SUMMARY
March 30, 2023

2023COA29

No. 21CA0983, *Fontanari v. Snowcap Coal* — Energy and Environment — Mining — Colorado Surface Coal Mining Reclamation Act — Colorado Mined Land Reclamation Board — Review by Board — Judicial Review — Attorney Fees

A division of the court of appeals holds that a court conducting judicial review of a decision by the Mined Land Reclamation Board may not award attorney fees that were incurred during agency proceedings. In addition, interpreting section 34-33-128(4), C.R.S. 2022, the division holds that a fee award is not "just and proper" on judicial review absent a finding of bad faith.

COLORADO COURT OF APPEALS **2023COA29**

Court of Appeals No. 21CA0983
Mesa County District Court No. 17CV30391
Honorable Brian J. Flynn, Judge

Rudolph Fontanari, Jr., Trustee of the Rudolph and Ethel Carol Fontanari Revocable Living Trust; Ethel Carol Fontanari, Trustee of the Rudolph and Ethel Carol Fontanari Revocable Living Trust; and Fontanari Revocable Living Trust,

Plaintiffs-Appellants,

v.

Snowcap Coal Company Inc.,

Defendant-Appellee.

ORDER REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division IV
Opinion by JUDGE GROVE
Schutz and Graham*, JJ., concur

Announced March 30, 2023

Lewis Roca Rothgerber Christie LLP, Kendra N. Beckwith, Denver, Colorado, for Plaintiffs-Appellants

Hoskin Farina & Kampf, PC, Michael J. Russell, John P. Justus, John T. Pryzgoda, Grand Junction, Colorado, for Defendant-Appellee

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3) and § 24-51-1105, C.R.S. 2022.

¶ 1 Plaintiffs, Rudolph Fontanari, Jr., Trustee of the Rudolph and Ethel Carol Fontanari Revocable Living Trust; Ethel Carol Fontanari, Trustee of the Rudolph and Ethel Carol Fontanari Revocable Living Trust; and the Fontanari Revocable Living Trust (collectively, Fontanari), appeal the district court's order awarding attorney fees and costs to defendant, Snowcap Coal Company Inc. (Snowcap).

¶ 2 The district court's fee award to Snowcap covered two phases of the proceedings: the administrative hearing before the Mined Land Reclamation Board (MLRB) and the subsequent judicial review. We reverse both parts of the award.

¶ 3 First, we conclude that the court lacked authority to award fees to Snowcap for the agency phase of the proceedings under either section 34-33-128(4) or section 34-33-124(5), C.R.S. 2022. Second, we conclude that the court failed to make sufficient findings to justify an award of fees for the judicial review phase. We therefore reverse the court's order and remand the case so that the district court may consider whether a fee award is "just and proper" for the judicial review phase under section 34-33-124(5).

I. Background

¶ 4 Until 1999, Snowcap operated an underground coal mine, part of which was underneath surface land owned by Fontanari. In 2013, Snowcap applied to the Division of Reclamation, Mining, and Safety (the Division) for a partial release of its performance bond, which was filed to ensure Snowcap's compliance with a reclamation plan, after completing certain reclamation work. On February 16, 2017, Fontanari filed objections to Snowcap's request, arguing to the Division that Snowcap's operations had damaged his property due to subsidence and hydrologic communication between surface lands and underground mine workings. Inspections revealed that a substantial amount of surface water from an irrigation ditch was making its way into the mine through an improperly reclaimed air shaft.

¶ 5 Snowcap submitted a repair and reclamation plan (Technical Revision 69) for the air shaft. Fontanari filed an objection with the Division, arguing that the plan was deficient in several respects, but the Division approved it as submitted. Fontanari then filed a letter of objection and requested a hearing before the MLRB. After a

hearing, the MLRB approved Snowcap's proposal by a vote of three to one.

¶ 6 Fontanari filed a complaint for judicial review of the MLRB's decision. The district court affirmed the ruling in a detailed written order. That ruling is not before us in this appeal.

