FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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January 14, 2005

DAVID R. COLEMAN, employed by LODESTAR ENERGY, INC., Applicant	:	EQUAL ACCESS TO JUSTICE PROCEEDING
	:	Docket No. EAJ 2004-02
v.	:	Formerly KENT 2003-275
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Mine ID 15-18015
Respondent	:	Bent Mountain

INTERIM DECISION

Before: Judge Feldman

This matter concerns an application for the recovery of attorney's fees and incidental litigation expenses under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (1996), filed on July 2, 2004, by David R. Coleman who was employed by Lodestar Energy, Inc.(Lodestar). Coleman prevailed in the underlying 110(c) case brought by the Secretary that involved a fatal truck accident that occurred on October 3, 2001. 26 FMSHRC 485 (June 2004). Section 110(c) provides, in pertinent part:

> Whenever a corporate operator violates a mandatory health or safety standard . . . any director, officer, or agent of such corporation *who knowingly authorized, ordered, or carried out such violation* . . . shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d) of this section.

30 U.S.C. § 820(c) (emphasis added).

The Secretary opposes Coleman's EAJA application on substantive grounds. The Secretary does not assert that Coleman's net worth exceeds the two million dollar limit for individual eligibility under EAJA. 29 C.F.R. § 2704.104(b)(4)(I). Coleman's financial information has been submitted and will be withheld from public disclosure. 29 C.F.R. § 2704.204. The parties have not requested a hearing in this matter. 29 C.F.R. § 2704.306(b).

Briefly stated, the Secretary charged Coleman with "knowingly" violating the mandatory safety standard in section 77.1605(b) that requires mobile equipment to be equipped with adequate brakes. A knowing violation requires a showing that Coleman's conduct constituted

aggravated conduct rather than ordinary negligence. *Bethenergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (August 1992).

Under EAJA, as the prevailing party, Coleman is entitled to reasonable attorney's fees and expenses in connection with any proceeding, or any significant and discrete substantive portion thereof, in which the Secretary's case was not substantially justified. *Cooper v. United States R.R. Retirement Board*, 24 F.3d 1414, 1416 (D.C. Cir. 1994); 29 C.F.R. § 2704.105(a). The Secretary has the burden of demonstrating that her position was substantially justified. *Lundin v. Mecham*, 980 F.2d 1450, 1459 (D.C. Cir. 1992). Substantially justified means that the Secretary was "justified to a degree that could satisfy a reasonable person" and that the Secretary had "a reasonable basis both in fact and in law" to continue to proceed with her litigation. *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). Determining whether the Secretary's actions were substantially justified "necessarily requires the court to examine . . . the Government's litigation position and the conduct that led to litigation. After doing so, the court must then reach a judgment independent from that of the merits phase." *FEC v. Rose*, 806F.2d 1081, 1090 (D.C. Cir. 1986).

On September 20, 2004, the Secretary was ordered to specify, with particularity and supporting transcripts, all statements she relied on during the accident investigation, discovery and hearing stages to justify her position that Coleman committed a "knowing" violation of section 77.1605(b). The Secretary filed her brief in opposition to Coleman's EAJA on November 12, 2004.

In support of her belief that the litigation against Coleman was substantially justified, the Secretary referred to transcripts of MSHA investigation interviews with Elchaney Cline conducted on October 4 and October 18, 2001. (Sec'y opp. br. at 3). She also relied on statements made to MSHA during its investigation in October 2001 by Craig Anderson and Roy Collins. (Sec'y opp. br. at 3-4). With respect to the discovery phase, the Secretary acknowledged that Cline's sworn testimony at both his February 10, 2004, deposition and at the hearing that began on February 11, 2004, differed from what MSHA investigator Robert Bates understood Cline's testimony to be during his interviews with Cline shortly after the accident on October 4 and October 18, 2001. (Sec'y opp. br. at 5). Coleman replied to the Secretary's opposition to his EAJA application on December 14, 2004.

A. Factual Background

The facts in the underlying decision in this case are set forth at 26 FMSHRC 485.[1] Briefly stated, on October 3, 2001, Gary Blackburn was driving a red Mack DM600 fuel truck (FT154) down an inclined haulage road (known as the "hell hole") in order to refuel mining equipment located in a coal producing pit. At approximately 10:45 a.m., at some point along the

[1] Transcript references for the February 11 and February 12, 2004, hearing are cited as "Tr. I" and "Tr. II", respectively. Exhibit references pertain to exhibits proffered during the hearing.

road, Blackburn lost control and jumped from the vehicle sustaining injuries that resulted in his death the following day. Drivers normally relied on downshifting in low gear to control their trucks while descending steep grades. After the accident, examination of the service brakes revealed significant defects. 26 FMSHRC at 486. However, as noted in the initial decision, no one had knowledge of the specific brake defects until the wreckage was examined by MSHA during the course of its accident investigation. *Id.* at 501.

