

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES

601New Jersey Ave., N.W., Suite 9500

Washington, D.C. 20001-2021

December 7, 2006

ELMORE SAND & GRAVEL, INC.,	:	EQUAL ACCESS TO JUSTICE
Applicant	:	PROCEEDING
	:	
	:	Docket No. EAJ 2006-01
	:	Formerly SE 2005-48-M
v.	:	
	:	
SECRETARY OF LABOR,	:	Mine ID 01-01138
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Respondent.	:	Scott Pit

**DECISION**

Appearances: George W. Walker, III, Esq., & J. David Martin, Esq, Elmore Sand & Gravel, Inc.,  
Montgomery, Alabama, for the Applicant;  
Heather A. Joys, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta,  
Georgia, for the Respondent

Before: Judge Weisberger

**Introduction**

This proceeding is before me based upon an Application for Award of Fees and Expenses under the Equal Access to Justice Act, 5 USC § 504 (“EAJA”). On July 19, 2006 a decision was issued in the underlying civil penalty proceeding, *Elmore Sand & Gravel, Inc.*, 28 FMSHRC 631, (July 2006), (“the decision”) The decision, *inter alia*, dismissed the citation that had been issued to Elmore Sand & Gravel, Inc. (“Elmore”), alleging a violation of 30 C.F.R. § 56.14100(c). Thereafter, Elmore filed an application for fees and expenses on the basis that it had prevailed in the civil penalty proceeding and that the Secretary’s position on the citation at issue was not substantially justified.

## **I. The Mine Act Civil Penalty Proceeding**

On December 20, 2003, Donnie Ziegler, one of Elmore's haul truck drivers informed Derrell Sanders, another haul truck driver, that he was going to check the brakes on the haul truck. Ziegler pulled the truck forward approximately twenty feet with the bed fully raised. The bed on the truck was observed lowering slowly. Sanders saw Ziegler pinned under the dump bed, and immediately went into the cab of Ziegler's truck to raise the dump bed off Ziegler. Sanders moved the joystick<sup>1</sup> inside the cab to the raise position, and raised the dump bed off Ziegler.

Subsequent to the accident, it was observed that the harness containing electric wires that ran from the cab of the truck to the dump bed was not intact; that the end that was connected to the cab appeared to have been severed; that the end attached to the dump bed ended in butt connectors; and that a piece of the harness of indeterminate length was missing between the severed end, and the butt connectors.

On December 20 through 23, MSHA Inspector, Eugene Hennen, conducted an investigation of the accident, and performed various tests on the equipment that was involved. Based on these tests, and on assumptions that the harness was disconnected at the time of the accident and that the joystick was in the hold position, Hennen opined that prior to the accident the wiring harness was disconnected causing the dump bed to not operate properly when the joystick was in the hold position.

On January 12, 2004, subsequent to investigation, the Secretary issued a citation to Elmore alleging a violation of 30 C.F.R. § 56.14100(c). Subsequently, the Secretary filed a petition for assessment of a civil penalty, and an answer thereto was duly filed by Elmore. The matter was heard on November 8 and 9, 2005.

In the penalty proceeding, the Secretary argued that it established the existence of a defect under Section 56.14100(c), *supra*, in that before the accident the wiring harness had come loose, creating an open circuit that disabled the joystick, the body-up switch, and the warning light. In support of this assertion, the Secretary alleged that it established that the wiring harness had come loose before the accident, which disabled the joystick, the body-up switch, and the warning light. The penalty proceeding decision ("the decision") rejected the Secretary's arguments and held that the Secretary ". . . failed to establish, by a preponderance of the evidence (emphasis added), that the harness wires had become loose prior to the accident on December 20." 28 FMSHRC, *supra*, at 640.

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<sup>1</sup>If the joystick is placed in either the raise or lower position and the operator releases the joystick it will go to and remain in the hold position, and the bed will not come down. If the joystick is placed in the float position and the joystick is released, it will remain in the float position, and the weight of the dump bed will cause the bed to lower.

