FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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May 13, 2014

NORTH COUNTY SAND & GRAVEL, INC., Applicant v. SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	EQUAL ACCESS TO JUSTICE PROCEEDING Docket No. EAJ 2014-0001-J Formerly WEST 2010-365-M Mine ID 04-05632 Mine: Roadrunner 32

INTERIM DECISION

Appearances: Timothy J. Turner, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado for Petitioner
C. Gregory Ruffennach, Esq., Washington D.C. for Applicant

Before: Judge Manning

This case is before me upon an application for the 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 2704. North County Sand & Gravel, Inc., filed the application against the Department of Labor's Mine Safety and Health Administration based upon my decision in *North County Sand & Gravel, Inc.*, 35 FMSHRC 3217 (Sep. 2013) (ALJ).

North County seeks an award in the amount of $40,180.60 under the EAJA, alternatively under 29 C.F.R 2704.105(a) and 29 C.F.R 2704.105(b). North County attests, and the Secretary does not oppose, that it satisfies the basic requirements to be eligible to receive an EAJA award under 29 C.F.R 2704.104.[1]

I find that North County is entitled to an EAJA award under 29 C.F.R 2704.105(a). I furthermore order the parties to confer upon the amount of reimbursement to be awarded to North County.

[1] Section 2704.104 requires that only small entities that are parties to the adversary adjudication may seek EAJA awards. The standards are different for individuals and entities, but focus on net worth and number of employees. North County has a net worth less than "$7 million and not more than 500 employees." 29 C.F.R 2704.104(b)(3)(iii).

I. BACKGROUND

The underlying case concerned one citation that MSHA issued under section 104(d)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(3) (the "Mine Act" or "Act"). A hearing in that case, concerning Citation No. 7980681 of Docket No. WEST 2010-365-M, was held on May 1, 2013, in San Bernardino, California.[2] The parties presented testimony and documentary evidence and filed post-hearing briefs.

On April, 16, 2009, MSHA Inspector Steven Soderburg issued Citation No. 7980681 under section 104(d)(1) of the Mine Act, alleging a violation of section 56.15005 of the Secretary's safety standards. The inspector designated Citation No. 7980681 as significant and substantial ("S&S") and highly likely to cause an injury that could reasonably be expected to be fatal. He also alleged that the violation was the result of North County's reckless disregard and unwarrantable failure. The Secretary proposed a specially assessed penalty of $35,500 for this citation.

Citation No. 7980681 alleged that Inspector Soderburg saw the owner and president of North County, Michael LaPaglia, standing upon a portable crusher without fall protection. The ground was 11 feet below where LaPaglia stood. The Secretary provided photographs and called Inspector Soderburg to testify to show where LaPaglia was standing when the inspector issued the citation and also provided proof to show that LaPaglia was an experienced miner who had owned North County for over 20 years. Counsel for the Secretary focused her efforts upon impeaching LaPaglia's testimony by asking questions about specific details concerning when North County purchased the cited portable crusher and when it obtained legal title to the crusher. These events occurred years earlier and were irrelevant.

At hearing, North County contested the citation and its designations, but stated that the "number one reason" it brought the citation to hearing was the large penalty that the Secretary proposed. (Tr. 125 in WEST 2010-365-M). North County focused upon providing evidence to show that the Secretary did not consider factors required by the Secretary's penalty regulation at 30 C.F.R. § 100.3(a)[3] and that the penalty was too high based upon the factors set forth in section 110(i) of the Mine Act.[4] North County called one witness, LaPaglia, to testify.

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[2] Pamela Mucklow represented the Secretary prior to and at the hearing. On July 22, 2013, Timothy Turner filed a Substitution of Counsel and became the Secretary's counsel.

[3] Section 100.3(a) states, in part:

> The amount of the proposed civil penalty shall be based on the criteria set forth in sections 105(b) and 110(i) of the Mine Act. These criteria are:
>
> (i) The appropriateness of the penalty to the size of the business of the operator charged;
> (ii) The operator's history of previous violations;
> (iii) Whether the operator was negligent;
> (iv) The gravity of the violation;
> (v) The demonstrated good faith of the operator charged in attempting to achieve rapid

I issued a decision on the merits on September 26, 2013. In that decision, I modified the citation at issue, reducing the penalty to $3,500, the negligence designation from reckless disregard to high, the likelihood from highly likely to reasonably likely, and reduced the Secretary's designation of fatal for the likely injury.