The accident investigation team initially believed that defective brakes were the primary cause of the accident based on the erroneous belief that an employee, Elchaney Cline, had complained to Coleman about the truck's brakes the night before the accident. *Id.* at 486. In fact, Cline testified he communicated brake complaints to Coleman approximately one month before the accident. (Tr. II, 227-30); *Id.* at n.2. There is very little evidence of brake complaints in the intervening weeks leading up to the accident. *Id.* Although poor brakes undoubtedly were a significant contributing factor, the evidence reflects the proximate cause of the accident was a defective clutch that was adjusted only two hours before the fatal accident. The clutch failure caused the truck to "freewheel" out of control. In this regard, at trial, MSHA conceded that it was implausible that Blackburn jumped while the truck was in low gear and limited to a speed of ten miles per hour. (Tr. I, 250-61); *Id.* at 486-87.

The initial decision summarized the Secretary's failure to satisfy the substantive parameters in a 110(c) case:

> to prevail in a 110(c) personal liability case, the Secretary must show that Coleman, as a foreman in a position to protect employee safety, failed to act *on the basis of information that gave him knowledge or reason to know of the existence of a hazardous violation*. *Sec'y of Labor v. Richardson*, 3 FMSHRC 8, 16 (January 1981), *aff'd*, 689 F.2d 632 (6th Cir. 1982). In addition, the Secretary must demonstrate that Coleman's failure to act in response to the information known to him constitutes aggravated conduct. *Bethenergy*, 14 FMSHRC at 1245.
>
> In evaluating the evidence, *the focus is on the nature and extent of Coleman's knowledge of the brake conditions in the weeks preceding the October 3, 2001, accident. In this regard, Coleman cannot be charged with knowledge of the significant brake defects that were revealed by a detailed examination of the wreckage after the accident.* As discussed herein, the Secretary has failed to demonstrate that Coleman's failure to recognize the defective brake conditions constituted aggravated conduct. Consequently, the personal liability case brought by the Secretary against Coleman must be dismissed.

Id. at 487[2] (emphasis added) (footnote omitted).

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[2] The initial decision noted Coleman was not been charged with failing to remove the truck from service because it was defective in violation of section 77.404(a). Rather,

B. Discussion and Evaluation

The Secretary's regulations implementing EAJA provides, in pertinent part:

> (a) A prevailing applicant may receive an award of fees and expenses incurred in connection with a proceeding, or in *a significant and discrete substantive portion of the proceeding*, unless the position of the Secretary was substantially justified. *The position of the Secretary includes*, in addition to the position taken by the Secretary in the adversary adjudication, the action or *failure to act by the Secretary upon which the adversary adjudication is based*. The burden of proof that an award should not be made to a prevailing applicant because the Secretary's position was substantially justified is on the Secretary, who may avoid an award by showing that [her] position was reasonable in law and fact.

Section 2704.105, 29 C.F.R. § 2704.105 (emphasis added).

Thus, Coleman's EAJA application requires analysis of whether the Secretary was substantially justified in bringing her case in the investigative, discovery and trial stages of this litigation. Resolution of this issue requires a qualitative analysis of whether the evidence relied upon by the Secretary in each portion of this proceeding substantially justified her continuing assertion that, based on the facts known to him, Coleman committed a "knowing" violation of section 77.1605(b). Particular focus must be on whether the Secretary's failure to act on Cline's contradictory deposition testimony by vacating the citation against Coleman was reasonable in law and fact.

(1) Investigative Stage

As previously noted, The Secretary's principal witness in this proceeding is Elchaney Cline. Cline, a utility man who reported to Coleman, operated the defective red FT154 fuel truck for 7 hours during the shift immediately preceding the fatal accident on the morning of October 3, 2001. Coleman reported clutch problems to the maintenance department after he overheard Cline complain on the CB radio at the end of his shift that the clutch was slipping. Although Cline complained about a clutch malfunction on October 3, 2001, Cline did not complain about the service brakes at any time immediately prior to the accident. 26 FMSHRC at 498, 502. The clutch was adjusted approximately 3 hours before the fatal accident. *Id*. at 488-89.

