FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021
Fax No.: (202) 434-9949

April 26, 2004

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. EAJ 2002-2
v.	:	
GEORGES COLLIERS, INCORPORATED	:	

DECISION ON REMAND

This Equal Access to Justice Act (EAJA) case has been returned to me by the Commission with instructions to determine whether the penalties proposed by the Secretary were substantially in excess of those assessed, whether the penalties proposed were unreasonable, and, if so, whether circumstances exist which, nonetheless, should bar an award. The remand is necessary because, when I initially ruled on Georges Colliers, Inc.'s (GCI's) application for attorney's fees (Georges Colliers, Inc., 24 FMSHRC 572 (June 2002)), I did not apply "the standard set forth in Commission EAJA Rule 105(b)[1] and the legal principles set forth in L&T Fabrication [& Constr., Inc., 22 FMSHRC 509 (April 2000)][2]" (Georges Colliers, Inc., 26

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[1] Commission Rule 105(b) (29 C.F.R. §2704.105(b)) states in part:

> If the demand of the Secretary is substantially in excess of the decision of the Commission and is unreasonable when compared with such decision, under the facts and circumstances of the case, the Commission shall award to an eligible applicant the fees and expenses related to defending against the excessive demand, unless the applicant has committed a willful violation of law or otherwise acted in bad faith or special circumstances make an award unjust. The burden of proof is on the applicant to establish that the Secretary's demand was substantially in excess of the Commission's decision; the Secretary may avoid an award by establishing that the demand was not unreasonable when compared to that decision.

[2] L&T Fabrication establishes:

> a two-part test for determining whether fees should be awarded. The first prong is largely quantitative, focusing on whether . . . the Secretary has proposed a penalty that is "substantially in excess of" the penalty ultimately assessed

FMSHRC 1, 9 (January 16, 2004)).

The Commission directed that when considering whether the proposed penalties are "substantially in excess" of the assessed penalties, I should compare the amounts proposed by the Secretary with the amounts I assessed in the underlying civil penalty cases. ("The benchmark should . . . [be] the penalties that the judge finally imposed" (26 FMSHRC at 9).) The Commission added that in making the determination I should consider the percentage the proposed penalties were reduced and whether the Secretary's proposals were motivated to extract a speedy settlement, or for other onerous reasons (Id. at 10).

In addition, the Commission observed that the Secretary's Program Policy Manual (PPM) sets out a procedure by which an operator may seek adjustment of a proposed penalty by submitting a written request to the District Manager for a review of the operator's financial status and for a determination as to whether a reduction in the proposed assessment is warranted (26 FMSHRC at 12). The Commission stated that although "the record evidence and the PPM indicate that there was a procedure for submitting financial data that GCI followed in at least some cases . . . there is an absence of record evidence indicating that the Secretary ever responded to GCI's submission" (Id. at 14). Therefore, the Commission instructed me to examine "whether the Secretary sufficiently considered GCI's evidence of its ability to continue in business when the information was submitted" (Id. at 11); or, put another way, to "address the effect, if any, of the Secretary's consideration of and response to GCI's financial data after the issuance of the proposed penalties, given the procedures in the PPM" (Id. at 14).

Finally, depending on my conclusions regarding the "substantially in excess" and "reasonableness" issues, the Commission noted I might need to determine whether GCI's actions or other circumstances made an otherwise valid award unjust (26 FMSHRC at 15).

Following the remand, I requested that the parties comment upon the issues flagged by the Commission (Order on Remand (February 6, 2004)). They have responded and, for the reasons that follow, I hold that GCI is not entitled to an award.

I. Were the proposed penalties substantially in excess of the assessed penalties?

In L&T Fabrication, the Commission stated that "substantially in excess" means "considerable in amount, value or the like; large" (22 FMSHRC at 515-516 (citation omitted)). The penalties initially proposed by the Secretary totaled $332,701, and I assessed penalties of

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> by the Commission. . . . [T]he second prong is qualitative, and presents the issue of whether the Secretary has acted reasonably in proposing a particular penalty.

22 FMSHRC at 514. To recover fees, both parts of the test must be met (Id.).

$72,298, a reduction of 78%. The percentage of the reduction was nearly as large as that in U.S. v. One 1997 Toyota Land Cruiser, 248 F.3d 899 (9th Cir. 2001). There, the Government settled the case it valued at $40,000 for a $1,000 fine and $4,000 in costs, and the court found the reduction constituted a "substantial disparity" between the amount sought and the final judgment (248 F.3d at 906). Application of the Commission's definition and case precedent at first blush suggest that the reduction of the proposed penalties to those ultimately assessed was "considerable in amount, value or the like; large" (22 FMSHRC at 515-516) and, thus, met the substantial disparity requirement. However, I am persuaded that more than the reduction and the proposed assessments must be considered.

