FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

December 22, 2014

MAGRUDER LIMESTONE CO., INC., Applicant	EQUAL ACCESS TO JUSTICE PROCEEDING
v.	Docket No. EAJ 2013-01
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	Mine: Portable Plant #1 Mine ID: 23-00077

DECISION AND ORDER

Appearances: R. Lance Witcher, Esq., Ogletree, Deakins, Nash, Smoak, & Stewart, St. Louis, Missouri, for Applicant

Courtney Przybylski, Esq., U.S. Department of Labor, Office of the Solicitor, Denver, Colorado, for Respondent

Before: Judge McCarthy

I. Statement of the Case

Litigation is a crapshoot. The parties relinquish control, and when the dust settles, reasonable minds can differ about the legal import of the facts established, and the cogency of the legal arguments advanced. Thorough investigation, preparation of witnesses, and legal research is often an effective antidote, but not here. Both sides dug in during settlement efforts and were caught off guard by independent analysis and research by the judge, or his clerk for that matter.

This case is before me upon an Application for Award of Fees and Expenses filed by Magruder Limestone against the Secretary of Labor's Mine Safety and Health Administration under the Equal Access to Justice Act (EAJA). 5 U.S.C. § 504 (2014). The final decision in the underlying proceeding approved partial settlement of several citations, and after hearing, ordered that Citation No. 6575266 be modified from a section 104(d)(1) unwarrantable failure with high negligence to a section 104(a) citation with moderate negligence, that the specially assessed penalty of $52,500 be reduced to $16,509, and that section 104(d)(1) unwarrantable failure Order No. 6575267 be vacated based on circuit court precedent. *See Magruder Limestone Co., Inc.*, 35 FMSHRC 1385 (May 2013)(ALJ).

Applicant argues that it prevailed in significant and discrete portions of the underlying consolidated civil penalty proceeding. It did. Applicant further argues that the Secretary's position was not substantially justified. I disagree. For the reasons set forth below, despite reclassification of the 104(d)(1) Citation with lower negligence and a substantially reduced penalty, and vacatur of the 104(d)(1) Order, I find that an EAJA award is not appropriate here because the Secretary's position was substantially justified with regard to Citation No. 6575266 and Order No. 6575267, and special circumstances make an award of fees unjust with regard to the vacatur of Order No. 6575267.

II. The Procedural Distraction – Alleged Improper Service

On June 20, 2013, Magruder mailed its Application to the Commission, with certificate of service indicating same date email transmission to the Secretary's trial counsel. On June 20, 2013, Applicant also emailed the undersigned and the Secretary's trial counsel and advised of the EAJA filing. The Commission docketed the matter on June 27, 2013, but under Commission Rules 301 and 7, service was effective with the Commission on the date of mailing, i.e., June 20, 2013, and service was not effective on the Secretary until email receipt. 29 U.S.C. § 2700.7(c)(2).

The Secretary filed his Objection to the Application on August 13, 2013. He argued that the Application was improperly served on June 20, 2013 via email because the Secretary's former trial counsel left the office on April 12, 2013, and his email account was deactivated shortly thereafter. In support, the Secretary proffers an August 7, 2013 email from the system administrator indicating that at least as of that date, an email sent to the Secretary's former trial counsel did not reach its recipient, and that the email account no longer exists. Sec'y Obj. 2, n.1 and Ex. A. Alternatively, the Secretary argues that it had no notice of the existence of the Application until the Commission docket office notified it on August 5, 2013 of the existence of an EAJA filing on June 27, 2013. Accordingly, the Secretary argues that its Objection filed on August 13, 2013 should be treated as a timely answer.

Applicant replies that the Secretary provided no notification that his former trial counsel had left the Department of Labor. Nor was any withdrawal or substitution of counsel ever filed. In fact, the undersigned's May 21, 2013 Decision and Order listed the Secretary's former counsel as attorney of record, since the Commission also never received any contrary notice from the Secretary. Applicant alleges that it did not become aware that the Secretary's trial counsel had left the agency until August 13, 2013, when it received a copy of the Secretary's Opposition. Applicant has no objection to the timing of the Secretary's Opposition, which I treat as its Answer.

Given my disposition on the merits,[1] I need not decide whether Signature's EAJA application was timely served because the Secretary's email account had not been deactivated on

[1] The determination of the merits of the EAJA application "will be made on the basis of the record made during the proceeding for which fees and expenses are sought," except where either party requests or the judge orders further proceedings. See Commission Rule § 2704.306.

