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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

RUSSELL COLLINS AND VIRGIL KELLEY,
APPLICANTS

v.

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),
RESPONDENT

APPLICATION FOR ATTORNEYS FEES

Docket No. EAJ 83-1

DECISION

Statement of the Case

Following my decision dismissing a civil penalty proceeding brought by the Secretary of Labor under section 110(c) of the Mine Safety Law, 4 FMSHRC 1816 (1982), two of the six individuals charged moved for an award of costs and attorneys fees.(FOOTNOTE 1) Jurisdiction over the claim arises under the Equal Access to Justice Act (EAJA), 5 U.S.C. 504(a).

The bench decision dismissing the charges occurred after lengthy pretrial discovery and a four-day evidentiary hearing. It was predicated on a failure of proof with respect to both the underlying violation and applicants' alleged knowing participation therein.

Thereafter, counsel for the Secretary waived his right to challenge the tentative bench decision; agreed there was insufficient evidence to show applicants knowingly authorized, ordered or carried out the violation charged; joined nunc pro tunc applicants' motion to dismiss at the close of the

receipt of evidence; and in the alternative independently moved to dismiss the Secretary's charges on the grounds stated in the decision of the trial judge.(FOOTNOTE 2)

An exhaustive review of the record shows the Secretary's evidence failed to rise above a level of suspicion. Indeed, the countervailing evidence as to the drivers' negligence and reckless disregard for safe operation of the truck, which both the underlying investigation and the solicitor's pretrial discovery largely ignored, convincingly shows that the government's litigation position was factually and legally untenable. The failure to properly evaluate the probative force of this evidence, including the implausibility of the characterizations of the operative facts by the Secretary's witnesses, led to an improvident decision to proceed where no prosecutable offense had, in fact, been committed.

~1341

The record at trial confirmed the fatal flaws in the pretrial investigation and preparation of the case. The same considerations that led to the decision to dismiss four of the six respondents after two days of trial supported my finding that the claimed mechanical defect in the braking system was not a defect affecting safety. Further, applicants' knowledge of the complaining drivers' improper and unsafe operating procedures justified applicants' reliance on brake adjustments to correct the condition and did not violate applicants' duty under the law to provide a vehicle capable of safe operation.

As the court of appeals has recently pointed out, the fact that government counsel may have felt reasonably justified in putting applicants to their proof does not mean the agency was substantially justified in pursuing the litigation. One of the principal purposes of the EAJA was to deter prosecutors from pursuing weak cases or to pay the price in sizeable awards of attorneys fees.(FOOTNOTE 3) Stanley Spencer, supra, Slip Op. at 22, n. 40; 39-41. Thus, it would be improper for me to accept as a substantial justification the bald assertion that the testimony of the complaining drivers, if uncritically accepted, was sufficient to warrant this prosecution. As the court noted, where the controversy revolves around competing characterizations of the underlying facts, here a defect in the braking system allegedly affecting safety, the "trial judge must assess the plausibility of the government's original depiction of the situation that gave rise to the suit." This "involves evaluation of the probative force of evidence submitted by the government." Stanley Spencer, supra at 51-52.

The government's only disinterested witness, Mr. Zancauske, was reliable but gave no evidence probative of a defect in the braking system affecting safety. It is true that he testified there might have been a defect in the braking system but he could not say it affected safe operation of the truck. On the other hand, he unreservedly expressed the view that the principal problem was the drivers' habit of riding the brakes on the steep inclines instead of gearing down and engaging the retarder. Counsel, who admitted he had never interviewed Mr. Zancauske before he testified, made a serious error in believing Mr. Zancauske would provide probative evidence of the underlying violation. Absent reliable, probative and substantial evidence of the underlying

violation, the Secretary could never hope to prove applicants knew or should have known of its existence. It is impossible for an individual to have knowledge of the unknowable or of the existence of the nonexistent.

A review of the investigative file further shows the inspection and investigation were botched due to a lack of diligence, if not competence, on the part of both the inspector and investigator. Nor did their failure to appear as witnesses because they chose to take a vacation enhance the worth of their efforts.

Applying what I understand is the applicable standard, a standard which Congress and the courts deem to be "slightly more stringent than one of reasonableness," I conclude that neither the underlying nor the ligitation position of the Secretary was substantially justified.(FOOTNOTE 4) S. Rep. 96-253, supra, at 8; Stanley Spencer, supra, Slip Op. 16, n. 31, 25, 39.

Because this case presents a matter of first impression under the EAJA for the trial judge and the Commission as well as an issue of eligibility which has never before been decided by any tribunal, administrative or judicial, I set forth below my formal findings and conclusions.

