FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, DC 20001

April 26, 2005

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

BEFORE: Duffy, Chairman; Jordan, Suboleski, and Young, Commissioners

DECISION

BY THE COMMISSION:

This case involves an application for an award of attorney's fees and other expenses by Georges Colliers, Inc. ("GCI"), pursuant to the Equal Access to Justice Act ("EAJA"), 5 U.S.C. § 504, on the grounds that the Secretary of Labor's demands were substantially in excess of the decision of the judge and unreasonable when compared to that decision. The matter was previously before the Commission, which vacated and remanded the decision of the administrative law judge. *Georges Colliers, Inc.*, 26 FMSHRC 1 (Jan. 2004) ("*Georges Colliers I*"), *vacating and remanding* 24 FMSHRC 572 (June 2002) (ALJ) ("*ALJ I*"). On remand, the judge concluded that the penalties proposed by the Secretary were neither excessive nor unreasonable and that, therefore, GCI was not entitled to fees under the EAJA. *Georges Colliers, Inc.*, 26 FMSHRC 371, 376 (Apr. 2004) (ALJ) ("*ALJ II*"). GCI appealed the judge's determination, and the Commission issued a direction for review limited to the issues raised by the judge's remand decision.

I.

Factual and Procedural Background

A. The Mine Act Proceeding

GCI began operations in the early 1990's when it took over three coal mines of two financially troubled Oklahoma coal operators. 26 FMSHRC at 2. In 1998, Craig Jackson became GCI's president. *Id*. A more complete summary of the background facts is found in the judge's decision in the underlying Mine Act proceeding. *Georges Colliers, Inc.*, 23 FMSHRC 1346 (Dec. 2001) (ALJ).

The inspections giving rise to the Mine Act proceeding began in November 1998 and continued until July 2000. *See id.* at 1392-1416. Ultimately, the Mine Act proceeding involved more than 50 dockets that included 559 citations issued between 1998 and 2000.[1] 26 FMSHRC at 2. GCI stipulated with the Secretary to all issues raised by the citations and penalties except whether the amount of the proposed penalty assessments would affect GCI's ability to continue in business. *Id*. Subsequently, a hearing was held on this issue on April 10-12, 2001. *Id.*

After weighing all the penalty criteria and the evidence relating to the effect of the proposed penalties on GCI's ability to continue in business, the judge assessed penalties totaling $72,398, reduced from the Secretary's proposed penalties of $332,701. *Id.* at 1395, 1416. Neither GCI nor the Secretary appealed the judge's decision to the Commission.

B. The EAJA Proceeding ("*ALJ I*")

On January 25, 2001, GCI filed its Application for Fees and Expenses in the amount of $45,019.36, pursuant to 5 U.S.C. § 504(a)(4). 26 FMSHRC at 3; GCI EAJA Appl. at 10. In support of its application, GCI asserted that the Secretary's demands were excessive, as evidenced by the judge's 77% to 80% reductions in the Secretary's proposed penalties, and unreasonable when compared to the judge's decision.[2] The Secretary opposed the application,

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[1] Also included in the Mine Act proceeding were nine civil penalty assessments issued to three agents of GCI who were charged under section 110(c), 30 U.S.C. § 820(c), for knowingly violating various safety standards. 26 FMSHRC at 2. The violations and penalties associated with these individuals are no longer involved in the EAJA proceeding. *Id.* at 5 n.4.

[2] Section 504(a)(4) of EAJA provides:

> If, in an adversary adjudication arising from an agency action to enforce a party's compliance with a statutory or regulatory requirement, the demand by the agency is *substantially in excess of the decision of the adjudicative officer and is unreasonable when*

stating that GCI did not submit financial information during the penalty assessment phase of the proceeding. Sec. Opp'n to Appl. at 1-2. The Secretary asserted that during subsequent settlement negotiations GCI requested either complete removal of penalties or imposition of nominal penalties, neither of which were permitted under the Mine Act. *Id.* at 2-3. The Secretary further argued that the applicants committed willful violations of the Mine Act and acted in bad faith. *Id.* at 5-8. Finally, the Secretary argued that penalties were not unreasonable when compared with the judge's decision and that demands by the Mine Safety and Health Administration ("MSHA") were not substantially in excess of the penalties assessed. *Id.* at 8-17.

The judge denied the EAJA application on June 14, 2002. 24 FMSHRC at 578. GCI filed a petition for discretionary review of the judge's decision and we granted that petition.