¶ 7 Instead, what is before us is the district court's subsequent order awarding Snowcap approximately $125,000 in attorney fees. Although Snowcap had not requested fees at the completion of the MLRB proceedings, in the district court, it moved for an omnibus award under section 34-33-128(4) that encompassed all the legal costs that it had incurred since Fontanari filed his objection with the Division. The district court granted the award by signing Snowcap's proposed order without any alterations. The order summarily provided:

- "Snowcap is entitled to recover its attorneys' fees and costs incurred defending against [Fontanari's] Objections and appeal in this matter since February 16, 2017 pursuant to C.R.S. 34-33-128(4)."
- "The hourly rates for attorneys' fees charged by Snowcap's counsel are reasonable."

- "The time spent by Snowcap's counsel to defend against Fontanari's objections and subsequent appeal was reasonable given the procedural history of the case and the legal and factual issues involved."
- The total amount of fees ($101,563.00) and costs ($23,285.66) was reasonable, and the "costs requested by Snowcap were necessarily incurred in connection with the defense against Fontanari's Objections and this appeal."

¶ 8 Fontanari appeals this order, arguing that (1) the court had no authority to issue an award for fees incurred during the MLRB proceedings; (2) the court should not have awarded fees to Snowcap for the judicial review phase of the proceedings because it was not "just and proper" to do so; (3) the amount awarded to Snowcap is unreasonable; and (4) the court's findings were inadequate to support its ruling. As discussed in detail below, we agree with Fontanari's first and fourth arguments and thus do not reach his second and third points. We therefore reverse the district court's order and remand the case for further consideration of the fee award arising from Fontanari's request for judicial review.

II. Standard of Review

¶ 9 A trial court has broad discretion in determining whether to award attorney fees, and absent a showing of an abuse of that discretion, we will not disturb its decision. *Redmond v. Chains, Inc.*, 996 P.2d 759, 765 (Colo. App. 2000). However, we review de novo any statutory interpretation or legal conclusion that provides a basis for an attorney fee award. *US Fax L. Ctr., Inc. v. Henry Schein, Inc.*, 205 P.3d 512, 515 (Colo. App. 2009).

III. Applicable Law

¶ 10 The Colorado Surface Coal Mining Reclamation Act (the Act) includes two separate fee-shifting provisions. The first appears in section 34-33-124, which outlines procedures for administrative proceedings before the MLRB:

> Whenever an order is issued *under this section or as a result of any administrative proceeding under this article*, at the request of any party to such proceeding, a sum equal to the aggregate amount of all costs and expenses (including attorney fees) *which the [MLRB] determines* to have been reasonably incurred by such party for or in connection with his participation in such proceedings may be assessed against any party to the proceedings, *as the [MLRB] deems just and proper.*

§ 34-33-124(5) (emphasis added).

¶ 11 The second fee-shifting provision is in section 34-33-128, which allows for judicial review of MLRB decisions:

> At the request of any party to a proceeding *under this section*, the court may assess costs and expenses, including attorney fees, against any party, *as the court deems just and proper*.

§ 34-33-128(4) (emphasis added).

¶ 12 Although the statutory standard for a fee award — "just and proper" — appears in both sections, it is not defined anywhere in the Act.

IV. Fee Award for Agency Proceedings

¶ 13 We first consider the propriety of the district court's award of fees associated with the administrative proceedings before the MLRB. We conclude that the district court did not have authority to award fees for this phase of the proceedings.

¶ 14 As relevant here, MLRB regulations provide that attorney fees may be awarded "[t]o a permittee from any person where the permittee demonstrates that the person initiated a proceeding [seeking MLRB review of a notice or order issued by the Division] or participated in such a proceeding in bad faith for the purpose of harassing or embarrassing" the opposing party. Div. of

Reclamation, Mining & Safety Rule 5.03.6(4)(b), 2 Code Colo. Regs. 407-2.