Findings and Conclusions

Attorney Fees - Eligibility

The Equal Access to Justice Act (EAJA) requires the award of attorney fees and expenses to a qualified party prevailing against a regulatory agency unless the administrative law judge who heard and determined the matter finds

that "the position of the agency as a party to the proceedings was substantially justified or that special circumstances make an award unjust."(FOOTNOTE 5)

Administrative Law Judges of the Federal Mine Safety and Health Review Commission are by law the designated adjudicative officers under the Mine Safety Law for charges brought under section 110(c) of the Act. 30 U.S.C. 823(d)(1). The Commission has determined therefore that they are authorized to hear and determine claims for fees and expenses arising under the EAJA against the Department of Labor which is charged with responsibility for enforcing the Mine Safety Law. 29 C.F.R. 2704.201(f). Unlike the old line regulatory agencies such as the FTC, SEC, ICC, FCC, CAB and NLRB, the Federal Mine Safety and Health Review Commission (FMSHRC) does not initiate or prosecute the adversary administrative adjudications that it hears and decides. This Commission is an independent administrative agency that functions as an administrative trial and appellate court. 30 U.S.C. 823. The Commission possesses only adjudicative powers, has no prosecutorial prerogatives, is not a party to proceedings brought before it, and is not responsible for the actions of the Department of Labor in initiating or prosecuting alleged violations of the law. Under the Commission's rules, awards are made by the Commission and its judges against the Department of Labor. 29 C.F.R. 2704.108. Findings by the Commission's trial judges are final and conclusive if supported by substantial evidence. Chacon v. Phelps Dodge Corporation, D.C. Cir. No. 81-2300, decided June 7, 1983, Slip Op. at 9-10. Judicial review is available in the courts of appeals under an abuse of discretion standard only to the extent that a decision denies an award or there is a dispute over the calculation of an award. 5 U.S.C. 504(c)(2).(FOOTNOTE 6)

There is no dispute about the fact that applicants were prevailing parties whose individual net worth was less than $1,000,000. The Secretary suggests a special circumstance warranting denial of applicants' eligibility, however, is the fact that they incurred no expense in defending themselves.

Applicants' employer, GAF Corporation, a large, multinational corporation with more than 500 employees and a net worth that exceeds $5,000,000 authorized one of its full-time house counsel, Mr. Patrick Daly, to represent applicants with the understanding that (1) GAF would defray all of the expense involved without right of reimbursement from applicants and (2) if applicants prevailed Mr. Daly would be entitled to keep whatever attorney fees and expenses he succeeded in recovering. If the allowance of fees for Mr. Daly's services is in accord with the purposes and policy of the Act, I can perceive no valid basis for denying applicants' eligibility even if payment to Mr. Daly amounts to a bonus to him over and above the salary and benefits he earned from GAF during the period of his pro bono representation of applicants. Under the Commission's rules and the applicable case law the fact that services are rendered on a pro bono basis is no bar to the recovery of fees for such services by a prevailing party. Rule 2704.106(a); Hornal v. Schweiker, 551 F. Supp. 612, 615-616 (M.D. Tenn. 1982); Kinne v. Schweiker, Civ. No. 80-81, D. Vt., December 29, 1982. Compare Munsey v. FMSHRC, No. 82-1079, D.C. Cir., March 11, 1983. Contra, Cornella v. Schweiker, 553 F. Supp. 240, 245-248 (D.S.D. 1982).

The language of the Act and its legislative history lead me to conclude the underlying policy of the EAJA is served by awarding applicants Mr. Daly's fees regardless of the source of the funds advanced to enable him to defend applicants. The Act, as well as the House and Senate Committee Reports, show that to be allowable fees and expenses need not be actually owed to attorneys. The Act provides that awards are to be based on "prevailing market rates," 5 U.S.C. 504(b)(1)(A), and that this is to be the measure of the prevailing party's recovery. The "measure" of applicants' entitlement has nothing to do with whether they owe all, some, or none of it to the attorney or anyone else. The House Report states:

> In general, consistent with the above limitations [$75.00 per hour], the computation of attorney fees should be based on prevailing market rates without reference to the fee arrangements between the attorney and client. The fact that attorneys may be providing

> services at salaries or hourly rates below the standard commercial rates which attorneys might normally receive for services rendered is not relevant to the computation of compensation under the Act.

H.R. Rep. 96-1418, supra, at 15. The Senate Report is to the same effect. For these reasons, I conclude that in considering applicants' claims for Mr. Daly's fees the source of the funds used to defray Mr. Daly's expenses pendente lite and the actual fee arrangement between applicants and Mr. Daly is irrelevant.

