FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
SUITE 9500
WASHINGTON, DC 20001

January 16, 2004

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

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

DECISION

BY: Duffy, Chairman; Beatty, Suboleski, and Young, Commissioners

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 et seq. GCI's application followed the decision in *Georges Colliers, Inc.*, 23 FMSHRC 1346, 1392-1416 (Dec. 2001) (ALJ), in which Administrative Law Judge David Barbour assessed penalties of $72,298 for numerous violations of the Federal Mine Safety and Health Act of 1977, 30 U.S.C § 801 et seq. (1994) ("Mine Act" or "Act"). The Department of Labor's Mine Safety and Health Administration ("MSHA") had proposed penalties of $332,701. Thereafter, GCI filed an application for fees and expenses on the grounds that the penalties proposed by MSHA were substantially in excess of the penalties assessed by the judge and unreasonable when compared to the judge's decision. The application for fees and expenses was denied by the administrative law judge. 24 FMSHRC 572, 578 (June 2002) (ALJ). For the reasons that follow, we vacate the judge's decision and remand this proceeding for further consideration consistent with our analysis.

I.

Factual and Procedural Background

A. The Mine Act Proceeding

GCI began operations when it took over the three eastern Oklahoma coal mines of two financially troubled companies, P&K and HMI. 23 FMSHRC at 1352. P&K and HMI had sought financial assistance from a Chicago investment firm, Heller Financial, Inc. *Id.* Heller acquired the assets of P&K and HMI and formed GCI to own and operate the mines that were formerly owned by the companies. *Id.* In 1998, Craig Jackson, whom Heller had hired to help in improving GCI's profitability, became its president. *Id.* at 1352-53.

Between 1998 and 2000, MSHA issued to GCI approximately 550 citations and orders. In addition, there were nine civil penalty assessments issued against three agents of GCI who were charged under section 110(c), 30 U.S.C. § 820(c), for knowingly violating the Mine Act. *Id.* at 1351. Ultimately, more than 50 dockets were consolidated in the Mine Act proceeding.

With the exception of the dockets involving liability of the individual agents under section 110(c), the Secretary and GCI stipulated to all issues other than whether the amount of the proposed penalty assessments would affect GCI's ability to continue in business.[1] *Id.* Thereafter, a three-day hearing was held on the citations and penalties under section 110(c) and on the issue of whether the proposed penalties arising from the citations and orders issued to GCI would affect its ability to continue in business. *Id.* at 1350-51. The judge found the three individuals liable under section 110(c) for most of the violations charged. *Id.* at 1355-86. The judge reduced their proposed penalties from $18,900 to $3,300. *Id.* at 1395-98.

With regard to GCI, the judge noted that the operator presented extensive evidence on the effect of the proposed penalties on its ability to continue in business. *Id.* at 1389. The judge

[1] Section 110(i) sets forth six criteria to be considered in the assessment of penalties under the Act, including the operator's ability to pay the proposed penalty and stay in business:

> [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] *the effect on the operator's ability to continue in business*, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i) (emphasis added). *See Sellersburg Stone Co.*, 5 FMSHRC 287, 290-94 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984).

relied on the testimony of GCI's president, Craig Jackson, whom the judge found to be "an articulate and forthright witness," and documentary evidence submitted at trial. *Id.* at 1389-90. The judge found that, by the second quarter of 1997, it became apparent that GCI was unable to meet principal and interest payments on its loan to Heller. *Id.* at 1389. The judge further noted that, in 1998, the amount of Heller's loan to GCI was $13.5 million, while the book value of its assets was between $8 and $9 million. *Id.* Finally, he found that, by July 2000, GCI was no longer actively involved in mining and had cut back its work force from 50 miners to between 12 and 15 miners who performed reclamation work so Heller could avoid incurring a significant environmental liability. *Id.* Based on these findings, the judge concluded that GCI's condition was "precarious" and that imposition of the proposed penalty assessments would adversely affect its ability to continue in business. *Id.* at 1390. After weighing all the penalty criteria, the judge assessed penalties totaling $72,298, reduced from the Secretary's proposed penalties of $332,701. *Id.* at 1398-1416.

Neither GCI, the Secretary, nor the section 110(c) agents appealed the judge's decision to the Commission.

B. The EAJA Proceeding

On January 28, 2002, the Commission received from GCI an Application for Fees and Expenses on behalf of itself and its agents requesting reimbursement in the amount of $45,019.36.[2] GCI Appl. at 9, GCI Amended Appl. at 1. In support of its application, GCI asserted that the Secretary's demands were excessive, resulting in 77 to 80 percent reductions by the judge in the Secretary's proposed penalties. GCI Appl. at 5-6. GCI further alleged that the Secretary failed to consider that the company was small and insolvent and that the proposed penalties would affect its ability to continue in business. *Id.* at 7-9.

The Secretary opposed the application, 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 stated that, during subsequent settlement negotiations, GCI requested either complete revocation 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 GCI 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 the demands were not substantially in excess of the penalties assessed. *Id.* at 8-17.