**A. The Secretary's Position in the Civil Penalty Proceeding**

In support of its position that the loose wiring disabled the joystick, the body-up switch, and the warning light prior to the accident, the Secretary relied on the testimony of Hennen regarding the relationship between a severed wire, and the failure of the dump bed to operate properly in the hold position. The decision, 28 FMSHRC, *supra*, at 641-644, quoted Hennen's testimony, and found that the testimony was confusing and lacking in clarity and thus lacking in probative value.

In support of its position that the joystick was in the hold position at the time of the accident, but that the bed did not hold in that position, the Secretary relies on the testimony of Sanders. He testified that when he entered the cab immediately after the accident and used the joystick to raise the bed, it was in the hold position. However, the decision accorded little probative weight to Sanders' testimony, due to its lack of clarity and numerous inconsistencies. The Secretary also relied on tests conducted by Hennen relating to the operation of the dump bed, along with discussions the latter had with the manufacture of the truck, which provided the bases for his opinion that a break in the wiring harness prior to the accident, caused the dump bed to not operate properly when the joystick was in the hold position. 28 FMSHRC, *supra*, at 647-648. In the decision, various inconsistencies in the record were noted along with admissions of Hennen elicited on cross-examinations that the bed came down only once when the joystick was in the hold position. It was concluded that the tests were insufficient to support Hennen's opinion that a break in the harness caused the bed to come down when the joystick was in the hold position. Further, it was found that testimony regarding tests performed by Elmore, which were not consistent with Hennen's tests, was not impeached or contradicted, diminishing the weight to be accorded his tests. The decision held that the Secretary had not established a violation under Section 56.14100(c), *supra*, in that it failed to meet its burden of proof of establishing that prior to the accident the harness wire running between the dump bed and truck had become loose, and would have caused the truck bed to come down after it was raised and the joystick was placed in the hold position. 28 FMSHRC, *supra*, at 649. Thus it was concluded that the Secretary failed to establish that prior to the accident a defect existed that made continued operation of the truck at issue hazardous to persons, and the citation at issue was dismissed. 28 FMSHRC, *supra* at 649.

**II. The EAJA Proceeding**

Elmore's application alleges that its net worth and number of employees is below that required for eligibility for an award under EAJA, and that the Secretary's position was not substantially justified. The application seeks fees and expenses in the amount of \$64,576.87.

The Secretary's response asserts that her position in the civil penalty proceeding was substantially justified. In addition, the Secretary argues that Elmore's affidavit and unsworn uncertified balance sheets are insufficient documentary evidence to meet its burden of establishing that its net worth is below the threshold for eligibility under the EAJA.

### **A. Elmore's Arguments**

As an initial matter, Elmore argues that inasmuch as the decision did not find in the Secretary's favor on any factual issue that was essential to proof of the Secretary's case, it should be concluded that the Secretary's case is lacking in substantial justification. In this connection, Elmore refers to the Secretary's position that a defect existed in the truck prior to the accident, in that the wiring harness had become loose which disabled the joystick, the body-up switch, and the warning light. The validity of this position is dependent upon the existence of the following facts which the decision held were not established: 1) the wiring harness had come loose prior to the accident, 2) the joystick was in the hold position at the time of the accident, and 3) that because of the severed harness, the bed would not hold in the fully upright position even when the joystick was placed in the hold position.

Further, Elmore argues that the Secretary's allegation that the wiring harness had become loose prior to the accident was not substantially justified in fact. Elmore asserts that the Secretary's position was predicated upon repairs made to the harness prior to the accident. In contrast, Elmore cites Sanders' statement in a taped interview with MSHA investigators, that immediately after the accident the wires between the front and back of the dump truck were "connected good". Elmore also alleges that Zeigler did not report any problems with his truck in his inspection reports for December 18 and 19, and that he had told Elmore's Safety Director at the conclusion of the shift on December 19, that everything was running fine. Additionally, Elmore cites the parties' stipulation that tests performed by Hennen to determine whether the previous repairs of the harness caused the wires to become shortened and therefore to pull loose prior to the accident, were inconclusive.