June 20, 2013, such that service was effective upon receipt. Assuming arguendo that Signature's EAJA Application was timely served on the Secretary, I find that an EAJA award is unwarranted because the Secretary's litigation position was substantially justified with regard to Citation No. 6575266 and Order No. 6575267, and special circumstances make an award of fees unjust with regard to the vacatur of Order No. 6575267.

III. Substantial Justification

A. General Principles

EAJA entitles a prevailing party to receive fees and other expenses incurred in an adversary adjudication, unless the position of the agency was substantially justified. 5 U.S.C. § 504(a)(1). The government agency bears the burden of demonstrating that its position in an adversary adjudication was substantially justified so as to preclude an award of attorney's fees and expenses to the prevailing party. *Loumiet v. Office of Comptroller of Currency*, 650 F.3d 796, 799 (D.C. Cir. 2011). The agency must prove that both its pre-litigation and litigation positions were substantially justified. *Iowa Exp. Distribution, Inc., v. NLRB*, 739 F.2d 1305, 1309-10 (8th Cir. 1984). "Substantially justified" does not mean justified to a high degree, but rather justified in substance or in the main - - that is, justified to a degree that could satisfy a reasonable person. *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). A position may be justified even though incorrect, and it may be substantially (i.e., for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact. *Id.* To establish substantial justification, an agency must show a reasonable basis in truth for the facts alleged, a reasonable basis in law for the theory advanced, and a reasonable connection between the facts alleged and the legal theory propounded. See *Iowa Exp. Distribution,* 739 F.2d at 1308 (quoting *United States v. 2,116 Boxes of Boned Beef*, 726 f.2d 1481, 1487 (10th Cir. 1984).

The "position of the agency" is to be measured against the underlying proceeding as a whole, not by reference to "separate parts of the litigation, such as discovery requests, fees, or appeals." *Kuhns v. Board of Governors of Federal Reserve System*, 930 F.2d 39 (D.C. Cir. 1991) (quoting *Commissioner, I.N.S. v. Jean*, 496 U.S. 154, 159 (1990). That is, whether or not the position of the agency was substantially justified is determined on the basis of the administrative record as a whole in the adversary adjudication for which fees and other expenses are sought. *Alphin v. National Transp. Safety Bd.*, 839 F.2d 817, 822 (D.C.Cir. 1988); see also 5 U.S.C. § 504(a)(1). Partial awards, however, are contemplated within the EAJA's statutory scheme. Therefore, if some, but not all, of the agency's allegations are substantially justified, an eligible prevailing party should be compensated for challenging those allegations that are not substantially justified. In determining whether a partial award of attorney's fees is appropriate, the EAJA demands that each allegation made by the agency be evaluated at each step of the proceedings when new or additional evidence indicates that an allegation lacks substance or is erroneous. *Id.*

Neither party requested additional proceedings nor sought to supplement the administrative record.

B. Citation No. 6575266

In the underlying civil penalty proceeding, undisputed facts established that a rock jam occurred during an MSHA inspection and that a stipulated rank-and-file plant operator, Harold Nichelson, was observed by MSHA inspector, Lawrence Sherrill, standing on an inclined conveyor belt, 10 feet off the ground, using a six-foot breaker bar to clear the jam. Nichelson did not utilize fall protection (Citation No. 6575266) or follow lock out/tag out protocol (Order No. 6575267). These alleged violations occurred shortly after the inspector observed plant manager, Tim Stewart, speak to Nichelson about the rock jam near a loud generator. 35 FMSHRC at 1385.

Citation No. 6575266 alleged that Applicant Magruder unwarrantably failed to comply with the fall protection standard at 30 C.F.R. § 56.15005. 30 C.F.R. § 56.15005 is a mandatory standard which provides that "[s]afety belts and lines shall be worn when persons work where there is a danger of falling . . . ." The citation ascribed high negligence to Magruder for a violative practice that was "highly likely" to result in an injury that could reasonably be expected to be fatal. The parties stipulated that the actions alleged constituted a violation of the standard and that the citation was correctly characterized as significant and substantial (S&S). The Secretary proposed a specially assessed penalty of $52,500. As noted, after hearing, I modified the 104(d)(1) unwarrantable failure citation with high negligence to a section 104(a) citation with moderate negligence, and assessed a penalty of $16,509.