C. The Commission's Decision ("*Georges Colliers I*")

The Commission vacated the judge's decision and remanded the proceeding for further consideration. 26 FMSHRC at 16. The Commission concluded that the judge had applied the incorrect legal test of "substantial justification," rather than evaluating the Secretary's penalty proposals under section 504(a)(4) of EAJA, 5 U.S.C. § 504(a)(4), to determine whether they were excessive and unreasonable.[3] *Id.* at 8-9. On remand, the Commission instructed the judge to determine whether the Secretary's proposed penalties were "substantially in excess" of the penalties finally assessed in the Mine Act proceeding. *Id.* at 9-10. The Commission further instructed the judge to consider whether the government's demand was reasonable when compared with the judge's decision in the Mine Act proceeding. *Id.* at 10-11. Guided by its decision in *L & T Fabrication & Constr., Inc.*, 22 FMSHRC 509 (Apr. 2000), the Commission stated that, in examining the reasonableness of the Secretary's demand, a judge must ascertain whether she matched the penalties "to the actual facts and circumstances [of] the case." *Id.* at 11 (citation omitted). The Commission directed the judge on remand to consider whether the Secretary responded to GCI's submission of financial data indicating whether GCI's payment of the proposed penalties would have affected its ability to remain in business. *Id.* at 14. Finally,

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> *compared with 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. . . .

5 U.S.C. § 504(a)(4) (emphasis added). The term "demand" is defined as "the express demand of the agency which led to the adversary adjudication." 5 U.S.C. § 504(b)(1)(F).

[3] The Commission noted that this proceeding involved only the second claim presented to it under the 1996 amendments to EAJA, the first claim being one decided by the Commission in *L & T Fabrication & Constr., Inc.*, 22 FMSHRC 509 (Apr. 2000). 26 FMSHRC at 8.

the Commission instructed the judge, in the event that he determined the proposed penalties were excessive and unreasonable, to examine whether GCI committed willful violations or acted in bad faith, or whether special circumstances made an award unjust. *Id.* at 15.

D. The Judge's Decision on Remand ("*ALJ II*")

In his decision, the judge initially addressed whether, under the Commission's decision in *L & T Fabrication*, the proposed penalties were substantially in excess of the amounts ultimately imposed. 26 FMSHRC at 372. He noted that he ultimately reduced the proposed penalties by 78% but that "more than the reduction and the proposed assessments must be considered." *Id.* at 373. He further stated that he had to consider the context in which the penalty proposals arose and were litigated, noting that the Secretary reduced her proposed penalties by 50% following GCI's submission of documentary evidence concerning its financial status. *Id.* With regard to the settlement offer, the judge noted that he had refused to rely on "undocumented" settlement offers in his prior decision, but that on remand there was no question that the Secretary had made the offer, as evidenced by GCI counsel's letter rejecting the offer. *Id.* at 374 n.5. Considering the settlement offer, the judge concluded that the government's "demand" was reduced by 43%, which did not establish a substantial disparity between the demand and the final assessments. *Id.* at 373-74. The judge reiterated a finding from his prior decision that the Secretary did not propose onerous penalties in order to extract a speedy settlement. *Id.* at 374. The judge concluded that the proposed penalties were not substantially in excess of the assessed penalties. *Id.*

In addition to finding that the proposed assessments were not substantially in excess of the assessed penalties, the judge addressed whether the proposed penalties were reasonable. *Id.* The judge reviewed GCI's submission of financial data during the penalty proposal process and the Secretary's response to determine whether the Secretary acted reasonably in proposing a penalty reflective of "the actual facts and circumstances of the case." *Id.*, quoting *L & T Fabrication*, 22 FMSHRC at 514. Then, the judge examined the procedures in the Secretary's *Program Policy Manual* ("*PPM"*), which set out a process that provides an operator the opportunity to submit financial data to MSHA to determine whether proposed penalties should be reduced. 26 FMSHRC at 374. The judge noted that, by letter dated June 27, 2000, GCI submitted financial data and requested that MSHA review the company's financial status with regard to three citations and all other outstanding proposed assessments. *Id.* at 374-75. The judge found that the letter was timely with respect to only a few of the proposed assessments. *Id.* at 375. The judge further found that there was no evidence that MSHA's Assessment Office responded, as required by the *PPM*. *Id.* However, the judge concluded that the Secretary followed the "spirit" of the *PPM* by reviewing the data and proposing a 50% reduction in the proposed penalties in a settlement offer. *Id.*

In sum, the judge concluded that the Secretary's offer to settle represented a reasonable effort to match the penalties to the facts and circumstances and that the offer was a logical and efficient way for the Secretary to respond. *Id.* The judge noted that, while the Secretary's

reduction was not as great as the reduction he ordered, he had the benefit of sworn hearing testimony that was unavailable to the Secretary and that he had to consider other penalty criteria. *Id.* at 375-56. For these reasons, the judge concluded that the penalties the Secretary "effectively" proposed were reasonable. *Id.* at 376.

