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June 14, 2002

GEORGES COLLIERS, INCORPORATED, Applicant	:	EQUAL ACCESS TO JUSTICE PROCEEDING
v.	:	Docket No. EAJ 2002-2
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Formerly CENT 99-178
	:	Mine: Pollyanna No. 8

DECISION

Before: Judge Barbour

This case is before me on an Application for Award of Fees and Expenses under the Equal Access to Justice Act (EAJA), (5 U.S.C. § 504 (1996)), which provides for an award to a prevailing party against the United States or an agency thereof unless the position of the government was "substantially justified or that special circumstances make an award unjust" (5 U.S.C. § 504(a)(1)). Georges Colliers, Inc. (GCI) filed the application against the Secretary of Labor (Secretary) following the issuance of a decision in numerous consolidated civil penalty proceedings brought by the Secretary on behalf of her Mine Safety and Health Administration (MSHA) against GCI and three of its agents. The cases were filed pursuant to sections 105, 110(a), and 110(c) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. §§§ 815, 820(a) and 820(c); *Georges Colliers, Inc.* 23 FMSHRC 1346 (Dec. 2001); *see also Georges Colliers, Inc.*, 24 FMSHRC 51 (Jan. 2002). I heard the cases. Based upon the evidence and the parties' stipulations, I found GCI violated all of the cited mandatory safety standards. I also held the Secretary established the agents were liable for several knowing violations. After considering the statutory civil penalty criteria, I levied penalties against the company and the agents.

In assessing the civil penalties, I concluded, among other things, that GCI established the penalties proposed by the Secretary would "adversely affect [the company's] ability to continue in business" (23 FMSHRC at 1390) and that one of the agents (Kenneth Clark) established the penalties proposed would adversely affect his ability to meet his financial obligations (23 FMSHRC at 1389). In addition, I noted the parties' stipulations that the agents had no history of previous violations (23 FMSHRC 1352, 95, 96, 97 and 98). In the aggregate, the penalties I assessed were approximately 23 percent of those proposed by the Secretary (23 FMSHRC at 1416; *see also* 24 FMSHRC at 52).

GCI argues the Secretary's proposed penalties and the positions she took during litigation regarding those penalties were "not substantially justified." The company views the "Secretary's demands . . . [as] substantially excessive, arbitrary, and capricious" (Appl. 1-2). GCI seeks a total of $45,019.36 in fees and expenses (Amended Appl. 1).

I conclude no basis exists for an award.

STATUS OF THE APPLICANTS

The Commission's rules implementing the EAJA are found at 29 C.F.R § 2704. Rule 100 provides for the "award of attorneys fees and other expenses to eligible individuals and entities who are parties to certain . . . 'adversary adjudications' before [the] Commission" (29 C.F.R. § 2704.100).

To be eligible for an award, an applicant must be a "party" as that term is defined in 5 U.S.C. § 551(3). Section 551(3) states a "party" includes "a person or agency named or admitted as a party . . . in an agency proceeding." Under the Commission's rules, party status is accorded "[a] person, including the Secretary or an operator, who is named as a party" (29 C.F.R. § 2700.4(a)). The Commission's rules also state that the definitions of section 3 of the Mine Act apply. Section 3(f) defines "person" as "any individual, partnership, . . . corporation, . . . or other organization" (30 U.S.C. § 802(f)).

The underlying proceedings involved two types of cases: civil penalty cases filed by the Secretary against GCI and civil penalty cases filed by the Secretary against GCI's agents. The cases filed against GCI were brought pursuant to sections 105(a) and 110(a) of the Act (30 U.S.C. §§ 815(a), 820(a)). The cases filed against the agents were brought pursuant to section 110(c) of the Act (30 U.S..C. § 820(c)). In the 105(a)/110(a) proceedings the "person named . . .as a party" was the corporate operator. In the section 110(c) proceedings, the "person[s] . . . named as . . . part[ies]" were the individuals. However, when the cases were consolidated for hearing the two types of cases effectively became a single case, and both the company and agents became parties to the single case. Thus, while the application was filed solely by GCI, and while GCI clearly is authorized to bring an application for itself, it also is authorized to apply for the individual agents, who are subsumed in the application as parties to the consolidated case.

