Findings of Fact

I. Procedure in Underlying Case

1. On December 30, 2011, Petitioners filed a complaint with this Commission appealing the Department's decision to grant a request to revise the original permit (2011 permit revision). Upon motions to intervene, we allowed the following parties to intervene: Alternate Fuels, Inc., by its Chapter 11 Bankruptcy Trustee Christopher J. Redmond (AFI), and Continental Insurance Company and Continental Casualty Company (Continental).

2. On February 20, 2012, we held a hearing on the complaint. Elnicki represented Petitioners. Assistant Attorney General Jennifer Frazier represented the Department. Amber Steinbeck and Lowell D. Pearson, with Husch Blackwell Sanders, LLP, represented AFI. Thomas C. Smith, with Newman, Comley & Ruth, P.C., represented Continental.

[3] Case No. 16B4-CV00012.

3. On February 28, 2012, we issued a recommended decision, recommending that LRC deny the application for the 2011 permit revision (Appendix A, which we incorporate by reference into this recommended decision).

4. On March 21, 2012, Petitioners filed a motion asking LRC to disqualify itself due to bias, prejudice, and pre-judgment.

5. On March 29, 2012, LRC denied the request to disqualify itself and issued its final decision vacating this Commission's recommended decision and granting the application for the 2011 permit revision (Appendix B, which we incorporate by reference into this recommended decision).

6. LRC's decision was, by law, based only on the facts and evidence in the hearing record.

II. Procedures in Court

7. On April 26, 2012, Petitioners filed their Petition for Judicial Review and Stay with the Circuit Court of Barton County.

8. On May 29, 2012, AFI filed a Notice of Removal removing the Barton County proceedings to the U.S. Bankruptcy Court for the Western District of Missouri (Missouri Bankruptcy Court). In the proceedings before the Missouri Bankruptcy Court, AFI filed a motion to transfer venue, seeking transfer of the matter to the U.S. Bankruptcy Court for the District of Kansas (Kansas Bankruptcy Court). DNR and Continental joined in AFI's removal of the Barton County proceeding to the Missouri Bankruptcy Court. DNR and Continental joined in AFI's request to the transfer of venue of the Missouri Bankruptcy Court proceedings to the Kansas Bankruptcy Court.

9. On July 19, 2012, upon Petitioners' motions for remand for lack of removal jurisdiction and for abstention, the Missouri Bankruptcy Court remanded the proceeding back to the Circuit Court of Barton County.

10. On November 18, 2013, the Circuit Court of Barton County upheld LRC's decision.

11. On December 18, 2013, Petitioners filed with the Circuit Court of Barton County a motion to amend judgment and for an evidentiary trial to be held allowing additional evidence to be submitted on the bias, prejudice and pre- judgment of LRC and DNR in this matter. On January 31, 2014, the circuit court denied Petitioners' post-trial motion to amend the judgment.

12. On February 6, 2014, Petitioners filed their Notice of Appeal to the Missouri Court of Appeals for the Southern District (Southern District).

13. On May 6, 2015, the Southern District reversed the decision of LRC and remanded the case back to LRC (at this point known as the Mining Commission) with directions to enter a new order denying AFI's application for the 2011 permit revision. The Southern District held that LRC, in its final decision, misapplied the law by failing to mention and, therefore, completely ignoring, its own regulation (10 CSR 40- 6.060(4)(E).5), which required obtainment of landowner consent for the creation of "water bodies." Accordingly, the Southern District held that Petitioners' third point on appeal was dispositive with no need to reach or address any of Petitioners' other seven points on appeal.[4]

14. On July 23, 2015, the Mining Commission issued its new order denying AFI's application for the 2011 permit revision.

III. Procedure in Present Case for Fees and Expenses

15. On August 21, 2015, Petitioners filed with this Commission their application for fees and expenses (fee application).

[4] Fowler Land Co., Inc. v. Mo. Dep't of natural Resources, 460 S.W.3d 502 (Mo. App. S.D. 2015).

16. On September 22, 2015, DNR filed a motion to dismiss on the basis that the fee application was untimely. On October 6, 2015, Petitioners filed a response in opposition to DNR's motion to dismiss. On November 10, 2015, we denied DNR's motion to dismiss.

17. On November 12, 2015, DNR filed a second motion to dismiss, arguing that we have no jurisdiction to conduct the evidentiary hearing and determine the merits of the fee application. On November 20, 2015, Petitioners filed a response to the second motion to dismiss, stating their position that we have jurisdiction pursuant to § 621.250[5] to conduct the evidentiary hearing and render a recommended decision with respect to the Fee Application.