Having again carefully reviewed the matter, I find that the Secretary's litigation position with respect to Citation No. 6575266 had a reasonable basis in fact and law and was substantially justified to a degree that could satisfy a reasonable person. *Pierce,* 487 U.S. at 565. The Secretary reasonably argued that Stewart's actions in the face of a hazardous condition did not meet the heightened standard of care for supervisors, and the fall hazard scenario presented a sudden, high degree of danger, which was not necessarily suitable for a traditional, factor-dependent unwarrantable failure analysis under Commission precedent such as *Lopke Quarries,* Inc., 23 FMSHRC 705, 711 (July 2001). P. Br. at 13-14, citing *Midwest Material Co.*, 19 FMSHRC 30 (Jan. 1997). That is, where hazardous conditions involve "a high degree of danger," a supervisor is held to a "heightened standard of care." *Lafarge Construction Materials,* 20 FMSHRC 1140, 1145-48 (Oct. 1988). The Secretary argued that supervisor Stewart's failure to meet that heightened standard of care supported an unwarrantable failure determination. P. Br. at 13-14.

The Secretary specifically argued that an unwarrantable designation was justified because Stewart acted with a "serious lack of reasonable care" when he shouted hurried and confusing instructions to plant operator Nichelson in front of a loud diesel generator, where such instructions were easily misunderstood and conveyed a sense of urgency to take immediate action without regard for safety protocol. In fact, the Secretary relied on alleged inconsistencies within Stewart's own testimony establishing that Stewart instructed Nichelson to act (either shut down the conveyor belt or lock out the power source), and not act (wait for him before doing anything). The Secretary argued that Stewart's confusing and unclear instructions were easily misunderstood when delivered in front of the 95 decibels of noise being emitted by the diesel

generator. Additionally, the Secretary emphasized that Nichelson was standing around with other miners waiting for Stewart to return from a discussion with a vendor, when Nichelson told Stewart that the feeder was jammed. Then, only after instruction from Stewart, did Nichelson attempt to clear the jam. P. Br. at 14-15.

Nichelson testified that he ignored the safety requirements because he desired to resume production as soon as possible. 35 FMSHRC at 1392, citing Tr. 357. Stewart admitted that before promotion to management, he had ignored the fall protection and lock out/tag out requirements when in a hurry. 35 FMSHRC at 1390, citing Tr. 296-98, 306. The Secretary argued that Nichelson took cues from a hurried Stewart, assumed production was more important than safety, and risked fatal injury in a hasty attempt to comply with Stewart's instructions. P. Br. at 15.

The Secretary also emphasized that Stewart had opportunities to take precautionary measures and had no reason to rely on any assumption that Nichelson would wait to handle the rock jam. Stewart handled approximately 10 rock jams when employed as a rank and file miner, and first did so when his supervisor was too busy. P. Br. at 15-16. Also, Stewart knew that Nichelson had handled at least two rock jams prior to July 14, 2010, one of which Stewart witnessed. P. Br. at 16, see also Tr. 273. Since Stewart conceded that he thought Nichelson was going to lock out power to the conveyor, the Secretary argues that Stewart should have assumed that Nichelson was going to handle the rock jam. The Secretary pointed out that Stewart knew from personal experience that miners failed to use fall protection and lock out power sources when in a hurry. Therefore, the Secretary argued that if Stewart did not want Nichelson to handle the rock jam, Stewart should have recognized that Nichelson was taking steps to do so and clarified his instructions. P. Br. at 16.

The Secretary also argued that an unwarrantable failure determination was warranted under a traditional, factor-dependent, unwarrantable failure analysis, which considers aggravated conduct based on extensiveness, duration, notice that greater compliance efforts are necessary, abatement efforts, obviousness, high degree of danger, and knowledge. P. Br. at 17-19. In this regard, the Secretary reasonably argued that the alleged violations posed a high degree of danger and that Stewart should have known that a miner may overlook both lock out/tag out and fall protection protocol when in a hurry. P. Br. at 18. Although conceding short duration with high danger, the Secretary argued that the condition was extensive because work was being performed on the elevated belt and that MSHA's Rules to Live By were adequate to put Magruder on notice that greater efforts were necessary to achieve compliance. P. Br. at 17.

In this regard, inspector Sherrill observed Nichelson standing on the elevated conveyor belt for 20-30 seconds, without using fall protection or locking and tagging out the conveyor. Tr. 120-21. Sherrill testified that this was an extensive and extremely hazardous condition because two standards were simultaneously violated and Nichelson was performing work at elevated heights without fall protection. Tr. 123-24, 135-36.