Finally, the judge addressed whether GCI should be denied an award because it committed willful violations or acted in bad faith. *Id.* at 376 n.7. The judge rejected the Secretary's position that the number of unwarrantable and significant and substantial (S&S) violations, in addition to its history of prior violations, was evidence of "willful . . . bad faith actions." *Id.* The judge further noted that GCI counsel's conduct did not make an award unjust because she used the hearing to make her case that GCI's financial condition warranted larger penalty reductions than the Secretary was prepared to offer. *Id.* The judge concluded that counsel's "conduct was not such as to bar an otherwise valid award." *Id.*

II.

Disposition

GCI initially argues that the proposed penalties of $332,701 were substantially in excess of the assessed penalties, totaling $72,398 – a reduction of 78%. GCI Br. at 4. GCI further argues that the Secretary's adherence to the proposed penalties, in light of GCI's financial hardship, was unreasonable. *Id.* at 3-6. GCI asserts that it was instructed to send financial documents to MSHA but that the agency never responded. *Id.* at 7-8. GCI asserts that it should not be barred from fees for committing willful violations because it was never charged under section 110(d) of the Mine Act, 30 U.S.C. § 820(d).[4] *Id.* at 11-12. GCI continues that it did not act in bad faith, either in its conduct giving rise to the violations or in its conduct during litigation. *Id.* at 13. Finally, it asserts that there are no special circumstances that would justify the denial of an award, noting particularly that it would have accepted a settlement offer reducing the proposed penalties by 50% had the Secretary made such an offer. *Id.* at 13-14.

The Secretary asserts that her demand in this proceeding was not excessive and that the judge correctly considered the Secretary's 50% settlement offer as her demand. S. Br. at 16-17. The Secretary argues that substantial evidence supports the judge's finding that the Secretary made a settlement offer of 50% of the proposed penalties. *Id.* at 20-25. The Secretary further argues that the penalty proposals were reasonable. *Id.* at 26-33. The Secretary asserts that the procedures in the *PPM* are not binding on her, and, even if they were, she was not required to reduce the proposed penalties based on the financial information submitted by GCI. *Id.* at 33-34. The Secretary also contends that GCI failed to comply with the procedures in the *PPM* and, alternatively, that GCI submitted financial data to MSHA through an informal procedure and that the Secretary responded to her consideration of that data with the settlement offer. *Id.* at 34-37.

[4] Section 110(d) provides for criminal sanctions for, inter alia, "[a]ny operator who willfully violates a mandatory health or safety standard." 30 U.S.C. § 820(d).

The Secretary concludes by contending that special circumstances make an award unjust and supports her position by pointing to the extensive number of citations and GCI's conduct during litigation of the case. *Id.* at 42-46. The Secretary argues that this proceeding is the type of case that Congress meant to exclude from an EAJA award. *Id.* at 42. The Secretary continues that, because GCI's conduct reflects an attitude that it could repeatedly violate safety and health standards with impunity because of its financial condition, the case embodies the special circumstances that preclude an EAJA award. *Id.* at 44.

In disposing of GCI's EAJA application, we begin by noting that there are three issues before the Commission: whether the Secretary's penalty proposals were substantially in excess of the decision of the administrative law judge; whether the proposed penalties were unreasonable when compared with the judge's decision; and whether special circumstances make an award unjust. *See George Colliers I*, 26 FMSHRC at 8-15; *ALJ II*, 26 FMSHRC at 372-76 & n.7. GCI must prevail on whether the proposed penalties were both excessive and unreasonable when compared to the judge's final decision. If GCI prevails on those two issues, it still must prevail on the issue of whether special circumstances would make an award of fees unjust.[5]

A. Special Circumstances Make an Award Unjust

In *Georges Colliers I*, the Commission noted that GCI committed 559 violations that repeatedly endangered the lives and safety of its miners, including 272 violations stipulated to be S&S, and that 39 violations were the result of its unwarrantable failure. 26 FMSHRC at 15. On remand, the judge stated, "[W]ere I required to rule, I would reject the Secretary's argument that the stipulated number of violations . . . evidence GCI's 'willful . . . bad faith actions.'" 26 FMSHRC at 376 (citations omitted). Thus, the judge reviewed the violations to determine whether GCI acted willfully or in bad faith; however, he did not consider GCI's pattern of violations in relation to the special circumstances exception. In examining GCI's conduct, we conclude that the judge considered GCI's history of violations too narrowly.