ELIGIBILITY

To be eligible for an award, GCI must meet certain specific requirements. The Commission's rules require a party corporation to have a net worth of not more than seven million dollars and to have not more than 500 employees (29 C.F.R. § 2704.104(b)(4)(iii)). The underlying decisions establish that the company meets these requirements (23 FMSHRC at.1389-1390; *see also* 24 FMSHRC at 51-52). In addition, for the agents to be eligible, each must have a net worth of not more than two million dollars (29 C.F.R. § 2704.104(b)(4)(i)). As stated in my findings regarding Clark and as was clear from the testimony of the agents and others

at the hearings, the agents meet this requirement.

The question then is whether the Secretary's positions were substantially justified.

SUBSTANTIAL JUSTIFICATION

The burden is on the Secretary to establish her positions both before and during litigation were "substantially justified." Neither the EAJA nor the Commission's rules define "substantial justification." However, the standard is directly adopted from federal civil litigation discovery, where the essence of "substantial justification" is whether "reasonable people could genuinely differ" (*See The Essentials of the Equal Access to Justice Act,* 56 La. L. Rev. 22 (1995)). When drafting the legislation, Congress stated, "where the Government [can] show that its case has a reasonable basis both in law and fact, no award [will] be made" (*Id.* 23). Moreover, as the Commission has noted, the Supreme Court echoed this statement by defining "substantially justified" as meaning the government's position "must have a reasonable basis both in law and fact" and that it was "justified to a degree that could satisfy a reasonable person" (*Pierce* v. *Underwood*, 487 U.S. 552, 565 (1988), *quoted in James M. Ray, employed by Leo Journagan Construction Co., Inc*., 20 FMSHRC at 1014, 1021 (Sept. 1998). The EAJA defines the "position of the agency" as "the position taken by the agency in the adversary adjudication [in addition to] the action . . . by the agency upon which the adversary adjudication is based" (5 U.S.C. § 504(b)(1)(E)). Finally, an EAJA application may be granted where the government's demand is "substantially in excess" of the relief awarded, that is where the demand is unreasonable when compared with the relief awarded (5 U.S.C. § 504(a)(4)).

MSHA'S POSITION PRIOR TO LITIGATION

In ruling on the merits of the application, the judge must keep in mind the essentials of what was at issue in the underlying disputes. All of the proceedings were cases in which the Secretary sought the assessment of monetary penalties for alleged violations of regulations promulgated pursuant to the Act.

The disputes between the parties commenced when citations alleging the violations were issued to GCI. Following the issuance of the citations, the Act required MSHA to propose penalties for the alleged violations. The company and the individuals then contested all or part of the allegations upon which the violations and proposed penalties were based. The proposed assessments represented the ultimate position of the agency prior to litigation.

The penalties proposed by the Secretary were the result of her application of regulations for determining the amount of "regular assessments" (30 C.F.R. § 100.3), "single penalty assessments" (30 C.F.R. § 100.4), and "special assessments" (30 C.F.R. § 100.5). The regulations codify MSHA's implementation of the statutory civil penalty criteria. There is no indication in the record (and it is a voluminous record) that in computing the proposed civil penalties MSHA did anything other than faithfully follow and properly apply the regulations it was

compelled to follow. Indeed, it is worth noting that during the litigation stage of the proceedings GCI stipulated to facts regarding its size and previous history that fully accorded with those MSHA previously used in its calculations (*see* 23 FMSHRC 1350, 1352).