Regarding obviousness or high degree of danger, Sherrill testified that if Nichelson had continued working on the elevated conveyor belt, without any fall protection, it was highly likely that he would have fallen and suffered fatal injuries. Tr. 103-04. In addition, because

Nichelson was standing on the belt, any inadvertent belt movement likely would have caused him to fall and suffer fatal injuries or broken bones, or be impaled by the breaker bar. Tr. 102-04, 135-36.

Regarding notice that greater compliance efforts were necessary, the Secretary relied on Sherrill's testimony that MSHA provided all operators with its Rules to Live By prior to the July 14, 2010 inspection. Tr. 117-18. Also, Stewart acknowledged that Superintendent Twellman advised Stewart about MSHA's Rules to Live By, confirming that Respondent knew that MSHA was focusing compliance initiatives on certain standards, including fall protection and lock out/tag out standards. Additionally, the Secretary relied on Sherrill's testimony that he discussed the importance of using fall protection during the pre-inspection conference with Stewart. Tr. 69-70, 141-44. See P. Br. at 18.

Regarding Respondent's knowledge of the existence of the violation(s), the Secretary relied on Stewart's allegedly conflicting testimony about what he expected Nichelson to do, wait for him or lock out. Tr. 261, 321. Stewart acknowledged that his instructions were unclear. Tr. 286. The Secretary emphasized that after issuing the instructions, Stewart testified that he thought Nichelson was going to lock out the belt, and that the lock out is performed by the individual who is going to clear the rock jam. Thus, the Secretary argued that Stewart should have assumed that the Nichelson would clear the rock jam himself. Further, Stewart should have known from personal experience that it was possible for a hurried miner to climb up to the rock jam and overlook the need to lock and tag out and use fall protection. See P. Br. at 19.

Finally, the Secretary argued that the high negligence designation was warranted per regulation because Stewart knew or should have known of the alleged violations, and there were no mitigating circumstances, as Sherrill testified. P. Br. at 19; Tr. 107-115. More specifically, the Secretary argued that Stewart's response to a highly hazardous condition, the rock jam, constituted high negligence because Stewart should have given effective instructions to Nichelson regarding how to clear the rock jam, and should have ensured that Nichelson used fall protection and followed lock out/tag out procedures, particularly since a former plant operator, who was present that day, could have inadvertently started the conveyor belt while Nichelson was standing up there without tying off. *Id.* at 20-22; Tr. 324. The Secretary relied on Sherrill's testimony that he did not consider Stewart's alleged instruction to Nichelson to "shut it down and wait" to mitigate the ineffectiveness of the communication. *Id.* The Secretary argued that Stewart's unmitigated negligence resulted in a miner working on an elevated conveyor belt without the use of fall protection, while power was not locked out. P. Br. at 20-21. In sum, the Secretary concluded that while the incident was brief in duration, it was extraordinarily dangerous and constituted an inexcusable and unwarrantable breach of mine safety procedures involving two mandatory safety standards as a result of a serious lack of reasonable care on the part of management. Accordingly, the Secretary argued that the undersigned should have enforced both Citation No. 6575266 and Order No. 6575267 as written, and assessed the proposed penalties. P. Br. at 24

Although I rejected these arguments after hearing all the evidence, and weighing the credibility of witnesses, the language summarizing my conclusions regarding the unwarrantable failure factors indicates that the issue was close and the Secretary's position was substantially justified.

> . . . Citation No. 6575266 was of a very serious nature and placed Nichelson in a high degree of danger. I strongly concur with the parties' stipulation that the fall protection violation was properly designated significant and substantial. Nichelson's failure to don fall protection as described in Citation No. 6575266 was highly likely to result in an injury and there is sufficient evidence to show that such an injury was reasonably likely to be fatal.
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> Despite the high risk of danger, however, the other unwarrantable factors are either neutral or weigh against an unwarrantable failure finding. The Secretary's own witness testified that Stewart did not have knowledge of the violation and there was no evidence that Stewart should have expected Nichelson to violate safety protocols. Respondent was not placed on notice that greater efforts were needed to achieve compliance with the standard, and the violation was not obvious to Stewart given the location of the belt and the short duration of the hazard. Although the scope of the hazardous practice was limited in terms of area and the number of miners affected, Stewart's testimony of past violations suggests that the violative practice may have been more extensive and signaled a possible culture of disregard for safety standards when miners were in a hurry. This is troubling and I take this into account in assessing a penalty for the violation. Nevertheless, I find that the totality of the factors weigh against a finding of unwarrantable failure for Citation No. 6575266.