18. On December 10, 2015, we granted DNR's second motion to dismiss for lack of jurisdiction.

19. Petitioners sought judicial review with the Circuit Court of Barton County, Case No. 16B4-CV00012, with respect to our order dismissing the fee application for lack of jurisdiction.

20. On September 18, 2018, the Circuit Court of Barton County issued its judgment reversing the dismissal of Petitioners' fee application for lack of jurisdiction and remanding the case back to this Commission with instructions to conduct an evidentiary hearing and to render a recommended decision with respect to the fee application.

IV. Eligibility for Fees and Expenses

21. Fowler is a corporation owned by 17 family members, has never operated a business, and has the sole purpose of owning land for use by the family members.

22. Fowler, at the initiation of the underlying case in 2011, had less than $7 million net worth and less than 500 employees. Fowler has never had a net worth of $7 million or more and has never had 500 or more employees.

[5] Statutory references are to RSMo 2016 unless otherwise noted.

23. Leist is a trust with the sole purpose of caring for Margaret Leist and the land owned by Margaret Leist. Leist has never had employees.

24. Leist has never had a net worth of $2 million or more, including in 2011 during the initiation of the underlying case.

V. Department's Claim of Substantial Justification

25. The Department maintains it considered the following factors in making the decision to grant the application:

- Before mining, AFI obtained the permit, which incorporated AFI's plan for reclaiming mined areas, as required by 10 CSR 40-6.050(10). The Department issued the permit under 10 CSR 40-3.130.

- The permit incorporated affidavits and maps that Petitioners signed to indicate their consent to the plan, which included new, permanent water impoundments.

- AFI mined coal on Petitioner's properties from approximately March 1993 through late 1996.

- AFI changed the mining method and sequence without first obtaining Petitioners' consent and the Department's approval, and AFI changed the locations and sizes of the water impoundments.

- In January 1995, the Department inspected the operations and advised AFI that it must obtain the Department's approval to change the water impoundments.

- In April of 1995, AFI submitted a request for a minor revision to the permit, noting the redesign of the mining sequence, which would increase the surface water area, and seeking to leave in place water impoundments that were already constructed.

- The Department regarded the 1995 revision request as a minor revision, allowed mining operations to continue while the request was pending, and attempted to work with AFI to approve the 1995 revision request.

- On October 11, 1995, Fowler executed a Land Use Change Affidavit requesting AFI to increase pasture land by five acres

and decrease wildlife habitat by five acres, but it did not change the water acreage.

- On September 22, 1995, Leist executed a Land Use Change Affidavit requesting AFI to include four acres of water in its reclamation plan for post reclamation land use.

- AFI submitted the Land Use Change Affidavits as evidence of Petitioners' consent to the existing water impoundments on their properties.

- On August 5, 2000, AFI submitted a revised reclamation plan map in conjunction with the 1995 revision request. The map showed the water impoundments that are present today.

- The Department requested that AFI obtain Petitioners' written consent to leave the water impoundments as constructed.

- The 1995 revision request met all the requirements, except landowner consent, so on December 17, 2002, the Department denied the request for that reason. AFI did not appeal.

- The Department initiated formal enforcement actions in response to the unauthorized changes and entered into a 1999 Consent Agreement and Compliance Schedule, which required AFI to finalize permit revisions to alternative post-mining land uses for the permit in order to leave the final water impoundments in place instead of reclaiming the land back to pasture.

- The Department issued Show Cause Order No. 2500 on September 19, 2001, and an Amended Show Cause Order on November 8, 2002.

- On July 28, 2004, LRC issued its Findings of Fact and Conclusions of Law for Show Cause Order No. 2500, revoking AFI's permits and forfeiting its bonds. LRC found that a 1999 Consent Agreement and Compliance Schedule required AFI to finalize permit revisions to alternative post-mining land uses for the permit in order to leave several final water impoundments in place instead of reclaiming the land back to pasture. LRC found that AFI had failed to abate the violation regarding finalizing the post-mining land uses because it had failed to obtain the landowners' consent for this permit revision.

- AFI appealed LRC's July 28, 2004, Final Order for Show Cause No. 2500. On October 9, 2008, the Cole County Circuit Court reversed LRC, reinstating AFI's permits and bonds. The court

found that the Department had "exceeded" its authority when it "would not approve the ultimate land use" requested by AFI "because landowners did not agree to the proposed changes." The "credible evidence" before LRC was that AFI was prohibited from completing the abatement of the alleged violation set forth in the Show Cause Orders because permitting would not approve the ultimate land use.