The day of the hearing, May 1, 2013, North County filed a Motion to Strike the Secretary's Specially Assessed $35,500 Proposed Penalty. In that Motion to Strike, North County argued that the Secretary's special assessment procedure was arbitrary and unlawful because the Secretary's general principles used to determine the amount of special assessments modify the part 100 penalty scheme, but did not undergo notice and comment rule making required by the Administrative Procedure Act. (Ex. R-3). North County argued that the special assessment general procedures removed the requirement that the Secretary base penalties upon the six penalty criteria and make narrative findings of his consideration of those criteria. (R. Mot. to Strike at 9). The special assessment policies produce penalties contrary to the scheme mandated by congress in the Mine Act by inflating penalties against small, compliant operators. Due to what North County asserted to be the unlawful procedures used to determine and apply the specially assessed penalty, it asserted in its Motion to Strike that the $35,500 special assessment at issue should be removed.

On July 22, 2013, the Secretary filed a substitution of counsel and on July 23, 2013, prior to submitting a post hearing brief, the Secretary filed a Motion to Amend the Penalty Proposal and to Deny North County's Motion to Strike as Moot. The Secretary's Motion to Amend reduced the proposed penalty from $35,500 to $5,961, removing the special assessment. North County subsequently opposed the Secretary's Motion to Amend, objecting to the assertion that the amendment of penalty mooted its Motion to Strike. In response, the Secretary filed a motion in support of its Motion to Amend. On July, 30, 2013, I issued an order granting the Secretary's Motion to Amend and finding North County's Motion to Strike moot because the subject special assessment was no longer at issue after I granted the Secretary's Motion to Amend. *North County Sand & Gravel, Inc.*, 35 FMSHRC 2318 (July 2013) (ALJ). In that order, I limited my

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compliance after notification of a violation; and

(vi) The effect of the penalty on the operator's ability to continue in business.

30 C.F.R. 100.3(a).

[4] Section 110(i) of the Mine Act states, in part:

> The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 C.F.R. 110(i).

ruling to the civil penalty proceeding, specifically stating that the ruling did not address or affect an EAJA claim. *Id* at 2320.

II. PARTIES' ARGUMENTS

North county 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. The judge lowered the penalty. The initial penalty is the Secretary's position "upon which the adversary adjudication [was] based[.]" 29 C.F.R 2704.105(a). The judge's de novo penalty determination of $3,500 must be compared to the original proposed penalty of $35,500. The judge made a decision on the merits and the Secretary can no longer demand a higher penalty for Citation No. 7980681, which makes North County a prevailing party. The judge's penalty was a de novo assessment that provided the necessary judicial imprimatur and was not affected by the Secretary lowering the penalty.

The Secretary, North County argues, provided no evidence to support the extreme nature of the penalty and did not address the history, good faith, or size of North County. North County references the argument in its Motion to Strike that the procedure used in the special assessment of Citation No. 7980681 violated 30 C.F.R. 100.5(b). The assessment was also not proportional to other penalties assessed against North County, inconsistent with penalties assessed to other operators for violations of section 56.15005, and was substantially in excess of the properly assessed penalty under 30 C.F.R 100.3. The Secretary's post trial decision to remove the special assessment also supports the argument that the $35,500 penalty was unreasonable and unjustified.

North County also notes that the judge removed the reckless disregard determination from Citation No. 7980681 because the Secretary presented "no evidence" to show that LaPaglia knew of his violation of the standard but ignored it. *North County Sand & Gravel*, 35 FMSHRC at 3223. Section 56.15005 does not designate a height at which fall protection must be worn, which shows that the Secretary based its argument upon unjustified inferences and not objective factors.

If North County is not a prevailing party under 29 C.F.R 2704.105(a), it argues that it is entitled to attorney fees and expenses under 29 C.F.R 2704.105(b) because the demand of the Secretary was unreasonable and substantially in excess of the judge's decision.

