In the United States Court of Federal Claims

* * * * * * * * * * * * * * **CEMS, INC.,** **Plaintiff,** **v.** **UNITED STATES,** **Defendant.** * * * * * * * * * * * * * *	* * * * * * * * * * * *	**Nos. 99-951C, 00-437C, 00-438C, 00-439C** **Filed: May 25, 2005**

O R D E R

Judgment was issued in the above captioned case, initially awarding plaintiff $316,567.52, plus interest, pursuant to the Contract Disputes Act. See CEMS, Inc., v. United States, 59 Fed. Cl. 168, 233 (2003). In response to a motion for reconsideration filed by the defendant on the merits, the plaintiff's award was revised to $294,777.89, with interest, pursuant to the Contract Disputes Act. Plaintiff then sought attorney fees under the Equal Access to Justice Act, (EAJA), 28 U.S.C. § 2412 (2000), and was awarded EAJA fees in the amount of $57,058.64 by this court. See CEMS, Inc. v. United States, No. 99-951C, et al., 2005 WL 950495, at *15 (Fed. Cl. Apr. 22, 2005). These two opinions are incorporated into this order. Plaintiff has filed a motion pursuant to Rule 59 of the Rules of the United States Court of Federal Claims (RCFC) for the court to "reconsider, rehear or amend" its EAJA award.

DISCUSSION

A motion for reconsideration is permitted under RCFC 59, which provides that reconsideration "may be granted to all or any of the parties and on all or part of the issues, for any of the reasons established by the rules of common law or equity applicable as between private parties in the courts of the United States." RCFC 59(a)(1). The United States Court of Appeals for the Federal Circuit has stated that: "The decision whether to grant reconsideration lies largely within the discretion of the [trial] court." Yuba Natural Res., Inc. v. United States, 904 F.2d 1577, 1583 (Fed. Cir.), reh'g denied (1990); see also Tritek Techs., Inc. v. United States, 63 Fed. Cl. 740, 752 (2005); Keeton Corrections, Inc. v. United States, 60 Fed. Cl. 251, 253 (2004); Paalan v. United States, 58 Fed. Cl. 99, 105 (2003), aff'd, 120 Fed. Appx. 817 (Fed. Cir. 2005); Pacific Gas and Elec. Co. v. United States, 58 Fed. Cl. 1,

2 (2003); Citizens Fed. Bank, FSB v. United States, 53 Fed. Cl. 793, 794 (2002). The court must address reconsideration motions with "exceptional care." Carter v. United States, 207 Ct. Cl. 316, 318, 518 F.2d 1199, 1199 (1975), cert. denied, 423 U.S. 1076, reh'g denied, 424 U.S. 950 (1976); Henderson County Drainage Dist. No. 3 v. United States, 55 Fed. Cl. 334, 337 (2003) (citing Fru-Con Constr. Corp. v. United States, 44 Fed. Cl. 298, 300 (1999)); Seldovia Native Ass'n Inc. v. United States, 36 Fed. Cl. 593, 594 (1996), aff'd, 144 F.3d 769 (Fed. Cir. 1998). To prevail, a motion for reconsideration "must be based upon manifest error of law, or mistake of fact, and is not intended to give an unhappy litigant an additional chance to sway the court." Circle K Corp. v. United States, 23 Cl. Ct. 659, 664-65 (1991) (citing Weaver-Bailey Contractors, Inc. v. United States, 20 Cl. Ct. 158 (1990)), vacated (to facilitate settlement), No. 12-86T, 1996 WL 904545 (Fed. Cl. Nov. 15, 1996); see also Pacific Gas and Elec. Co. v. United States, 58 Fed. Cl. at 2; Ammex, Inc. v. United States, 52 Fed. Cl. 555, 557 (2002), aff'd, 384 F.3d 1368 (2004), cert. denied, 125 S. Ct. 1697 (2005); Stelco Holding Co. v. United States, 42 Fed. Cl. 156, 157 (1998); Principal Mut. Life Ins. Co. v. United States, 29 Fed. Cl. 157, 164 (1993), aff'd, 50 F.3d 1021 (Fed. Cir.), reh'g denied and en banc suggestion declined (1995). In order to prevail on a motion for reconsideration, the movant must show that: (a) an intervening change in the controlling law has occurred; (b) evidence not previously available has become available; or (c) that the motion is necessary to prevent manifest injustice. See Tritek Techs., Inc. v. United States, 63 Fed. Cl. at 752; Bishop v. United States, 26 Cl. Ct. 281, 286 (1992) (citing Weyerhaeuser Corp. v. Koppers Co., 771 F. Supp. 1406, 1419 (D. Md. 1991)), recons. denied (1992)); see also Bannum, Inc. v. United States, 59 Fed. Cl. 241, 243 (2003); Citizen Fed. Bank, FSB v. United States, 53 Fed. Cl. at 794; Strickland v. United States, 36 Fed. Cl. 651, 657, recons. denied (1996). "A court, therefore, will not grant a motion for reconsideration if the movant 'merely reasserts . . . arguments previously made . . . all of which were carefully considered by the court.'" Ammex, Inc. v. United States, 52 Fed. Cl. at 557 (quoting Principal Mut. Life Ins. Co. v. United States, 29 Fed. Cl. at 164) (emphasis in original) (quoting Frito-Lay of P.R., Inc. v. Canas, 92 F.R.D. 384, 390 (D.P.R. 1981))); see also Tritek Techs., Inc. v. United States, 63 Fed. Cl. at 752.