Cline provided equivocal information shortly after the accident about the timing of relevant brake complaints he communicated to Coleman prior to the accident. Specifically, on

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Coleman was charged with violating section 77.1605(b) that requires that mobile equipment must have adequate brakes. Thus, the decision identified the issue as whether Coleman's failure to recognize the inadequacy of the truck's brakes constituted a knowing violation of section 77.1605(b).

October 4, 2001, the day following the accident, Cline told MSHA investigators that he complained to Coleman about the brakes "just about every time I [got] in the truck" during the month preceding the accident. *Id*. at 490. Cline was subsequently interviewed by MSHA investigators on October 18, 2001. This time, explaining that the red truck was used infrequently, Cline stated that he last complained about the brakes to maintenance supervisor Johnny Huffman and Coleman "a month or two before the accident." (Joint Ex. 1, p. 102; Tr. I , 67-68); *Id*. The Secretary concedes Cline's investigation statements and testimony "often appeared inconsistent and, sometimes, contradictory." (Sec'y post-hrg. br. at 35); *Id.* at 490 n.5.

MSHA also interviewed grease truck operator Craig Anderson during the course of its investigation. Anderson stated that on or about September 15, 2001, he complained to Coleman about the brakes failing to prevent the red fuel truck from rolling back on a hill. Like Cline, he also brought his brake complaints to the attention of the truck mechanics. Anderson drove the truck the following day without incident. Anderson did not know if the brakes had been adjusted. Anderson did not communicate any subsequent brake complaints after September 15, 2001. *Id*. at 496.

MSHA also questioned dozer operator Roy Collins during its investigation. Although Collins opined that the brakes on the red fuel truck were weak, Collins did not report any brake complaints to Coleman. Significantly, the Secretary's investigation did not reveal any relevant written pre-shift brake complaints on the time sheets of Cline, Anderson, Collins, or any other red fuel truck operator. *Id*. at 502.

While the information provided by Cline on October 4 and October 18, 2001, with respect to the timing and frequency of his complaints was inconsistent, Cline's brake concerns were corroborated by Anderson and Collins. Thus, it was reasonable for the Secretary to conclude after her investigation that Coleman had knowledge of brake complaints prior to the accident. When viewed in the context of MSHA's investigation of a fatality, there was a reasonable basis in fact and in law, to support the Secretary's belief, based on information obtained during her investigation, that Coleman had reason to know of serious brake defects on a fuel truck descending steep grades and that Coleman ignored the need for maintenance. Such conduct would constitute aggravated conduct as a matter of law.

(2) Discovery Stage

Cline was deposed on February 10, 2004, one day before the hearing. During the deposition, Cline unequivocally stated that he told Coleman approximately one month prior to the fatal accident that the brakes on the red fuel truck were inadequate. (Sec'y opp. br. at 5). Although consistent with the information provided by Cline during the investigation on October 18, 2001, Cline's deposition testimony contradicted the information he provided to MSHA on October 4, 2001, that he frequently complained to Coleman "just about every time I [he got] in the truck." 26 FMSHRC at 490.

Thus, after depositions, the Secretary was left with a relevant Cline complaint "a month or two before the accident" and a vague Anderson complaint approximately two weeks before the accident. Both Cline and Anderson had stated that they communicated their brake complaints to the truck mechanics as well as to Coleman. *Id*. at 490, 496. Significantly, the Secretary was left with no relevant complaints, written or verbal, during the intervening weeks prior to the accident demonstrating that Cline and Anderson's concerns had not been alleviated. Moreover, there was no evidence of other relevant complaints by other truck operators during this period.

Despite the fact that Cline had recanted his October 4, 2001, statement in his deposition taken before the hearing that he frequently complained to Coleman "every time" he drove the truck, the Secretary elected to proceed to trial. As further discussed below, Cline's deposition testimony undermined the continuing reasonableness of the Secretary's position in fact and in law when viewed in the context of the paucity of the other evidence against Coleman introduced at trial.

(3) Trial Stage

In the weeks preceding the accident, Cline testified that he drove the red fuel truck on September 13, September 14, September 15 and September 21, 2001, and on the evening of October 2 until the morning of October 3, 2001. *Id*. Lodestar's policy required equipment operators to note equipment defects on their daily time sheets. *Id*. Cline's daily time sheets reflect he operated FT154 for 8½ hours on September 13, 2001; 4½ hours on September 14, 2001; 2 hours on September 15, 2001; 3 hours on September 21, 2001; and 7½ hours on October 2, 2001. Cline operated FT154 for a total of 25½ hours on these days. *Id*. However, he did not enter any brake defects on his time sheets. (Gov. Exs. 45, 46, 47, 53, 56); *Id*.