Elmore next refers to the Secretary's sole reliance on Sanders' testimony to establish that the joystick was in the hold position prior to the accident. In this connection, Elmore cites conflicting statements made by Sanders regarding the joystick position. Elmore also refers to the holding in the decision that the Secretary's evidence was insufficient to support this critical element.

Lastly, Elmore refers to the Secretary's reliance on testing by Hennen regarding the operation of the dump truck, which was intended to establish that if the harness is severed and the joystick is in the hold position, that the dump bed would not stay up in the fully raised position. In this connection, Elmore cites inconsistencies in Hennen's tests. Also, Elmore refers to Hennen's admission that the bed came down only once out of twelve times when the joystick was in the hold position, the dump fully raised, and the wiring harness was not intact. Elmore argues that accordingly the results are lacking in significance.

### **B. The Secretary's Position**

In contrast, it is the Secretary's position, that in essence, its reliance on the testimony of Sanders to establish that the joystick was in the hold position at the time of the accident is substantially justified in that Sanders, in statements given to MSHA officials within a few days

of the accident, described the joystick as being in the neutral and not in the float position. Also, that the Secretary could not have been expected to predict that ultimately it would have been found in the decision after trial that Sanders' testimony was lacking in credibility. The Secretary further argues that its reliance on its theory that the wiring harness had disconnected prior to the accident causing the dump bed to fall even if it was in the hold position, was reasonable. In this connection, the Secretary asserts that its reliance on inferences from circumstantial evidence was reasonable. The Secretary notes, in her response in opposition to Elmore's application, that subsequent to the accident it was observed that the wiring harness appeared to have been cut, that investigations after the accident revealed that the wiring harness had been cut or damaged several times in the recent past causing the system to malfunction, and that on the day of the accident Ziegler had said "that the wiring on the truck was messed up". (Secretary's Response, p. 10) Lastly, the Secretary argues that its reliance on the tests performed by Hennen, her expert witness, as well as the latter's opinion based on these tests, was reasonable.

### **C. Discussion**

In *Contractor's Sand & Gravel Company*, 20 FMSHRC 960, 969 (September 1998) the Commission set forth the following regarding a prevailing party's entitlement to attorneys fees under the EAJA:

EAJA provides that a prevailing party may be awarded attorney's fees unless the position of the United States is substantially justified. *Cooper v. United States R.R. Retirement Bd.*, 24 F. 3d 1414, 1416 (D.C. Cir. 1994). The Supreme Court has defined a "substantially justified" position as "justified in substance or in the main" or one that has "a reasonable basis both in law and fact." *Pierce*, 487 U.S. at 565. In *Pierce* the court set forth the test 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 has a reasonable basis in law and fact." *Id.* at 566 n. 3. In EAJA proceedings the agency bears the burden of establishing that its position was substantially justified. *Lundin v. Mecham*, 980 F.2d 1450, 1459 (D.C. Cir. 1992) (Emphasis added).

#### **1. Whether the Secretary's Position has a Reasonable Basis in Fact**

In the case at bar, Elmore was charged with violating Section 56.14100(c), *supra*, which provides as follows:

When defects make continued operation hazardous to persons, the defective items including self-propelled mobile equipment shall

be taken out of service and placed in a designated area posted for that purpose, or a tag or other effective method of marking the defective items shall be used to prohibit further use until the defects are corrected.

According to the plain language of Section 56.14100(c), *supra*, to establish a violation the Secretary must prove 1) that a defect existed, 2) that the defect makes continued operation hazardous to persons, and 3) that the defective equipment was not taken out of service.<sup>2</sup> It is the Secretary's position herein that the truck was defective in that before the accident the wiring harness had come loose creating an open circuit which disabled the joystick, the body-up switch and the warning light. I note that it is not necessary for the Secretary in this EAJA proceeding to prove its position. Rather, she need only demonstrate that her position was a reasonable one. (*Contractor's Sand & Gravel, supra*, at 973).