In ruling on the application, the judge reviewed the different bases for recovery under the EAJA. He noted that an EAJA application may be granted "where the government's demand is 'substantially in excess' of the relief awarded, that is where the demand is unreasonable when

[2] GCI initially sought fees and expenses totaling $72,495, GCI Appl. p. 9, but submitted an amended application with reduced fees and expenses because it had included fees arising out of a separate proceeding, *Georges Colliers, Inc.*, 23 FMSHRC 822 (Aug. 2001).

compared with the relief awarded." 24 FMSHRC at 574 (citations omitted). In examining MSHA's proposed penalties, the judge stated that they represented the agency's ultimate position prior to litigation. *Id.* He found that the proposed penalties were the result of applying the regulations governing assessments, and that there was nothing in the record to indicate that in computing the penalties the Secretary did anything other than "faithfully follow and properly apply the regulations." *Id.* at 574-75. In responding to GCI's contention that the Secretary did not properly consider the effect of the proposed penalties on its ability to continue in business, the judge found that the record did not reveal that during the penalty proposal process GCI brought to MSHA's attention all of the financial documents and the statements of its president that the judge found persuasive during the hearing. *Id.* at 575. Further, the judge found that the proposed penalties did not seem excessive when compared to the statutory limits in the regulations. *Id.* Therefore, the judge concluded that MSHA's proposed penalties issued to GCI and its agents were substantially justified. *Id.*

The judge next addressed whether MSHA's litigation positions were reasonable. *Id.* at 576-77. He noted that it is the judge's duty to assess penalties de novo based on statutory criteria and that the amounts ultimately assessed reflect the exercise of his discretion. *Id.* at 576. Here, the judge found that he had reduced the proposed penalties between 77.5 and 80.84 percent. *Id.* He rejected the parties' invitation to review their settlement discussions, determining rather to judge the reasonableness of the Secretary's position by whether what was revealed at trial was known, or reasonably should have been known. *Id.* at 577. The judge concluded that it was not unreasonable for the Secretary to pursue the proposed penalties and that she could not have anticipated his credibility determinations. *Id.* The judge, therefore, denied the EAJA application. *Id.* at 578.

C. Petition for Review

On June 14, 2002, the administrative law judge issued his decision on the EAJA application. *Id.* at 572. GCI filed a petition for review with the Commission on July 19, 2002, some 35 days after issuance of the judge's decision. The Secretary filed an opposition to the petition, arguing that the Commission had no authority to accept a petition filed beyond 30 days after the judge's decision, or to extend the time for filing a petition. Sec. Opp'n to PDR at 3-7.

In response, counsel for GCI stated that she received mail at her home office in a bank of mail boxes and that it was possible "that the letter was miss-directed [sic] to another mailbox." GCI Reply to Sec. Opp'n to PDR at 1-2. GCI further argued that due process required timely notice of the judge's decision and that the problem could have been avoided if the decision had been sent by certified mail.[3] *Id.* at 3.

[3] Judges' decisions generally are sent via certified mail, but the judge's decision in this proceeding was sent by regular mail.

On July 24, 2002, the Commission voted to grant GCI's petition for review, with one commissioner voting to deny the petition because it was untimely.

II.

Disposition

GCI initially argues that the judge applied the substantial justification test instead of the two-prong test of whether the government's demand is substantially in excess of the relief awarded and unreasonable when compared to that relief. GCI Br. at 7-8. GCI further argues that, under the Secretary's penalty assessment regulations, it cannot be required to submit financial information prior to receiving the proposed penalty assessment or within 30 days of a proposed assessment prior to filing a notice of contest. *Id.* at 8-10. GCI next argues that the Secretary, in considering the penalties in this proceeding, should have been aware of GCI's financial records submitted in the record of other Mine Act proceedings. *Id.* at 10-11. GCI then contends that the amount of the proposed assessments was excessive when compared to the judge's decision. *Id.* at 11-12. Finally, GCI asserts that the Secretary's proposed assessments were unreasonable when compared to the judge's decision.[4] *Id.* at 12-14.

The Secretary reiterates her position that GCI's petition for review was filed late and that the Commission has no authority to accept it. Sec. Br. at 6-11. The Secretary further argues that, because GCI's petition for review failed to challenge the judge's findings that the proposed penalties were not substantially in excess of those assessed, the Commission must affirm the judge. *Id.* at 12-13. The Secretary challenges GCI's assertion that the judge applied the incorrect test for making an award and that, if he did apply the incorrect legal standard, it was harmless error. *Id.* at 13-16. The Secretary argues that the judge properly found that the Secretary's proposed penalties were not excessive when compared with those assessed by the judge. *Id.* at 16-18. The Secretary further argues that the proposed penalties were not unreasonable when compared with those assessed by the judge. *Id.* at 24-35. Finally, the Secretary argues that the Commission should deny GCI an EAJA award because it committed willful violations of the Mine Act, committed over 500 violations, frequently endangering the health and safety of miners, and acted in bad faith during the litigation of the case. *Id.* at 35-38.