- AFI submitted the 2011 revision request, which was virtually identical to the 1995 revision request, in response to the 2008 Cole County Circuit Court's judgment.

- LRC's contention that the law allows the Department to revise a permit upon application by the permittee, even after mining has ceased and reclamation has been commenced.

- AFI's trustee testified that he was cooperating with reclamation, but there were limited funds available to complete reclamation.

26. The Department argues that considering these factors, its decision was substantially justified.

VI. Attorney Fees Amount

27. The number of pages of records and documents contained in the underlying case totals 2,920 pages.

28. The number of pages of records and documents generated pursuant to the judicial review of LRC's final decision held before the Circuit Court of Barton County totals 575 pages.

29. The number of pages of records and documents generated in regard to the removal proceeding before the Missouri Bankruptcy Court totals 407 pages.

30. The number of pages and records pertaining to the appeal to the Southern District totals 295 pages.

31. The number of pages of documents and records in the entire underlying proceeding is over 4,000 pages.

32. Petitioners' Exhibit J, consisting of the Affidavit of Attorney Elnicki, contains, among other things, the various dates, detailed description of services provided, and hours spent by Elnicki on behalf of Petitioners in relation to both the underlying and current proceedings through August 26, 2019.

33. The total number of hours spent by Elnicki in his representation of Petitioners in the underlying proceeding was 1,033.2 hours. This includes and encompasses: representation of Petitioners in the administrative proceedings before DNR, this Commission, and the administrative proceeding before LRC (collectively referred to herein as the "Underlying Administrative Proceedings"); representation of Petitioners in the judicial review before the Circuit Court of Barton County both before removal of the matter to the Missouri Bankruptcy Court and after remand of such matter back to the Circuit Court of Barton County; representation of Petitioners before the Missouri Bankruptcy Court as a result of removal of the matter from the Circuit Court of Barton County; and representation of Petitioners in the appeal to the Southern District.

34. The time spent by Elnicki in his representation of Petitioners in the Underlying Administrative Proceedings began on August 17, 2011, and ended on March 30, 2012. Elnicki recorded time on 63 different calendar days during that period with total recorded hours of 329.9.

35. Elnicki claims 1,262.1 hours for services performed from August 17, 2011 to August 26, 2019, and 156.6 hours for services performed from August 27, 2019 to April 13, 2020,[6] for a total of 1,418.7 hours. Elnicki incurred expenses of $16,383.83 from January 29, 2012 to August 26, 2019, and $2,323.65 subsequent to August 26, 2019, for a total of $18,707.48.[7]

[6] Petitioners' Ex. J and Addendum to Ex. J.
[7] Petitioners' Ex. I and Addendum to Ex. I.

Conclusions of Law

In certain cases, we have jurisdiction to hear applications for fees and expenses.[8] Section 536.087 states:

> 1. A party who prevails in an agency proceeding or civil action arising therefrom, brought by or against the state, shall be awarded those reasonable fees and expenses incurred by that party in the civil action or agency proceeding, unless the court or agency finds that the position of the state was substantially justified or that special circumstances make an award unjust.

I. Jurisdiction

The Department continues to argue that we lack jurisdiction over this case because the Fee Application was filed in the wrong place and because we are not authorized by statute to hear this type of case. In our decision dated December 10, 2015, we agreed with one of the Department's arguments and granted its motion to dismiss. We found that the statutes did not authorize us to act as LRC's hearing officer in fees and expenses cases. We agreed that we did not have jurisdiction to hear the case and dismissed it. Petitioners sought judicial review in the Circuit Court of Barton County. On September 18, 2018, that court reversed and remanded the case back to us with instructions "to conduct an evidentiary hearing and render a recommended decision with respect to Petitioners' Fee Application[.]" The circuit court's remand was not appealed.

Despite our continuing contention that we lack jurisdiction,[9] we must follow the court's order. We held a hearing, and we issue this recommended decision, which may be amended or reversed by the Mining Commission, as our recommended decision was reversed by LRC in the underlying case.

---

[8]Section 536.087.

[9] *See Country Club Homes, LLC v. Department of Natural Resources*, 591 S.W.3d 882, 898 (Mo. App. W.D. 2019) (Court remanded the case to the Clean Water Commission – not the Administrative Hearing Commission – to determine whether the party was entitled to attorney fees).