On the other hand, I find special circumstances bar the award of fees and expenses for services rendered by outside attorneys employed by GAF to assist Mr. Daly in his representation of applicants. These attorneys did not enter appearances in the matter on behalf of applicants, had no colorable attorney-client relationship with applicants, and no pro bono or other fee arrangement with applicants. They were employed by Mr. Daly in his capacity as labor attorney for GAF on the understanding that their billings would be sent to and paid for by GAF. These fees and expenses, which totalled $13,139.31, were, in fact, paid by GAF Corporation for the services rendered. Under these circumstances, payment of these sums to Mr. Daly or applicants would be a pure windfall. Further, since the outside attorneys have been paid by GAF the statute does not authorize further payment to them.

The remaining question is whether GAF Corporation qualifies directly for reimbursement of the fees and expenses incurred on behalf of applicants. I find payment of these monies is not compensable to GAF because this tax deductible business expense was made not only on behalf of applicants but in pursuit of GAF's own business interests. These were GAF's interests in (1) supporting and defending its supervisory management against what it firmly believed to be trumped-up charges of reckless disregard for safety and (2) creating a precedent against MSHA's easy acceptance of charges of wrongdoing against supervisors by union representatives and rank-and-file miners. In other words, GAF had a large stake in this litigation from the standpoint of preserving management's valued right to manage its quarry without unwarranted intrusion on that right by the union and MSHA.

While it is clear that a deterrent to improvident regulatory action is in accord with the purposes and policy of the Act for eligible applicants, here GAF was not an eligible applicant. 5 U.S.C. 504(b) (1) (B); H.R. Rep. 96-1418, supra, at 15. Because of its size and wealth the

~1346
economic deterrent the Act sought to remove with respect to applicants was never present with respect to GAF which, quite properly, chose to join in applicants' defense as a matter of sound and prudent business policy. Further, as a necessary and proper business expense incurred by GAF, up to 54% of the sums in question have already been fee-shifted to the government under the applicable provisions of the Internal Revenue Code.

Under the circumstances shown, I believe GAF's participation was sufficient to make it a privy to applicants' defense. The claim for fees and expenses for the outside attorneys and law firms is therefore, disallowed on the ground that this expense was primarily incurred on behalf of an entity ineligible to receive compensation under the terms of the statute.(FOOTNOTE 7) It is also denied on the ground that to allow an award of the under the special circumstances shown, be unjust and inequitable. (FOOTNOTE 8)

The Standard

The EAJA does not require the Government to compensate prevailing parties automatically for fees and expenses. Instead, it adopts a compromise position, embodied in the standard of "substantial justification," which "balances the constitutional obligation of the executive branch to see that the laws are faithfully executed against the public interest in encouraging parties to vindicate their rights."(FOOTNOTE 9) H.R. Rep. No. 96-1418, supra, at 10. In particular, Congress rejected the liberal standard of recovery under the civil rights statutes which generally entitle prevailing plaintiffs

to receive an award of attorney fees unless special circumstances would render an award unjust. See Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968).

At the same time, Congress rejected a standard proposed by the Department of Justice which would have authorized recovery of fees and expenses against the Government only if a prevailing party could prove that the government's position was arbitrary, frivolous, unreasonable, or groundless. H.R. Rep. 96-1418, supra, at 10, 14. See, Christianbery Garment Co. v. EEOC, 434 U.S. 412, 420-421 (1978). Such a restrictive approach, Congress reasoned, would maintain significant barriers to recovery of fees by prevailing litigants and would not appreciably diminish existing deterrents created by the high cost of vindicating legal rights in the face of arbitrary and unreasonable government action. Id.

The standard of recovery that ultimately emerged represents a "middle ground" between an automatic award of fees to a prevailing party engaged in litigation with an agency and the standard proposed by the Department of Justice. Although the Act itself is silent on the meaning of the "substantially justified" standard, the House Report contains an instructive passage:

> The test of whether or not a Government action is substantially justified is essentially one of reasonableness. Where the Government can show that its case had a reasonable basis both in law and fact, no award will be made. In this regard the strong deterrents to contesting Government action require that the burden of proof rest with the Government. This allocation of the burden, in fact, reflects a general tendency to place the burden of proof on the party who has readier access to and knowledge of the facts in question. The committee believes that it is far easier for the Government, which has control of the evidence, to prove the reasonableness of its action than it is for a private party to marshal the facts to prove that the government was unreasonable.
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> *   *   *   *   *   *
>
> The standard, however, should not be read to raise a presumption that the Government position was not substantially justified, simply because it lost the case. Nor, in fact, does the standard require the Government to establish that its decision was based on a substantial probability of prevailing.