35 FMSHRC at 1410-11.

Having reexamined the record as a whole in light of the Secretary's proof and arguments on briefs, I find that the Secretary had a reasonable basis in fact and law for pursuing its litigation theories in the civil penalty proceedings below and was substantially justified to a degree that could satisfy a reasonable person. *Pierce v. Underwood*, 487 U.S. at 565. As outlined above, the Secretary established a reasonable basis in truth for the facts alleged, a reasonable basis in law for the theories advanced, and a reasonable connection between the facts alleged and the legal theories advanced. As the Fourth Circuit has recognized, "although the impulse to equate ultimate judicial rejection of the Government's merits position--at whatever level--with its lack of substantial justification is understandable, the courts perforce have rejected it as inappropriate, for to do so, '"would virtually eliminate the 'substantially justified' standard from the statute."' *United States v. Paisley*, 957 F.2d 1161, 1167 (4th Cir. 1992) (quoting *Broad Avenue Laundry & Tailoring v. United States*, 693 F.2d 1387, 1391-92 (Fed. Cir. 1982). It would be "a war with life's realities to reason that the position of every loser in a lawsuit upon final conclusion was unjustified." *Id.* (quoting *Evans v. Sullivan*, 928 F.2d 109, 110 (4th Cir. 1991).

The Secretary's litigation position and proof could have satisfied a reasonable person. I emphasize that this case could have come out differently depending on certain credibility resolutions or other legal determinations made after trial. *See e.g., Ray, employed by Leo*

Journagan Constr. Co., 20 FMSHRC 1014, 1026-27 (Sept. 1998) (citing *Europlast Ltd. v. NLRB*, 33 F.3d 16, 17-18 (7th Cir. 1994) ("noting that NLRB had no way of foreseeing that the judge would make credibility resolutions in favor of Respondent's witnesses and against NLRB's witnesses.")). I could have credited Nichelson over Stewart's varying versions of what was said and found that Stewart told Nichelson to shut it down, but did not tell Nichelson to wait for him. Nichelson was the plant operator, Stewart was busy with MSHA trying to avoid additional citations, and Stewart had previously witnessed Nichelson clear one rock jam and was aware that Nichelson had cleared at least two rock jams prior to the instant incident on July 14, 2010. Moreover, Stewart saw Nichelson walk off in the direction of one who would perform lock out and tag out. Based on this record evidence, and my close examination of the demeanor of Respondent's witnesses and their responses to tightly scripted and often leading questions from Respondent's counsel, I came close to concluding that Respondent's litigation strategy was to make Nichelson the fall guy, who appeared to have violated instructions, in an effort to shield Stewart and Respondent from responsibility for Nichelson's unlawful actions after direction from Stewart.

Furthermore, irrespective of exactly what Stewart told Nichelson, I found that Stewart's decision to provide instructions near the diesel generator was not without consequence and was (at least) moderately negligent. 35 FMSHRC at 1404. Stewart conveyed instructions with a lack of care, which departed from what an ordinary and prudent operator, familiar with the mining industry and in dealing with MSHA, would have done in the same or similar circumstances. There is no doubt that his instructions were conveyed in an extremely noisy environment, where they were capable of falling on deaf ears or being misunderstood. Further, Stewart's instructions were conveyed hastily, and outside the earshot of MSHA inspectors, who could have helped Respondent properly resolve the rock jam. These facts, particularly in light of Stewart's admitted failures as a rank-and-file miner to comply with both the fall protection and lock out/tag out standards when busy or in a hurry, reasonably could have led to a conclusion that Stewart signaled Nichelson to resolve the rock jam consistent with this unlawful practice before it attracted additional attention from MSHA. In fact, after speaking with Stewart, Nichelson did just that, but got caught by MSHA in the violative conduct. That could have been aggravated conduct with high negligence by Respondent.