Cline's deposition, in view of the absence of relevant written brake complaints on written pre-shift reports, should have raised red flags for the Secretary. The Secretary was aware of an absence of relevant written pre-shift brake complaints in Lodestar's time sheet records for the weeks preceding the accident. Significantly, at trial, the Secretary proffered Anderson and Cline's daily time sheets for the period September 13 through October 2, 2001, that are devoid of relevant brake complaints. (Gov. Exs. 45-48, 53, 56); *Id*. at 493, 496.

Cline testified that the FT154 would "barely crawl" down the steep decline at no more than five miles per hour if the vehicle was downshifted in first gear. *Id.* at 496. Downshifting in second gear limited the vehicle to five to ten miles per hour. *Id*. Operators relied on downshifting rather than the service brakes when descending the haulage road. *Id*. Cline never expressed concern that the red fuel truck could not safely traverse the steep grade on "hell hole" haulage road. *Id*. Cline drove down the "hell hole" hill in second and low with a full load of fuel on October 2, 2001, and did not report any brake complaints. *Id*. The significance of this evidence on the issue of substantial justification cannot be overstated. Going into the trial, the Secretary had no evidence that any red fuel truck operator had ever complained to Coleman about

inadequate brake operation while descending the "hell hole" accident site, the steepest grade at the mine site.

As noted, at trial Cline initially testified, "I told Dave Coleman and Johnny Huffman that the brakes wasn't (sic) working right . . . . three weeks to a month before the accident." (Tr. I, 67); *Id*. at 493. Cline subsequently testified he told Coleman and Huffman twice about a month before the accident. (Tr. I, 69-70); *Id*.

On cross-examination, Cline further clarified the only brake complaint he communicated to Coleman prior to the accident:

> Q. Now let's go back to the month before. [What] I understood from what you told me in yesterday's deposition is the first person you told was Mr. Huffman?
>
> A. Yes.
>
> Q. That the brakes needed worked on, they were weak, or how did you refer to it, they needed looked at?
>
> A. Yes.
>
> Q. And [Huffman] was head of maintenance for this Lodestar job?
>
> A. Yes.
>
> Q. And that after you reported it to Mr. Huffman, I think you told me, what, about ten minutes or so [you] saw Mr. Coleman?
>
> A. Yes, I got in the truck to go around the hill and met Dave coming and I told him.
>
> Q. And what you told Mr. Coleman was, "The brakes need to be looked at. I've just told Mr. Huffman about it," correct?
>
> A. I never told him I talked to Johnny. I said, "The brakes need to be fixed, they ain't right."
>
> Q. (Examining deposition transcript) Do you remember yesterday that when you had your conversation with Mr. Coleman - -
>
> A. Yes.
>
> Q. - - He asked you what Johnny Huffman had told you?

A. Yes.

Q. So you did have a discussion with Mr. Coleman on the fact that you just talked to Mr. Huffman about brakes?

A. Yes.

Q. Right? You remember that now, right?

A. Yes.

Q. Okay. There was a discussion about a switch on [the] pedal and some other things, wasn't there?

A. Yes.

Q. So what happens here is you talk to Mr. Huffman first, the chief of maintenance, right?

A. Yes.

Q. Then you say around the corner or around the hill when you run into Mr. Coleman?

A. Yes.

Q. You tell him that you want the brakes looked at and you have been talking to Mr. Huffman, the guy that's in charge of maintenance?

A. Yes.

Q. Now, the procedure up at this job is that if you needed something fixed you just went right to a mechanic, didn't you?

A. Yes.

Q. You didn't wait for a foreman to authorize it or anything else, you could call a mechanic over to get anything that you wanted done, basically?

A. We'd have to get a hold of Dave, yes.

Q. But you also at times went right to the mechanic, didn't you?

A. Yes.

Q. Now, you also told me yesterday that you had your conversation with Mr. Huffman first and then with Mr. Coleman, but Mr. Coleman very well could have believed that this was being handled because you had addressed it with the head of maintenance of the mine?

A. Yes.

Q. And you told me yesterday you had no further conversations with Mr. Coleman about any brake issues other than that incident about a month before?

A. Yes.

(Tr. I, 80-83); *Id*. at 493-96.

Cline testified that the clutch on the red fuel truck was slipping during his shift that began the evening of October 2, 2001. Cline informed Coleman of the clutch problem over the CB radio at the end of his shift at approximately 5:30 a.m. on October 3, 2001. *Id*. at 498. Coleman advised Cline that he would take care of it. The clutch was adjusted that morning before Blackburn's accident. (Tr. I, 80); *Id*.

