FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 New Jersey Avenue, Suite 9500
Washington, DC 20001

November 10, 2003

COLORADO LAVA, INC.,	:	EQUAL ACCESS TO JUSTICE
Applicant,	:	PROCEEDING
	:	
v.	:	Docket No. EAJ 2001-2
	:	
SECRETARY OF LABOR,	:	Mine ID No. 05-04232
MINE SAFETY AND HEALTH	:	
ADMINISTRATION	:	Mine: Antonito Plant
Respondent.	:	

DECISION

Appearances: Mark W. Nelson, Esq., Mark W. Nelson, Esq., Hall & Evans, LLC,1200 17th Street, Suite 1700, Denver, CO, for the Applicant;
Mark R. Malecki, Esq., U.S. Department of Labor, Arlington, VA, for the Respondent.

Before: Judge Weisberger

This proceeding is before me based upon an Application for Award of Fees and Expenses under the Equal Access to Justice Act, 5 U.S.C. Section 504 (EAJ Act), and a subsequent Amended Application. In the underlying discrimination proceeding brought under Section 105(c)(2) of Federal Mine Safety and Health Act of 1977 (the Act), a decision was issued sustaining Colorado Lava's Motion to Dismiss, which had been made at the conclusion of the Secretary's case, and finding that the Secretary had not established its prima facie case. 23 FMSHRC 213 (Feb 13, 2001). The Secretary petitioned the Commission for discretionary review which was granted by the Commission. In its decision, the Commission vacated the dismissal of the Discrimination Compliant, and sustained the initial findings of protected activities and adverse actions. 24 FMSHRC 350 (April 2002). The Commission also held that circumstantial evidence of discriminatory motivation and reasonable inferences drawn therefrom may be used to sustain the prima facie case. The Commission noted findings in the initial decision that pointed to evidence of indicia of disparate treatment and also noted other evidence of record that could support a finding of disparate treatment. 24 FMSHRC, supra, at 355. The Commission remanded the matter for further proceedings to consider all the evidence tending to show improper motivation including that of disparate treatment.

Colorado Lava prevailed in the Decision on Remand in that it was found that the Secretary failed to establish, by a preponderance of evidence, that the adverse action taken by

Colorado Lava was motivated in any part by the miner's protected activity.[1]

The EAJ Act, which is implemented by the Commission at 29 C.F.R. Section 2404.00 *et. seq.*, provides that a prevailing applicant may be awarded attorney's fees and expenses unless the position of the Secretary was substantially justified. In addition, the Act as implemented by the Commission provides that an eligible party may receive an award of fees and expenses if the demand of the Secretary is substantially in excess of the decision of the Commission and unreasonable when compared with such decision. In essence, it is the position of Colorado Lava that it is entitled to attorney's fees and expenses on the ground that it prevailed in the proceeding brought against it by the Secretary, and that the Secretary's decision to commence the proceeding was not substantially justified. As a further basis for the award of fees, Colorado Lava asserts that the Secretary's demand was substantially in excess of the Commission's decision and was unreasonable. The Secretary argues that an award should be denied regarding the first statutory basis asserted by Colorado Lava since the Secretary's position was reasonable in law and fact. The secretary also seeks to avoid an award by asserting, in essence, that since Colorado Lava prevailed in the underlying preceding, it is not entitled to an award under Section 2704.105(b), supra. The Secretary also argues that an award under this Section should be denied as its demand was not unreasonable. For the reasons set forth below I agree with the Secretary's position, and find that Colorado Lava's application should be denied.

I. Whether the Secretary's Position was Substantially Justified (29 C.F.R. §105(a))

A. The underlying Discrimination Proceeding.

In October 1999 Andrew Garcia, who was employed at Mountain West Colorado Aggregates (MWCA) Antonito bagging facility made safety complaints regarding some equipment to his supervisor, David McCarroll, the plant manager. Subsequently, Garcia complained to MSHA about the condition of this equipment. McCarroll acknowledged being upset with Garcia for complaining to MSHA.

On June 5, 2000, Colorado Lava purchased the Antonito site from MWCA. Prior to that time, Ronald Bjustrom, the 80 percent owner of Colorado Lava, informed McCarroll that he would be retained as plant manager. Also, prior to June 5, 2000, Bjustrom retained Terry Kissner, who is not an employee of Colorado Lava, to do the hiring. Kissner interviewed all MWCA employees, and made the final decision to rehire all of them except Garcia and Ernie Lucero, a mechanic. Bjustrom did not participate in that decision.