Section 504(a)(4) of EAJA states that a party who has been subjected to an excessive and unreasonable government demand is entitled to fees and expenses related to defending against the demand "unless the party has committed a willful violation of the law or otherwise acted in bad faith, or special circumstances make an award unjust." 5 U.S.C. § 504(a)(4). While the 1996 amendments were designed to prevent the government from issuing a high demand as a way of pressuring small entities to agree to quick settlements, Congress also wanted "to ensure that the government is not unduly deterred from advancing its case in good faith." 142 Cong. Rec. S3242, S3244 (1996) (statement of Senator Bond). One way in which Congress did this was to exclude an award when special circumstances are present. *Id.* These special

[5] Nothing in the analytical framework of section 504(a)(4) dictates that these issues enumerated must be addressed sequentially as they appear in the statute. *See L & T Fabrication*, 22 FMSHRC at 515 (Commission disposed of an application on the basis that the Secretary's penalty proposal was not unreasonable without resolving whether the proposal was excessive).

circumstances "are intended to include both legal and factual considerations which may make it unjust to require the public to pay attorneys fees even in situations where the ultimate award is significantly less than the amount demanded."[6] *Id.* "Special circumstances could include instances where the party seeking fees engaged in a flagrant violation of the law, endangered the lives of others, or engaged in some other type of conduct that would make the award of fees unjust." *Id.*

The special circumstances exception in section 504(a)(4) has its genesis in 5 U.S.C. § 504(a)(1) and 28 U.S.C. § 2412(d)(1)(A). Section 504(a)(1) provides that, in an administrative adjudication, a party that prevails in an action brought by the agency shall be awarded fees and other expenses "unless . . . the position of the agency was substantially justified or that special circumstances make an award unjust." 5 U.S.C. § 504(a)(1). Section 2412(d)(1)(A) provides for an identical special circumstances exception to a fee award in proceedings in federal court when a party prevails over the government and the position of the government is not substantially justified. 28 U.S.C. § 2412(d)(1)(A). These sections, which predated the passage of the 1996 amendments to EAJA and apply only to prevailing parties, offer additional guidance to the meaning and application of the special circumstances exception in section 504(a)(4).

The House Report that accompanied EAJA, when it was enacted in 1980, stated the following with regard to the special circumstances exception to awards to prevailing parties in section 504(a)(1) and section 2412(d)(1)(A):

> Furthermore, the Government should not be held liable where "special circumstances would make an award unjust." This "safety valve" helps to insure that the Government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts. *It also gives the court discretion to deny awards where equitable considerations dictate an award should not be made.*

H.R. Rep. No. 96-1418, at 11 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4953, 4990 (emphasis added).

Several courts have addressed whether prevailing parties were precluded from recovering fees under the special circumstances provision in 28 U.S.C. § 2412(d)(1)(A). In *Oguachuba v. INS.*, 706 F.2d 93, 99 (2nd Cir. 1983), the court denied fees to an applicant who successfully challenged his incarceration by the Immigration and Naturalization Service ("INS"), stating, "In viewing applications for such awards in the context of general equitable principles, we are not required to limit our scrutiny to a single action or claim on which the applicant succeeded but

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[6] In his remarks, Senator Bond also stated: "Since there will not be a conference report on [EAJA], this statement and a companion statement in the House should serve as the best legislative history of the legislation as finally enacted." 142 Cong. Rec. S3242.

must view the application in light of all the circumstances." The court was particularly influenced by the fact that, although the applicant had successfully won his release from the INS through a habeas corpus action, he had repeatedly violated U.S. immigration laws prior to his incarceration. *Id.* The court concluded, "In classic equity terms, Oguachuba is without clean hands." *Id.*

In analyzing special circumstances under section 2412(d)(1)(A), another court has commented that the "theme of 'unclean hands' pervades the jurisprudence of 'special circumstances' under EAJA." *Air Transport Assoc. of Canada v. FAA*, 156 F.3d 1329, 1333 (D.C. Cir. 1998). *See also U.S. Dept. of Labor v. Rapid Robert's, Inc.*, 130 F.3d 345, 347-49 (8th Cir. 1998) (court denied attorney's fees to a prevailing party that committed statutory violations but was relieved of paying penalties because the agency's implementing regulations were invalidated); *Taylor v. U.S.*, 815 F.2d 249, 252-54 (3rd Cir. 1987) (court denied attorney's fees to a prevailing party who took advantage of government misconduct that he later successfully challenged and that became the basis for his EAJA claim).