A. Timeliness of GCI's Petition for Review

The time limit for filing an appeal from a judge's decision in an EAJA proceeding is

[4] Although GCI referred to the section 110(c) agents in its petition, PDR at 2, GCI made no argument in its brief to the Commission regarding the individuals. Accordingly, it has abandoned its appeal with regard to those individuals. *See RNS Services, Inc.*, 18 FMSHRC 523, 526 n.6 (Apr. 1996). Thus, in the event that the judge finds that an EAJA award to GCI is appropriate, the charges related to counsel's preparation of her defense of those individuals must be separated from the legal fees submitted by GCI.

governed by Commission Procedural Rule 308(b), 29 C.F.R. § 2704.308(b) (hereafter "EAJA Rule"). That provision states, "[t]he party seeking review shall file a petition for discretionary review so as to be received by the Commission . . . within 30 days of the issuance of the . . . decision by the administrative law judge." 29 C.F.R. § 2704.308(b).

In the instant proceeding, contrary to the Commission's usual practice, the judge's decision was not sent by certified mail. GCI's counsel stated that she did not receive the judge's decision until July 17, 2002, some 33 days after it was issued. GCI Reply to Sec. Opp'n to PDR at 1. Counsel stated that she received mail at a bank of mailboxes at her residence where mail was often incorrectly delivered. *Id.* at 2. GCI's petition was received by the Commission 35 days after issuance of the judge's decision.[5]

The Secretary filed an opposition to GCI's petition for review, arguing that the Commission had no authority under the Mine Act to grant the late-filed petition. Sec. Opp'n to PDR at 3-7. In her brief, the Secretary reiterates her position that the Commission has no authority under the Mine Act to grant a late-filed petition in an EAJA proceeding and, therefore, should vacate its direction for review. Sec. Br. at 6-11.

We disagree with the Secretary's position. At the time that the petition for review was filed, the Commission reviewed the Secretary's arguments and the circumstances surrounding the issuance of the judge's decision. Included in this review was the Commission's inadvertent failure to use certified mail, and the mail delivery problems recounted by GCI's counsel. We note further that section 113 of the Mine Act, 30 U.S.C. § 823, upon which the Secretary relies in large measure to argue that the Commission has no authority to accept the petition (Sec. Opp'n to PDR at 4-7), governs the procedures for filing a petition for discretionary review of a judge's decision in a Mine Act proceeding. This, however, is an EAJA proceeding that is governed by Commission EAJA Rule 308(b). In light of the foregoing, we decline the Secretary's request to vacate the Commission's direction for review.[6]

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[5] GCI's argument that, under Mine Act Rule 8, 29 C.F.R. § 2700.8, it had an additional five days to file because service of the judge's decision was by mail, is incorrect. As Mine Act Rule 7(a), 29 C.F.R. § 2700.7(a), makes clear, service pertains to the obligation of a party to deliver documents to another party when filing with the Commission. EAJA Rule 308(b), as well as Mine Act Rule 70(a), 29 C.F.R. § 2700.70(a), upon which EAJA Rule 308(b) was modeled, is clearly pegged to the judge's "issuance of the decision," rather than a party's filing and service of documents. *Compare* EAJA Rule 301, 29 C.F.R. § 2704.301 (an application for an award or a petition for discretionary review shall be filed and served on all parties).

[6] We do not suggest that in future proceedings we may not strictly apply the time limits specified in the Commission's EAJA rules. We merely hold that, in light of the Secretary's arguments and the unique factual circumstances of this proceeding, we decline to do so here.

B. The EAJA Claim

Section 504(a)(1) of EAJA, which was enacted in 1982, provides that an eligible prevailing party may be awarded attorney's fees and expenses in an adversary proceeding brought by the United States unless the government's position is "substantially justified" or special circumstances make an award unjust. 5 U.S.C. § 504(a)(1). The 1996 amendments to EAJA expanded the basis for recovering fees and expenses to include certain adversary proceedings against private parties where the government's "demand" leading to the proceedings was excessive and unreasonable. EAJA Amendments of 1996, Pub. L. No. 104-121, 110 Stat. 862. Section 504(a)(4), the pertinent portion of EAJA, as amended, 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 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 in part as "the express demand of the agency which led to the adversary adjudication." 5 U.S.C. § 504(b)(1)(F).

The legislative history of the 1996 EAJA amendments is meager. However, the committee report published following the passage of the amendment explains that a party would not be required to prevail in the agency adversary proceeding in order to be eligible to recover fees under section 504(a)(4):

> This subtitle amends the EAJA to allow small entities to recover the fees and costs attributable to a demand by the agency which is excessive and unreasonable under the facts and circumstances of the case. The small entity would not be required to prevail in the underlying action; the final outcome must be, however, to require payment of an amount substantially less than what the agency sought to recover.

H.R. Rep. No. 104-500, at 2 (1996). Floor comments accompanying the passage of the EAJA amendments provide additional guidance in evaluating the government's demand:

> 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.*

Joint Managers Statement of Legislative History and Congressional Intent, 142 Cong. Rec. S3242, S3244 (Mar. 29, 1996) (emphasis added) ("*Joint Statement*").

The Commission has implemented the requirements of EAJA through its special EAJA rules in 29 C.F.R. Part 2704. The standards to be applied in addressing EAJA claims are set forth in 29 C.F.R. § 2704.105. Commission EAJA Rule 105(a) applies to claims of prevailing parties brought under section 504(a)(1) of EAJA, and Rule 105(b) applies to claims that the Secretary's demand was excessive and unreasonable under section 504(a)(4) of EAJA.