The Secretary argues that North County was not a prevailing party because the Secretary, not the judge, voluntarily removed the special assessment and lowered the penalty to $5,961. The judge never ruled upon the $35,500 penalty because the Secretary voluntarily amended the penalty. The judge also affirmed the Secretary's unwarrantable failure and S&S designations and found that North County's high negligence caused Citation No. 7980681.

Even if North County was a prevailing party, the Secretary asserts that his position was substantially justified. A reasonable person could find that the underlying violation was the result of North County's reckless disregard because LaPaglia owned the mine. The highly likely designation was also reasonable because the inspector had a reasonable belief that the cited

conduct would recur. The fatal designation of Citation No. 7980681 was justified based upon the inspector's experience and the judge's finding that a fatality was possible. Citation No. 7980681 violated a Rule to Live By, which led to a special assessment of the penalty. MSHA also followed its usual procedures to propose a penalty under special assessment and did not review the application of those procedures to this case until after the hearing.

The Secretary cites *Colorado Lava* to argue that if North County was a prevailing party, then section 2704.105(b) is inapplicable under Commission precedent. *Colorado Lava Inc.*, 27 FMSHRC 186, 195 (Mar. 2005). The Secretary's position is substantially justified and therefore is also reasonable under 29 C.F.R 2704.105(b). The Secretary's proposed penalty of $5,961, furthermore, was not substantially in excess of the judge's decision.

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." 29 C.F.R 2704.105(a). A position may "encompass both the agency's prelitigation conduct and...subsequent litigation positions," but "only one threshold determination for the entire civil action is to be made." *Commissioner, I.N.S. v. Jean*, 496 U.S. 154, 159 (1990).

Section 5 U.S.C. 504(a)(1), implemented by the Commission in 29 C.F.R 2704.105(a), requires that a party to the action be a prevailing party to be awarded funds in an EAJA claim. The term "prevailing party" is a term of art that means "one who has been awarded some relief by the court[.]" *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 603 (2001). A prevailing party must prevail on the merits of some of its claims and receive at least nominal relief. *See Buckhannon*, 532 U.S. at 603-04 (citing *Farrar v. Hobby,* 506 U.S. 103, 113 (1992)). The D.C. Circuit interpreted *Buckhannon* to impose a three part test to determine prevailing party status, "(1) there must be a "court-ordered change in the legal relationship" of the parties; (2) the judgment must be in favor of the party seeking the fees; and (3) the judicial pronouncement must be accompanied by judicial relief." *District of Columbia v. Straus,* 590 F.3d 898, 901 (D.C. Cir. 2010) (quoting *Thomas v. National Science Foundation*, 330 F.3d 486, 492-93 (D.C. Cir. 2003)).

Once a party is established as the 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 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 substantially justified standard demands more than non-frivolousness, but less than a showing that the government's "'decision to litigate was based on a substantial probability of prevailing.'" *Taucher v. Brown–Hruska*, 396 F.3d 1168, 1173 (D.C. Cir. 2005) (quoting *Spencer v. NLRB*, 712 F.2d 539, 557 (D.C. Cir. 1983)). The position must be "substantially justified on the law and facts[.]" *Contractor's Sand and Gravel, Inc. v. Federal Mine Safety and Health Review Com'n*, 199 F.3d 1335, 1340 (D.C. Cir. 2000).

Secretary's Position in the Underlying Case

I find that the position of the Department of Labor pertinent to North County's EAJA claim includes the Secretary's demand for $35,500. Only one determination of the Secretary's position can be used in an EAJA proceeding; each change in position does not warrant a separate finding. *Jean*, 496 U.S. at 159. The Secretary's original position demanded a penalty of $35,500 from North County for its violation of section 56.15005. The Secretary adhered to this position throughout the proceeding including during the hearing. The large monetary amount of the proposed penalty caused North County to contest the penalty, incur substantial legal fees, and proceed to hearing. The Secretary adhered to this position for years and it composed both "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." 29 C.F.R 2704.105(a).

