FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

November 21, 1996

JAMES M. RAY, employed by LEO JOURNAGAN CONSTRUCTION, Applicant	:	EQUAL ACCESS TO JUSTICE PROCEEDING
	:	Docket No. EAJ 96-4
v.	:	Formerly CENT 96-53-M
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Journagan Portable #12 MO

DECISION

Before: Judge Fauver

James M. Ray filed an application for attorney fees and litigation expenses against the Secretary of Labor (MSHA) under the Equal Access to Justice Act (EAJA), 25 U.S.C. § 504, based upon the outcome of the Secretary's civil penalty case against him under § 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (Docket No. CENT 96-53-M).

The EAJA provides for the award of attorney fees and other expenses to a "prevailing party" against the United States or an agency unless the position of the government "was substantially justified or ... special circumstances make an award unjust."

I.

Judge's Findings in CENT 96-53-M

Citation No. 4329462

The judge found that on March 28, 1995, Federal Mine Inspector Michael Marler inspected the Journagan Portable #12 portable crusher in southwestern Missouri. While he was

on the site, rocks became stuck in the crusher. He observed a miner, Steve Catron, straddling the opening to the crusher and trying to dislodge rocks with a metal bar about five to six feet long. The opening of the crusher was about six feet deep. The jammed rocks extended about two feet from the jaws of the crusher. The superintendent of the operation, James M. Ray, was with the inspector.

The crusher was not turned on, but the electric power to the crusher was not shut off and locked out. Catron was straddling the crusher while standing on metal plates about two feet above the jaws of the crusher. He was wearing a safety belt with a lifeline attached to a catwalk railing above him. The judge found that if Catron fell, his fall would be limited to 1-1/2 to 2 feet. His feet "could possibly have brushed the movable jaw but it was unlikely that he would be injured" by the jaw.

Another employee, Keith Garoutee, was standing at the doorway of a power shed that controlled the power to the crusher. After Catron tried to dislodge the rocks, he would disconnect his lifeline and step up on a metal plate about 1-1/2 feet above his original position. He would then connect the lifeline to a point above and behind him and signal Garoutte to start the crusher to see if it would operate. If it was still jammed, he would signal Garoutee to turn off the crusher and he would disconnect his lifeline and step down to his original position, reattach the lifeline to the catwalk railing and again try to dislodge the rocks.

Ray was familiar with the above procedure. The company had been following this practice before Ray was employed there, and Ray had seen the employees dislodge rocks this way before the inspection on March 28.

Inspector Marler issued Citation/Order No. 4329462, charging the company with a violation of 30 C.F.R. § 56.12016, which provides:

> Electrically powered equipment shall be deenergized before mechanical work is done on such equipment. Power witches 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 ....

After the inspection on March 28, the Secretary conducted a special investigation under § 110(c) of the Mine Act to determine whether Ray should be charged with liability as an agent of the corporation. The Secretary decided to bring charges against Ray individually.

The Secretary proposed a $4,000 civil penalty against the company and a $1,500 penalty against Mike Ray.

Citation No. 4329463

When the withdrawal order was issued on March 28, Ray shut off the power to the crusher, and he and the inspector went to the crusher. They observed Catron and Garoutte inside the crusher shute removing rocks. Above the miners, the hopper was 3/4 full with about 25-30 tons of rocks piled at an angle of about 35 degrees. The judge found that the rocks, which extended to within a foot of the miners, ranged in size from dust particles to stones two inches in diameter. There was no barrier between the rocks and the crusher. Inspector Marler considered this to be an imminent danger of rocks sliding into the crusher shute and on top of the miners. Accordingly, he issued Citation/Order No. 4329463, which charged the company with a violation of 30 C.F.R. § 56.16002(a), which provides:

> Bins, hoppers, silos, tanks, and surge piles, where loose unconsolidated materials are stored, handled or transferred shall be-
>
> > (1) Equipped with mechanical devices or other effective means of handling materials so that during normal operations persons are not required to enter or work where they are exposed to entrapment by the caving or sliding of materials ....

After a special investigation under § 110(c), the Secretary charged Ray individually for this violation.

The Secretary proposed a civil penalty of $4,500 against the company and a penalty of $1,500 against Ray.

II.