Plaintiff argues in its motion for reconsideration that, in an EAJA case, the court "should award fees for all time reasonably expended on the successful litigation as a whole, not just the time spent contesting the particular aspect of the government's case that was found to be without substantial justification." The court found that the government's overall position in this case was not substantially justified. See CEMS, Inc. v. United States, 2005 WL 950495, at *11. However, the parties addressed and the court discussed at some length the issues now raised by plaintiff on EAJA reconsideration, and awarded plaintiff's EAJA fees based on the varying degrees of success achieved by CEMS during the various phases of the litigation. See id., at *12-13. As noted above, the plaintiff's reassertion of arguments previously made, considered, and addressed by the court in its opinion do not provide a proper basis for reconsideration.

In its motion for reconsideration, plaintiff cites to Russell v. National Mediation Board, 775 F.2d 1284 (5th Cir. 1985). Plaintiff cites to this 1985 United States Court of Appeals for the Fifth Circuit case for the first time. The court observes that more recent cases were cited

and relied upon by the court in CEMS, including binding United States Supreme Court and United States Court of Appeals for the Federal Circuit opinions, compared to the belated citation to the Russell case. See CEMS, Inc. v. United States, 2005 WL 950495, at *12-13. Moreover, unlike the present case, in which CEMS presented over one hundred claims, with varying degrees of success, id. at *5, *12, in Russell, the claimant presented a single claim, that the National Mediation Board had dismissed, rather than processed his application for the investigation of a union representational dispute, and on which the claimant was successful, warranting EAJA fees for the entire case, see Russell v. Nat'l Mediation Bd., 764 F.2d 341, 343 (5th Cir. 1985), opinion withdrawn, 775 F.2d at 1291-92. The citation of the Russell case, therefore, on an issue previously addressed by the court, does not provide a proper basis for reconsideration.

The plaintiff cites one other 1985 case for the first time in its motion for reconsideration, Wedra v. Thomas, 623 F. Supp. 272 (S.D.N.Y. 1985). As noted above, more recent cases were generally cited and relied upon by the court in CEMS, including binding United States Supreme Court and United States Court of Appeals for the Federal Circuit opinions. See CEMS, Inc. v. United States, 2005 WL 950495, at *12-13. The United States District Court in Wedra cited Hensley v. Eckerhart, 461 U.S. 424, 435 n.11 (1983), for the principle that EAJA awards should not be made on the basis of a strict "mathematical" approach. Wedra v. Thomas, 623 F. Supp. at 276. The same point was made in this court's CEMS opinion:

> this court must determine the appropriate reduction based on its determination of what would be reasonable in light of the plaintiff's [CEMS'] more limited success. In making this determination, the United States Supreme Court in Hensley v. Eckerhart found that EAJA awards should not be reduced according to a mathematical ratio that compares the number of issues upon which the plaintiff actually prevailed with the total number of issues in the case. Hensley v. Eckerhart, 461 U.S. at 435 n.11.

CEMS, Inc. v. United States, 2005 WL 950495, at *12. The United States Supreme Court in Hensley also stated that a fee award should be informed by the "results obtained," a factor which is "particularly crucial" when a plaintiff "succeeded on only some of his claims for relief." Hensley v. Eckerhart, 461 U.S. at 434. According to the Supreme Court, if a plaintiff has achieved only partial or limited success, a full fee award may be "excessive." Id. at 436. In the Hensley case itself, the Supreme Court stated that if the claimants had prevailed on only one of their six claims, an award of the full fees sought "clearly would have been excessive." Id. The Supreme Court continued: "There is no precise rule or formula for making these determinations. The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success. The court necessarily has discretion in making his equitable judgment." Id. at 436-37. The Supreme Court then stated that it was unable to affirm the lower court decisions in Hensley, "because the District Court's opinion did not properly consider the relationship between the extent of success and the amount of the fee award." Id. at 438 (footnote omitted). Finally, vacating and remanding in Hensley, the Supreme Court concluded that, "where the plaintiff achieved only

limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained." Id. at 440.

In the Wedra case itself, there were five claims. The claimant received full relief on three of the five claims, some relief on one claim, and no relief but some personal assurances from the agency with regard to the final claim. Id. at 275. The District Court in Wedra awarded $2,205.00 in EAJA fees, which represented $75.00 an hour for the 29.4 hours claimed. Id. at 277-78. The District Court based its award on the conclusion that, "All of the plaintiff's claims were concerned with facilitating social and legal visitation in the [federal correctional] unit with a minimum of intrusion on the part of the institution into the privacy of the inmates, their attorneys, and their social guests." Id. at 277. As to this purpose, the claimant enjoyed a high degree of success, warranting EAJA compensation by the court for all of the hours expended. In contrast, in the present case, CEMS did not enjoy the same level of success on its numerous, diverse claims, warranting the adjustment made in the court's earlier EAJA award.

CONCLUSION

For the foregoing reasons, plaintiff's motion for reconsideration is **DENIED**. The court's April 26, 2005 **JUDGMENT**, awarding plaintiff $57,058.64 in EAJA fees remains in effect.

IT IS SO ORDERED.

_____

MARIAN BLANK HORN
Judge