Here, GCI committed 559 violations involving penalties that were at issue in the Mine Act proceeding. In addition, GCI had committed over 384 violations during the 2-year period prior to the proceeding that gave rise to the EAJA application. 23 FMSHRC at 1391. The judge concluded that this was "a large history" for a small operator. *Id.* at 1392. In the Mine Act proceeding, 272 of the 559 violations were stipulated to be S&S, and 39 of the violations were stipulated to be due to GCI's unwarrantable failure. In addition, there were nine citations in which supervisory agents of GCI were found to have knowingly engaged in violations of standards. *Id.* at 1356-86.

We conclude that GCI's record of violations brings this proceeding well within the special circumstances exception to section 504(a)(4). GCI's conduct reflects "flagrant violation[s]" of the Mine Act over an extended period that resulted in numerous violations that frequently "endangered the lives" of its miners, as evidenced by the S&S designations of a substantial number of citations. In short, GCI's conduct is the type of misconduct that Congress deemed sufficient to disqualify an applicant from an award.

Further, based on the traditional equitable principles that courts have applied to the special circumstances exception to deny fees to prevailing parties under 28 U.S.C. § 2412(d)(1)(A), denial of fees in this proceeding is further warranted because GCI, like the applicant in *Oguachuba v. INS*, 706 F.2d at 99, has "unclean hands." We note in particular GCI's extensive history of violations associated with this proceeding set forth above.

Finally, in weighing the equities in this proceeding, we can consider the nature and consequence of GCI's success in the underlying Mine Act proceeding. *See Rapid Robert's*, 130 F.3d at 349. In the merits proceeding, GCI's litigation strategy was to stipulate to the violations charged and to all the penalty criteria in section 110(i), 30 U.S.C. § 820(i), while preserving only its position to contest its ability to pay the proposed penalties and continue in business. 23

FMSHRC at 1351. Ultimately, upon considering the economic defense with the other penalty criteria, the judge reduced the proposed penalties by 78%. The court's comments on an applicant in similar circumstances in *Rapid Robert's* is instructive:

> Here, the district court relieved Rapid Robert's of over seven times the amount of penalties which actually resulted from the invalidated regulations. Rapid Robert's has reaped a windfall by escaping its duty to pay for clear violations of a valid statute. To add to that windfall by requiring the government to pay attorneys' fees and expenses would be patently unjust.

130 F.3d at 349. *Compare U.S. v. One 1997 Toyota Land Cruiser*, 248 F.3d 899, 906 (9th Cir. 2001) (under 28 U.S.C. § 2412(d)(1)(D), the judicial counterpart to section 504(a)(4), the court, in remanding for a determination of the existence of willful violations, bad faith, or special circumstances, noted that the fee applicant "has not been charged with any illegality, and she has asserted an 'innocent owner' defense"). But for its economic circumstances, GCI should justly have been held accountable for a much greater penalty, having made no allegations of its own innocence or the oppressive or abusive government conduct EAJA intended to address. We thus conclude that to grant GCI fees in the circumstances of this case would create a "windfall," as well, and that therefore we deny GCI's request for fees and costs.[7]

In *Georges Colliers I,* we established that in order to recover fees, an operator must show that the Secretary's demand was both excessive *and* unreasonable. We now address those two issues in order. While denial of GCI's EAJA application could rest solely on our determination of the special circumstances exception, the judge's decision on remand in *ALJ II*, in light of our decision in *Georges Colliers I*, merits our further consideration.

B. Whether the Proposed Assessments Were Excessive

On remand, the judge concluded that there was not a substantial disparity between the Secretary's demands and the final penalty assessments. 26 FMSHRC at 373-74. In reaching that conclusion, the judge relied on a settlement offer from the Secretary, which purportedly reduced the original assessments by 50%. *Id.* GCI appealed the judge's decision because it contends that the judge should not have relied on the 50% settlement offer. PDR at 2-6.

[7] In light of our disposition that fees be denied because of special circumstances in the proceeding, we do not reach the issues of whether GCI acted in bad faith or engaged in willful violations.