[1]The miner complainant, Andrew Garcia, appealed the decision to the United States Court of Appeals, Tenth Circuit. Subsequently, Garcia and Colorado Lava filed before the Tenth Circuit, a stipulation to dismiss, asserting that pursuant to the agreement of the parties they stipulated that the appeal may be dismissed with prejudice.

B. The Parties' Arguments

1. Colorado Lava's Arguments

In essence, Colorado asserts, in support of its argument that the Secretary's position was not substantially justified, that at the time the depositions were taken, prior to the trial of the discrimination proceeding, MSHA's special investigator admitted he did not have any evidence that McCarroll was involved in deciding who Colorado Lava was going to hire. He also admitted he did not have any evidence that McCarroll shared with Bjustrom information regarding Garcia's protected activities. Further, Colorado Lava asserts that the deposition testimony indicates there was not any evidence that MSHA had investigated why Kissner chose another employee, Robert Duran over Garcia. Lastly, Colorado Lava asserts that during MSHA's investigation of Garcia's discrimination complaint, it discovered that Bjustrom and Kissner were not made aware of Garcia's protected activities until after Duran was hired instead of Garcia. Additionally, Kissner told MSHA during its investigation that he had never heard of Garcia until June 5, 2000, when he interviewed him.

2. The Secretary's Arguments

In response, the Secretary refers to the fact that it was found in the initial decision, and concurred in by the Commission, that Garcia had engaged in protected activities and that Colorado Lava had taken adverse action against him. Further, the Secretary argues that its position that Garcia was discriminated against was reasonable in fact, based on inferences of disparate treatment by Colorado Lava of Garcia, which raises an inference of discriminatory motivation.

C. Discussion

The burden of proof is on the Secretary to establish that her position was substantially justified, Section 105(b), supra. In Secretary v Black Diamond Construction Inc., 21 FMSHRC 1188, 1194 (Nov. 1999), the Commission, citing Pierce v Underwood, 487 U.S. 552, 565 (1988), noted that in Pierce, the Supreme Court "... set forth the test for substantial justification as follows: 'a position can be justified even though it is not correct, and we believe it can be substantially (i.e. for the most part) justified if a reasonable person could think it correct, that is, if it had a reasonable basis in law and fact.' Id. at 566 n.2."

In support of the Secretary's position, I note that in the initial decision in this matter it was found that Garcia had engaged in protected activities and that Colorado Lava had taken adverse action against him. (21 FMSHRC, supra.) These findings were concurred in by the Commission. (21 FMSHRC, supra.) I take cognizance of the fact that prior to the hearing on the underlying discrimination complaint, the MSHA's special investigator who investigated Garcia's discrimination complaint testified in a deposition that in his investigation he did not learn of any evidence that McCarroll ever shared any information with Bjustrom concerning any

protected activity that Garcia engaged in while an employee of MWCA. The investigator also admitted that he did not have any "understanding of what information, if any" that Bjustrom gave to Kissner concerning any employees prior to Kissner's conducting his interviews (Colorado Lava's Amended Application, Exhibit C). The MSHA Investigator also indicated he was not aware of any evidence that McCarroll had any role or involvement in deciding who was doing to be hired by Colorado Lava. Further, he conceded that no attempt was made by MSHA to determine how much experience Garcia had versus anyone else who was retained by Colorado Lava. Also, Bjustrom testified at the temporary reinstatement hearing that McCarroll told him that Garcia had filed grievances, but he (Bjustrom) did not take any part in the decisions by Kissner regarding whom Colorado Lava should hire from among MWCA's employees. Further, Kissner testified at the temporary reinstatement hearing that McCarroll had not provided him with any information regarding the interviewees, and that he decided to hire Duran over Garcia because the former had more experience at the specific work site in question.

It is the position of Colorado Lava, in essence, that based on these facts, known to the Secretary prior to the filing of its compliant of discrimination, no reasonable person could conclude that there was any causal connection between Garcia's having engaged in protected activities while an employee at MWCA, and the adverse action taken by Colorado Lava not to rehire him.

