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March 4, 2016

TRAYLOR MINING, LLC, Applicant	EQUAL ACCESS TO JUSTICE ACT PROCEEDING
v.	Docket No. EAJA 2016-0002 Formerly WEST 2014-351-M
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	Mine ID: 05-00413 X940 Bulldog Mine

DECISION

Before: Judge Manning

This case is before me upon an application for an award of fees and expenses under the Equal Access to Justice Act ("EAJA") 5 U.S.C. § 504 and the Commission's regulations at 29 C.F.R. Part 2704. Traylor Mining, LLC ("Traylor") filed the application against the Department of Labor's Mine Safety and Health Administration based upon my decision in *Traylor Mining, LLC*, 37 FMSHRC 2307 (Oct. 2015) (ALJ). Traylor was an independent contractor performing work at the Bulldog Mine, which was an underground silver mine near Creede, Colorado.

Traylor seeks an award in the amount of $43,615.09 under 29 C.F.R. § 2704.105(a) and alternatively 29 C.F.R. § 2704.105(b). Traylor attests that it satisfies the eligibility requirements of 29 C.F.R. § 2704.104. The Secretary argues that its decisions to try the citation as an unwarrantable failure and high negligence citation and to specially assess a penalty of $52,500 are substantially justified.

I find that while Traylor is an eligible party under EAJA, Traylor is not entitled to an EAJA award under 29 C.F.R. § 2704.105(a) because the Secretary's position with respect to the citation at issue was substantially justified. Consequently, I do not consider the parties' arguments concerning the reasonableness of the fee request.

I. BACKGROUND

The underlying case concerned Citation No. 8597320 that MSHA issued under section 104(d)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §814(d)(1) (the "Mine Act" or "Act"). A hearing was held on June 30, 2015, in Denver, Colorado. The parties presented testimony and documentary evidence and filed post-hearing briefs.

On June 3, 2013, MSHA Inspector David M. Sinquefield issued Citation No. 8597320 alleging a violation of section 57.9100(a) of the Secretary's safety standards. Section 57.9100(a) provides in part that "[r]ules governing speed, right-of-way, direction of movement, and the use

of headlights to assure appropriate visibility, shall be established and followed at each mine[.]" 30 C.F.R. § 57.9100(a). The standard requires mines to establish and follow right-of-way procedures to ensure the safe movement of mobile equipment. The inspector designated Citation No. 8597320 as significant and substantial ("S&S") and reasonably likely to cause an injury that could reasonably be expected to be fatal. He also alleged that the violation was the result of Traylor's high negligence and unwarrantable failure. The Secretary proposed a specially assessed penalty of $52,500 for this citation.

Citation No. 8597320 alleged that Lowell Hicks, Traylor's production supervisor, was injured by the roadheader on a Bobcat excavator when the boom on the excavator was inadvertently activated by the excavator operator as he backed out of a mucked out area. After Hicks and the excavator operator, Michael Reagan, determined that no further cutting was necessary, Hicks removed the water line and Reagan, once certain that all miners were clear of the excavator, began to tram backwards. At this time, Hicks walked inby on the left side of the excavator. Reagan did not see Hicks advance and, as the excavator moved over uneven ground, Reagan turned to his right to look behind him and inadvertently hit the swing lever. The lever caused the boom to swing and strike Hicks. Hicks was evacuated from the mine and taken to a hospital in Denver to address his injuries.

Following the accident, Inspector Sinquefield traveled to the Bulldog Mine to take photos and measurements at the scene of the accident. He did not interview the miners that were present at the accident. Inspector Sinquefield based his conclusions upon his inspection of the accident site and his interview with Hicks that occurred the following day at the Denver hospital. The inspector interpreted Hicks to say that standing in front of the blade of the operating excavator during cleanup was his normal practice. The citation alleged that Hicks was standing too close to the excavator during its operation and, as a result, failed to follow the right-of-way rules established in Traylor's Job Hazard Analysis ("JHA"). The citation also alleged that Hicks engaged in aggravated conduct by failing to yield the right-of-way to the excavator while it was in operation.