¶ 15 Rule 5.03.6 sets forth the procedural requirements for MLRB-issued attorney fee awards. The rule provides, in pertinent part:

> The petition for an award of costs and expenses including attorney's fees must be filed with the [MLRB], within 45 days of receipt of such order. Failure to make a timely filing of the petition may constitute a waiver of the right to such an award.

Id. at Rule 5.03.6(1). In addition, Rule 5.03.6(3) provides that "[a]ny person served with a copy of the petition [for a fee award] shall have 30 days from service of the petition within which to file an answer to such petition."[1]

¶ 16 Snowcap never filed a petition for an award of attorney fees and costs with the MLRB, much less within forty-five days of the issuance of the MLRB's order, as Rule 5.03.6(1) stated that it "must" do. Instead, it waited until the judicial review was complete

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[1] Section 34-33-124(5), C.R.S. 2022, does not set a deadline for fee applications. Thus, unlike the situation that the division addressed in *Fontanari v. Colorado Mined Land Reclamation Board*, 2023 COA 15, there is no potential for conflict between the time limits set forth in Division of Reclamation, Mining & Safety Rule 5.03.6, 2 Code Colo. Regs. 407-2, and the underlying statute.

and requested fees arising from the administrative proceedings as part of its omnibus motion for fees filed in the district court. The court summarily granted Snowcap's request in its entirety, "pursuant to § 34-33-128(4)." The court's order did not mention the agency-specific fee-shifting provision, section 34-33-124(5), at all.

¶ 17 Fontanari raises two jurisdictional challenges to this part of the court's order. First, he argues that the district court is only statutorily authorized to award fees incurred on judicial review, and not for underlying administrative proceedings. And second, he argues that any request for fees incurred before the MLRB would be time barred and so should be rejected as a matter of law. We agree with Fontanari's first argument, so we need not address the second.

¶ 18 When construing statutes, we look first to the plain meaning of the statutory language, reading words and phrases in context and construing them according to the rules of grammar and common usage. *Butler v. Bd. of Cnty. Comm'rs*, 2021 COA 32, ¶ 9. If possible, we will harmonize conflicting provisions and avoid interpretations that render provisions superfluous. *In re Estate of Ramstetter*, 2016 COA 81, ¶ 16. But in doing so, we "must accept

the General Assembly's choice of language and not add or imply words that simply are not there." *Williams v. Dep't of Pub. Safety*, 2015 COA 180, ¶ 85 (citation omitted). And "[w]hen legislative language is unambiguous," we "give effect to the statute's plain and ordinary meaning without resorting to other rules of statutory construction." *St. Vrain Valley Sch. Dist. RE-1J v. A.R.L.*, 2014 CO 33, ¶ 10.

¶ 19 We need not look beyond the plain meaning of section 34-33-128(4) — which the district court relied on to grant fees for the agency-level proceedings — to determine that the statute only authorizes the court to award fees in connection with judicial review. Section 34-33-128 is devoted exclusively to the procedures for judicial review of an MLRB ruling; it does not contemplate or reference the underlying administrative proceedings that necessarily precede judicial review. (Indeed, as we have already noted, those procedures are outlined elsewhere in the Act.) And subsection (4) permits the court to award fees "[a]t the request of any party to a proceeding *under this section*." § 34-33-128(4) (emphasis added). When we consider that language together with section 34-33-124(5), which allows the MLRB to award fees "under

this section or as a result of any administrative proceeding under this article," the intent is all the more clear. Section 34-33-128(4) only authorized the district court to award fees incurred on judicial review.