It is the company's position that prior to litigation the Secretary did not properly consider the effect of the proposed penalties on its ability to continue in business (Appl. 6-7), but the record does not substantiate this claim. Throughout the course of the penalty proposal process, the burden was on the company, not on the Secretary, to come forward with information that the penalties proposed would adversely affect its ability to continue in business. The regulations state that the Secretary must presume initially the operator's ability to continue in business will not be affected by the penalties, but the operator may submit information to the District Manager concerning the business's financial status and if the information indicates that the penalty will adversely affect the ability to continue in business, the penalty may be adjusted (30 C.F.R. § 100.3(h)). At the hearing, the company offered numerous financial documents and detailed testimony from its president, Craig Jackson, explaining both the documents and the company's financial background. The record does not reveal that during the penalty proposal process GCI brought to the District Manager's attention all of the financial documents and Jackson's explanations, items I found compelling and persuasive during later litigation of the cases (*see* 23 FMSHRC at 1389-90).

Nor does it reveal that prior to litigation the agents came forward with information regarding the effect of the proposed penalties on their abilities to meet their financial obligations or with information indicating that other civil penalty criteria should be weighed in their favor. Included in the Secretary's assessment proposals were her consideration of the fact that the individuals had no prior histories of violations and the presumption the proposed penalties would not adversely effect the individuals' abilities to meet their financial obligations, presumptions the individuals did not then challenge. Thus, in assessing civil penalties against the individuals, the Secretary again properly followed her regulations (30 U.S.C. § 100.4(e)).

I am also compelled to observe that the penalties proposed for GCI ranged from $55.00 to $16,000.00 and those proposed for the agents ranged from $600.00 to $3,000.00. The proposals do not seem at all excessive when measured against the statutory limit of $50,000 per violation (30 U.S.C. §§ 820(a), 820(c)).

Finally, there is no indication that the company or its agents were singled out or that the regulations were applied differently to them than they would have been to any other company or to any other agents in similar circumstances. Although GCI ascribes an unlawful motive to the Secretary's initiation and adjudication of the civil penalty proceedings (Appl. 1-2), there is not an iota of evidence to substantiate the charge, which I will not dignify by reciting. For these reasons, I find that the actions of the agency in proposing the penalties were substantially justified with regard to the cases against the company and its agents.

MSHA'S LITIGATION POSITION

The question now is whether the agency's actions were reasonable with regard to the positions it took during the litigation process, and I conclude that they were. GCI sees them as unreasonable because the Secretary did not officially compromise the proposed penalties. However, the record confirms that by insisting upon the proposed penalties, the Secretary proceeded both reasonably and strictly according to law.

With respect to the ability to continue in business civil penalty criterion, just as during the penalty proposal process, the burden was on the company, not on the Secretary, to come forward with information that any penalties assessed would adversely affect its continuation. The presumption that unless the company proves otherwise the penalties are assumed to have no adverse effect is one of the oldest in mine safety law (*see Buffalo Mining Co.*, 1 IBMA 226, 247-248 (Sept. 1973)). When a civil penalty petition is filed and Commission jurisdiction attaches, it becomes the duty of the judge to assess the penalties de novo based on the statutory penalty criteria (*Sellersburg Stone Co.*, 5 FMSHRC 287, 291-292 (Mar. 1983); *aff'd*, 736 F.2d 1147, 1152 (7th Cir. 1984)) . The impact of the proposed penalties on the company's ability to continue in business is based on the evidence of record, and the ultimate amounts assessed by the judge reflect the exercise of his or her discretion bound by all of the statutory penalty criteria.

In the cases filed by the Secretary against the company, I reduced the penalties from those proposed between 77.5 percent and 80.84 percent. Much of the reduction was based on my conclusion that imposition of the proposed penalties would have an adverse effect on the company. Although the company argues the magnitude of the reduction indicates the unreasonableness of MSHA's demands, the test for determining whether the proposed penalties were substantially in excess of those awarded can not be based solely on mathematical percentages. Rather, it must appear "the agency's . . . action did not represent a reasonable effort to match the penalty to the actual facts and circumstances of the case" (142 Con. Rec. 3242, 3244 (Mar. 29, 1996 (n. 4)).