While the Secretary could not be sure of Cline's testimony at trial, she had reason to know Cline was an unreliable witness after taking his deposition. When the Secretary decided to proceed to trial with Cline as her key witness, she did so at the risk of EAJA liability. EAJA was intended to reimburse individuals, such as Coleman, who incur the expense of defending against Government litigation that should not have been brought. The Secretary's decision to go to trial, although well intentioned, was not substantially justified in fact and in law. Cline's deposition testimony, and the lack of relevant verbal or pre-shift written brake complaints in the weeks preceding the accident, fail to justify, as an issue of fact, the Secretary's position that Coleman had the requisite knowledge that a hazard continued to exist. The lack of clear and reliable evidence concerning the nature and extent of Coleman's knowledge undermined the Secretary's ability to demonstrate at trial the higher threshold for a 110(c) violation, namely, that Coleman engaged in aggravated conduct as a matter of law.

While I recognize the Secretary's prosecutorial discretion, it is noteworthy that, at all times relevant to this 110(c) proceeding, there were three other shift foreman in addition to Coleman who supervised operators of the red fuel truck who were not charged by the Secretary. *Id*. at 487. Moreover, it was not uncommon for equipment operators to bring truck defects directly to the attention of the mechanics, or the maintenance supervisor, who could make adjustments without a foreman's knowledge. Id. at 488, 496. Yet, for reasons best known to the

Secretary, the supervisory mechanic who allegedly was informed by Cline of the defective condition of the service brakes, was not charged with a 110(c) violation.

Even, Cline, the Secretary's key witness, does not believe that MSHA should have filed a case against Coleman because Coleman was not the supervisory mechanic responsible for repairs. *Id*. at 496. Cline characterized Coleman as a foreman who was interested in safety and one who would not hesitate to remove a defective vehicle from service. (Tr. I, 93). *Id*.

While Lodestar's failure to maintain adequate service brakes may constitute an unwarrantable failure, unwarrantability, alone, is not evidence of aggravated conduct by a particular agent of the company. *Id*. at 499. Thus, although the disrepair of the brakes evidences Lodestar's inexcusable neglect, it does not provide the reasonable justification required to be shown by the Secretary to defeat Coleman's EAJA application.

(4) Special Circumstances

Finally, the Secretary argues, alternatively, that even if she was not substantially justified throughout all phases of this proceeding, Coleman should be disqualified from EAJA recovery because there are "special circumstances [that] make an award unjust." 29 C.F.R. § 2704.100 As a bar to recovery, the Secretary relies on the initial decision that determined Coleman lacked credibility when he testified that he could not recall any relevant brake complaints communicated to him by Cline and/or Anderson. *Id*. at 501.

As the initial decision noted, it is not surprising that Coleman, who was the focus of a fatal accident investigation, asserted that he could not recall the brake complaints relied on by the Secretary. *Id.* In the absence of adequate justification for bringing Coleman to trial, the Secretary is in no position to fault Coleman for his reticence to aid in his own prosecution. Given the facts in this case, I am neither surprised nor offended by Coleman's asserted lack of recollection.

Accordingly, the Secretary has failed to demonstrate adequate special circumstances to preclude Coleman's reimbursement. Consequently, Coleman's EAJA application for attorney fees and litigation expenses shall be granted for all expenditures incurred as of the February 11, 2004, trial date including fees and expenses related to post-hearing filings.

ORDER

In view of the above, **IT IS ORDERED** that Coleman's EAJA application for attorney fees and expenses incurred on or after of February 11, 2004, **IS GRANTED**. Coleman's application for fees and expenses through the discovery and deposition stages of this proceeding **IS DENIED**.

This is an Interim Decision on EAJA liability. It does not become final until a Final Decision on EAJA REIMBURSEMENT is issued. Accordingly, **IT IS FURTHER ORDERED** that the parties should confer **before February 18, 2005,** in an attempt to reach an agreement, consistent with this Decision, on the specific reimbursement to be awarded. If the parties agree on the amount of reimbursement, they shall file a Joint Stipulation on Reimbursement **on or before March 5, 2005.** An agreement concerning the scope and amount of reimbursement to be awarded shall not preclude either party from appealing this decision.

If the parties cannot agree on reimbursement, the parties **ARE FURTHER ORDERED** to file, **on or before March 29, 2005,** Proposals for Reimbursement specifying the appropriate reimbursement to be awarded accompanied by supporting documentation, if any. I am available for a telephone conference if the parties so desire.

Jerold Feldman
Administrative Law Judge

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