¶ 20 We are not persuaded otherwise by Snowcap's argument that, because Fontanari filed "the action for judicial review within 30 days of the [MLRB] order, the [MLRB] was deprived of further jurisdiction over matters concerning" the repair and remediation plan — thus leaving it with no alternative but to request a fee award from the district court. Neither section 34-33-128 nor *Colorado State Board of Medical Examiners v. Lopez-Samayoa*, 887 P.2d 8, 14 (Colo. 1994) — which Snowcap argues is dispositive — suggests that a request for judicial review of the MLRB's decision on the *merits* would have deprived the MLRB of jurisdiction over a subsequently filed *fee petition*. Indeed, in the analogous situation of an appeal from a district court to the court of appeals, our supreme court has made clear that "[a] judgment on the merits is final for purposes of appeal notwithstanding an unresolved issue of attorney fees." *L.H.M. Corp., TCD v. Martinez*, 2021 CO 78, ¶ 2. The corollary is that a district court retains jurisdiction to rule on a fee

request even after a merits appeal has been perfected. *See Koontz v. Rosener*, 787 P.2d 192, 198 (Colo. App. 1989). Snowcap cites no authority holding that this principle is inapplicable to judicial review of agency proceedings. We are thus not convinced by Snowcap's argument that Fontanari's timely filed complaint for judicial review deprived it of an opportunity to file a fee petition with the MLRB. As a result, the district court's award of fees for the agency stage of the proceedings cannot stand.[2]

V. Fee Award for Judicial Review

¶ 21 Fontanari contends that the district court erroneously awarded Snowcap attorney fees that it incurred during judicial review proceedings. We conclude that the court's findings are

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[2] In the interest of avoiding ambiguity on remand, we note the narrowness of our holding on this point. Based on the plain language of sections 34-33-124(5) and 34-33-128(4), C.R.S. 2022, we conclude only that the district court is not empowered to award attorney fees for the agency stage of the proceedings. We express no opinion whether Snowcap could still file a fee request with the MLRB at this late date, and if so, how the MLRB should interpret the apparent internal conflict in Division of Reclamation, Mining and Safety Rule 5.03.6(1), which says that a fee application "*must* be filed with the [MLRB], within 45 days of receipt of such order," but also that "[f]ailure to make a timely filing of the petition *may* constitute a waiver of the right to such an award." 2 Code Colo. Regs. 407-2 (emphasis added).

insufficient to support this portion of the fee award. We therefore reverse the award and, after clarifying the standard that should be applied under section 34-33-128(4), remand the case for additional findings.

A. Sufficiency of Findings

¶ 22 The "just and proper" standard for awarding attorney fees under section 34-33-128(4) has not been previously applied or interpreted by Colorado's appellate courts. That provision, however, shares the same general structure as many others under Colorado law — it empowers the court to exercise its discretion to award fees on the motion of a party who asserts that the statutory criteria for a fee award have been met. And while these various statutes differ in their specifics, they all share one common thread — the need for detailed findings that justify the court's exercise of its discretion and enable meaningful appellate review. *See, e.g.*, *In re Marriage of Aldrich*, 945 P.2d 1370, 1378 (Colo. 1997) (holding that the district court's findings were insufficient to support its award of fees under section 14-10-119, C.R.S. 2022); *Crow v. Penrose-St. Francis Healthcare Sys.*, 262 P.3d 991, 998 (Colo. App. 2011) (observing, when applying section 13-17-201, C.R.S. 2010, that "a district

court is obliged to make findings that will permit meaningful appellate review of the attorney fees award"); *Bob Blake Builders, Inc. v. Gramling*, 18 P.3d 859, 866 (Colo. App. 2001) (vacating award of attorney fees because court did not make specific findings as required by section 13-17-103(1), C.R.S. 2022).

¶ 23 Here, because the district court adopted verbatim Snowcap's proposed order granting its motions for fees and costs, we will scrutinize its ruling more critically than we would if the court had independently produced it. *Trask v. Nozisko*, 134 P.3d 544, 549 (Colo. App. 2006). That scrutiny reveals no justification for the award other than a single citation to section 34-33-128(4) as grounds for awarding Snowcap's fee request. Although the order did summarily address the reasonableness of the fee award, it did not construe (or even explicitly mention) the "just and proper" standard, nor did it explain how — or whether — the court determined that a fee award was just and proper under the circumstances.