II. Agency Proceeding/Prevailing Party

Section 536.087.1 authorizes an award of fees and expenses to a non-state party who "prevails in an agency proceeding or civil action arising therefrom[.]" An agency proceeding is "an adversary proceeding in a contested case pursuant to this chapter in which the state is represented by counsel[.]"[10] The underlying case was an agency proceeding.[11]

Section 536.085(2) defines a "party" to include:

> any . . . corporation . . . the net worth of which did not exceed seven million dollars at the time the civil action or agency proceeding was initiated, and which had not more than five hundred employees at the time the civil action or agency proceeding was initiated[.]

Section 536.085(3) defines "prevails" as:

> obtains a favorable order, decision, judgment, or dismissal in a civil action or agency proceeding[.]

Because each Petitioner has less than 500 employees, has a net worth less than $7 million, and obtained a favorable decision, they both were a prevailing party in the underlying case. A prevailing party is entitled to an award of fees and expenses unless it is determined that the State's position was substantially justified or special circumstances make an award unjust.[12]

III. Special Circumstances/Substantially Justified

The Department argues no "special circumstances" that would make an award of fees and expenses unjust, and we find none. Petitioners argue that the Department waived any right to argue that its position was substantially justified because it did not assert it as an affirmative defense in its answer. We disagree. In § 536.087.3, the party seeking attorney fees and other expenses must make assertions about whether the State's position was substantially justified as part of its application:

---

[10]Section 536.085(1).
[11]*Rose City Oil Co. v. Missouri Comm'n on Human Rights*, 832 S.W.2d 314, 317 (Mo. App., E.D. 1992).
[12]Section 536.087.1.

> **The party shall also allege that the position of the state was not substantially justified.** The fact that the state has lost the agency proceeding or civil action creates no legal presumption that its position was not substantially justified. Whether or not the position of the state was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by an agency upon which a civil action is based) which is made in the agency proceeding or civil action for which fees and other expenses are sought, and on the basis of the record of any hearing the court or agency deems appropriate to determine whether an award of reasonable fees and expenses should be made, provided that any such hearing shall be limited to consideration of matters which affected the agency's decision leading to the position at issue in the fee application.

(Emphasis added.) The issue is part of the statute authorizing attorney fees. In this case, Petitioners allege that the State's position was not substantially justified, and the Department denies this in its answer. The next step, according to the statute, is that the agency makes a determination on the issue, which we will do below.

Fees and expenses are to be awarded unless the State's position was substantially justified.[13] The Department must show that its position was clearly reasonable with a reasonable basis in both fact and law.[14] The Department has the burden of proof on substantial justification.[15] The Department must present *a prima facie* case that there was a reasonable basis in both fact and law for its position, and that this basis was not merely marginally reasonable, but clearly reasonable, although not necessarily correct.[16] The Department must bear this burden based on the facts found in the underlying case and the additional information shown at the fees and expenses hearing as to matters that led to the decision. We must take into consideration not just the facts as determined in the underlying case, but also how these facts reasonably may have appeared at the time of the decision.[17]

---

[13]Section 536.087.1.
[14]*Dishman v. Joseph*, 14 S.W.3d 709, 717 (Mo. App., W.D. 2000).
[15]*Hutchings v. Roling*, 193 S.W.3d 334, 349 (Mo. App., E.D. 2006).
[16]*Dishman*, 14 S.W.3d at 716, 718-19; *Joseph*, 81 S.W.3d at 153.
[17] *Dishman*, 14 S.W.3d at 716, 718-19.

The Department must show substantial justification for its decision to approve AFI's revision request, even though the landowners had not consented to the location of post-mining water impoundments. The Department offered no evidence at the hearing. The Department argues that its (and LRC's) decision was substantially justified based on the factors listed above in our Findings of Fact.

In approving the 2011 revision request, the Department argues it viewed the 2008 Cole County Circuit Court judgment as binding. Petitioners challenged that basis for the decision, but also pointed out that 10 CSR 40- 6.060(4)(E).5 required landowner consent to the placement of the water impoundments, and that without their consent, the regulation required the Department to deny the revision request.

The Department noted that even if this regulation did apply, the decision would not change because it would result in a difference of less than six acres of water impoundments from the originally approved acreage. The Department interpreted this rule as relating to the preservation of prime farmland and did not see the revision request as threatening that post-mining use.