This proceeding is the second that has come before the Commission involving a claim for attorney's fees and expenses under the 1996 amendments to the EAJA.[7] *See L & T Fabrication & Constr., Inc.,* 22 FMSHRC 509 (Apr. 2000). In *L & T Fabrication*, the Commission described the 1996 EAJA amendments as establishing a two-part test for determining whether fees should be awarded under 5 U.S.C. § 504(a)(4). "The first prong is largely quantitative, focusing on whether . . . the Secretary has proposed a penalty that is 'substantially in excess of' the penalty ultimately assessed by the Commission. . . . [T]he second prong is qualitative, and presents the issue of whether the Secretary has acted reasonably in proposing a particular penalty." *Id.* at 514. In order for an applicant to recover fees and expenses, both prongs of the test must be met. *Id. See also* Commission EAJA Rule 105(b), 29 C.F.R. § 2704.105(b) ("[t]he 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.").

Here, the Secretary's proposed civil penalties are the government's "demand" that must be analyzed. Although the judge generally recognized this class of claims under the 1996 amendments (". . . an EAJA application may be granted where the government's demand is 'substantially in excess' of the relief awarded, that is where the demand is unreasonable when compared with the relief awarded . . . " 24 FMSHRC at 574), his decision treats the EAJA application as if it were made by a prevailing party pursuant to 29 C.F.R. § 2704.105(a). GCI did not prevail in the Mine Act proceeding and claimed only that the Secretary's demand was excessive and unreasonable. Absent from the decision is the legal framework that the Commission established in *L & T Fabrication* for analyzing cases brought under section 504(a)(4) of EAJA. *Id.* at 574-77. Instead, the judge examined the Secretary's position prior to and during

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[7] In prior Commission EAJA cases brought by prevailing parties, the issue was whether the Secretary's position was substantially justified under section 504(a)(1) of the statute. *See Black Diamond Constr., Inc.*, 21 FMSHRC 1188 (Nov. 1999); *James Ray, empl'd by Leo Journagan Constr. Co.*, 20 FMSHRC 1014 (Sept. 1998); *Contractors Sand and Gravel, Inc.*, 20 FMSHRC 960 (Sept. 1998), *rev'd*, 199 F.3d 1335 (D.C. Cir. 2000).

litigation to determine whether her position was "substantially justified." *Id.* at 574-76. *See, e.g., Black Diamond*, 21 FMSHRC at 1194 ("EAJA provides that a prevailing party may be awarded attorney's fees unless the position of the United States is substantially justified."). Because the judge did not apply the standard set forth in Commission EAJA Rule 105(b) and the legal framework set forth in *L & T Fabrication*, the case should be remanded to him.

Further, in addressing whether the proposed penalties were "substantially in excess"[8] of the penalties finally assessed, the judge stated that he did not find the proposed penalties against GCI excessive "when measured against the statutory limit of $50,000 [per violation]."[9] 24 FMSHRC at 575 (citations omitted). However, the 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 that he used. *See L & T Fabrication*, 22 FMSHRC at 514-15. A comparison of the proposed penalties, $332,701, to the amount that the judge finally assessed, $72,298, indicates a 78 percent reduction.[10]

There is minimal guidance in the legislative history of the EAJA amendments in determining whether the government's demand is excessive. In a floor comment to the bill, Senator Bumpers stated that, if the Government sought $1 million to settle the case and the judge or the jury awarded, for example $10,000 or $50,000, the defendant should be able to recover his fees. 142 Cong. Rec. S2148-04 (March 15, 1996) (Statement of Sen. Bumpers). The Commission's decision in *L & T Fabrication* established some general principles that are instructive. There, a Commission majority eschewed an approach of evaluating penalties that would have led to the conclusion that proposed penalties were excessive whenever they were more than 50 percent of those imposed. 22 FMSHRC at 514-15 & n.6. Nevertheless, the

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[8] The Secretary argues that GCI did not raise in its petition for review the issue of whether her demand was excessive when compared with the judge's decision. However, in its petition for review, GCI stated that the standard for recovery of fees under EAJA is "whether the Secretary [sic] demand is substantially in excess of the decision and whether or not the demand is unreasonable" (PDR at 3). The rule governing petitions for review in EAJA proceedings provides, "Each issue in dispute shall be plainly and concisely stated, with supporting reasons set forth." 29 C.F.R. § 2700.308(b). We conclude that GCI's petition adequately preserves the issues for review.

[9] The maximum penalty that could be assessed per violation at the time of the judge's decision was set in the Secretary's regulations at $55,000. 30 C.F.R. § 100.3(a) & (g) (2000). The maximum penalty has recently been increased to $60,000. 68 Fed. Reg. 6609, 6611 (Feb. 10, 2003).

[10] Later in his decision, when the judge compared the proposed penalties to the penalties actually assessed, he did so in the context of examining the reasonableness of the Secretary's litigation position. 24 FMSHRC at 576.

Commission did not have to decide whether the proposed penalty was excessive because it held that the proposed penalty was reasonable and, therefore, dismissed the EAJA claim. *Id.* at 515-17.