In short, the Secretary proved up facts and advanced legal theory that reasonably supported the view that the Secretary's litigation position with regard to Citation 6575266 was substantially justified. Although ultimately not persuasive, the Secretary's position turned largely on credibility and a weighing of various evidence, and it was based on more than supposition or conjecture. His legal conclusions flowed from a rational process of reasoning and logical deduction. The unwarrantable failure and high negligence issues were close, and could have come out another way.[2]

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[2] Furthermore, although not specifically argued by the Secretary in light of the stipulation that Nichelson was a rank-and-file miner, it is arguable that such stipulation could have been set aside as contrary to law. In this regard, it was arguable that **Error! Main Document Only.**Nichelson was acting as Respondent's agent, whose negligence was imputable to Respondent for penalty and unwarrantable failure purposes. Section 3(e) of the Mine Act defines "agent" as "*any person charged with responsibility for the operation of all or a part of a coal or other mine* or the

B. Order No. 6575267

Section 104(d)(1) Order No. 6575267 alleges that Respondent unwarrantably failed to comply with the lock out/tag out standard at 30 C.F.R. § 56.12016. 30 C.F.R. § 56.12016 is a mandatory standard which provides:

> Electrically powered equipment shall be deenergized before mechanical work is done on such equipment. Power switches shall be locked out or other measures taken which shall prevent the equipment from being energized without the knowledge of the individuals working on it. Suitable warning notices shall be posted at the power switch and signed by the individuals who are to do the work. Such locks or preventative devices shall be removed only by the persons who installed them or by authorized personnel.

The citation ascribed high negligence to Respondent for an alleged violative condition that was "highly likely" to result in an injury that could reasonably be expected to be fatal. The Secretary proposed a penalty of $17,301.

The substantial justification analysis for this Order is more problematic because I set aside the parties stipulation of an S&S violation and vacated Order No. 6575267 based on well-established circuit court precedent that neither party discussed or relied upon. I found that although the Secretary has long argued that 30 C.F.R. § 56.12016 covers hazards associated with mechanical movement as opposed to electric shock, this interpretation is contrary to the clear meaning of the standard when examined in the

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supervision of the miners in a coal or other mine." Although Nichelson was not a supervisory or managerial employee, he was charged with responsibility for the operation of all or a part of the mine. He was the plant operator controlling the operation of the mine by starting and stopping the plant from the control booth.

In taking steps to clear the rock jam and start the plant operating again, it is arguable that Nichelson was acting within the scope of his employment as Respondent's operator agent with a level of responsibility normally delegated to management personnel. It is undisputed that a supervisor or plant manager usually cleared the rock jams, although a rank-and-file miner occasionally did so. Stewart admitted as much. Here, the record establishes that Nichelson was engaged in work that entailed "responsibility for the operation of all or a part of a . . . mine." Moreover, he was standing around near the rock jam talking to other miners before Stewart arrived. Thus, it could have been argued that Respondent held Nichelson out as its agent with apparent authority to act on behalf of management to clear the rock jam.

Thus, in the unique circumstances of this case, based on the facts the Secretary presented, it was arguable that Nichelson acted as agent of Respondent when he performed a typical managerial function and cleared a rock jam necessary for restarting production, without using fall protection. Had this been persuasively established, the undersigned could have set aside the parties stipulation that Nichelson was a rank-and-file miner whose conduct was not attributable to Respondent and found that Nichelson's gross negligence was imputable to Magruder Limestone for penalty and unwarrantable failure purposes.

context of the regulatory scheme. 33 FMSHRC at 1440, citing *Phelps Dodge Corp.*, 681 F.2d 1189, 1192 (9th Cir. 1982); *Northshore Mining Co.*, 709 F.3d 706 (8th Cir. 2013).