H.R. Rep. 96-1418, supra, 10-11.

The legislative history also teaches that the government must "make a positive showing that its position and actions during the course of the proceedings were substantially justified." H.R. Rep. 96-1418, supra 13. In Tyler Business Services v. NLRB, 695 F.2d 73, 75 (4th Cir. 1982), the court held this requires an agency to substantially justify not only its actions as a party to the proceeding but also its preliminary decision to initiate the proceeding. Contra, Stanley Spencer, supra.

In cases charging knowing violations by supervisors, MSHA acts as the investigator. The decision as to whether there is a prosecutable offense and the conduct of the prosecution, however, rests with the Office of the Solicitor, Department of Labor. While the record is replete with indications of the ineptness of the investigation, this would not require an award if the solicitor's pretrial preparation and discovery filled the voids in the investigative record to the point where it can fairly be said that by the time of the evidentiary hearing the solicitor had substantial, legally competent evidence of the violations charged. If, on the other hand, the solicitor's case, as presented, shows that at no time did he have such relevant evidence as a reasonable mind might accept as adequate to support a finding that the underlying violation occurred and that applicants knew or should have known of the putative condition I cannot find the Secretary's litigation position was substantially justified.

Since the advent of the EAJA, the quality of departmental in-house lawyering must obviously improve. No longer may the solicitor "wing" it or rest on MSHA's recommendation as the justification for pursuing weak and tenuous cases. The solicitor must make an independent evaluation of the probative force of his evidence in the light of the expected defense and whatever else fairly detracts from the probative value of his evidence.

The need to raise the level of the plane of litigating competence in administrative proceedings was foreshadowed by the legislative history's admonition that the EAJA was intended "to caution agencies to carefully evaluate their case and not to pursue those which are weak or tenuous."(FOOTNOTE 10)

~1349
H.R. Rep. 96-1418, supra, 14. The requirement for pretrial evaluation of the worth of evidence when coupled with the burden of demonstrating that a litigation position was substantially justified were purposely designed to press agencies "to address the problem of abusive and harassing regulatory practices." H.R. Rep. 96-1418, supra, 14.

Further, because this was a case in which the government conceded only after there was a substantial investment of effort and money the Secretary was required to make an "especially strong showing that [his] persistence in litigation was justified." Stanley Spencer, supra, at 43. Compare Id. 16, n. 31, 22, n. 40, 33-34, n. 58.

Insight as to the Secretary's burden is gleaned from the following passage of the legislative history:

> Certain types of case dispositions may indicate that the Government action was not substantially justified. A court should look closely at cases, for example, where there has been a judgment on the pleadings or where there is a directed verdict or where a prior suit on the same claim had been dismissed. Such cases clearly raise the possibility that the Government was unreasonable in pursuing the litigation.

H.R. Rep. No. 96-1418, supra, at 10-11; S. Rep. No. 96-253, supra, at 6-7.

Here, of course, the record shows that after protracted litigation the Secretary acceded by joining the applicants' motion to dismiss the charges.

Nevertheless, the Secretary argues that because the underlying case involved questions of credibility it was per se "reasonable" for government counsel to pursue the litigation. I do not agree.

A central objective of the Act was to require government counsel to carefully evaluate the worth of informers' testimony. No longer may counsel for the Secretary offer such testimony "for whatever its worth." At least not without risk of the imposition of substantial awards for attorney fees and expenses.

As the court of appeals so trenchantly observed, the purposes of the Act will "not be promoted by treating the question of whether the position taken by the United States in a particular case was "substantially justified' as

equivalent to the question whether it was "reasonable' for government counsel to pursue the litigation." Stanley Spencer, supra, at 39. My analysis of the government's litigation position shows its counsel gullibly accepted totally implausible stories by witnesses who had every incentive to disinform if not outright lie. The fact that bureaucratic constraints may have encouraged counsel to accept their stories at face value does not justify a conclusion that the decision to proceed, followed by dogged pursuit of a "long shot" was substantially justified.

I conclude, therefore, that the standard to be applied in determining whether the Secretary's case was substantially justified was not whether it was arguably or reasonably justified by the investigatory record but whether an objective evaluation of the probative force of the evidence adduced at the hearing shows that there was substantial credible evidence that the braking system of the Euclid truck had a defect affecting safety; that applicants knew or should have known of this condition; and that with such knowledge or awareness they tacitly ordered or authorized continued use of the truck.(FOOTNOTE 11)

Evidence which was discredited or which did not directly or circumstantially raise an inference of the existence of an operative fact was not substantial and therefore did not constitute a substantial justification for the agency's litigation position. In this context substantial evidence is used, to mean "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" and not "a certain quantity [or preponderance] of evidence." Steadman v. SEC 450 U.S. 69, 98-100 (1980).