United States v. One 1997 Toyota Land Cruiser, 248 F.3d 899 (9th Cir. 2001), is the only court of appeals case decided under the EAJA amendments that is pertinent to disposition of this issue. In a drug seizure proceeding, the government sought forfeiture of a vehicle that was estimated to be worth $40,000. *Id.* at 902. Ultimately, the government settled the matter for $1,000 and up to $4,000 in costs incident to the seizure. *Id.* at 902, 906. In determining that the government's demand was substantially in excess of the judgment obtained, the court concluded that "the disparity between the demand and the final settlement is substantial." *Id.* at 906. The court further concluded that the government's demand was also unreasonable because it valued the litigation at $40,000 but quickly lowered its claim to $1,000 plus costs, following the government's loss on summary judgment. *Id*. The court remanded the case to the lower court to determine whether the applicant committed a willful violation or acted in bad faith, or special circumstances made an award unjust. *Id.*

The disparity (78 percent reduction) between the proposed fines and the penalties assessed in this proceeding is greater than that in *L & T Fabrication* (50 percent reduction) but less than that in *One 1997 Toyota Land Cruiser* (88 percent reduction) and *Secretary of Labor v. Wolkow Braker Roofing Corp.*, 2000 WL 1466087 at 3-4 (OSHRC 2000) (93 percent reduction of proposed fine from $61,000 to $4,000) (attached to GCI's Br. as Ex. 5).[11] Further, it is not apparent from the record that the Secretary proposed an onerous penalty in order to extract a speedy settlement, one of the agency practices that the EAJA amendments were designed to redress. *See One 1997 Toyota Land Cruiser*, 248 F.3d at 906. On remand, the judge should weigh these considerations in making a determination as to whether the proposed penalties were excessive.[12]

In addition to addressing whether the proposed penalties were excessive, on remand the judge must properly analyze the reasonableness of the proposed penalties under the 1996 EAJA amendments. While the judge analyzed whether the proposed penalties were reasonable, his

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[11] *Wolkow Braker Roofing Corp.* is a decision by an administrative law judge at the Occupational Safety and Health Review Commission ("OSHRC") that was not appealed. If a judge's decision is not appealed to OSHRC, it becomes a final order after 30 days. 29 C.F.R. § 2200.90(d). OSHRC rules appear to be silent on the precedential value of judges' decisions that are not appealed. *Compare* Mine Act Rule 72, 29 C.F.R. § 2700.72 ("An unreviewed decision of a Judge is not a precedent binding upon the Commission.").

[12] Because an EAJA award requires that the government's demand be both unreasonable *and* excessive, the judge need not decide whether the proposed penalties are excessive if he again concludes that the proposed penalties are not unreasonable. As noted above, in *L & T Fabrication*, the Commission did not determine whether the Secretary's proposed penalty was excessive, because it concluded that it was reasonable. 22 FMSHRC at 515.

analysis was in the context of treating GCI as a prevailing party and evaluating whether the Secretary's pre-litigation and litigation positions were substantially justified. 24 FMSHRC at 574-77. The Commission's decision in *L & T Fabrication* again is instructive in the analysis that the judge should follow in addressing whether the government's demand was unreasonable when compared to the judge's decision in the Mine Act proceeding.

In *L & T Fabrication*, the Commission examined the Petition for Assessment of Penalty to ascertain the reasonableness of the proposed penalty. 22 FMSHRC at 515-16, *quoting Joint Statement* at S3244 ("Clearly, the Secretary made 'a reasonable effort [here] to match the penalty to the actual facts and circumstances the case.'"). In this proceeding, the file in each docket contained several documents relating to how MSHA determined the assessed value of the citations.[13]

However, in weighing the reasonableness of the Secretary's proposed penalties, the primary issue is whether the Secretary sufficiently considered GCI's evidence of its ability to continue in business when that information was submitted. The judge largely rejected GCI's argument that the Secretary failed to consider this information, stating ". . . the record does not substantiate this claim." 24 FMSHRC at 575. Therefore, the issue before us is whether substantial evidence supports the judge's finding.[14]

Neither party disputes the fact that GCI submitted financial information to MSHA. *See* GCI Br. at Ex. 1; Sec. Br. at 25. Indeed, the parties discussed lower penalties prior to trial in light of this information. However, neither GCI's submissions nor the parties' subsequent negotiations resulted in the Secretary revising her proposed penalties. Before the Commission, both GCI and the Secretary argued at length over the timing of the submission of GCI's financial documents. The Secretary argues that she cannot be charged with knowledge of GCI's financial condition because the information was not submitted until after the penalty proposals had been issued in the

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[13] In each docket, the Secretary filed a Petition for Assessment of Penalty. Attached to the Petition was the Proposed Assessment; a sheet listing the citations, the penalty criteria and points assigned to each violation, the maximum penalty based on total penalty points, and the proposed penalty (which, in all cases, was less than the maximum penalty allowed in the Secretary's regulations); and the underlying citations. *See, e.g.,* Pet. for Assessment of Penalty, dated April 23, 1999, Docket No. CENT 99-179. In addition, many of the files had a Proposed Assessment Data Sheet, which contained information regarding the nature of GCI's operation, past violations, and number of inspection days.