At hearing, Traylor conceded the violation, the S&S designation, and gravity-related designations, but contested (1) the unwarrantable failure designation, (2) the high negligence designation, and (3) the $52,500 special assessment. (Tr. 6-7).[1] Traylor provided evidence to show that the Secretary based its high negligence and unwarrantable failure designations on Inspector Sinquefield's misinterpretation of Hicks's statement made during the interview at the hospital following the accident, as well as the inspector's failure to interview other miners present during the accident. *Traylor Mining*, 37 FMSHRC at 2313. Traylor also argued that the Secretary's special assessment procedures constituted substantive rules that should have undergone notice and comment rulemaking, and thus should be disregarded. (Traylor Br. at 19-20).

I issued a decision on the merits on October 15, 2015. I vacated the unwarrantable failure designation, modified the violation to a 104(a) citation, reduced the negligence designation from high to moderate, and reduced the penalty from a special assessment of $52,500 to a regular assessment of $1,000. As a result of these modifications, I did not address the parties' arguments

[1] Transcript and exhibit references are to the record in the June 30, 2015 hearing on the merits.

regarding the proposed specially assessed penalty or the Secretary's special assessment process. *Traylor Mining*, 37 FMSHRC at 2317.

II. PARTIES' ARGUMENTS

On December 14, 2015, Traylor submitted an application for fees and expenses under EAJA. Traylor argues that it is entitled to fees and expenses under 29 C.F.R. § 2704.105(a) because it was a prevailing party and the position of the Secretary was not substantially justified. Traylor notes that the judge vacated the Secretary's unwarrantable failure designation and modified Citation No. 8597320 to a 104(a) citation because the violative condition "was not extensive, did not exist for a long period of time, the operator did not have notice that greater efforts were necessary for compliance, and [Traylor] had taken significant steps towards preventing an accident of just this kind." *Traylor Mining*, 37 FMSHRC at 2316. Traylor also argues that the Secretary's high negligence designation relied upon the inspector's incomplete investigation and incorrect interpretation of Hicks's statements during his post-accident interview.[2] (Traylor App. at 3). Finally, Traylor notes that upon modifying the negligence and unwarrantable failure claims, the judge reduced the penalty from its special assessment amount of $52,500 to $1,000, and that the reduction indicates that the Secretary's decision to issue a specially assessed penalty and the amount of that penalty were not substantially justified. (Traylor App. at 5).

In addition, Traylor argues that it is entitled to attorney's fees in excess of EAJA's prescribed $125 per hour maximum because its attorney, Jason Hardin, is one the few attorneys in the nation with significant experience contesting MSHA violations, charges a competitive hourly rate relative to the market in which he practices, and possesses a unique science and engineering background that enhances his practice in this area. (*Id.* at 6-8).

On January 27, 2016, the Secretary filed an objection to Traylor's application, arguing that even as a prevailing party, Traylor was not eligible under EAJA to receive attorney's fees, and even if it were eligible, the Secretary's positions were substantially justified. (Sec'y Obj. at 2-3). The Secretary also questioned Traylor's rationale for raising the fees to be awarded above the statutory limit. (*Id.* at 3). Traylor filed a reply to the Secretary's objection on February 19.

On March 1, 2016, the Secretary withdrew its contest of Traylor's eligibility in light of additional documentation provided by Traylor in its Reply. (Sec'y Letter, at 1). The Secretary continues to argue that his position was substantially justified because the judge found that a number of the criteria in designating unwarrantable failures were present based on the facts and

[2] Traylor argues alternatively that if it is not a prevailing party it is entitled to relief under section 2704.105(b). I find that because Traylor was the prevailing party in the underlying case, I need not consider it. A party that does not prevail may be entitled to attorney's fees under EAJA if "the demand of the Secretary is substantially in excess of the decision of the Commission and is unreasonable when compared with such decision[.]" 29 C.F.R § 2704.105(b). Section 2704.105(b) does not apply to prevailing parties because prevailing parties "could argue that they meet the requirements of the 'excessive demand' prong of section 504(a)(4) in nearly every instance, rendering it essentially meaningless (although the Secretary's demand must also be determined to be 'unreasonable')." *Colorado Lava, Inc.*, 27 FMSHRC 186, 189 (Mar. 2005).

circumstances of the case, that the violation presented a high degree of danger, and that Traylor had knowledge of the danger. (Sec'y Obj. at 8-10). The Secretary argues that his high negligence designation was substantially justified because the judge modified the designation based on crediting the testimony of Traylor's witnesses over that of the Secretary's. (*Id.* at 11). The Secretary also notes that Traylor's settlement offer prior to the hearing supported a high negligence designation. (*Id.* at 11-12). In addition, the Secretary argues that the special assessment of $52,500 was substantially justified. (*Id.* at 12-13).