The Department looked to 10 CSR 40-3.130(3), which provides criteria for approving post-mining use that would be an alternative to the use approved in the original permit, after consultation with the landowners. The Department focused upon the requirement that landowners be consulted, and they had been. But the Southern District focused, instead, on the language that appears to limit application of the rule to alternatives that would be "higher or better uses."

On the specific question of whether Petitioners' consent was required, the Department's position was reversed by the Southern District, which identified 10 CSR 40-6.060(4)(E).5 as dispositive. The Southern District found:

> The legal issue before the Commission, therefore, in order to determine the propriety of the Program's approval of the 2011 Permit revision, was whether property owners' consent was legally required, as maintained by the Program in denying the 1995 Permit Revision, or not legally required, as maintained by the Program in approving the 2011 Permit Revision. Without any mention or discussion of 10 CSR § 40-6.060(4)(E).5, as raised by property owners in their complaint for review, the Commission decided that property owners' consent was not required and that the Program was only required under 10 CSR § 40-3.130(3) to consult with property owners before approving the 2011 Permit Revision. This decision failed to address and ignored the express, clear, and plain language of 10 CSR § 40-6.060(4)(E).5.[18]

The Department argues it considered the regulations with a view to accomplishing the goals of the mining laws: reclamation of mined areas for uses that are lawful, can be achieved without delay, and pose no hazard to human health or the environment. The Department considered the limited funds available from AFI's bankruptcy to accomplish reclamation. The Department argues its approval of the revision request was based on a reasonable understanding of the regulations – a broad view that was accepted by the Mining Commission and Circuit Court of Barton County, though the Southern District later determined that the Department's implementation of its rules was incorrect. The Department also believed that it could not lawfully require landowner consent because of the 2008 Cole County Circuit Court judgment, even though the Southern District ruled otherwise on appeal. The Department argues that it believed its approval was reasonable in view of the facts and the law as the Department understood it at the time.

Petitioners argue that the Department's position conflicts with its prior conduct when it denied the 1995 permit revision because of AFI's failure to obtain Petitioners' written consent. Petitioners argue that it was not reasonable to completely ignore its own regulation, which clearly requires consent. We agree with Petitioners. As noted in the Southern District opinion,

[18] Fowler Land, 460 S.W.3d at 508-09.

the Department was not forced to choose between the regulations and could have – and should have – followed both, which would have resulted in the required consent.

The Department's positions in the underlying case were not substantially justified. Petitioners are entitled to an award of attorney fees and expenses. The award of fees and expenses includes those expended in the present case.[19]

IV. Amount of Award

A. Special Factors

Section 536.085(4) provides:

> The amount of fees awarded as reasonable fees and expenses shall be based upon prevailing market rates for the kind and quality of the services furnished, except that . . . attorney fees shall not be awarded in excess of seventy-five dollars per hour unless the court determines that a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee[.]

Petitioners argue there are special factors warranting a fee greater than $75 per hour and request $200 per hour. They note that the case has proceeded through this Commission, the Circuit Court of Barton County, and the Southern District, and involved review and analysis of the Federal Surface Coal Mining Control and Reclamation Act, and numerous federal regulations and bankruptcy law. They argue that the underlying case was factually complex, involving the provisions of the permit, the history of AFI's mining of Petitioners' land, and violations by AFI.

The Department argues that there are no special factors. While Petitioners make a compelling argument, we agree with the Department after analyzing the factors provided by the Court of Appeals. As explained in *Cooling v. Dept. of Soc. Services*:[20]

> When considering a particular expertise of an attorney for purposes of Section 536.085(4), **the expertise necessary to handle the case means that the case requires an attorney with "some distinctive knowledge**

[19] *Hernandez v. State Bd. of Regis'n for the Healing Arts*, 936 S.W.2d 894, 901-02 (Mo. App., W.D. 1997).
[20] 491 S.W.3d 253 (Mo. App. E.D. 2016).