But the undersigned's reliance on such circuit court precedent does not compel the conclusion that the Secretary's legal interpretation was not substantially justified, particularly when Commission law on the subject is unsettled and could be read to support the Secretary's longstanding interpretation that the lock out requirements in 30 C.F.R. § 56.12016 were intended to protect miners performing mechanical work even where there was no danger of electric shock. Although I ultimately was persuaded that 30 C.F.R. § 56.12016 was not applicable based on the reasoning of the Ninth Circuit in *Phelps Dodge* and the Eighth Circuit in *Northshore Mining* -- a case that was not even decided at the Commission level when the underlying civil penalty matter was tried in June 2012 --, this authority was not binding on the Secretary, who was free to litigate a contrary position before the Commission to create a split in the circuits, particularly where other extant authority supports the Secretary's long-standing position. *See, e.g., Ray, employed by Leo Journagan Constr. Co.*, 20 FMSHRC 1014, 1023 (Sept. 1998)("[a]lthough section 56.12016, standing alone, could be viewed as containing a plain and unambiguous lockout requirement, section 56.14105 and the case law interpreting that standard creates uncertainty regarding the scope of that lockout requirement."); *Empire Iron Mining Co.*, 29 FMSHRC 999, 1003 n.8 (2007) (dictum agreeing with dissent in *Phelps Dodge* [681 F.2d at 1193 (Boochever, dissenting)] that the language of § 56.12016 "is clear and unambiguous" and reiterating statement of ALJ in underlying decision [29 FMSHRC at 328] that "the standard means exactly what it says – to wit, that '[e]lectrically powered equipment shall be deenergized before mechanical work is done on such equipment.'"); *Northshore Mining Co.*, 34 FMSHRC 663, 674 (Mar. 2012) (ALJ)(finding a violation of § 56.12016 despite *Phelps Dodge* and holding that "while 30 C.F.R. § 56.12016 and 30 C.F.R. § 56.14105 have many overlapping characteristics, they do not in any way preclude one another."); *Blue Mountain Prod. Co.*, 32 FMSHRC 1464, 1478-79 (Oct. 2010) (ALJ) (finding violation of § 56.12016 where miners were repairing conveyor that was not locked out/tagged out); *QMAX Co.*, 28 FMSHRC 848, 854 (Sept. 2006) (ALJ) (finding "clear" violation of § 56.12016 where miners working on conveyor belt that was de-energized but not locked out/tagged out were exposed to entanglement hazards).

In my view, this split of authority gave the Secretary a reasonable basis in law to support a violation of § 56.12016 in the instant litigation before the Commission, notwithstanding contrary circuit precedent. As I noted in *Pattison Sand Company, LLC*, 34 FMSHRC 2938, 2943, n. 3 (Nov. 2012) (ALJ), the Commission has not addressed the issue of non-acquiescence to circuit court decisions despite the fact that there is considerable authority that an administrative agency charged with the duty of formulating uniform and orderly national policy in adjudications is not bound to acquiesce in the views of the U.S. Courts of Appeals that conflict with those of the agency. *See, e.g., S & H Riggers & Erectors, Inc. v. OSHRC*, 659 F.2d 1273, 1278-1279 (5th Cir. 1981); *see generally* Samuel Estreicher, *Nonacquiescence by Federal Administrative Agencies*, 98 Yale L.J. 679, 681 (1989). Clearly, the language of the Mine Act gives the Commission jurisdiction over "substantial question[s] of law, policy or discretion." 30 U.S.C. §

823(d)(2)(A)(ii)(IV). The Supreme Court has recognized the *unique* role of the Commission as the arbiter of questions of interpretation of the Mine Act. *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 214 (1994) (affirming the Commission's role in formulating a uniform and comprehensive interpretation of the Mine Act).

Accordingly, in this unsettled area, the Secretary was entitled to advance its longstanding interpretation of § 56.12016 in an effort to convince the Commission to utilize its unique adjudicatory expertise and either bow to or disagree with the Ninth and now Eighth Circuits. As the Eighth Circuit recognized in an analogous EAJA context:

> The substantial justification standard, however, should not be used to deter the government from bringing cases of first impression or offering novel arguments. The special circumstances exception "is a 'safety valve' designed to 'insure that the Government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts.' " *Russell v. Nat'l Mediation Bd.*, 775 F.2d 12884, 1290(5th Cir. 1985)(quoting H.R. Rep. No. 96-1418 at 11 (1980)).

S.E.C. v. Zahareas, 374 F.3d 624, 627 (8th Cir. 2004). Similarly, if the case turns on an unsettled or close question of law, as here, the government's position will normally be substantially justified, notwithstanding the fact that its legal position is ultimately rejected, unless it clearly offends established precedent. *Washington v. Heckler*, 756 F.2d 959, 961-62 (3d Cir. (1985). As noted, Commission precedent on this issue has not been clearly established.

It is troubling that the Secretary declined to appeal to the Commission my underlying decision adopting the views of the two circuits in this unsettled area. Had he done so, he may have prevailed. Perhaps the Secretary chose to wait for a better case, or for better facts, or for a judge's decision, like those in *Northshore Mining, Blue Mountain Prod.*, or *QMAX Co.*, where the judges found a § 56.12016 violation where no electric shock hazard was present. Certainly, given this difficult and unsettled area of law, the Secretary presented facts supporting a longstanding lock-and-tag-out theory of violation that, although rejected, was substantially justified because reasonable persons, including numerous Secretaries and several other Commission judges, have thought that it has a reasonable basis in fact and law when mechanical work is done on electrically powered equipment.