The Evidence

At the outset of the hearing the Secretary offered a document subpoenaed from the files of the Midco Sales & Service Company which showed that after the imminent danger closure order (later modified to an unwarrantable failure citation) was issued GAF immediately employed Midco to perform repairs on the braking system of the Euclid truck (GX-1). This document, a purchase order, invoice, and service report covering the work done, was offered through Mr. Jerry D. Zancauske, service manager for Midco, to establish (1) the fact of violation under the strict liability standard of the Act, and (2) culpable conduct, i.e., consciousness of fault through awareness of the existence of a defect affecting safety on the part of the six individual respondents (Tr. 38-39).

Counsel for respondents objected to the receipt of this document and testimony pursuant to the exclusionary rule set forth in Rule 407 of the Federal Rules of Evidence (Tr. 24, 39). Rule 407 provides:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.(FOOTNOTE 12)

The trial judge admitted the document and Mr. Zancauske's testimony solely to prove the fact of violation under the strict liability standard of the Mine Safety Law. (Tr. 39-41).(FOOTNOTE 13)

~1352

A review of the applicable case law shows that since at least 1980 the weight of authority has supported the view that Rule 407 bars the receipt of post hoc remedial measures with respect not only to culpable conduct but also strict liability. Neither counsel brought these authorities to the attention of the trial judge during the hearing. Nevertheless, in deciding whether the Secretary's action in prosecuting this matter was substantially justified I find it necessary to consider whether in view of the practical unaniminity of the decisions interpreting Rule 407 as precluding the receipt of evidence of post-event repairs to show strict liability, negligence, or culpable conduct it was reasonable for the Secretary to rely on this inadmissible evidence as the keystone of his case against these applicants. I conclude it was not.(FOOTNOTE 14)

Rule 407 of the Federal Rules of Evidence bars post-event remedial evidence to prove (1) strict liability, (2) negligence, or (3) culpable conduct. The rationale for this exclusionary rule is the public interest in encouraging the adoption of safety measures and the questionable relevancy of evidence of subsequent repairs. 2 Wigmore, Evidence 283, at 151 (3 Ed. 1940); Columbia and P.S.R.R. v. Hawthorne, 144 U.S. 202, 207-208 (1892); Weinstein's Evidence, %57 407(02) (1982); Louisell and Mueller, Federal Evidence, 163, 164 (1978); 23 Wright & Graham, Federal Practice and Procedure, 5382 (1980).

While there is, and will probably continue to be, considerable debate, at least among the commentators, over whether the quasi-privilege created by Rule 407 encourages people to correct unsafe conditions or practices, there is practical unanimity among the courts of appeals on the question of relevance. Because of its equivocal nature, the courts have held that evidence of subsequent repair has little relevance with respect to whether a defect affecting safety existed in a machine or product prior to its repair.

~1353
Grenada Steel Industries v. Alabama Oxygen Co., 695 F.2d 883, 887 (5th Cir. 1983), and cases cited.

The commentators also favor the view that Rule 407 does not apply in strict liability cases. Again the federal circuit courts have disagreed. Research discloses that long before this case went to trial it had been authoritatively held in the First, Second, Third, Fourth, Fifth, Sixth and Seventh Circuits that post hoc remedial measures were not admissible in strict liability cases. Grenada Steel Industries, supra, at 888; Oberst v. International Harvester Company, 640 F.2d 863, 866 & n. 5 (7th Cir. 1980). Compare DeLuryea v. Winthrop Labs., 697 F.2d 222, 229 (8th Cir. 1983).

Counsel for the Secretary was chargeable with knowledge of these developments in the law of evidence, including the fact that the Supreme Court had denied certiorari in two of the leading cases that support application of the exclusionary rule in strict liability proceedings. Werner v. Upjohn Co., 628 F.2d 848 (4th Cir. 1980); cert. denied, 449 U.S. 1080 (1981); Cann v. Ford Motor Co., 658 F.2d 54, 59-60 (2d Cir. 1981), cert. denied _____ U.S. _____, 72 L Ed. 484 (1982). In Cann, the court observed:

> The failure of Rule 407 to refer explicitly to actions in strict liability does not prevent its application to such actions. When Congress enacted the Federal Rules of Evidence, it left many gaps and omissions in the rules in the expectation that common law principles would be applied to fill them %y(4)4B The application of those principles convinces us that although negligence and strict product liability causes of action are distinguishable, no distinction between the two justified the admission of evidence of subsequent remedial measures in strict product liability actions.
> Id. at 60.

