FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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June 7, 1999

L & T FABRICATION & CONSTRUCTION, INCORPORATED, Applicant	:	EQUAL ACCESS TO JUSTICE PROCEEDINGS
22.	:	Docket No. EAJ 99-1
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Formerly WEST 98-243

DECISION

Before: Judge Hodgdon

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, 29 CFR § 2704.100 *et seq*. L & T Fabrication & Construction, Inc., filed the application against the Secretary's Mine Safety and Health Administration (MSHA) based on the decision of the judge in *L & T Fabrication & Construction, Inc.*, 21 FMSRHC 71 (January 1999) assessing a penalty of $20,000.00 for a violation for which MSHA had proposed a penalty of $40,000.00. The applicant contends that the penalty proposed by MSHA was substantially in excess of the penalty assessed by the judge and was unreasonable when compared to the judge's decision. For the reasons set forth below, the application is denied.

Section 504(a)(4), 5 U.S.C. § 504(a)(4), provides that:

> If, in an adversary adjudication arising from an agency action to enforce a party's compliance with a statutory or regulatory requirement, the demand of the agency is substantially in excess of the decision of the adjudicative officer and is unreasonable when compared to such decision, under the facts and circumstances of the case, the adjudicative officer shall award to the party the fees and other expenses related to defending against the excessive demand, unless the party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust. Fees and expenses awarded under this paragraph shall be paid only as a consequence of appropriations provided in advance.

Section 504(b)(1)(B) defines "party," for the purposes of this case, as a "corporation . . . the net worth of which did not exceed $7,000,000 at the time the adversary adjudication was initiated."

There is no doubt that L & T qualifies as a "party" under this definition, as its net worth clearly did not exceed $7,000,000. Therefore, I conclude that the company is eligible to be awarded costs and attorney's fees. However, I find that L & T is not entitled to them.

Section 2704.105(b) of the Commission's EAJA Rules, 29 C.F.R. § 2704.105(b), provides that: "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." L & T has failed to demonstrate that the proposed penalty was substantially in excess of the penalty finally adjudged.

The facts and circumstances of the case are that on August 6, 1997, one of L & T's employees was permanently paralyzed from the neck down as the result of being struck on the head by a 60 to 90 pound section of handrail which fell off of a deck 18.5 feet above him. At the hearing the company did not contest that it violated section 77.203 of the Secretary's mandatory health and safety standards, 30 C.F.R. § 77.203,[1] that the violation was "significant and substantial" and that the violation was caused by its high negligence and "unwarrantable failure" to comply with the regulation.[2] The operator had previously been cited for the same violation on

[1] Section 77.203 provides: "Where overhead repairs are being made at surface installations and equipment or material is taken into such overhead work areas, adequate protection shall be provided for all persons working or passing below the overhead work areas in which such equipment or material is being used."

[2] The "significant and substantial" and "unwarrantable failure" language is taken from section 104(d)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard" and which was "caused by an unwarrantable failure . . . to comply with . . . mandatory health or safety standards . . . ."

May 21, 1997. The main thrust of the company's efforts at the hearing was to show that the penalty would adversely affect its ability to remain in business. It did not prevail on this issue. *L & T Fabrication* at 74.

As both parties have noted in their briefs, there do not appear to be any cases on this section of the EAJA, which was added by Congress in 1996.[3] In the *Joint Managers Statement of Legislative History and Congressional Intent*, the managers said, with regard to section 504(a)(4), that:

> This bill amends the EAJA to create a new avenue for small entities to recover their attorneys fees where the government makes excessive demands in enforcing compliance with a statutory or regulatory requirement, either in an adversary adjudication or judicial review of the agency's enforcement action, or in a civil enforcement action. In these situations, the test for recovering attorneys fees is whether the agency or government demand that led to the administrative or civil action is substantially in excess of the final outcome of the case so as to be unreasonable when compared to the final outcome (whether a fine, injunctive relief or damages) under the facts and circumstances of the case.
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> This test should not be a simple mathematical comparison. The Committee intends for it to be applied in such a way that it identifies and corrects situations where the agency's demand is so far in excess of the true value of the case, as demonstrated by the final outcome, that it appears the agency's assessment or enforcement action did not represent a reasonable effort to match the penalty to the actual facts and circumstances of the case.

142 Cong. Rec. S3242, S3244 (March 29, 1996) (*Joint Statement*).[4]

L & T argues that the fifty percent reduction in the penalty proposed by MSHA meets the substantially in excess test. However, as Congress has indicated, the test is not a simple mathematical comparison. Furthermore, I do not find, as a general proposition, that a fifty percent reduction demonstrates that the original penalty was excessive. In most cases that would

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[3] Pub.L. 104-121, Title II, § 231, Mar. 29. 1996, 110 Stat. 862.

[4] In introducing this statement, Senator Bond stated: "Since there will not be a conference report on the act, this statement and a companion statement in the House should serve as the best legislative history of the legislation as finally enacted." *Joint Statement* at S3242.

not establish that the agency's demand was so far in excess of the true value of the case as to be unreasonable. Clearly, a greater discrepancy is required. Senator Bumpers expressed the type of disparity required for an applicant to be successful under this section when he stated that "if the Government sought $1 million to settle the case, and the judge or the jury awarded, for example, $1,000 or $5,000, the defendant should be able to recover his fees." 142 Cong. Rec. S2156 (March 15, 1996) (Statement of Sen. Bumpers). Thus, I do not find that the penalty proposed by the Secretary was excessive.

I also do not find that the penalty proposed by the Secretary was unreasonable when compared with the penalty adjudged. As was stated in the decision, the gravity of the violation and L & T's negligence justified a penalty of $40,000.00. *L & T Fabrication* at 74. The fact that I gave greater weight to some of the other penalty criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), than the Secretary did, does not demonstrate that the Secretary was unreasonable. There is no evidence that the Secretary did not consider all of the penalty criteria in arriving at a penalty; if fact, the *Narrative Findings of Special Assessment* accompanying the citation indicates that she did.

Moreover, it is well established that "[w]hen a civil penalty is filed and Commission jurisdiction attaches, the judge assesses a penalty *de novo*, based upon the statutory penalty criteria and the record evidence developed in the course of the adjudication" and he is not bound by the Secretary's proposal. *Wallace Brothers, Inc.*, 18 FMSHRC 481, 484 (April 1996). Consequently, the fact that the penalty was reduced after hearing does not establish that the Secretary's assessment was unreasonable, only that the judge viewed it differently based on the hearing evidence.

Finally, there is no evidence in this case that the Secretary proposed a $40,000.00 penalty for this violation in an attempt to pressure L & T into a quick settlement.[5] Indeed, in its application, L & T complains that the lowest the Secretary would go when discussing settlement of the case was $32,000.00.

ORDER

I conclude that the penalty proposed by the Secretary was neither substantially in excess of the penalty adjudged in the decision on the case, nor unreasonable when compared with that decision. Accordingly, L & T's Application for Award of Fees and Expenses is **DENIED**.

[5] One of the reasons given for amending the EAJA was so "government attorneys with the advantages and resources of the federal government behind them in dealing with small entities [would] adjust their actions accordingly and not routinely issue original penalties or other demands at the high end of the scale merely as a way of pressuring small entities to agree to quick settlements." *Joint Statement* at S2344.

T. Todd Hodgdon
Administrative Law Judge

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