In addressing whether the Secretary's demand was substantially[8] in excess of the penalty imposed in *Georges Colliers I*, the Commission noted that the test for evaluating the demand "should not be a simple mathematical comparison." 26 FMSHRC at 7, quoting *Joint Managers Statement of Legislative History and Congressional Intent*, 142 Cong. Rec. S3242, S3244 (Mar. 29, 1996) ("*Joint Statement*"). Further, consistent with this intent, the Commission has held that whether an applicant meets the "substantially in excess" test will depend on the facts and circumstances of each case. *L & T Fabrication*, 22 FMSHRC at 514. Finally, the Commission has considered it significant whether "the Secretary proposed an onerous penalty in order to extract a speedy settlement" because that was one of the agency practices that EAJA was designed to redress. 26 FMSHRC at 10.

In considering whether the Secretary's demand was substantially in excess of the decision of the judge, we must first identify the Secretary's "demand." In *Georges Colliers I*, the Commission rejected consideration of the Secretary's purported 50% settlement offer because, like the judge (24 FSMHRC at 576-77), the Commission was "understandably reluctant 'to delve into [the parties'] settlement discussions,' particularly given the lack of 'an undisputed, fully documented settlement proposal.'" 26 FMSHRC at 14 n.21.[9] In addition, the Commission further noted the statutory definition of "demand" at 5 U.S.C. § 504(b)(1)(F) (defining "demand" as the "express demand of the agency which led to the adversary adjudication"), and the lack of any written revised penalty proposals from the Secretary. 26 FMSHRC at 14 n.21

Notwithstanding the Commission's rejection of any consideration of settlement-related material in *Georges Colliers I*, the judge relied on the letter from GCI's counsel to the Secretary's counsel in which she refers to "the Secretary [sic] last offer to settle at the rate of fifty percent (50%)." PDR, Ex. A. The judge's consideration of this letter was in error. The Commission's prior disposition of consideration of settlement-related materials constitutes the law of the case. *See Douglas R. Rushford Trucking*, 24 FMSHRC 648, 652 (July 2002). In fact, the Secretary relied on the same letter from GCI's counsel with no docket numbers and a reference to a "ruling" from Judge Melick (rather than Judge Barbour, who presided over the Mine Act proceeding) that was before the Commission in *Georges Colliers I*.[10] *See* Sec. Opp'n

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[8] In *L & T Fabrication*, the Commission held that "substantially" when used in the phrase "substantially in excess," means "[c]onsiderable in amount, value or the like; large." 22 FMSHRC at 514 n.5 (citation omitted).

[9] The Commission's refusal to consider the purported settlement offer in *Georges Colliers I* was in connection with the reasonableness of the penalties. *Id.* at 14. However, the rationale for not considering the settlement offer in relation to the reasonableness of the offer applies with equal force to our consideration of whether the Secretary's demand was excessive.

[10] The Secretary's brief addresses the Commission's consideration of GCI's letter and whether it reflected a 50% offer as a substantial evidence question. S. Br. at 21-25. This is the sort of evidentiary review of settlement discussions that the Commission was trying to avoid in

to Appl. at 12, 15. There has been no legal or factual change in the proceeding that would warrant revisiting this issue. In short, in agreement with GCI, we conclude that the judge's consideration of the letter (26 FMSHRC at 373-374 & n.5) was in error. Any examination of the Secretary's "demand," in the circumstances of this case, should be limited to her proposed penalty assessments and those actually imposed by the judge.[11]

The instant proceeding presents an initial demand that was reduced by 78% by the judge's decision. In addition to this mathematical comparison of the Secretary's demand and the judge's decision, our analysis also includes an examination of the facts and circumstances surrounding the penalty proposals. The judge found and we agree that there is no evidence of inappropriate motivation on the part of the Secretary in proposing an initially high demand to extract a speedy settlement. 26 FMSHRC at 374. In this regard, we cannot conclude that the proposed penalties, totaling $332,701, were onerous. While the demand figure on its face is large, it represents the cumulative penalties for 559 violations accumulated over a period of 2 years.

The Secretary further argues that the Commission should look at the proposed penalty assessments individually, rather than at the total assessed penalties. S. Br. at 17-18. Examining the proposed penalties in individual dockets presents a different, but more representative, picture than does examining the penalties *in toto*. As the Secretary indicates, more than half of the citations involve penalties at the lowest level – $55 – permitted by the regulations, 30 C.F.R. § 100.4. Our examination of the total penalties has been largely driven by the fact that GCI has not sought fees for challenging penalties for individual citations. *See* GCI EAJA Appl. at 5-6. This approach was borne out of the circumstances of the underlying Mine Act proceeding in

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Georges Colliers I. While the Secretary suggests that GCI's position that the letter should not be considered is based on "[s]nippets of legislative history" (S. Br. at 26) (citation omitted), the Commission's approach to this issue in *Georges Colliers I* was based on the statutory definition of "demand" in 5 U.S.C. § 504(b)(1)(F) and sound policy reasons for not delving into parties' settlement discussions. *See* 26 FMSHRC at 14 n.21.