The Secretary also argues that Traylor's claim for fees is excessive. The Secretary cites Traylor's failure to provide sufficient documentation of fees and expenses and a full itemized statement showing the hours connected to making the prevailing arguments. (*Id.* at 14). Without full documentation, the Secretary argues that it is impossible to exclude hours dedicated to issues that Traylor conceded during hearing, hours that were inadequately documented, or hours that were "excessive, redundant, or otherwise unnecessary." (*Id.* at 14, quoting *Precision Concrete v. NLRB*, 362 F.3d 847, 853 (D.C. Cir. 2004); *Hensley v. Eckerhart*, 461 U.S. 434, 443 (1983)). Finally, the Secretary argues that Traylor's assertions of attorney specialization, educational background, and complexity of the underlying litigation are insufficient to justify a request exceeding the EAJA maximum. (*Id.* at 16-17).

III. DISCUSSION AND ANALYSIS

Commission procedural rules state that "[a] prevailing applicant may receive an award of fees and expenses incurred in connection with a proceeding, or in a significant and discrete substantive portion of the proceeding, unless the position of the Secretary was substantially justified." 29 C.F.R. § 2704.105(a). The "position of the agency" includes the "position taken by the Secretary in the adversary adjudication" and "the action or failure to act by the Secretary upon which the adversary adjudication is based." *Id.*

The applicant bears the burden to establish eligibility under EAJA. 29 C.F.R. § 2704.104(a). The applicant must show that it has a net worth of less than $7 million and employs fewer than 500 employees. 29 C.F.R. § 2704.104(b)(3)(iii). The applicant must also provide a detailed exhibit in any form "convenient to the applicant that provides full disclosure of the applicant's assets and liabilities[.]" 29 C.F.R. § 2704.202(c). Requests for attorney's fees should not result in major litigation, and thus "some informality of proof is appropriate." *United States v. 88.88 Acres of Land,* 907 F.2d 106, 108 (9th Cir. 1990) (citation omitted). If the underlying litigation bestowed significant benefits on entities other than the applicant, the worth of those entities should be aggregated to determine eligibility under EAJA. *Lion Raisins, Inc. v. United States*, 57 Fed. Cl. 505, 509 (2003).

Once a party is established as an eligible prevailing party, EAJA mandates that the Commission award fees and expenses to the prevailing party unless the Secretary proves that "the position of the agency was substantially justified or that special circumstances make an award unjust." 29 C.F.R. § 2704.100. The Government bears the burden to show that its position was substantially justified. *Scarborough v. Principi*, 541 U.S. 401, 414 (2004). The Secretary is not required to justify his position to a high degree, but must justify his position "to a degree that could satisfy a reasonable person" to prove that his actions were substantially

justified. *Pierce v. Underwood*, 487 U.S. 552, 564-566 (1988). The position must be "substantially justified on the law and the facts." *Contractor's Sand and Gravel, Inc. v. FMSHRC*, 199 F.3d 1335, 1340 (D.C. Cir. 2000) (quoting *Cinciarelli v. Reagan*, 729 F. 2d 801, 806 (D.C. Cir. 1984)). A position may still be justified even if incorrect, and it may be substantially justified if a reasonable person could think it is correct. *Pierce*, 487 U.S. at 564-66.

As Commission Judge McCarthy observed: "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." *McGruder Limestone Co., Inc.*, 36 FMSHRC 3288 (Dec. 2014) (ALJ). "[i]t would be a war with life's realities to reason that the position of every loser in a lawsuit upon final conclusion was unjustified." *United States v. Paisley*, 957 F. 2d 1161, 1167 (4th Cir. 1992) (quoting *Evans v. Sullivan*, 928 F. 2d 109, 110 (4th Cir 1991)).

Traylor's Eligibility and Prevailing Party Status

Both parties now agree that Traylor Mining is an eligible prevailing party under 29 C.F.R. § 2704.105(a). (Traylor App. at 3; Sec'y Letter at 1). Traylor has met its burden under 29 C.F.R. § 2704.104(b) because it has established that it has a net worth of less than $7 million, employs less than five hundred employees, and is the only party to which the underlying litigation bestowed significant benefits. Traylor's December 14, 2015 EAJA application for attorney's fees and expenses included balance sheets indicating that it had a net worth well below the threshold and no more than 80 employees. (Traylor App. at 2; Ex. A). In its February 19, 2016 Reply, Traylor also provided sworn declarations from its Secretary and Treasurer, a general ledger, asset depreciation report, and trial balance. (*See* Traylor Reply Exs. A, B). These materials properly supplemented Traylor's position as an eligible party and established Traylor's net worth and employee count as well below EAJA eligibility limits.