As the Secretary persuasively points out, her proposals must be viewed in the context in which they arose and were litigated (Sec's Response to Order on Remand 3-6). The cases involve approximately 547 citations issued between August 11, 1998, and July 18, 2000. The initial penalty proposals were calculated by MSHA's Office of Assessments through application of the Secretary's civil penalty assessment regulations (30 C.F.R., Part 100). However, and as discussed more fully below, the Secretary did not remain wedded to the original proposals. On June 27, 2000, after a large majority of the assessments at issue had been proposed, GCI submitted documentary data to MSHA concerning the financial status of the company.[3] Based on the data, the Secretary's counsel responded by offering to reduce all proposed assessments by 50%.[4]

When the EAJA was debated, then senator, Dale Bumpers, gave an example of what would constitute an excessive demand. He stated, "if the Government sought $1 million to settle the case and the judge . . . awarded, for example $1000 or $5000, the defendant should be able to recover his fees" (142 Cong. Rec. S. 2148-04, 2156 (March 15, 1996)). Thus, it seems clear that Congress did not envision the Government's demand as a static concept, but, rather, recognized that under some circumstances it could include an offer of settlement made after an initial proposal. Here, it is proper to treat the Secretary's settlement offer as the Government's demand because, as Secretary points out, a majority of the original assessments were based on information available to MSHA at the time and that information did not include the financial data the company later submitted (Sec. Response To Order on Remand 6-7).

When the Government's all-inclusive settlement offer is viewed as its demand, my assessments represent an approximate 43% reduction of the demand. In the context of Mine Act cases, such a reduction by a Commission judge is not uncommon and is not "considerable in amount, value or the like; large" (22 FMSHRC at 515-516), and I conclude the reduction does

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[3] This is the data which the Commission instructed me to consider in applying the L&T Fabrication test (26 FMSHRC at 11, 14).

[4] GCI rejected the offer and, on August 24, 2000, GCI's counsel advised the Secretary's counsel of the rejection (Sec. Response to Order On Remand, Exh. C).

not establish a substantial disparity between the demand and the final assessments.[5] This is especially true given the fact the posture of the cases required the Secretary to act solely on the basis of the written, unexplained documents.

As for the Secretary's proposing onerous penalties for a nefarious purpose -- e.g., to extract a speedy settlement -- as I previously found, MSHA did nothing other than "faithfully follow and properly apply the [assessment] regulations it was compelled to follow" (24 FMSHRC at 574-575). There is no indication the Secretary was trying to force a settlement that was unfair to CGI or that the Secretary had any other disreputable purpose in mind.

II. Were the proposed penalties reasonable?

Although a denial of GCI's EAJA application can rest solely on the conclusion the Secretary's proposed demands were not substantially in excess of the assessed penalties, I also conclude the proposed penalties were reasonable.

Congress cautioned that an EAJA determination "should not be a simple mathematical comparison." Rather, the proposed penalty must be "so far in excess of the true value of the case, as demonstrated by the final outcome, that it appears the agency's assessment . . . did not represent a reasonable effort to match the penalty to the actual facts and circumstances of the case" (142 Cong. Rec. S. 3242, S. 3244 (March 29, 1996)). The Commission stated the issue as "whether the Secretary . . . acted reasonably in proposing a particular penalty" and, like Congress, indicated that "reasonableness" must be decided within the context of the "actual facts and circumstances of the case" (L & T Fabrication, 22 FMSHRC at 514).

Here, the "facts and circumstances" include more that the mechanics of the initial assessment process. They also include the Secretary's counsel's response to the financial information submitted by GCI to the agency.

The PPM states that within 30 days of the receipt of a proposed assessment, an operator may submit a written request to an MSHA district manager for review of the operator's financial status and that, upon receipt of the request, MSHA will suspend processing the case until a determination is made as to whether the proposed penalty should be reduced (PPM, Part 100 at 46 (2001)). GCI's June 27, 2000, letter to the MSHA district manager has been referenced above. It is the letter in which GCI's attorney requested a review of the company's financial status with regard to three citations and "all other outstanding proposed assessments" (26 FMSHRC at 13 (quoting GCI Resp. to Opp'n to Appl., Ex. 4)). As has been noted, the letter was

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[5] In my initial decision, I expressed my reluctance to rely on undocumented settlement proposals (24 FMSHRC at 577 n. 1). Here, however, there is no question but that the Secretary made the offer, and GCI's rejection is documented by its own counsel's letter (Sec's Response to Order on Remand 12, Exh. C (August 24, 2000, letter of GCI's counsel rejecting "offer to settle at the rate of fifty percent (50%)")).

accompanied by financial data. As has also been noted, the Commission found no evidence in the record that MSHA responded to the request as required by the PPM (Id. at 13).[6] In other words, it found no evidence MSHA "suspended processing of the case until a final determination [was] made as to whether a financial reduction [was] warranted" and it found no evidence MSHA's Assessment Office "notified . . . [GCI] of a final decision via certified mail" (PPM, Part 100 at 46 (2001)). This is why the Commission instructed me to "address the effect, if any, of the Secretary's consideration of and response to GCI's financial data after the issuance of proposed penalties, given the procedures in the PPM" (26 FMSHRC at 14).