Judge's Decision in CENT 96-53-M

The judge held that the company violated § 56.12016. He reasoned that the plain language of the standard applied to the crusher operation and the "fact that miner Catron was tied off at almost all times when he was above the energized crusher is not relevant to the issue of whether the standard was violated." The judge found that the violation was not significant and substantial because "there was no reasonable likelihood that the hazard contributed to by Journagan's violation would result in injury." He assessed a penalty of $500 against the company for this violation.

The judge ruled that Ray was not subject to a civil penalty for the violation of § 56.12016. He reasoned that, although Ray "clearly had reason to know that his employees would be working on the crusher without it being deenergized ...., his conduct was not aggravated." The judge found that the procedure followed by the employees was not a practice initiated by Ray, but was a company policy in place before Ray was hired. The judge also stated: "More importantly, I find that Ray had a reasonable good faith belief that miners were adequately protected by wearing a safety belt that was tied off above them. Mr. Catron was tied off for all but a very brief period, during which it was very unlikely he would fall and that the jaw of the crusher would move." The judge vacated the penalty proposed against Ray as to Citation No. 4329462.

The judge held that the Secretary failed to prove a violation of § 56.16002(a). He found that the Secretary had not proved that the 25-30 tons of rock above the miners "had not reached an angle of repose" and that the company's "evidence tends to prove that the rocks would not slide." Accordingly, he vacated Citation No. 4329463.

III.

Disposition of Issues Under
Equal Access to Justice Act

The Secretary has moved to dismiss the application on the ground that it was not filed within 30 days of the final disposition in the adversary adjudication.[1] The judge's decision in the Mine Act case was on June 7, 1996. The application was filed on July 8, 1996. Under the Commission's Rules of Procedure, the date of the judge's decision is excluded in computing the time. 29 C.F.R. § 2700.8. Accordingly, day 1 is June 8 and day 30 is July 7. Since July 7 was a Sunday, the rule requires the period to run to the end of the next business day, July 8. Therefore, the application was timely filed.

The Equal Access to Justice Act, 5 U.S.C. § 504 (administrative agency actions) and 28 U.S.C. § 2412 (civil actions), was passed in 1980. The legislative history of the act reflects the intent of Congress to help individuals and small businesses defend against unreasonable government actions. The House Report of the Judiciary Committee on the 1980 bill provides:

> [The EAJA] rests on the premise that certain individuals, partnerships, corporations and labor and other organizations may be deterred from seeking review of, or defending against unreasonable governmental action because of the expense involved in securing the vindication of their rights. The economic deterrents to contesting governmental action are magnified in these cases by the disparity between the resources and expertise of these individuals and the government. The purpose of the bill is to

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[1]5 U.S.C. § 504(a)(2) states: "A party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency an application...."

> reduce the deterrents and disparity by entitling certain prevailing parties to recover an award of attorneys fees, expert witness fees and other expenses against the United States, unless the Government action was substantially justified.

H.R. Rep. 96-1418, 96th Cong., 2nd Sess. (1980). Congress was concerned that parties with limited resources were allowing unjust agency actions to go uncontested because "[w]hen the cost of contesting a Government order, for example, exceeds the amount at stake, a party has no realistic choice and no effective remedy. In these cases, it is more practical to endure an injustice than to contest it." Id. The report further notes that the rapid growth in government regulations, combined with the increasing inability of ordinary citizens to defend against unrea-sonable charges, results in a situation where "at the present time, the Government with its greater resources and expertise can in effect coerce compliance with its position." Id.

The EAJA as originally written was to expire in October 1984, but Congress made the law permanent in 1985 through Pub. L. No. 99-80, 99 stat. 183. Referring to agency actions, the Act states:

> An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought. [5 U.S.C. § 504(a)(1).]

Under the case law, "substantially justified" means "justified to a degree that could satisfy a reasonable person," or having a "reasonable basis both in law and fact." Pierce v. Underwood, 487 U.S. 552, 565 (1988). In Pierce, the Supreme Court rejected a higher standard and held that "as between the two commonly used connotations of the word 'substantially,' the one most naturally conveyed by the phrase ['substantially justified'] is not '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." Ibid. The Supreme Court also held that a loss on the merits is not equated with a lack of substantial justification, recognizing that the government "could take a position that is substantially justified, yet lose." Pierce, 487 U.S. at 569. The government is not required to show that its decision to litigate was based on a substantial probability of prevailing. Different triers of fact may view conflicting evidence differently. However the government has the burden of showing that its position was reasonable in law and fact.

The basic issue is whether, based on the information available to the government, the charges had a reasonable basis in law and fact.