Finally, since the Secretary essentially relied on the same facts and legal arguments to justify the high negligence and unwarrantable failure designations in Order No. 6575267 that he relied on to justify those factually and legally parallel allegations in Citation No. 6575266, I find that the Secretary has established that his litigation position with respect to the failure to lock and tag out was also substantially justified for essentially the same reasons as those set forth above concerning the fall protection violation. Accordingly, I conclude that the Secretary was substantially justified both in fact and in law in proceeding with the underlying litigation as a whole.

C. Special Circumstances Make an EAJA Award Unjust with Regard to Order No. 6575267

Magruder's rather audacious play for attorney fees is troubling given its stipulation that it engaged in a significant and substantial violation of 30 C.F.R. § 56.12016. Despite the fact that Magruder and its attorneys never uncovered the circuit court case law relied on by the undersigned to vacate Order No. 6575267, it now asks the Commission to award it attorneys' fees and costs because the Secretary should have uncovered this precedent and backed off the stipulation. Although Magruder correctly points out that the Secretary has the burden of proving that its litigation position was substantially justified, I have found that he met that burden with regard to the litigation as a whole, including the unwarrantable failure and high negligence designations.

I further find that special circumstances make an EAJA award unjust with regard to the vacatur of Order No. 6575267 because Magruder stipulated to an S&S violation, and it would contravene principles of equity, fairness and justice to recompense Magruder for time and expense that the administrative tribunal, sua sponte, determined to be erroneous. In explaining the "special circumstances" exception, the House Report accompanying the EAJA stated:

> Furthermore, the Government should not be held liable where "special circumstances would make an award unjust." This "safety valve" helps to insure that the Government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts. It also gives the court discretion to deny awards where equitable considerations dictate an award should not be made.

H.R.Rep. No. 1418, 96th Cong., 2d Sess. at 11, *reprinted in* 1980 U.S.C.C.A.N 4953, 4990. "The EAJA thus explicitly directs a court to apply traditional equitable principles in ruling upon an application for counsel fees by a prevailing party." *Oguachuba v. INS*, 706 F.2d 93, 98 (2d Cir. 1983).

I agree with the Secretary that Magruder justly cannot claim that it deserves to be paid for time spent being wrong by stipulating to facts and law supporting the lock out tag out violation and concomitant S&S designation during the course of this litigation. Not one billable hour nor one word in Magruder's post-hearing brief appears to be spent on supporting any argument or research that *Phelps Dodge Corp.*, 681 F.2d 1189, 1192 (9th Cir. 1982) or progeny justified vacating Order No. 6575267.[3]

I further agree with the Secretary that Magruder's ongoing stipulation to the fact of the S&S violation in Order No. 6575267 had the practical effect of foreclosing the

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[3] As noted, *Northshore Mining Co.*, 709 F.3d 706 (8th Cir. 2013) came down in March 2013, two months before my underlying decision, and a year after the judge in that case adopted the Secretary's interpretation of 30 C.F.R. § 56.12016 that was advanced here.

Secretary's argument in the alternative that the facts in question supported a violation of 30 C.F.R. § 56.14105. This was understandable since stipulations are designed to narrow issues and areas of disagreement and simplify proceedings. Balancing the equities under the special circumstances exception, Magruder's work on a stipulated violation cannot equitably be deemed to have been expended in pursuit of the fortuitous vacatur achieved here. *Cf., United States v. 27.09 Acres of Land in Town of Harrison*, 43 F.3d 769, 775 (2d Cir. 1994)(eligible, prevailing party was denied attorneys' fees under the special circumstances exception because it did not substantially contribute to the successful phase of the litigation by ineligible parties, and fees were not expended on discrete efforts that achieved an appreciable advantage).

IV. Order

Having evaluated the record as a whole and the arguments presented by each party, and having applied the relevant law, it is **ORDERED** that EAJA fees be **DENIED**. The Secretary has established that an EAJA award is not appropriate because his position was substantially justified with regard to Citation No. 6575266 and Order No. 6575267, and that special circumstances make an award of fees unjust with regard to the vacatur of Order No. 6575267.

Thomas P. McCarthy
Administrative Law Judge

Distribution:

Courtney Przybylski, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 800, Denver, CO 80202-5708

R. Lance Witcher, Esq., Ogletree, Deakins, Nash, Smoak, & Steward, P.C., 7700 Bonhomme Ave., Suite 650, St. Louis, MO 63105