GCI would have me judge the reasonableness of the Secretary's litigation position by the settlement negotiations and discussions which involved the company and the Secretary. The Secretary, too, would not object to using her settlement proposals as a basis for judging reasonableness, provided, of course, they are the proposals as she recalls them. For example, she states that on June 27, 2000, during the litigation stage of the proceedings, GCI provided some information regarding its financial condition and, in response, MSHA offered to "adjust the penalty by 50 %" (Sec's Opposition to Appl. 15). She also states at one point she was "willing to go as far as exploring a reduction of 90%" (*Id*. 16). In the Secretary's view, the test for determining whether MSHA's demand was substantially in excess of what I ultimately assessed should be based on the difference between the 50 percent offer and my assessments (*Id*. 15). GCI responds that the Secretary has the facts wrong, that she "never offered a ninety percent . . . settlement . . . . [and] that the fifty percent . . . offer was discussed but was never memorialized with a specific amount" (GCI's Response 2).

I decline the parties' invitation to delve into their settlement discussions. Aside from the difficulty, indeed the nearly certain impossibility, of establishing the facts, it would be bad policy to require a judge to use the parties' shifting negotiations as a bench mark for gauging the reasonableness of the agency's demands. In most instances a judge can not be expected to reconstruct with certainty what may or may not have passed between the parties or to document the myriad motives that may have spawned their settlement proposals. This is especially true when, as here, definitive written proposals are lacking.[1] Rather than use the parties' settlement discussions, I will judge the reasonableness of the Secretary's litigation position by whether that which was revealed at trial was known, or reasonably should have been known, by the Secretary.

As I have noted, in large measure, the civil penalties I assessed against GCI were based on my conclusion the proposed penalties would adversely effect its ability to remain in business. In turn, that conclusion was based upon the documentary evidence the company produced as well as on the credibility of the company president's explanations of the company's financial position (*see* 23 FMSHRC 1289-1390). Even assuming that all of the documentary evidence presented at trial was available to the Secretary during the course of litigation, it was not unreasonable for the Secretary to maintain her insistence on the proposed penalties. The Secretary did not have Jackson's sworn explanations before her, nor did she have the prescience to anticipate my credibility determinations. It would be irrational, unreasonable, and contrary to precedent to expect the Secretary to obtain all of the evidence regarding the ability to continue in business criterion that GCI introduced at trial, and it would transpose the positions of judge and litigant to expect the Secretary to gauge the credibility of Jackson and to lower the proposed penalties so they did not vary substantially from those I assessed. In the end, the Secretary simply followed the law and required the company to prove its case, which is not a basis for awarding EAJA fees and expenses.

Finally, in the cases the Secretary brought against the individuals, it also was not unreasonable for the Secretary to adhere to the proposed penalties. Even though the individual litigants had no histories of prior violations, that was but one criterion dictating what penalties ultimately would be assessed. In every instance, the Secretary made reasonable arguments regarding the existence of the violations, their gravity, and the knowledge of the charged individuals. Although she was not successful in proving all of her allegations, none of her positions was so far outside the bounds of reason and logic a reasonable person would have found them without substance or a fair possibility of success. Nor was it unreasonable for the Secretary to insist the individuals establish the size of any penalties assessed would affect their abilities to meet their financial obligations. The law places the burden of proving that criterion upon the individuals, as one of them ultimately did (*see* 22 FMSHRC at 1387 - 89).

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[1]/ This is not to state that a judge in the exercise of his or her discretion is barred from considering an undisputed, fully documented settlement proposal as an element of determining whether a demand is excessive. It is simply to hold in this instance, where the alleged proposals and considerations are neither fully documented nor undisputed, it would be unwise to do so.

ORDER

For the reasons set forth above, the application is **DENIED** and this proceeding is **DISMISSED**.

David F. Barbour
Chief Administrative Law Judge

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