Traylor also established that it had sole direct interest in the underlying decision. Net worth of an applicant's related corporate entities should not be aggregated in determining EAJA eligibility unless the underlying litigation substantially benefited the related entities. *See Lion Raisins, Inc.* 57 Fed. Cl. at 510. Traylor's sworn declarations state that Traylor was in no way indemnified or reimbursed by Traylor Bros. for legal fees, and that Traylor is a separately incorporated entity. (Traylor Reply Ex. A ¶¶ 5-9; Ex. B ¶¶ 12-13). Aggregation of additional financial information is therefore improper.

Traylor has sufficiently met its burden of eligibility under EAJA.

Substantial Justification

After the applicant proves prevailing party status and eligibility, the government bears the burden of proving that its position in the underlying litigation was substantially justified. 29 C.F.R. § 2704.100. The Secretary must substantially justify his position on both the law and facts to satisfy a reasonable person. *Pierce v. Underwood*, 487 U.S. at 564-66. Here, the Secretary has met that burden. The Secretary provided evidence that the facts and circumstances reasonably justified the inspector's determination that the violation was the result of Traylor's

unwarrantable failure and high negligence, and that the Secretary's decision to specially assess a penalty of $52,500 was reasonable. While the investigator did not perform the most comprehensive investigation, his consideration of the high level of danger and that Hicks, the production supervisor, knew he was committing a violation indicate that the Secretary's assertions of fact and law were reasonable.

Unwarrantable Failure

The Secretary's position that the violation constituted an unwarrantable failure was substantially justified. Proper designation of unwarrantable failure must be based on the facts and circumstances of each case and consider the (1) obviousness of the violation, (2) length of time the violation existed, (3) the extent of the violative condition, (4) the degree of danger of the violative condition, (5) the operator's knowledge of the existence of the violation, (6) the extent of operator's notice that greater efforts were necessary for compliance, and (7) efforts to abate the violative condition. *I.O. Coal Co., Inc.*, 31 FMSHRC 1346 (2009). No single factor of the test is dispositive and the presence of a majority of the factors is not always necessary to determine an unwarrantable failure. *See Windsor Coal Co.*, 21 FMSHRC 997, 1001 (1999).

I determined that three factors supported the unwarrantable failure decision while four factors did not. *Traylor Mining*, 37 FMSHRC at 2314-17. The high degree of danger associated with Hicks placing himself in front of the blade between the excavator and the rib, the obvious nature of the violation, and the operator's imputed knowledge that Hicks's position posed a danger, all supported finding an unwarrantable failure. *Id.* at 2316. The fact that the violation was not extensive, that Traylor was not put on sufficient notice of the violative condition, and that Traylor properly enforced its safety standards all mitigated an unwarrantable failure finding. *Id.* at 2315. The decision to vacate the unwarrantable failure designation essentially turned on crediting the testimony of Traylor's witnesses that Hicks did not have a history of walking in front of the blade when the excavator was operating. *Id.* at 2314-15.

I find that the Secretary's reliance on his inspector's investigation of the violation and post-accident interview with Hicks do not render the unwarrantable failure designation unjustified. The Secretary argued that Hicks's own statements during the post-accident interview indicated that walking in front of the blade while the excavator was running constituted a normal practice. (Tr. 36). Traylor's witnesses persuasively claimed that they only ever saw Hicks violate the safety standard on the day of the accident. (*Traylor Mining,* 37 FMSHRC at 2314-15). Yet persuasive witness testimony on one factor does not render the entire unwarrantable failure designation unreasonable. While the Secretary failed to prove that Hicks normally walked in front of the blade, he nonetheless established that Hicks knowingly stood in an area of danger while the excavator was running. *Id.* at 2317.

Traylor argues that the inspector's misinterpretation of an "innocuous" comment by Hicks during post-accident interview was due to his failure to fully investigate the matter and his misunderstanding of the equipment and the JHA. (Traylor Reply at 18). The Secretary's investigation may not have been as fully comprehensive as Traylor believes it should have been, but the JHA does contemplate that the excavator must stop operating if "personnel need to be in the area." (Ex. G-7, p. 2). The JHA explicitly recognizes a zone of danger around the excavator.