[14] "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The Commission in *Contractors Sand & Gravel,* 20 FMSHRC at 966-67, 978, held that the substantial evidence test is the appropriate standard of review for a judge's factual determinations in an EAJA proceeding.

vast majority of citations. Sec. Br. at 25. GCI contends that requiring it to submit financial information and argue that it is unable to pay penalties prior to their issuance violates due process. GCI Br. at 9. GCI further contends that even requiring it to submit financial information during a 30-day period after issuance of proposed penalties is inadequate. *Id.*

While the regulations do not specifically address the timing of submission of financial data (30 C.F.R. § 100.3(h)),[15] the Secretary's *Program Policy Manual* does.[16] Part 100.3(h) provides:

> Within 30 days of receipt of a proposed assessment, an operator may submit a written request to the District Manager for review of its financial status. . . . Upon receipt of such request, MSHA will suspend processing of the case until a determination is made as to whether a financial reduction is warranted.

III MSHA, U.S. Dep't of Labor, *Program Policy Manual*, Part 100, at 46 (2001) ("*PPM*").[17] The *PPM* further provides that the District Manager will forward the information submitted along with a memorandum to the Office of Assessments, which decides whether any penalty adjustment should be made. *Id.* Finally, the *PPM* specifies that the Office of Assessments "will notify the

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[15] The Secretary's regulation, 30 C.F.R. § 100.3(h), provides, in pertinent part:

> The operator may submit information to the District Manager concerning the business financial status to show that payment of the penalty will affect the operator's ability to continue in business. If the information provided by the operator indicates that the penalty will adversely affect the ability to continue in business the penalty may be adjusted.

[16] The Commission has long held that the *PPM* is not binding on the Secretary or the Commission. *See D.H. Blattner & Sons, Inc.*, 18 FMSHRC 1580, 1586 (Sept. 1996), *quoting King Knob Coal Co.*, 3 FMSHRC 1417, 1420 (June 1981). Nevertheless, the *PPM* is a policy statement that, in this instance, complements the Secretary's regulation and fills in a significant gap regarding the timing of the submission of financial data and the nature and timing of the Secretary's response. *See* 30 C.F.R. § 100.3(h). Moreover, in weighing the reasonableness of the Secretary's position in a prior EAJA proceeding involving a prevailing party, the Commission relied on "the clear language of the *PPM*." *See Black Diamond*, 21 FMSHRC at 1195, 1198 (referring to *PPM's* definition of "construction work" that is exempt from Mine Act coverage).

[17] The section of the *PPM* cited was issued on July 3, 2001. Prior to that date, the procedure for submitting financial data was included in a Program Policy Letter issued by MSHA. P99-III-5 (1999) ("PPL"). The procedure specified in the PPL was identical to that in the *PPM*. *Id.*

operator of the final decision via certified mail" and the operator will have 30 days to pay the proposed penalty or notify MSHA of its intention to contest the proposed penalty. *Id.*

Consistent with the procedures outlined in the *PPM*, in a letter dated June 27, 2000, and addressed to MSHA's district manager, GCI's attorney requested "pursuant to § 100.3(h) of the Act, a review of its financial status" and submitted financial information for review in relation to three identified citations "and all other outstanding proposed assessments." GCI Resp. to Opp'n to Appl., Ex. 4. Following the hearing on the proposed penalties in the Mine Act proceeding, GCI argued to the judge that the *PPM* provided a procedure by which it could submit financial records to MSHA's Penalty Assessment Office, that it had regularly done so, but that it had never received a response, contrary to the requirements of the *PPM*.[18] GCI Post Hr'g Br. at 30, Docket No. CENT 2000-420. In support of this position, GCI's president, Craig Jackson, testified at trial that GCI had submitted to MSHA the financial documents that were exhibits at trial and heard nothing in response. Tr. 579-80.

Finally, in a Commission order involving a docket that was subsequently consolidated in the underlying Mine Act proceeding, there is further evidence of GCI's adherence to the procedures in the *PPM*. In *Georges Colliers, Inc.*, 22 FMSHRC 939, 939-40 (Aug. 2000), GCI requested the Commission to reopen two penalty assessments that had become final orders after the proposed penalty assessments had been misplaced. In the order remanding the matter to the judge, the Commission noted that GCI had asserted that it submitted financial documents to MSHA's Compliance Office and that it "was indirectly notified that that office notified the Regional Solicitor's Office that [GCI] was entitled to financial hardship consideration." *Id.* at 939. The Secretary did not respond to GCI's assertion.

In its brief to the Commission, the Secretary dismisses the effect of GCI's June 27 letter, stating that GCI submitted the letter *after* all but seven of the 559 penalty proposals had been issued. Sec. Br. at 25. The Secretary concluded that she cannot be "charged with any knowledge of GCI's financial condition" or that its penalty proposals were unreasonable because she "did not consider GCI's financial condition in issuing them." *Id.* However, the Secretary's position ignores the procedures in the *PPM* that would have, at the least, generated a response from MSHA *after* issuance of the proposed assessments but *prior* to the issuance of penalty petitions.