The Secretary consistently maintained that the proposed penalty of $35,500 was appropriate from the onset of the litigation until more than two months after the close of the hearing. The Secretary's actions led North County to incur substantial legal fees. The aim of EAJA is to deter the government from forcing small entities to incur legal fees when the government's position is unjustified; here, allowing the government to change its entrenched position to avoid an EAJA claim defeats the purpose of EAJA. The government stood by its position through the adversary adjudication and North County had already incurred attorney fees, regardless of the post-hearing amendment that the Secretary made. The adjudication was based upon the Secretary's prehearing and litigation position that included a proposed penalty of $35,500 and that is the position that is pertinent to this EAJA award.[5]

The Secretary argues that had North County filed its Motion to Strike earlier, the parties could have resolved the case without a Motion for Summary Decision or hearing; I disagree. North County raised this issue in its answer to the Secretary's penalty petition. Moreover, North County filed a Motion for Summary Decision on June 30, 2012 that, among other issues, argued that MSHA's special assessment did not consider the six penalty criteria in the Mine Act and the Secretary's penalty regulations and that the Secretary "provided absolutely no information as to how the $35,500 penalty was determined." (R.'s Motion for Summary Decision at 11-14).[6]

[5] I reject the Secretary's argument that the decrease in penalty was a voluntary change and not the product of judicial action. I assessed the penalty de novo and my assessment of a $3,500 penalty was not influenced by the fact that the Secretary amended the penalty after the hearing.

[6] By order dated April 12, 2012, I denied the motion because material facts were in dispute as to the merits of the citation.

Thus, North County presented the core argument included in its Motion to Strike to the Secretary well before the hearing, but the Secretary did not change his position and, in all likelihood, did not review the legitimacy of the special assessment at that time. The Secretary only reduced his proposed penalty, changing his position and settlement offer, after participating in the hearing and appointing new counsel as his representative. Ms. Mucklow, the Secretary's counsel until July 2013, apparently showed no interest in reviewing the basis for the special assessment or in otherwise settling the case.

North County's Prevailing Party Status

I find that North County is a prevailing party under 29 C.F.R 2704.105(a) because in the underlying proceedings, (1) I ordered a change in the relationship of the parties (2) in favor of North County which (3) provided judicial relief to North County. In my September 26, 2013, decision, I ordered a final disposition of Citation No. 7980681, which modified the citation and removed the Secretary's ability to further change the penalty or designations of the citation. The modifications all favored North County: I lowered the negligence designation from reckless disregard to high, found that the cited condition was reasonably likely and not highly likely to lead to an injury, and that the likely injury would not be fatal.[7] Most important to this proceeding is the significant reduction of penalty that North County received. North County declared that its main objective at hearing was to achieve a reduction in the proposed penalty and tailored its arguments and presentation of evidence to achieve that goal. North County achieved its primary goal of a penalty reduction and is therefore a prevailing party, even though I found that they owe more than zero dollars.[8] My conclusion that a penalty of $3,500 was appropriate for the violation was not based on the Secretary's motion to amend the penalty.

The decision provided judicial relief and changed the legal relationship of the parties by modifying the citation and lowering the penalty owed by North County. The legal relationship between the parties changed, North County prevailed in some of its claims and was awarded relief by the court; North County is therefore a prevailing party for the purposes of this EAJA proceeding.

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[7] I reject the Secretary's argument that he was victorious based upon the affirmation of the unwarrantable failure and S&S designations of Citation No. 7980681. Every modification made to the citation was adverse to the Secretary's position. Any success achieved by the Secretary would affect the extent of North County's victory, which subsequently would diminish the fees awarded to North County. *Hensley v. Eckerhart*, 461 U.S. 424, 432 (1983).

[8] North County argues that if it is not a prevailing party it is entitled to relief under section 2704.105(b). The Secretary made a demand that substantially exceeded my decision and was unreasonable, but I find that North County is not eligible for relief under section 2704.105(b). 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 at 189.