The question of admissibility aside, a review of the totality of the evidence as to the repairs effected by Midco shows the Secretary was not justified in believing the brakes on the Euclid truck were defective at the time the closure order issued. Mr. Zancauske candidly admitted that while he supervised the brake repairs he had no personal knowledge or "hands on" experience with the condition of the brakes either before or after the closure order issued and that from the service report he could not testify as to what the "holding ability or stopping ability of the brakes of this truck" were prior to the time Midco worked on it (Tr. 59). When pressed for an opinion he could only say he "surmised" that safety of the brakes may have been adversely affected by the presence of an unknown quantity of oil or

~1354
grease on one of the brake linings (Tr. 59-63, 107-109). Whether this was a "major" or "minor" defect and whether it affected safety he said he could not say (Tr. 108-109). Most telling was the following colloquy between counsel for the Secretary and Mr. Zancauske:

Counsel:

Q. Can you explain what it means to adjust the brakes on this type of machine, on this very machine, let's say, the Euclid truck?

Judge: If you know.

Counsel:

Q. If you know. If you were to adjust the brakes, and they get hot and have to be backed off, what does that indicate to you, sir?

A. That somebody might be riding the brakes overheating them.

Q. And if this continues over a two month period for practically every eight-hour shift at this quarry, and sometimes even eight and nine times during this shift that the brakes have to be adjusted they get hot and have to be backed off, and this occurs for a two month period, what would that indicate to you, sir?

A. Well you could assume several things. One, that the operator is driving too fast, he's not using the retarder.

Q. Let's assume he's using the retarder.

Judge: Let him answer the question, don't interrupt. Go ahead, sir.

A. Not using the retarder, he's driving too fast, or the hauls are in such a short sequence that the brakes are having to be used too much, that maybe not all of the wheels are not holding to their ability that they were designed for.

*   *   *   *   *   *

Counsel:

Q. What is the effect of the brakes heating up, does that help deteriorate them?

A. If you have an overheating condition of the brakes for a period of time, you'll heat crack the drums and glaze the lining, which will affect your stopping ability. Tr. 104-105.

Three days and many hundreds of transcript pages later the undisputed testimony of Mr. Weigenstein, an experienced quarry foreman and GAF's expert on the repair and maintenance of the Euclid truck gave substantially the same reasons for the need for repeated adjustments to the brakes, namely, the fact that the complaining drivers drove too fast, failed or refused to use the retarder and continually rode the brakes on the steep inclines thus overheating the brakes and impairing their braking power (Tr. 861-868).

Counsel for the Secretary admitted neither he nor MSHA's investigator had interviewed either Mr. Zancauske or Mr. Weigenstein before they testified and apparently had no idea that they would be in agreement as to the causes for the brakes overheating and losing their braking power.

Despite this the Secretary contends that he was substantially justified in pursuing these matters because (1) a mechanic of admittedly limited experience and knowledge but who worked on the truck believed the adjustments were not effective to remedy the condition because of a break in a seal on the right rear wheels which allowed grease to leak on the brake lining causing the lining to crystallize and lose braking power, (2) the mechanic related this defect to applicants at a meeting on February 15, 1980, (3) applicants reportedly took no corrective action but authorized continued use of the truck, and (4) Mr. Zancauske the service manager for Midco who supervised the post-citation repair work believed that if there was oil or grease on the right rear brake lining it could result in a "slipping effect" on that wheel assembly that could diminish the degree of friction necessary for proper braking of the truck.

Facts developed on cross examination showed that the mechanic's testimony was highly unreliable. He was an individual with an obviously selective memory and little experience as a heavy equipment mechanic. The only completely candid testimony he gave was persuasive of the fact that he had never pulled the right rear wheel assembly of the truck to examine the alleged oil or grease leak and that the crystallization of the lining on the other wheels was, he believed, due to the complaining drivers' penchant for riding the brakes down the steep grades (Tr. 324, 327, 364). Had a thorough pretrial interview of the witness been

conducted, these facts would have been known to government counsel before Mr. Stevens testified.

