

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 26, 2003

CONCRETE AGGREGATES, LLC,	:	EQUAL ACCESS TO JUSTICE
Applicant	:	PROCEEDING
	:	
	:	Docket No. EAJ 2003-01
v.	:	
	:	Formerly CENT 2002-230-DM
SECRETARY OF LABOR,	:	Id. No. 23-01840
MINE SAFETY AND HEALTH	:	Eureka Materials Quarry
ADMINISTRATION (MSHA),	:	
on behalf of JOHN G. MUEHLENBECK,	:	
Respondent	:	

DECISION

Before: Judge Manning

This proceeding is before me upon the application of Concrete Aggregates, LLC, for an award of fees and expenses pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504 (“EAJ Act”). Concrete Aggregates prevailed over the Department of Labor’s Mine Safety and Health Administration (“MSHA”) in the underlying discrimination proceeding brought under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(2) (the “Mine Act”). *Sec’y of Labor on behalf of John G. Muehlenbeck v. Concrete Aggregates, LLC*, 25 FMSHRC 270 (May 2003). The EAJ Act provides that an eligible applicant may be awarded attorney’s fees and expenses unless the position of the United States is substantially justified or that special circumstances make an award unjust. The Commission’s rules for the implementation of the EAJ Act in Commission proceedings are set out at 29 C.F.R. § 2704.100 *et seq.*

Concrete Aggregates contends that it qualifies as an eligible applicant and that the position of the Secretary was not substantially justified. The Secretary does not dispute that Concrete Aggregates is a prevailing party within the meaning of 29 C.F.R. § 2704.202 and that Concrete Aggregates satisfies the eligibility criteria for a prevailing party set out in 29 C.F.R. § 2704.104(b). The Secretary contends that Concrete Aggregates is not entitled to an EAJ Act award because her decision to proceed with the underlying case was substantially justified and because special circumstances exist that would make an award unjust.

A brief summary of my decision in underlying case is critical to understand the parties' arguments in this case. Mr. Muehlenbeck, who was the superintendent at the quarry, was terminated from his employment at Concrete Aggregates after he left the quarry on September 28, 2001, without permission or the knowledge of his supervisor. Because Concrete Aggregates was a small company, it contracted out its payroll and human resources functions. Concrete Aggregates was in the process of engaging a new provider for these functions when several employees raised concerns about one of the forms that they were required to sign. As important here, an arbitration clause on one form required all employees to agree to resolve any disputes with Concrete Aggregates or the provider through binding arbitration. This clause prohibited administrative agencies from resolving disputes or proceeding on behalf of an employee. Muehlenbeck raised concerns about the effect of this clause on his Mine Act rights and refused to sign the form. Concrete Aggregates tried to convince him to sign the form and told Muehlenbeck that he could have an attorney of his choosing review the form at company expense. Muehlenbeck attended a meeting with the provider but his concerns were not allayed. On September 28, 2001, Muehlenbeck was presented with a copy of the form by the office secretary and it was suggested that he sign the form "under protest." Muehlenbeck became angry and he left the property before quitting time without the permission or knowledge of the quarry manager. On the following work day he was terminated for leaving his post.

In my decision, I held that the facts in the case most closely resemble a work refusal and I analyzed the case on that basis. I found that Muehlenbeck had a reasonable, good faith belief that the arbitration clause would interfere with his Mine Act rights. Based on my analysis of the record, I held that the Secretary established a *prima facie* case of discrimination. I also found that Concrete Aggregates was unable to establish that Muehlenbeck's termination was unrelated to his continuing refusal to sign the form. I dismissed Muehlenbeck's complaint of discrimination after analyzing the record as a mixed-motive case. I found that Muehlenbeck's termination was precipitated by the fact that he left the quarry without notice or permission coupled with the fact that he was unable to offer any explanation for his absence. I determined that Concrete Aggregates would have terminated Muehlenbeck for that reason alone. Finally, I found that, by asking Muehlenbeck to sign the form under protest, Concrete Aggregates did not wrongfully provoke Muehlenbeck and his response to the suggestion was excessive and unreasonable.

I. ANALYSIS OF THE ISSUES

A. Substantial Justification

The Secretary has the burden to establish that her position both before and during litigation was "substantially justified." Neither the EAJ Act nor the Commission's rules define "substantial justification." The United States Supreme Court has defined the phrase "substantially justified" as " 'justified in substance or the main' . . . justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). The

position of the government “can be justified even though it is not correct” and it can be “substantially (*i.e.* for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact.” *Id.* n. 2.

1. Summary of the Parties’ Arguments

The Secretary contends that her case had a reasonable basis in fact. She states that MSHA completed a thorough investigation of Mr. Muehlenbeck’s discrimination complaint and her solicitors continued that investigation through discovery. She determined that the factual basis of Muehlenbeck’s complaint was substantiated by both witness testimony and documentary evidence. The administrative law judge concurred with the Secretary’s position that Muehlenbeck had engaged in protected activity and that Concrete Aggregates did not establish that his termination was not motivated, at least in part, by his protected activity. The judge dismissed the complaint of discrimination only after evaluating and weighing the evidence concerning the particular circumstances of Muehlenbeck’s departure from the mine on September 28, 2001. The Secretary did not prevail in the underlying case because the judge, after making “difficult credibility determinations,” concluded that Muehlenbeck was not reasonably provoked by the company into leaving his post at the mine without the permission or knowledge of his supervisor. (Secretary’s Objection at 8). The judge’s credibility determinations and resultant findings of fact could not have been predicted by the Secretary.