**a. The Wiring Harness Came Loose Prior to the Accident**

The Secretary's position that the wiring harness had come loose prior to the accident is based on inferences to be drawn from the testimony of two of Elmore's employees that on two occasions shortly before the date of the accident at issue, they repaired damaged wires within the harness of the truck at issue by reconnecting the wires and placing them in butt connectors which were then crimped. Also, another Elmore employee told MSHA officials in a taped interview a few days after the accident, that when he operated the truck in question on four occasions within the previous week, the bed turned over and he noticed that the wires between the bed and the truck had come loose. He also stated that the bed was slow coming down. Further, in another taped interview an Elmore employee, Tommy Finley, who was working on the same site as Ziegler on the day of the accident, told MSHA officials that the latter had said that the wiring was "messed up" (JX 3 at 1).

The decision applied the standard of preponderance of evidence, and concluded that the Secretary had not established that the wires had come loose prior the accident.<sup>3</sup> However, in

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<sup>2</sup>It is not disputed that, on December 20, 2003, the truck at issue had not been taken out of service.

<sup>3</sup>The decision took cognizance of various factors in the record that diminished the weight to be placed on the inferences drawn by the Secretary. It was noted that the record did not contain any evidence that the repairs prior to the accident were not done properly, or that the reconnected wire-ends were not secure. Also, it was noted that any statement made by Ziegler to Finley that the wiring was messed up on the date of the accident was hearsay, that Finley's statement as to what Ziegler told him was unsworn, and that Finley was not called by the Secretary to testify. Further, it was noted that Ziegler had not reported any problems with the truck in his inspection reports for December 18 and 19.

this EAJA proceeding, the Secretary need not prove its position by a preponderance of evidence only that it was reasonably justified. (*Contractor's Sand & Gravel*, supra, at 973). I find that the Secretary's position, based upon a combination of facts and inferences, was not unreasonable.

                    b.       **The joystick was in the hold position prior to the accident**

The only testimony relied on by the Secretary consists of the testimony and statements made by Sanders. Sanders testified that immediately after the accident when he entered the cab, the joystick was in the hold position. However, the decision analyzed the entire record and it was concluded that the Secretary failed to establish by a preponderance of evidence that immediately prior to the accident the joystick was in the hold position.<sup>4</sup> The decision noted inconsistencies in Sanders' description of the position of the joystick describing it as either in hold or in neutral. Also, it was noted that his testimony regarding the various positions of the joystick was not consistent with the parties' stipulations.

A finding that a preponderance of all the evidence fails to establish that the joystick was in the hold position does not compel a conclusion that the Secretary's reliance on Sanders statements regarding the position of the joystick was not reasonable. In this regard, it is not unreasonable for the Secretary to have relied on Sanders' testimony inasmuch as he clearly indicated on direct examination that the joystick was in the hold position and not in the float position, and agreed that he used the term the "hold" position as being the same as the "neutral" position. Also, the Secretary should not have been expected to anticipate the lack of clarity in the Sanders' testimony that was elicited on cross-examination, or how the decision after hearing would weigh Sanders' testimony.

Thus, I find that the Secretary has established that it was reasonably justified in its position that the joystick was in the hold position.

                    c.       **If the wires are severed the bed will not hold in the fully upright position even when the joystick is placed in the hold position.**

Elmore argues, in essence, that the reliance by the Secretary on tests performed by Hennen and the latter's opinion, was not substantially justified due to inconsistencies in Hennen's testimony, contradictions between Hennen's testimony regarding the tests and contemporaneous notes taken by MSHA investigators, Walter Turner and Harold Weeks. Also,

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<sup>4</sup>The decision referred to Sanders' testimony that the joystick would go into the float position when he released it while powering up or down. The decision found that this testimony was not consistent with the parties' stipulation that if the joystick is released from the lower or raise position, it will spring back to, or remain in the hold position.

that Hennen admitted on cross-examination that of the twelve tests that he performed, the bed came down only once with the harness severed, the joystick in the hold position, and the bed fully raised.