> **or specialized skill needful for the litigation in question," not "general lawyerly knowledge and ability useful in all litigation." ... Cooling presented no evidence suggesting his case involved a peculiarly complex issue requiring special legal expertise. Cooling also presented no evidence that his case was "distinctly complex when compared to other administrative agency matters."** The total eradication of Cooling's alleged support arrearage was largely based on Mother and Father's Agreement. Cooling's adjudication regarding the state debt did not involve complex skills or law. Accordingly, the expertise necessary to successfully argue Cooling's case was not more than general lawyerly knowledge and ability useful in all litigation. In addition, the fact that the prevailing hourly rate for an attorney's services in the City of St. Louis exceeds $75 per hour is not a special factor pursuant to Section 536.085(4). Also, the fact that the result obtained by Cooling's attorneys was a total eradication of the alleged child support arrears does not constitute a special factor pursuant to Section 536.085(4).[21]

When we analyze the existence of a special factor under *Cooling*, we determine no such factor is present here. The court in *Baker v. Department of Mental Health*[22] noted that "the mere fact an agency proceeding or civil action brought by or against the state will require representation at the agency, circuit and appellate levels is legally insufficient to establish a special factor[.]" Petitioners argue that mining regulation is a specialized area of law that requires expertise. The *Baker* court made a distinction between "general lawyerly knowledge" and highly specialized lawyerly skills such as patent law, knowledge of foreign law or language where such qualifications are necessary.[23] Accordingly, we find that regulatory work is a general lawyerly ability. Also, we cannot consider Petitioners' attorney's extensive work on this case to be a special factor. Similarly, witness testimony about the reasonableness of the attorney's fees does not meet the definition of a special factor.

The attorney fees shall be calculated at the statutory cap of $75 per hour.

---

[21] *Id.* at 264-65 (emphasis added, internal citations omitted).
[22] 408 S.W.3d 228, 240 (Mo. App. W.D. 2013).
[23] *Id.* at 242.

B. Amount of Fees and Expenses

The Department argues that we should limit the fees and expenses in this case because Petitioners did not prevail on all of their arguments. The Department cites *Sanders v. Hatcher*,[24] in which the court found that a father prevailed in his appeal on the issue of providing health insurance, but did not prevail on the issue of contesting the amount of child support. Therefore, he was only entitled to attorney fees incurred in relation to the first issue. Petitioners argue there was only one issue – whether the 2011 permit revision should be approved or denied. We agree with Petitioners that they fully prevailed on the one issue in the case, and fees should not be limited under the *Sanders* rationale.

Similarly, the Department argues that fees and expenses should be limited because the Southern District opinion was based on one argument (the failure to secure necessary consent), and thus Petitioners should not be entitled to attorney fees on time spent on other arguments. We reject the idea that just because a party prevails on one claim, the other arguments are in some way frivolous and unnecessary. We do not limit the fees and expenses as billed by Petitioners' attorney.

Petitioners' attorney claims 1,262.1 hours for services performed from August 17, 2011 to August 26, 2019, and 156.6 hours for services performed from August 27, 2019 to April 13, 2020,[25] for a total of 1,418.7 hours. Petitioners are entitled to reimbursement of $106,402.50 ($75 x 1,418.7) for attorney fees.

Section 536.085(4) provides that:

> "**[r]easonable fees and expenses**" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court or agency to be necessary for the preparation of the party's case, and reasonable attorney or agent fees.

[24] 341 S.W.3d 762 (Mo. App. W.D. 2011).
[25] Petitioners' Ex. J and Addendum to Ex. J.

Petitioners' counsel incurred expenses of $16,383.83 from January 29, 2012 to August 26, 2019, and $2,323.65 subsequent to August 26, 2019, for a total of $18,707.48.[26]

Petitioners are entitled to an award of $18,707.48 in expenses.

C. Prejudgment Interest

Petitioners ask for prejudgment interest under § 408.020:

> Creditors shall be allowed to receive interest at the rate of nine percent per annum, when no other rate is agreed upon, for all moneys after they become due and payable, on written contracts, and on accounts after they become due and demand of payment is made; for money recovered for the use of another, and retained without the owner's knowledge of the receipt, and for all other money due or to become due for the forbearance of payment whereof an express promise to pay interest has been made.

Section 408.020 concerns creditors and not an award of fees and expenses. Petitioners cite no cases in which prejudgment interest was awarded in a case for fees and expenses, and we find none.

Section 536.087 sets forth what may be considered and awarded in an attorney fees case. There is no provision referencing interest and no authority granted for an agency to award it.[27] We deny Petitioners' request for prejudgment interest.

Summary

This Commission recommends the Mining Commission award Petitioners $106,402.50 in attorney fees and $18,707.48 in expenses.

SO RECOMMENDED on August 4, 2020.

Sreenivasa Rao Dandamudi

SREENIVASA RAO DANDAMUDI
Commissioner

[26] Petitioners' Ex. I and Addendum to Ex. I.

[27] Compare with Department of Revenue statutes such as § 144.170, which authorizes us to order payment of interest if we determine that tax is owed.