The fact that the inspector did not understand that the blade was more than two feet in front of the cab does not render the Secretary's investigation insufficient.

The Secretary's unwarrantable failure designation was substantially justified in law and fact.

High Negligence

The Secretary was substantially justified in applying MSHA's section 100 regulations to designate the violation as highly negligent.[3] Section 100 designates a violation as constituting high negligence when the operator "knew or should have known of the violative condition or practice, and there are no mitigating circumstances." 30 C.F.R. § 100.3.

Commission Judges, however, are not limited to a restricted evaluation of allegedly mitigating circumstances, but may take the opportunity to consider all of the evidence presented after a full hearing to "take a more nuanced approach to the degree of negligence." *Brody Mining, LLC,* 37 FMSHRC 1687, 1701-02 (Aug. 2015) (citation omitted). "In determining whether an operator met its duty of care, we consider what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation." *Id.* at 1702 (citations omitted). As discussed above, I credited Traylor's witnesses in finding that the violation was an isolated incident under the reasonably prudent person standard and modified the negligence designation accordingly. 37 FMSHRC at 2313. This modification does not render the Secretary's high negligence determination under section 100.3 unjustified.

Traylor argues that the Inspector failed to interview the other miners present during the accident to corroborate Hicks's statements and this failure resulted in an unreasonable designation of high negligence. (Traylor Reply at 16). While the Inspector undoubtedly could have conducted a more thorough investigation, the Secretary's decision to rely upon Hicks's interview and the Inspector's examination of the accident scene was nevertheless reasonable. While the judge determined that walking in front of the excavator blade was not a normal practice, Hicks's testimony indicated that he knew his action was dangerous. Hicks's knowledge of the danger of the violative behavior sufficiently supports the Secretary's high negligence determination under section 100.3.

The Secretary's high negligence designation was justified in law and fact.

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[3] In addition to the following arguments, the Secretary asserts that Traylor's settlement offer to pay a reduced penalty and accept high negligence indicate the validity of the designation. (Sec'y Obj. at 12). I decline to consider the settlement negotiation in determining whether the Secretary's position was substantially justified. The Secretary argues that judges may exercise their discretion in considering an "undisputed, fully documented settlement proposal as an element of determining whether a demand is excessive. (Sec'y Obj. at 11-12, *citing Georges Collieries, Inc.*, 24 FMSHRC 572 (Jun. 2002) (ALJ) (subsequent history omitted)). Aside from choosing to exercise my discretion to the contrary, it is disputed whether the settlement negotiation is fully documented. Traylor Mining asserts that the exhibit is merely one of approximately 20 emails discussing settlements. (Traylor Reply at 4).

The Secretary's Decision to Specially Assess the Penalty

The Secretary proposes penalties using its special assessment procedures in accordance with 30 C.F.R. § 100.5, which was promulgated after notice and comment rulemaking. This provision simply provides that MSHA may elect to waive its regular assessment regulation "if it determines that conditions warrant a special assessment." 30 C.F.R.§ 100.5(a).

Two factors contributed to the Secretary's decision to specially assess the penalty in this case. First and foremost was the fact that someone was seriously injured as a direct result of the violation. The Secretary's criteria for determining whether to consider specially assessing a violation lists "violations that contributed to a fatal or serious injury" as a key factor. (Tr. 99-101; Ex. G-12 p. 1). Although the criteria used by the Secretary was not promulgated as a regulation and therefore was not subjected to notice and comment rulemaking, it is contained in MSHA's Program Policy Manual. The violation here was directly responsible for a very serious injury that could have been fatal. The Secretary followed its published procedures when electing to specially assess the penalty. As a consequence, the Secretary's decision to specially assess the violation was reasonable.

Second, because the violation was committed by the supervisor of the crew, the citation alleged that Traylor unwarrantably failed to comply with the safety standard. This fact played a significant part in the Secretary's decision to specially assess the penalty. As stated above, the Secretary's decision to issue the citation under section 104(d)(1) was reasonable and substantially justified.