[11] The Secretary reiterates an argument, which was considered and rejected in *Georges Colliers I*, that the Commission should compare the penalties proposed by the Secretary ($332,701) to the maximum amounts that the Secretary was authorized by regulation to impose ($31,045,000), rather than to the penalties actually imposed by the judge ($72,298). S. Br. at 18-20 & n.6. However, the Commission considered and rejected that issue in *Georges Colliers I.* "[T]he judge erred when he compared the proposed penalties to the maximum permissible penalty. The benchmark should have been the penalties that the judge finally imposed – a figure that was substantially lower than the dollar amount he used." 26 FMSHRC at 9, citing *L & T Fabrication*, 22 FMSHRC at 514-15. Indeed, the statute is clear on this point: "the demand by the agency is substantially in excess of the decision of the adjudicative officer." 5 U.S.C. § 504(a)(4).

which GCI raised a single global defense to all of the citations issued against it.[12] 23 FMSHRC at 1351. The Secretary responded to GCI's position by initially addressing, in the EAJA proceeding, "the total proposed penalty assessments." S. Br. (*Georges Colliers I*) at 18. Notwithstanding the Commission's prior focus on the total penalties, it is also appropriate to examine individual penalty amounts. Based on our review of the individual penalties proposed at the $55 level, we conclude, for this additional reason, that those penalties are not onerous and thus do not reflect an attempt by the Secretary to propose a high penalty in order to push GCI to settlement.[13]

In sum, based on the foregoing considerations, we conclude that the Secretary's penalty proposals, when compared to the judge's decision, were not excessive and that, for this reason, GCI's EAJA application should also be denied.

C. Whether the Proposed Assessments Were Reasonable

In *Georges Colliers I*, the Commission remanded to the judge the determination whether the proposed penalties were unreasonable. More particularly, the Commission instructed the judge to determine whether the Secretary sufficiently considered evidence of GCI's ability to continue in business in light of the proposed penalties. 26 FMSHRC at 14. On remand, the judge found that GCI had not fully complied with the procedures in MSHA's *PPM* in submitting financial data; nevertheless, the judge further found that the Secretary followed the spirit of the *PPM* by responding with a settlement offer to reduce the penalties by 50%. 26 FMSHRC at 375. On appeal, GCI objects to the judge's consideration of GCI's letter that purportedly rejected the Secretary's settlement offer to reduce the proposed penalties in the merits proceeding by 50%. PDR at 5-8.

The judge again relied on the same GCI letter that was discussed in relation to whether the Secretary's demand was excessive. That reliance is equally misplaced in this prong of his analysis. Indeed, the Commission in *Georges Colliers I* directly addressed consideration of the purported settlement offer in relation to the Secretary's response to GCI's submission of financial data under the *PPM*. *See* 26 FMSHRC at 14 n.21. The Commission stated: "'The EAJA defines 'demand' as a static concept and not one that metamorphoses over the course of settlement negotiations.' Accordingly, the lack of any written revised demand from MSHA dictates that the

[12] The individual citations, proposed penalties, and penalties that were finally assessed by the judge after considering GCI's economic defense are fully set out in the Mine Act proceeding. 23 FMSHRC at 1398-1416.

[13] As we have noted above, our examination of individual penalties is made more complicated by a consolidated docket with multiple citations. Nevertheless, in *Georges Colliers I*, in analyzing whether the Secretary had made a reasonable effort to match the penalty to the facts and circumstances of the case, the Commission examined the process followed by the Secretary in each docket in her Petition for Assessment of Penalty. 26 FMSHRC at 11 & n.13.

judge only consider the proposed penalty assessments issued by MSHA." *Id.* As noted above, the Commission's prior disposition of this issue is the law of the case.[14]

Once consideration of the GCI letter is eliminated from analysis of the reasonableness of the Secretary's actions, it is not apparent that the Secretary responded in any other way to GCI's financial information. The lack of documentation to indicate that the Secretary, at least, considered the financial information is contrary to the spirit of the Secretary's rules and guidelines. In this regard, 30 C.F.R. § 100.3(h) provides that "[i]t is initially presumed that the operator's ability to continue in business will not be affected" by the penalty assessments. It is apparent, then, that the *PPM* provides the *only* procedure by which operators can submit this financial information to MSHA because the rules are otherwise silent as to the process for transmitting this information.[15]