¶ 24 Given the paucity of the court's findings justifying the award, it would be difficult to reliably evaluate it even if the court had explained how it applied the "just and proper" requirement of

section 34-33-128(4). But without that starting point, appellate review becomes an impossibility. We therefore must reverse the award and remand the case so that the court may make the necessary findings in the event that it exercises its discretion to award fees.

B. Just and Proper

¶ 25 We turn next to the heart of the parties' disagreement: the meaning of the phrase "just and proper" as it appears in section 34-33-128(4). Fontanari argues, consistent with the MLRB's administrative regulations that implement identical language in section 34-33-124(5), that "an award of fees is permitted under section 34-33-128(4) only where the person's conduct was made in bad faith for the purpose of harassing or embarrassing the permittee." Snowcap contends that the statute does not include a bad faith requirement, and that a fee award is just and proper if (1) a party brought or defended an action and/or appeal that was substantially frivolous, and (2) such an award would be equitable and consistent with what is "lawful and legally correct."

¶ 26 Both of these interpretations are reasonable. The statute is thus ambiguous, *see Holcomb v. Jan-Pro Cleaning Sys. of S. Colo.*,

172 P.3d 888, 890 (Colo. 2007), and we must look beyond its plain language to discern its meaning, *see Lobato v. Indus. Claim Appeals Off.*, 105 P.3d 220, 225 (Colo. 2005). To assist with our interpretation, we may turn to aids of statutory construction to discern the legislature's intent, including the consequences of a particular construction and the goals of the statute. *Dep't of Transp. v. Gypsum Ranch Co.*, 244 P.3d 127, 131 (Colo. 2010).

¶ 27 The General Assembly passed the Colorado Surface Coal Mining Reclamation Act in 1979 in response to a federal law — the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 1201 to 1328 — that authorized individual states to assume exclusive jurisdiction over the regulation of surface coal mining and reclamation operations on non-federal lands so long as their programs met certain minimum requirements. *See* 30 U.S.C. § 1253(a). To satisfy those minimum requirements and to obtain federal approval, Congress required state laws to be both "in accordance with" SMCRA and "consistent with" corresponding federal administrative regulations. *See* 30 U.S.C. § 1253(a)(1), (3), (7); *see also Ill. S. Project, Inc. v. Hodel*, 844 F.2d 1286, 1287 (7th Cir. 1988). The synopsis of House Bill 79-1223, which eventually

became the Act, reflects the General Assembly's intent to comply with these requirements in order to obtain federal approval and funding:

> The present Colorado Mined Land Reclamation Act does not contain many of the ingredients required for an approvable state program under the Federal law. House Bill 1223 does contain those elements and represents the primary component of a Colorado state program designed to retain state control of the regulation of surface coal mining.

Bill Synopsis on H.B. 79-1223 to the H. Loc. Gov't Comm., 52d Gen. Assemb., 1st Reg. Sess. (Feb. 19, 1979).

¶ 28 Like SMCRA, the Act authorizes fee awards for administrative and judicial review proceedings. However, while the language in Colorado's law is similar to corresponding federal provisions, there are some differences. Most important for our analysis is a comparison between 30 U.S.C. § 1275(e) and section 34-33-128(4). The federal statute provides that "[w]henever an order is issued . . . as a result of any administrative proceeding," the court may assess costs and expenses, including attorney fees, "as the court . . . deems proper." 30 U.S.C. § 1275(e). The relevant subsection of the Act is similar, but the General Assembly added a word at the end:

"At the request of any party to a proceeding under this section [providing for judicial review of MLRB decisions], the court may assess costs and expenses, including attorney fees, against any party, as the court deems *just* and proper." § 34-33-128(4) (emphasis added).