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[18] It is not apparent from the record in the Mine Act proceeding that, in every docket, GCI submitted financial data within the 30-day period from issuance of the proposed assessment. In most dockets, following issuance of proposed penalties, GCI moved to stay proceedings pending consolidation with the lead cases. Thus, the 30-day period for filing financial data (or an opposition to the penalty assessment) was interrupted in many of the dockets. Clearly, GCI submitted financial data in some of the dockets that were consolidated with other dockets. Further, given the absence of record evidence indicating *any* response from the Secretary to GCI's submission of financial data, GCI's strict adherence to the 30-day period over the two-years during which penalty assessments issued would have been futile.

In short, the record evidence and the *PPM* indicate that there was a procedure for submitting financial data that GCI followed in at least some of the cases. But there is an absence of record evidence indicating that the Secretary ever responded to GCI's submission. Indeed, the Secretary now takes the position that she had no obligation to consider the financial data once the proposed penalties were issued.[19] Accordingly, we find no substantial evidence in the record to support the judge's rejection of GCI's claim that the Secretary did not consider the effect of the proposed penalties on its ability to continue in business (24 FMSHRC at 575).[20] On remand, the judge should reconsider his finding in light of this analysis. He should address the effect, in any, of the Secretary's consideration of and response to GCI's financial data after the issuance of proposed penalties, given the procedures in the *PPM*.[21] Specifically, he must consider the significance of the Secretary's apparent failure to respond to GCI's submission of financial data, either in writing (as provided for in the *PPM*) or by modifying the penalty amounts, in determining whether she made "a reasonable effort [here] to match the penalty to the actual facts and circumstances of the case." *L & T Fabrication*, 22 FMSHRC at 515-16 (citation omitted).

As a final matter on the issue of reasonableness of the Secretary's demand, the judge noted that his conclusion that the Secretary's proposed penalties would affect GCI's ability to remain in business was based on documentary evidence submitted at trial and his crediting GCI's president, Craig Jackson. 24 FMSHRC at 577. The Commission in *L & T Fabrication* commented on the

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[19] Notwithstanding the guidance in the *PPM*, the Secretary's regulations do not require adjustment of penalties based on the operator's financial status. *See* 30 C.F.R. § 100.3(h) ("If the information provided by the operator indicates that the penalty will adversely affect the ability to continue in business the penalty *may* be adjusted.") (emphasis added). The *PPM*, however, states that MSHA's Office of Assessments will notify an operator of its "final decision" on any penalty adjustment via certified mail. *PPM*, Part 100 at 46.

[20] GCI's argues that, in the event of a remand, it should have the opportunity of a evidentiary hearing. GCI Br. at 13. GCI further requests that it be allowed to move to compel production of documents and to depose an MSHA official. *Id.* at 13 n.18. If the parties believe that the judge needs to order further proceedings, they should make their request to the judge in accordance with EAJA Rule 306(d), 29 C.F.R. § 2704.306(d) ("A request that the judge order further proceedings . . . shall specifically identify the information sought . . . and shall explain why the additional proceedings are necessary to resolve the issues.").

[21] The judge was understandably reluctant "to delve into [the parties'] settlement discussions," particularly given the lack of "an undisputed, fully documented settlement proposal." 24 FMSHRC at 577 & n.1. As the court stated in *One 1997 Toyota Land Cruiser*, 248 F.3d at 905, "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 penalty assessments from MSHA dictates that the judge only consider the proposed penalty assessments issued by MSHA. *See* 5 U.S.C. § 504(b)(1)(F) (defining "demand" in part as "the express demand of the agency which led to the adversary adjudication.").

unique role of its judges under section 110(i) to assess penalties de novo based upon the statutory criteria and the record evidence developed during the course of a hearing. 22 FMSHRC at 516. For that reason, the Commission concluded that it was not unusual that a judge would reduce a proposed penalty because he determined to give greater weight to certain of the penalty criteria. *Id.* That rationale is, of course, applicable to the instant proceeding, and the judge should consider it in his determination of whether the Secretary's demands were reasonable.[22] However, the Mine Act does not preclude the Secretary from considering facts relevant to the penalty criteria because final authority to assess penalties lies with the judge. Indeed, the Secretary's regulations and the *PPM* provide an opportunity for MSHA to consider GCI's ability to continue in business in light of proposed penalties and that, in no way, detracts from the central role of the judge.

Before the Commission, the Secretary argues that GCI should be denied attorney's fees because EAJA, 5 U.S.C. § 504(a)(4), precludes an award if GCI committed willful violations or acted in bad faith, or because special circumstances make an award unjust. Sec. Br. at 35-36. In support, the Secretary argues that GCI committed 559 violations that repeatedly endangered the lives and safety of miners, including 272 violations stipulated to be significant and substantial (S&S), and that it committed 39 violations as a result of its unwarrantable failure. *Id.* at 36-39 & n.l3. If, on remand, the judge concludes that the Secretary's demand was excessive and unreasonable, he should consider whether an exception to the grant of an award exists. 29 C.F.R. § 2704.307. *See One 1997 Toyota Land Cruiser*, 248 F.3d at 906. In the present record, there are no findings from the judge on these issues. Given the judge's extensive involvement with the parties over a period of years in the underlying Mine Act proceeding, he should make findings in these areas in the first instance.