Substantial Justification

The Secretary did not fulfill his burden to substantially justify his position on the law and facts; he did not adhere to the requirements of 30 C.F.R. 100 and provided no convincing evidence that he was justified to initially propose and then litigate a $35,500 penalty. Once an applicant shows that it was a prevailing party, the Secretary bears the burden to justify his position "to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. at 564-66. Although the Secretary substantially justified his positions concerning his negligence and gravity designations that I modified following the hearing,[9] he did not justify the amount of his proposed penalty. The Secretary's Objection to Application for Award of Attorney's Fees and Expenses ignores the criteria required by 30 C.F.R. 100.3(a) and 30 C.F.R. 100.5(b)[10] and argues that the Secretary's procedures, which were either inapplicable or not followed, justified his position; the Secretary did not satisfy a reasonable person that his position was justified.

The Secretary did not provide evidence to show that he proposed the penalty after considering all the factors that the Mine Act requires, as set forth in 30 C.F.R. 100.3(a) and 30 C.F.R. 100.5(b). The Secretary did not address the penalty factors or explain why a penalty of $35,500 was appropriate under the Mine Act. The Mine Act mandates that Secretary formulate penalties based upon the six criteria in section 100.3(a). To justify the specific penalty amount in an EAJA case, therefore, the Secretary must show how he applied the penalty criteria to the facts of the case or at least address why the amount was reasonable.

In the underlying case, furthermore, the penalty was the focus of the dispute and the Secretary should have supported that penalty by demonstrating its consideration of all the factors required by the Mine Act. The Secretary had numerous opportunities to provide that information and justify his penalty, but he failed to do so. North County challenged the validity of the specially assessed penalty in its answer to the Secretary's penalty petition and in its motion for summary decision. In his opening statement at the hearing, counsel for North County asserted that his primary goal at hearing was the reduction of the penalty. The basic facts of the violation, which were easy to discern from photographs, were the only proof presented by Mucklow at the underlying hearing. These facts allowed me to uphold the violation as well as the Secretary's S&S and unwarrantable failure designations, but they do not justify the large proposed penalty, especially considering the mine's small size, the company's sparse history of previous violations, and its demonstrated good faith. I determined that North County was a small operator with only two employees at the Roadrunner 32 Mine at the time the citation was issued. 35 FMSHRC at 3223. The mine had a history of three violations, none of which were S&S. (*Id.*; Ex. G-19 in

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[9] Although I did not uphold all the designations proposed by the Secretary, they were not unreasonable for the purposes of this EAJA proceeding. The reasonableness standard of the EAJA is a distinct legal standard. The judicial decision in the proceeding underlying the EAJA claim can be relevant, but is not determinative. *Halverson v. Slater*, 206 F.3d 1205, 1208 (D.C. Cir. 2000) (citing *F.J. Vollmer Co., Inc. v. Magaw*, 102 F.3d 591, 595 (D.C. Cir. 1996)).

[10] Section 100.5(b) mandates that "[w]hen MSHA determines that a special assessment is appropriate, the proposed penalty will be based on the six criteria set forth in § 100.3(a). All findings shall be in narrative form." 30 C.F.R. 100.5(b).

WEST 2010-365-M). The mine operated on an intermittent basis. North County employed between 20 and 25 people at other facilities but most worked in operations that were not subject to the Mine Act. (Tr. 130-31 in WEST 2010-365-M).

When North County filed its Motion to Strike, the Secretary did not oppose the motion by supporting the validity of its special assessment by addressing the six penalty criteria; the Secretary chose instead to avoid doing so and removed the special assessment. In its motion to amend the penalty, the Secretary stated: "After reviewing the arguments presented in Respondent's motion and revisiting the evidence of the circumstances surrounding the citation at issue, the Secretary has determined that the conditions surrounding the violation at issue do not warrant a special assessment." (Motion at 2). At no point in the underlying proceedings did the Secretary show how the penalty amount was formulated, how it related to the penalty factors in section 100.3(a), or show that he even considered all the factors. The Secretary's Petition for Assessment of Penalty, as filed with the Commission, did not include Narrative Findings for a Special Assessment or any other documents setting forth the basis for the proposed penalty.