The Secretary also contends that her case had a reasonable basis in law. The underlying discrimination proceeding presented novel legal issues and was a case of first impression. The Secretary argues that she was not proceeding in bad faith in prosecuting her case and she presented valid legal arguments consistent with existing law. She points to the fact that the judge determined that she presented a *prima facie* case. The judge also determined that Concrete Aggregates failed to establish that Muehlenbeck’s protected activity was not a motivating factor in his termination. She argues that she did not prevail in the underlying case only because the judge found that Concrete Aggregates would have terminated Muehlenbeck for his unprotected activities alone.

Concrete Aggregates argues that the Secretary’s “good faith” and her thorough investigation are not sufficient to meet her burden of establishing that she had substantial justification for proceeding with the case. Concrete Aggregates afforded Muehlenbeck every opportunity to pursue his “good faith concerns.” (Applicant’s Response at 3). Muehlenbeck did not refuse to work; he returned to the quarry the next business day after he walked off the job. Muehlenbeck admitted at the hearing that he has difficulty expressing his concerns when he is flustered. Concrete Aggregates offered Muehlenbeck the opportunity to raise his concerns before an attorney of his choice at company expense. Because the company made every effort to address Muehlenbeck’s concerns, the Secretary’s prosecution of the underlying case was unreasonable. In addition, the Secretary offered no evidence that the arbitration provision in the form actually threatened Muehlenbeck rights under the Mine Act. Thus, the

Secretary's decision to litigate the underlying case was not substantially justified.

2. The Position of the Secretary was Substantially Justified

I agree with the Secretary that her position in this case was substantially justified because it had a reasonable basis in law and fact. The parties agree that the issues in the underlying proceeding presented a case of first impression. When a government agency acts in good faith in prosecuting a case of first impression, its position may be considered to be substantially justified. *Griffon v. U.S. Dep't of Health and Human Services*, 832 F. 2d 51, 52-53 (5th Cir. 1987). Although the facts presented in the underlying case had never been litigated before, the Secretary based her legal arguments on sound Commission precedent. The Secretary was not attempting to stretch the boundaries of section 105(c) beyond what presently exists but was attempting to apply existing law to a factual situation that had not previously arisen. Indeed, in a very real sense, the Secretary prevailed in the underlying case on the issues of law, but she did not convince the trier of fact that she should prevail on the particular facts of the case.

As stated above, I determined that the Muehlenbeck's refusal to sign the form containing the arbitration clause was reasonable and was made in good faith. On that basis, I found that Muehlenbeck engaged in protected activity and that Concrete Aggregates did not adequately address his concerns so that they reasonably should have been quelled. I next determined that Concrete Aggregates had not established that its termination of Muehlenbeck was in no part motivated by his protected activity. In performing a mixed-motive analysis, I found that Concrete Aggregates would have terminated Muehlenbeck for his unprotected activities alone. The most significant and difficult factual issue was whether Muehlenbeck had been wrongfully provoked into impulsively abandoning his post at the quarry by the company's continuing insistence that he sign the arbitration clause. After reviewing the evidence, considering the demeanor of the witnesses, and making credibility determinations, I found that Muehlenbeck had not been provoked to act in an impulsive manner by Concrete Aggregates. 25 FMSHRC 283-84. Reasonable people could reach opposite conclusions on this factual issue. Consequently, the Secretary's position was substantially justified on the facts. The Secretary cannot be expected to predict how the judge will analyze the evidence when making credibility determinations and findings of fact on close issues. *James Ray, employed by Leo Journagan Construction Co.*, 20 FMSHRC 1014, 1027 (Sept. 1998).

The Applicant's arguments are not well taken. Most of its arguments quarrel with the factual findings and legal conclusions in the underlying decision. For example, contrary to the Applicant's argument, the Secretary was not required to establish that the arbitration provision in the subject form actually threatened Muehlenbeck's rights under the Mine Act. Consequently, Applicant's arguments are rejected.

B. Special Circumstances

The Secretary argues that the granting of fees and expenses in cases brought under section 105(c) of the Mine Act will have an undue chilling effect upon the exercise of miners' rights. She maintains that it was not the intention of Congress, when it enacted the EAJ Act, to deter miners from pursuing the enforcement of their rights under the Mine Act. She cites the legislative history of the Mine Act which states, in the Senate Report, that section 105(c) was put in place to protect miners from any interference with the exercise of their statutory rights and that the Secretary is expected to rigorously enforce section 105(c). The Secretary argues that rigorous enforcement of the Mine Act will become more difficult if she is "preoccupied with concern that if she loses a case, for virtually any reason, she will automatically have to pay fees and expenses to the prevailing party." (Secretary's Objection at 10). The Secretary believes that the "award of fees and expenses in the context of section 105(c) cases in general, and this case in particular, presents special circumstances that make such an award unjust." *Id.* at 11.

Concrete Aggregates maintains that the \$14,200 that its counsel is seeking cannot reasonably be expected to have any chilling effect on the rights of miners. Since the Secretary expended substantially more resources in pursuing this case than \$14,200, if fiscal soundness is to be considered when evaluating a "chilling effect," then the Secretary should have paid Muehlenbeck his back wages and costs directly rather than bringing the underlying case. Concrete Aggregates argues that paying a mine operator's costs when the Secretary brings a discrimination case that is not substantially justified will not in any manner discourage miners or the Secretary from enforcing section 105(c) of the Mine Act.

In essence, the Secretary is asking that I rule that fees and expenses should never be awarded in discrimination cases, including cases in which the Secretary is unable to establish that her position was substantially justified, except in the most egregious of circumstances. Because I hold that the Secretary established that her position was substantially justified in the underlying case, I do not need to address this issue and I decline to do so.

II. ORDER

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

Richard W. Manning
Administrative Law Judge

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