In sum, on remand, the judge must use the appropriate analytical frame work, established in the Commission's *L & T Fabrication* decision, for determining whether the Secretary's proposed penalties were excessive and unreasonable. Further, the judge must address GCI's submission of financial data and the Secretary's response, in light of section 100.3(h) and the *PPM*. Finally, in the event that the judge determines that the Secretary's proposed penalties were excessive and unreasonable, he should proceed to address whether GCI committed willful violations or acted in bad faith, or whether special circumstances make an award unjust.

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[22] We note that GCI's president Craig Jackson's trial testimony was limited to describing Heller's involvement with GCI and authenticating and describing GCI's financial statements, including a flow of funds chart and security agreement (Resp. Ex. 6), a balance sheet (Resp. Ex. 8), cash flow analysis (Resp. Ex. 9), a letter from Heller concerning default of loan agreement (Resp. Ex. 10), and GCI's 1999 federal income tax return (Resp. Ex. 11). *See* Tr. 570-633. Thus, there was no competing witness or conflicting set of documents that had to be evaluated by the judge in determining what weight to give GCI's financial circumstances in assessing penalties.

III.

Conclusion

Based on the foregoing, we vacate the judge's decision and remand this proceeding for further consideration consistent with our analysis.

Michael F. Duffy, Chairman

Robert H. Beatty, Jr., Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

Commissioner Jordan, dissenting:

The Commission's Equal Access to Justice Act ("EAJA") regulations require a party to file a petition for discretionary review of a judge's EAJA decision within 30 days of the issuance of that initial ruling. Commission Procedural Rule 308(b), 29 C.F.R. § 2704.308(b). Georges Colliers, Inc. ("GCI") filed its petition 35 days after the underlying decision was issued. Because the petition was untimely, the Commission should not review this case.

The operator asks the Commission to excuse the late-filing of the petition because its attorney received the judge's decision on July 17, 2002, 33 days after it was issued. GCI Reply to Sec. Opp'n to PDR at 1. Claiming that "[i]t is possible that the letter was miss-directed [sic] to another mailbox," the operator's counsel explained that she

> has a home office that receives mail at a residential bank of twenty (20) mailboxes located approximately one-half (l/2) block from counsel's residence. Mail is frequently miss-boxed and is either placed in an outgoing slot, placed on top of the mail-box, or eventually hand delivered to the residence by the incorrect receiver of said mail.

Id. at 1-2.[1]

Under even a relatively lenient standard,[2] the excuse offered by the operator's counsel would not suffice. *See, e.g., Gibbs v. Air Canada*, 810 F.2d 1529, 1537-38 (11th Cir. 1987) (holding that default caused by failure to establish minimum procedural safeguards for determining that action in response to summons and complaint was being taken does not

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[1] She also argues that she erroneously believed that Commission procedural rules permitted five additional days for filing because the judge's decision was sent by mail. *Id.* at 2-3. My colleagues properly reject this argument. Slip op. at 6 n.5.

[2] The majority rightly leaves for a future case the question of how strictly the Commission should construe its regulation governing the time limits for filing a petition for discretionary review in an EAJA matter. Slip op. at 6 n.6. I note, however, that if the operator had failed to file the initial EAJA application on time and offered the same excuse to the administrative law judge that it provided to the Commission in this case, the EAJA application would have been rejected. *See Long Island Radio Co. v. NLRB,* 841 F.2d 474, 477 (2d Cir. 1988) (holding that 30-day time limitation in 5 U.S.C. § 504(a)(2) for filing an initial application for attorney's fees for agency proceedings under EAJA is jurisdictional). Similarly, a court of appeals would have refused to accept this excuse upon the late filing of a petition for review of this agency's EAJA adjudication. *See Howitt v. United States Dep't of Commerce*, 897 F.2d 583, 584 (1st Cir. 1990) (recognizing that the circuit courts have unanimously agreed that the statute's 30-day time limit for appealing agency EAJA decision to court of appeals is jurisdictional).

constitute default through excusable neglect, and claim that mail clerk must have misplaced the complaint is not a sufficient excuse), *reh'g and reh'g en banc denied*, 816 F.2d 688 (11th Cir. 1987). Her claim that she does not have the ability to receive mail in a timely fashion is a hollow one, given the fact that she practices law and must often receive time-sensitive material. In this case, she should have known that the judge's EAJA decision was pending, and that she would need to meet a deadline to file a petition for review to the Commission if her client chose to appeal. Nonetheless, she failed to establish a mechanism to ensure that she would routinely receive mail when it was delivered. The Commission should not reward such a lackadaisical approach by excusing her late-filed petition.[3]

For the foregoing reasons, the operator's petition for review should not be accepted by the Commission. Accordingly, I respectfully dissent.

Mary Lu Jordan, Commissioner

[3] Unlike my colleagues in the majority, slip op. at 6, I fail to see how the fact that the judge's decision was not sent by certified mail is relevant. The operator does not claim that the Commission failed to mail the judge's decision in a timely manner. In fact, there is no evidence indicating that the judge's decision was received late due to any failure by the Commission. The only reason offered by the operator for the late receipt of the decision (and thus the late-filed PDR) is its attorney's inadequate system for receiving mail.

Distribution

Elizabeth M. Christian, Esq.
7229 Nohl Ranch Road
Fort Worth, TX 76133

Robin A. Rosenbluth, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor West
Arlington, VA 22209-2247

Administrative Law Judge David F. Barbour
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021