In defense of her position, the Secretary argues that the *PPM* is not binding on her. We must note, however, that the Secretary's own regulations stipulate that an operator's ability to continue in business is presumed unless the operator submits evidence to the contrary. Upon such a submittal, the Secretary may, within her discretion, adjust the penalty. 30 C.F.R. § 100.3(h). When the Secretary establishes a procedure directing operators to submit financial information in support of a request for a mitigation of civil penalties, she should respond, even if the response is a rejection of the request.

Nothing required the Secretary to make an adjustment, and the operator's representation that it would be unable to pay even a token amount calls into question whether the Secretary would have been able to make any meaningful adjustment in the penalty without compromising her responsibility to ensure that appropriate penalties are imposed for profligate and serious violations of the Mine Act. Given the circumstances of this case, we understand the Secretary's reluctance to grant concessions to GCI. Nevertheless, the Secretary should have made a reasoned determination to that effect and communicated it to the operator. Indeed, one might view her failure to respond as an arbitrary and capricious disregard of a relevant penalty criterion under different circumstances.

By the time the parties went to trial in the Mine Act proceeding they had stipulated to all issues related to the violations and proposed penalties *except* whether GCI's payment of the

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[14] This is not to say that the Commission can never consider a settlement offer in determining the reasonableness of the Secretary's demand. Rather, on the record in this proceeding, including the lack of any definitive settlement offer from the Secretary that clearly pertains to the dockets before the Commission, consideration of the parties' settlement negotiations is clearly inappropriate.

[15] The Secretary asserts, and GCI does not disagree, that GCI timely submitted financial information in only five of the 55 dockets. S. Br. at 34-35. *See also ALJ II*, 26 FMSHRC at 374-75.

penalties would affect its ability to continue in business. Further, the judge's assessment of penalties in his decision focuses primarily, if not entirely, on this element of section 110(i), 30 U.S.C. § 820(i), in reducing the Secretary's proposed penalties in light of the parties' stipulations. 23 FMSHRC at 1398-1416. In these circumstances, the Secretary's failure to formally respond – either by a written settlement offer, revised penalties or by a letter rejecting mitigation of penalties – is at her peril in light of her potential EAJA liability. As the Commission noted in remanding this issue to the judge in *Georges Colliers I*,[16] the issue is to determine "whether [the Secretary] made 'a reasonable effort [here] to match the penalty to the actual facts and circumstances of the case.'" 26 FMSHRC at 14, quoting *L & T Fabrication*, 22 FMSHRC at 515-16.

In light of the Commission's decision in *Georges Colliers I*, the judge's clear error in considering GCI's letter, and the absence of any other evidence indicating that the Secretary responded to GCI's showing of financial hardship, we conclude that, while the Secretary's proposed penalty may not be deemed unreasonable in comparison with the judge's final decision, the Secretary did not act reasonably by failing to respond to the operator's request for an adjustment of the proposed penalties. However, given our prior disposition of the special circumstances exception and whether the penalties were excessive, our conclusions with regard to reasonableness do not change the outcome of this proceeding. We only intend our discussion to indicate what criteria we might apply were the circumstances different from those presented in this case, and because the reasonableness issue was remanded to the judge in *Georges Colliers I*.[17]

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[16] In *Georges Colliers I*, the Commission noted that the file in each docket indicated that the Secretary made a reasonable effort to match the penalty to the facts and circumstances of each citation when she initially issued her assessments. 26 FMSHRC at 11 & n.13. However, the central issue in this proceeding is the nature of the Secretary's response to GCI's submission of financial data that indicated GCI would be unable to continue in business if it paid the full amount of the penalty assessments. *Id.* at 11. Of course, it was not incumbent on the Secretary to lower the proposed penalties but rather to show that she had, at the least, considered the financial information in relation to the violations and the proposed penalties.

[17] While the Secretary erred by not providing a determinative response to GCI's economic hardship submission, nonetheless GCI's failure to timely follow the established procedure in most of these dockets constitutes a mitigating factor that would preclude a finding that the Secretary acted unreasonably in those cases.

III.

Conclusion

We affirm the judge's denial of the request for fees and expenses and dismiss the EAJA application for the reasons stated above.

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Stanley C. Suboleski, Commissioner

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