I reject the Secretary's argument that his $35,500 proposed penalty was justified because he abided by his "own policies." (Sec'y Br. at 12). The Secretary states that he decided to lower his proposed penalty "based on procedural gaps within the specific assessment process[.]" (Sec'y Br. at 6, 13-14). These "procedural gaps" could have and should have been discovered by the Secretary long before the citation was adjudicated at a hearing. When North County challenged the special assessment in its motion for summary decision, the Secretary should have conducted a review of his special assessment of the citation. His failure to do so is not a defense to North County's EAJA claim.

The Secretary's assertion that his position is justified because MSHA specially assesses all violations of its "Rules to Live By" actually undermines his position. As North County points out, MSHA's "Rules to Live By" policy referenced by the Secretary did not exist when the penalty was proposed, which shows that the Secretary could not possibly have abided by it when assessing this penalty.[11] The Secretary cannot revise the past to make the position he took in the past appear justified.

The timing of the Secretary's amendment of its penalty, moreover, is suspicious. North County disputed the specially assessed penalty throughout the proceedings, including in its answer to the penalty petition filed February 18, 2010 and in its Motion for Summary Decision filed on January 30, 2012. The Secretary maintained that his initial penalty proposal was appropriate and only reconsidered the penalty after North County filed its Motion to Strike and the Secretary substituted counsel.

Once an operator shows that it is a prevailing party, the Secretary bears the burden to show that his position was substantially justified. I find that the Secretary failed to fulfill this burden. The Secretary's justification of his position in this case could satisfy no reasonable

[11] The Rules to Live By policy was enacted in March 2010, but the Secretary filed his Petition for Penalty on January 15, 2010.

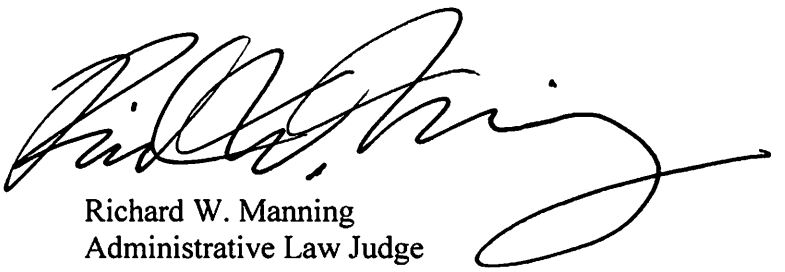
person.[12] The arguments that there were procedural gaps within the assessment process at issue and that the Secretary did not review the penalty procedures until after North County filed its Motion to Strike actually support that it was unreasonable for the Secretary to pursue such a high penalty against a small operator; he did not follow his own procedures and did not bother to review the procedures that the disputed penalty was based upon, but adhered to the penalty throughout the adjudication. The Mine Act requires the Secretary to base his proposed penalty upon the six penalty criteria and therefore he is required to present his consideration of those factors to the court. This failure, in addition the arguments that the Secretary did present, make it clear that the Secretary did not fulfill his burden to justify his position. North County is entitled to an EAJA fee award under 29 C.F.R 2704.105(a).

IV. ORDER

It is **ORDERED** that North County's EAJA application for attorney's fees and expenses is **GRANTED**. The parties are **FURTHER ORDERED TO CONFER** before **May 21, 2014,** in an attempt to reach agreement upon the specific reimbursement to be awarded. An agreement as to the amount of reimbursement to be awarded will not preclude either party from appealing this decision upon entry of my final order. If an agreement is reached, a Joint Stipulation on Reimbursement shall be submitted to me on or before **June 4, 2014**. The relief may be a lump sum payment.

If an agreement cannot be reached, the parties are **FURTHER ORDERED** to submit their respective positions upon the disputed issues, with any necessary supporting arguments, case citations, and citations to the record, on or before **June 18, 2014**. Each party shall submit specific proposed dollar amounts with explanations for the amount chosen.

I retain jurisdiction over this case until I issue a specific award to North County. Consequently, this decision will not become a final appealable decision until I issue an order containing a monetary award.



Richard W. Manning
Administrative Law Judge

[12] North County argues that the Secretary's special assessment procedure is inherently unreasonable. In this instance I find that the application and litigation of that procedure was unreasonable, but it is unnecessary for me to rule upon the procedure in general and therefore I decline to do so. I limit my findings to the specific facts and circumstances presented by this case.

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