With respect to the Secretary's other contentions, applicants claim the Secretary knew or should have known (1) that after the meeting on Friday, February 15, 1980, applicant Collins assigned applicant Kelley to investigate the complaints about the truck, (2) Mr. Kelley went to the day shift driver, Mr. Warnecke, and asked him to check the brakes, (3) Mr. Warnecke checked the brakes and reported they were "adequate," (4) the truck was not operated thereafter (because of the intervening weekend and Washington's Birthday holiday) until Tuesday, February 19, 1980, (5) that Mr. Collins told Mr. Weigenstein the quarry foreman who had over 30 years experience in maintaining heavy haulage equipment (20 years on this truck alone) to perform a thorough check of the braking system of the truck on the afternoon of Tuesday, February 19, 1980, (6) that Mr. Weigenstein took the truck out of service on the evening shift of Tuesday, February 19, and for four hours performed a complete overhaul of the braking system, (7) that Mr. Weigenstein did not find any measurable amount of oil or grease leaking on the right rear brake drum but did find and correct a leak in the hose that serviced the retarder, (8) that Mr. Howard, one of the complaining drivers, knew this work was performed on the truck, (9) that when the truck was put back into service on the midnight shift on February 20, it had no defect affecting safety, (10) that Mr. Johnson one of the complaining drivers drove the truck during that entire shift without adjusting the brakes, (11) when Mr. Warnecke the day shift driver took the truck over at 7:00 a.m. the morning of Wednesday, February 20 he found the brakes were in need of adjustment, (12) that Mr. Johnson was known to drive at excessive speeds and to ride the brakes instead of using the retarder in order to move his loads faster, (13) that foreman Goodman approached Mr. Warnecke and asked him if the brakes were adequate at about the time he, Mr. Warnecke, had decided to take the truck to the repair shop for a brake adjustment, (14) that the inspector Mr. Ryan arrived on the mine site around 7:00 a.m., announced he was there to investigate a complaint from the union about the truck and asked for the union representative, Mr. Mathes, (15) that when told Mr. Mathes was not there Mr. Ryan left the mine site to find Mr. Mathes, (16) that when the inspector returned about an hour later he found the truck parked at the repair shop, awaiting a brake adjustment, (17) that without making a static check of the condition of the brakes, the inspector, Mr. Ryan, directed the driver Mr. Warnecke to drive him to the loading area, (18) that Mr. Ryan directed Mr. Warnecke

to ride the brakes in taking the loaded truck down the steep grades, (19) that Mr. Warnecke did this but had to put the truck into reverse to stop it at one point because the brakes had not been adjusted, and (20) that Mr. Zancauske could not persuasively identify the defect that allegedly affected the safety of the brakes on the truck.

These undisputed facts lead me to concur in the applicants' claim that there never was any credible evidence that applicants failed to act in a responsible manner to correct the claimed defect affecting safety; that the defect claimed did not, in fact, affect safety either because it did not exist, or if it did, it was not serious enough to affect safety; that the retarder and other failsafe mechanisms described by Mr. Weigenstein were unaffected by the claimed oil leak; that the inspector, the investigator and the Secretary's trial counsel knew or should have known that the witnesses Warnecke and Weigenstein would testify that as a result of the complaint on February 15 corrective action was promptly taken; that no amount of corrective action could offset the drivers' bad driving habits; that the brakes ran hot because the complaining drivers operated the truck with a reckless disregard for their own safety; that the failure to take statements from the witnesses Warnecke and Weigenstein was not justified since both were material witnesses of applicants claimed dereliction and, in fact, Mr. Weigenstein was charged with the same dereliction.

Accordingly, I conclude there was (1) no credible evidence that applicants knew or should have known the truck was being operated with a defect affecting safety, (2) no probative evidence that the truck was at any time operated with a defect affecting safety, and (3) in the exercise of due diligence the Secretary and his duly authorized representatives including his trial counsel knew or should have known this.

In view of the oversights and deficiencies in the agency investigation and prosecution of this matter, I find there was no substantial justification for the agency to believe it could prove the underlying violation or applicants participation therein.

Order

The premises considered, it is ORDERED that the application for award of attorney fees and expenses be, and hereby

is, GRANTED as to the fees claimed by Mr. Daly, otherwise it is DENIED. It is FURTHER ORDERED that, there being no objection of record to the amount of fees claimed by Mr. Daly, the Department of Labor pay attorney fees in the amount of $15,600 to Patrick E. Daly on or before Tuesday, August 30, 1983.

Joseph B. Kennedy
Administrative Law Judge

FOOTNOTES START HERE-

1 The gravamen of the charge was that applicants, a superintendent and a foreman at the Annapolis, Missouri quarry of the GAF Corporation, with knowledge that the braking system of a large haulage truck was unsafe, authorized or ordered miners to operate the truck on a steep haulage road thereby endangering their lives. The relevant mandatory safety standard, 30 C.F.R. 56.9-2, prohibits the use of self-propelled equipment with "defects affecting safety."