The Commission, in vacating the initial decision in the discrimination proceeding, held that "... the consideration of indirect evidence when examining motivation and intent necessarily involves the drawing of inferences. As the Commission stated in Bradley v. Belva Coal Co., 'circumstantial evidence [of discriminatory motivation] and reasonable inferences drawn therefrom may be used to sustain a prima facie case' 4 FMSHRC 982, 992 (June 1982)." 24 FMSHRC, supra, at 354. The indicia discriminatory intent include the disparate treatment of the complainant. Phelps Dodge Corp., 3 FMSHRC 2508, 2510 (Nov. 1981) In this connection, the Commission in vacating the initial discrimination decision, noted the indicia of disparate treatment found in that decision. Specifically, it noted that although Garcia was not chosen by Colorado Lava to be hired as a loader operator position because another employee had more experience, 24 FMSHRC, supra. However, a mechanic with less experience than another employee was offered a position with Colorado Lava, and the latter, who was not rehired, was subsequently offered another position with the Company, but Garcia was not, 24 FMSHRC, supra. Also, when considering which positions to eliminate, Bjustrom only evaluated the loader operator and mechanic positions, but no other positions, 24 FMSHRC, supra. Further, the Commission noted other evidence of record that could support a finding of disparate treatment, 24 FMSHRC, supra.

In the remand decision, it was held, based on the above evidence, that it may be inferred that Garcia was the subject of disparate treatment, 24 FMSHRC, supra. However, the probative weight to be accorded inference evidence of disparate treatment, when considering all the remaining indicia of motivation set forth in Chacon, supra, is strictly a matter of judgement. Thus, the fact that it was concluded in the decision on remand that the Secretary failed to

establish by a "preponderance of the evidence ... that the adverse action taken by Colorado Lava was motivated in any part by Garcia's protected activities" 25 FMSHRC 144, 151 (March 2003), does not mean that a reasonable person could not have reached a contrary conclusion by weighing the evidence differently. Under these circumstances it is clear the Secretary could not have been expected to predict how a judge would weigh inferences versus live testimony, and all the various Chacon factors. See Concrete Aggregates, LLC, 25 FMSHRC 500, 503 (Aug. 2003) (Judge Manning).

For all these reasons I conclude the Secretary had met its burden in establishing that it's position in this case was substantially justified.

II. Entitlement to an Award Under Section 2704.105(b), supra.

Colorado Lava also predicates an award under Section 105(b), supra, asserting that the Secretary's demand was substantially in excess of the decision of the Commission, and was unreasonable when compared with that decision.

Section 105(b), supra, provides, as pertinent, that where the Secretary's demand is substantially in excess of the Commission's decision "... the Commission shall award to an eligible applicant fees and expenses." (Emphasis added.) In contrast, an award under 105(a), supra, is to be awarded to a "prevailing applicant" where the Secretary's position was not substantially justified.

29 C.F.R. § 2704.100 sets forth the purpose of regulations implementing the EAJ as follows: "[A]n eligible party may receive an award when it prevails over the Mine Safety and Health Administration unless the Secretary's position is substantially justified." (Emphasis added) Section 2704.100, supra, next provides as follows: "In addition to the foregoing ground of recovery, an eligible party may receive an award if the demand of the Secretary is substantially in excess of the decision of the Commission." (Emphasis added.)

It appears that under the Commission's rules it is contemplated that a prevailing party, such as Colorado Lava herein, who seeks an award of fees is eligible to apply only under Section 105(a), supra. This conclusion is borne out by the fact that Section 2704.104 sets forth the different eligibility requirements of applicants for awards of fees under Sections 105(a) and (c), supra. The criteria for eligibility under Section 105(b), supra, pertain solely to the applicants net worth, number of employees or annual receipts, Section 2700.104(c). In contrast, 29 C.F.R. § 2704.104(b) sets forth eligibility criteria "[f]or purposes of awards under Section 2704.105(a) for prevailing parties [.]" (Emphasis added). Thus, as stated by the Commission in L & T Fabrication and Construction, Inc. 22 FMSHRC 509, 513 (Apr. 2000), in discussing eligibility for an award under Section 504(a)(4) of the EAJ Act, which is implemented in Section 105(b), supra, as follows: "the 1996 Amendments to the EAJ [which added Subsection 4 to Section 504(a) of the Act] expanded the basis for covering fees and expenses to include certain claims against private parties who did not prevail against the government."

Considering all the above, I conclude that a prevailing party is entitled to an award under Section 105(a), supra. In contrast, an award under Section 105(b) is available for those eligible entities who were not a prevailing party. Inasmuch as Colorado Lava was the prevailing party therein, I find that it is not entitled to any award under Section 105(b), supra.

D. Conclusion

For all the above reasons, I conclude that Colorado Lava is not entitled to an award of fees and expenses under the Equal Access to Justice Act. Accordingly, its application is denied.

ORDER

It is **Ordered** that this case be **Dismissed**.

Avram Weisberger
Administrative Law Judge

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