Although GCI submitted financial data to MSHA on June 27, 2000, the data was timely with respect to only a few of the proposed assessments. GCI did not comply with the PPM by submitting timely data with respect to the vast majority of the penalty proposals (see Secretary's Response to Order on Remand at 11). As for MSHA, it, too, did not follow the PPM, in that its Assessment Office did not notify GCI by certified mail as to whether it would reduce the few assessments to which the data actually applied. However, the Secretary maintains, and I agree, that the agency essentially followed the spirit of the PPM because, when it received the financial information, it evaluated the data and decided that, timely or not, the agency would accept the request of GCI's counsel that the data be applied to all of the proposed assessments. As a result, the Secretary determined the data warranted a 50% reduction in all of the proposed penalties, and the Secretary so advised GCI's counsel (Sec's Response to Order on Remand 12).

In view of the Commission's instruction to address "the effect, i[f] any, of the Secretary's consideration of and response to GCI's financial data after issuance of the proposed penalties" (26 FMSHRC at 14) and given the law that the Secretary must make a "reasonable effort to match the penalty to the actual facts and circumstances of the case" (L & T Fabrication, 22 FMSHRC at 515-516, quoting Join Statement at S. 3244), I conclude that the Secretary's response to the financial information submitted to her by GCI – that is the Secretary's offer to settle the matters by reducing all proposed penalties by 50% – represented a reasonable effort to match the penalties to the facts and circumstances. While the Secretary did not comply with the procedures set forth in the PPM, neither, in most instances, did GCI. Still, when presented with documentary evidence of GCI's fiscal condition and the effect the proposed penalties would have on the company, the Secretary responded in the way the PPM contemplates, in that she considered the data and offered to effectively lower the proposed penalties. Since at the point the offer was made the vast majority of the assessments already had been contested, the offer was a logical and efficient way for the Secretary to proceed.

While the proposed reduction was not as large as the reduction I ultimately found was warranted, it is important to remember it was based, as it had to be, solely on the documents. The Secretary did not – indeed, could not – rely as I did on Jackson's sworn testimony (see 24

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[6] The Commission observed that "GCI's president, Craig Jackson, testified at trial that GCI had submitted to MSHA the financial documents that were exhibits at trial and heard nothing in response" (26 FMSHRC at 13, citing to Tr. 579-80).

FMSHRC at 577). She acted on the only information she had and, in so doing, she acted reasonably. The fact that she offered a 50% reduction rather than the 78% reduction I ultimately imposed should not make her liable for attorney's fees. This is especially true when it is recalled that consideration of an operator's ability to continue in business is but one of the civil penalty criteria and that the weight accorded it in assessing and proposing penalties is not fixed (see 30 C.F.R. § 100.3(h)).

For these reasons I conclude that the penalties the Secretary effectively proposed were reasonable.[7]

The application is **DENIED** and the proceeding is **DISMISSED**.

David F. Barbour
Administrative Law Judge
(202) 434-9980

Distribution:

Elizabeth M. Christian, Esq., 7229 Nohl Ranch Road, Fort Worth, TX 76133

Robin A. Rosenbluth, Esq., Office of the Solicitor, U. S. Department of Labor, 1100 Wilson Blvd., 22nd Floor West, Arlington, VA 22209-2247

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[7] Given my conclusions regarding the prongs of the L&T Fabrication test, I need not reach the issue of whether GCI should be denied an award because it committed willful violations, acted in bad faith, or because of special circumstances. However, were I required to rule, I would reject the Secretary's argument that the stipulated number of violations found to be unwarrantable and significant and substantial contributions of mine safety hazards (S&S), as well as GCI's history of previous violations, evidence GCI's "willful . . . bad faith actions" (Sec's Response To Order on Remand 19, citing 142 Cong. Rec. §§ 331 & 332 (March 29, 1996) (statement of Senators Bond and Bumpers)). The finding of large numbers of unwarrantable and S&S violations is not necessarily indicative that an operator has acted in bad faith or flagrantly violated the act; nor is a large history of previous violations. In addition, I am not persuaded that the conduct of GCI's counsel throughout the litigation would make an award unjust. In effect, what counsel did was use the hearing process to make her case that GCI's financial condition warranted larger penalty reductions than the Secretary was prepared to offer. Counsel was well within her right to pursue the trial option to resolve the matter and her conduct was not such as to bar an otherwise valid award.