¶ 29 Due to (1) the General Assembly's stated intent to comply with SMCRA, and (2) SMCRA's requirement that state laws must be "consistent with" the framework established by Congress and related federal regulations, 30 U.S.C. § 1253(a)(1), (3), (7), we do not view the General Assembly's addition of "just" to the Act's attorney fee provisions as an attempt to deviate from SMCRA. Thus, we look to SMCRA itself, as well as other sources interpreting it, as persuasive authority. *Cf. Cagle v. Mathers Fam. Tr.*, 2013 CO 7, ¶ 19 ("[I]nsofar as the provisions and purposes of our statute parallel those of the federal enactments, such federal authorities are highly persuasive." (quoting *Lowery v. Ford Hill Inv. Co.*, 192 Colo. 125, 129-30, 556 P.2d 1201, 1204 (1976))).

¶ 30 Perhaps the clearest statement of Congress's intent with respect to fee-shifting under SMCRA appears in the House report relating to SMCRA's adoption. Discussing the scope of section

525(e) of SMCRA, which is codified at 30 U.S.C. § 1275(e) and authorizes fee awards for federal administrative proceedings and judicial review, the Committee on Interior and Insular Affairs noted that the section "gives the Secretary [of the Interior] authority to award attorneys' fees to compensate participants in the administrative process," but it "does not require that the proceedings result in the finding of a violation" in order to award fees. H.R. Rep. No. 95-218, at 131 (1977). Moreover, the report went on to suggest that the discretion to award fees has limits: "It is the committee's intention that this subsection not be interpreted or applied in a manner that would discourage *good faith actions* on the part of interested citizens." *Id.* (emphasis added).

¶ 31 Federal agency rules implementing SMCRA — and largely mirrored by Colorado's own administrative regulations — incorporate this legislative intent. For actions like the one at issue here, where a private citizen seeks review of a notice or order, the federal regulation provides that attorney fees may be awarded "[t]o a permittee from any person where the permittee demonstrates that the person initiated a proceeding . . . or participated in such a proceeding *in bad faith for the purpose of harassing or embarrassing*

the permittee." 43 C.F.R. § 4.1294(d) (2021) (emphasis added). The pertinent Colorado regulation is nearly identical. It provides that the MLRB may grant a fee petition filed by a permittee "where the permittee demonstrates that the person [from whom fees are sought] initiated a proceeding under 5.03.5 or participated in such a proceeding *in bad faith for the purpose of harassing or embarrassing the permittee*." Div. of Reclamation, Mining & Safety Rule 5.03.6(4)(b), 2 Code Colo. Regs. 407-2 (emphasis added).

¶ 32 Based on these authorities, we agree with Fontanari's interpretation of section 34-33-128(4) and conclude that a fee award is not "just and proper" on judicial review absent a finding of bad faith. Accordingly, when reevaluating Snowcap's motion for an award of fees and costs on remand, the district court's findings should focus on whether Fontanari pursued judicial review of the MLRB's decision in bad faith for the purpose of embarrassing or harassing Snowcap. If the court, in its discretion, concludes that Fontanari's conduct met these criteria, it should make appropriate factual findings and award Snowcap attorney fees associated with the judicial review as contemplated by section 34-33-128(4).

VI. Appellate Attorney Fees

¶ 33 Snowcap requests an award of the attorney fees it incurred on appeal. But Fontanari's appeal was successful, and, in any event, Snowcap does not explain the legal and factual basis for such an award as required by C.A.R. 39.1. We therefore deny the request. *See Mountain States Adjustment v. Cooke*, 2016 COA 80, ¶ 47.

VII. Conclusion

¶ 34 We reverse the order awarding Snowcap attorney fees accrued during the administrative proceedings and on judicial review. We remand the case so that the court may make further findings and award Snowcap's request for fees if, in its discretion, it determines that Fontanari acted in bad faith for the purpose of embarrassing or harassing Snowcap in seeking judicial review of the MLRB's ruling.

JUDGE SCHUTZ and JUDGE GRAHAM concur.