Commission administrative law judges have criticized the rather opaque nature of the special assessment process. *See e.g. Douglas R. Rushford Trucking*, 23 FMSHRC 1418, 1419-20 (Dec. 2001) (ALJ); *American Coal Co.*, 35 FMSHRC 1774, 1821-24 (June 2013) (ALJ). These criticisms have arisen because Commission judges, in exercising their authority to assess a civil penalty, are required to explain the basis for the penalty addressing the six penalty criteria and must justify significant deviations from the Secretary's proposed penalty. *Performance Coal Co.*, 35 FMSHRC 2321, 2322-23 (Aug. 2013); *Cantera Green*, 22 FMSHRC 616, 620-21 (May 2000). I agree that this task is more difficult when a proposed penalty has been specially assessed by the Secretary. Nevertheless, it does not follow that the Secretary's reliance on his special assessment procedure in this case was unreasonable.

I find that the Secretary presented a reasonable explanation for his decision to specially assess the violation

The Secretary's Proposed Specially Assessed $52,500 Penalty

MSHA's Office of Assessments prepared a "Special Assessment Narrative Form" to calculate the proposed penalty. (Ex. G-14, p. 3). In completing this form, the assessment officer relied upon MSHA's general procedures for calculating special assessments. (Tr. 101-04; Ex. G-13). Although these procedures are not part of the Program Policy Manual, they are presently available on MSHA's website. These calculations take into account the six penalty criteria set forth in section 110(i) of the Mine Act. 30 U.S.C. § 820(i). The MSHA assessment officer has

little discretion in assigning penalty points when calculating special assessments, but there is some discretion in adjusting the penalty at the bottom of the form. (Tr. 108; Ex. G-14, p 3). Without these adjustments, the proposed penalty in this case would have been $70,000.

I find that the proposed penalty in this case was calculated in accordance with MSHA's special assessment guidelines. The Secretary called a witness at the hearing with knowledge of the special assessment process who explained how the special assessment was applied and calculated with respect to the subject citation. (Tr. 94-112). I credit his testimony. His testimony and the exhibits he relied upon establish that the Secretary did not deviate from the guidelines. (Tr. 103-04).

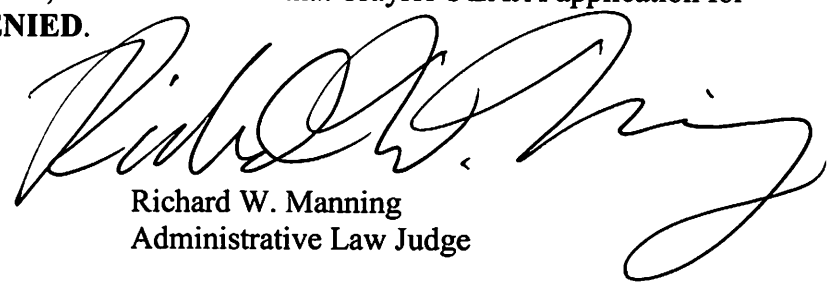
There is no question that the $52,500 proposed penalty was substantially higher than what the Secretary would have proposed if it the regular assessment formula were used, $2,000. I reduced the penalty to $1,000 when I vacated the unwarrantable failure designation. Evidence in the record establishes that the $52,500 penalty was calculated correctly using the formula developed by MSHA. (Tr. 103-04; Exs. G-13 & 14). This formula considered all six penalty elements specified in the Mine Act. Consequently, I find that the Secretary's proposed penalty was substantially justified.[4]

Conclusion

As discussed above, the result on the merits of the citation could have been different depending upon credibility resolutions and the weighing of the evidence presented. The Secretary's litigating position and proof could have satisfied a reasonable person. The Secretary has met its burden in establishing that its position was substantially justified in law and in fact. Accordingly, an EAJA award is not appropriate and I need not discuss either party's arguments regarding fee claims.

IV. ORDER

For the reasons set forth above, it is **ORDERED** that Traylor's EAJA application for attorney's fees and expenses is **DENIED**.



Richard W. Manning
Administrative Law Judge

[4] My holding in this case is consistent with my decision in *North County Sand & Gravel, Inc.*, 36 FMSHRC 1214, 1221-23 (May 2014). In that case I granted an application for attorney's fees filed by counsel for the mine operator because, in large part, I determined that the Secretary's proposed special assessment was not substantially justified. In that case, the Secretary did not seek to justify his special assessment at the hearing and, indeed, withdrew the special assessment after the close of the hearing upon a motion filed by the operator to strike the special assessment. 36 FMSHRC at 1222.

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