The government's § 110(c) investigation, before charges were brought against Ray, indicated that when Inspector Marler observed miner Catron straddling the crusher, his safety line was not taut but was looped down with slack several feet long. Exhibit A (Sec's Response in Opposition to Application) and hearing Tr. pp. 33 and 249. On these facts, if the miner fell his feet could become entangled in the crusher. Also, the safety line would offer no protection against an injury caused by the bar striking the miner or by rocks sliding down on the miner if the crusher were suddenly reactivated. The investigation also disclosed that Superintendent Ray had been cited earlier for failing to lock out a power circuit when doing mechanical work on a conveyor belt, and that Ray was the superintendent of the mine, the sole supervisor on the property, and a professional with a B.S. in mining engineering.

Section 110(c) of the Mine Act provides:

> Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act ..., any director, officer, or agent of such corporation, who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (b).

The Commission has held that the term "knowingly" as used in § 110(c) of the Mine Act "does not have any meaning of bad faith or evil purpose or criminal intent. Its meaning is rather that used in contract law, where it means knowing or having reason to know. *** If a person in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute." Kenny Richardson v. Secretary of Labor, 3 FMSHRC 8 (1981), aff'd, 689 F.2D 632 (6th Cir. 1982), cert. Denied, 461 U.S. 928 (1983).

The Commission has also held that a "knowing" violation under § 110(c) requires proof of "aggravated conduct," which means greater than ordinary negligence. Bethenergy Mines, 14 FMSHRC 1232 (1992).

The Secretary's investigation of the alleged violation of § 56.12016 provided a reasonable basis in law and fact for charging Mike Ray with liability under § 110(c) of the Mine Act. There was evidence that Mike Ray's practice was to ignore § 56.12016 if he decided that the procedure followed by the miners was not hazardous. Ray had been cited earlier for a similar violation. Section 56.12016 is plain and unambiguous. It requires deenergizing the power circuit on equipment when doing mechanical work. It does not provide or imply that a substitute method may be used,

such as relying on an employee to stand guard over the controls. A trier of fact could reasonably hold that Ray, as superintendent of the rock-crushing operation, served both as a role model for the work force and the leader accountable for complying with mandatory safety standards. In light of Ray's prior citation for a similar violation of § 56.12016, a trier of fact could also reasonably find that Ray acted deliberately in ignoring the safety requirement to deenergize the crusher and his act constituted "aggravated conduct." The fact that the judge in the mine case held it was not aggravated conduct does not mean that another judge may not have viewed the evidence differently.

The government's investigation of the alleged violation of § 56.16002(a) also provided a reasonable basis in law and fact for charging Ray with liability under § 110(c). The investigation disclosed that the investigator had observed two miners working in the crusher opening with rocks up to their chests. The rocks were small to very large and were held on the slope by other rocks. It was the opinion of Inspector Marler that a jolt by another rock or any small movement could send the pile of rocks down upon the two miners. He found an imminent danger. Mike Ray was aware of the practice and had observed miners removing rocks in this manner at other times. Ray disagreed with the inspector's opinion. Nonetheless, a trier of facts may have given weight to the inspector's observations and opinion and found that Ray's conduct was aggravated by subjecting miners to an imminent danger. The fact that the trial judge gave greater weight to Ray's safety opinion does not mean that the Secretary's case was not substantially justified by the inspector's observations and safety opinion.

I find that the government's position in charging Mike Ray under § 110(c) of the Mine Act as to both charges was "substantially justified" within the meaning of the Equal

Access to Justice Act.[2]

ORDER

The application for an attorney fee and other costs under the Equal Access to Justice Act is DENIED.

William Fauver
Administrative Law Judge

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[2]The Secretary also contends that there are “special circumstances which make an award unjust,” contending that his action against Ray involves a “credible extension of law.” Secretary’s Response to Application, p.13-14. The Secretary does not articulate what extension he was trying to advance. However, it appears that the Secretary’s position is that a supervisor may be subject to a penalty under § 110(c) even if he or she believed the miners were safe. This is not an extension of the current law. It is the current law. The contention of “special circumstances” is rejected.

Distribution:

Bradley Hiles, Esq., Peper, Martin, Hensen, Maichel and Hetlage, Twenty-Fourth Floor, 720 Olive Street, St. Louis, MO 63101-2395 (Certified Mail)

Margaret Miller, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 1600, Denver, CO 80202-5716 (Certified Mail)

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