The decision found that the Secretary had not met its burden of establishing that, prior to the accident, the harness wire that ran between the dump bed came loose and would have caused the truck bed to come down after it was raised, and the joystick placed in the hold position. However, the decision, which reasonably could not have been anticipated by the Secretary, resulted from a *de novo* review of all the evidence, and was based upon the standard of the preponderance of evidence. Thus, the decision is not dispositive of the issue as to whether the Secretary's reliance on Hennen's tests was reasonable and substantially justified. Clearly, another fact finder could reasonably have reached a contrary result regarding the weight to be accorded Hennen's tests and his conversations with representatives of the manufacture of the truck at issue. Also, another fact finder could reasonable have reached a contrary result resolving the conflict between Heenen's and Elmore's test results. I thus find that the Secretary's reliance on Hennen's tests, and his opinion was reasonable.

Therefore, for all of the above reasons, I find that the Secretary's position had a reasonable basis in fact.

## **2. The Secretary's Position Had a Reasonable Basis in Law**

### **a. The Secretary's Position**

In essence, it was the Secretary's litigating position that a violation of Section 56.14100(c), is established by proof that the truck in question had a defect that made continued operation hazardous, and that it was not taken out of service. Elmore argues that the requirement of Section 56.14100(c), *supra*, that defective equipment must be taken out of service, is predicated upon an operator's knowledge of the existence of the defect. Elmore asserts that there was not any evidence adduced that it had any knowledge of the defect alleged by the Secretary.

On the other hand, the Secretary relies on a unsworn statement by an Elmore employee, who did not testify, that on the morning of the accident Ziegler had told him that the wiring was messed up. The Secretary argues that Ziegler's knowledge should be imputed to the operator. Further, the Secretary cites *Rushton Mining Co.*, 10 FMSHRC 249, 252 (March 1988), which held that a standard mandating the removal of damaged equipment does not require the operator's knowledge of the defect. Additionally, the Secretary argues that its interpretation of Section 56.14100(c) as not requiring the knowledge of the operator, should be accorded deference, citing *Secretary of Labor v. Excel Mining*, 334 F.3d 1, (D.C. Cir. 2003), *Martin v. OSHRC*, 499 U.S. 144, (1991) and *Energy West Mining, v. FMSHRC*, 40 F.3d 457, (D.C. Cir. 1994).



**b. Discussion**

In *Contractor's Sand & Gravel Inc.*, 20 FMSHRC, *supra*, at 972, the Commission provided guidance as follows with regard to the standards to be applied in evaluating under the EAJA whether the Secretary's position had a reasonable basis in law:

. . . when federal courts inquire as to whether the government's position was substantially justified on legal grounds, they generally look to federal court of appeals precedent. *United States v. One 1984 Ford Van*, 873 F.2d 1281, 1282 (9<sup>th</sup> Cir. 1989) (government did not have a reasonable basis in law because there was no distinction between this case and an earlier Ninth circuit case); *Fraction v. Bowen*, 859 F.2d 574, 575 (8<sup>th</sup> Cir. 1988) (government's position was not substantially justified because the government's mistakes were "contrary to clearly established circuit precedent"). Similarly, in the administrative law context, Commission decisions serve as legal precedent, since the role of the Commission as a reviewing body is similar to that of a federal circuit court in the judicial setting . . . .

There is not any binding precedent in support of Elmore's position that actual knowledge on the part of an operator of a defect is essential to establish a violation of Section 56.14100(c), *supra*. Further, this issue was not addressed and resolved in the decision, inasmuch as the citation was dismissed. Thus, it is concluded that the Secretary's legal position that the doctrine of strict liability applies, is reasonable. Accordingly, I thus find that the Secretary's position had a reasonable basis in law.

**D. Conclusion and Order**

Therefore, for all of the above reasons, I find that the Secretary's position herein was substantially justified. Based on this finding, I conclude that Elmore has not established entitlement to attorney's fees under the EAJA as a prevailing party. Hence, it is **Ordered** that the application be **Dismissed**.

Avram Weisberger  
Administrative Law Judge

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