2 The Secretary contends the trial judge's denial of applicants' motion to dismiss at the close of MSHA's case-in-chief shows the government's litigation position was substantially justified. As my decision made clear, because of the need for clarification of the testimony given by the bench witness Warnecke I resolved all questions of credibility and conflicts in favor of the Secretary. This afforded applicants the opportunity to present the trial judge with a full exposition of the claimed flaws in the government's position. The first benefit of that decision was the Secretary's accedence in the correctness of the trial judge's tentative decision as to the final disposition of the matter. The second benefit was the light which that record affords for making this decision.

For these reasons, I find the Secretary's threshold contention without merit. The Secretary vigorously opposed the motion to dismiss at the close of MSHA's case-in-chief although at that time counsel had to be painfully aware of the unreliability of MSHA's witnesses. There is authority, of course, for holding the government liable for attorney fees and expenses where it adopts, even briefly, a litigation position lacking substantial justification. H.R. Rep. 1418, 96th Cong., 2d Sess., 11 (1980); S. Rep. 253, 96th Cong., 1st Sess. 7 (1979); Stanley Spencer v. NLRB, D.C. Cir. No. 82-1851, decided June 28, 1983, Slip Op. at 34, n. 58. But since counsel for applicants' has not separately argued the point I will treat it as subsumed under the argument that the record considered as a whole shows the government's position in the underlying litigation was not substantially justified.

3 Indeed the EAJA seems to be a specific grant of authority to review the exercise of prosecutorial discretion.

4 While the EAJA indicates that it was the Secretary's position "as a party," on which I should focus, I agree with the

court's observation that "Examination of the variety of kinds of controversies covered by the Act reveals that, in the large majority of contexts, it makes no functional difference how one conceives of the government's "position.' In actions brought by the United States, the governmental action that precipitates the controversy almost invariably is its litigation position." Stanley Spencer, supra at 25. That was certainly true in this case.

5 5 U.S.C. 504(a) provides:

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.

6 Stewart, Beat Big Government and Recover Your Legal Fees, 69 ABAJ 912 (1983); Few Claimants Win Fee Awards in Agency Actions, Legal Times, Monday, April 25, 1983, p. 1; Courts Debate Reach of EAJA, Legal Times, Monday, May 16, 1983, p. 16.

7 Rule 2704.104(g) provides:

An applicant that participates in a proceeding primarily on behalf of one or more other persons or entities that would be ineligible is not itself eligible for an award.

8 The House Report notes the "special circumstances" exception was intended to give the trial judge "discretion to deny awards where equitable consideration dictate an award should not be made." H.R. Rep. 96-1418, supra, at 11.

9 An analogous provision, 28 U.S.C. 2412 affords a similar entitlement to attorney fees and expenses to prevailing parties in the courts.

10 The Act was intended to "induce government counsel to evaluate carefully each of the various claims they might make in particular controversy, and to assert only those that are substantially justified." Stanley Spencer, supra, at 36.

11 Substantial evidence may consist of either direct or circumstantial evidence. It need not be dispositive but standing unrebutted must be capable of raising an inference of the existence of the operative fact or facts in issue. If it does not raise such an inference it is not substantial and cannot provide a substantial justification for prosecution of a case. I recognize that statutory formulations for reviewing discretion are among the most unsatisfactory of legislative standards. Words such as "substantial justification" or "abuse of discretion" state conclusions, not premises from which a conclusion may be derived. While these verbal formulas provide the terms in which the conclusion of invalidity may be pronounced, they do nothing to articulate the process of analysis by which the issue of invalidity is to be litigated and decided.

12 The document was never used for impeachment nor was the

fact of ownership, control or feasibility of precautionary measures ever controverted.

13 The trial judge also admitted the invoice, service report and GAF's purchase order, all of which were part of the same document, as records kept in the regular course of business (Tr. 64, 75-76), and as an implied admission under Rules 801(d)(2)(A), (B), (D), and 803(6) (Tr. 78). Since this evidence was barred under Rule 407, it was not properly received under these rules. 23 Wright & Graham, Federal Practice & Procedure 5284, at 109-110 (1980).

14 Even if properly received, which I find it was not, the repair report was of little or no probative value since standing alone it did not establish that the drivers' complaints over the need for frequent adjustments was attributable to any defect affecting safety in the equipment. Further, Mr. Zancauske's testimony served only to corroborate the respondents' claim that the principal defect affecting safety was the improper driving habits of the drivers assigned to operate the equipment (Tr. 104-105).