FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

September 22, 1998

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. EAJ 96-3
CONTRACTORS SAND AND GRAVEL, INC.	:	

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

DECISION

BY: Jordan, Chairman; Marks and Beatty, Commissioners

This is a proceeding involving the recovery of attorney=s fees and expenses under the Equal Access to Justice Act, 5 U.S.C. ' 504 (1996) (AEAJA@). Administrative Law Judge August F. Cetti ordered the Secretary of Labor to pay attorney=s fees and expenses following an application for fees filed by Contractors Sand and Gravel, Inc. (ACSG@), after CSG prevailed over the Mine Safety and Health Administration (AMSHA@) in a proceeding under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. (1994) (AMine Act@ or AAct@). 18 FMSHRC 1820 (Oct. 1996) (ALJ). The Secretary filed a petition for discretionary review with the Commission challenging the judge=s award and, after the Commission granted the Secretary=s petition, CSG filed a motion to dismiss for lack of jurisdiction over the Secretary=s appeal.

For the reasons that follow, we reject CSG=s contention that the Commission lacks jurisdiction over the Secretary=s appeal, reverse the judge=s holding that the Secretary=s legal position on the merits was not substantially justified, and vacate his award of attorney=s fees and expenses.

I.

Factual and Procedural Background

A. The Mine Act Proceeding

CSG operated the Montague Plant, a small portable sand and gravel surface mining operation located near Yreka in north central California. *Contractors Sand & Gravel Supply, Inc.*, 18 FMSHRC 384, 384 (Mar. 1996) (ALJ). The plant employed two workers and produced 10,000 to 15,000 tons of rock annually. *Id.* CSG=s general manager, Eric Schoonmaker, oversaw plant operations and was responsible for coordinating equipment maintenance and repair and for ensuring the safety of operations. *Id.* Schoonmaker also oversaw operations at another CSG operation near Yreka, the Scott River Plant. *Id.*

On March 10, 1993, MSHA conducted an inspection at the Montague Plant and issued several citations. *Id.* at 385. MSHA Inspector Ann Frederick observed two electrical motors mounted on a crusher that she believed were improperly grounded because A[t]he frame of the crusher was being used as the grounding conductor.@ *Id.;* Citation No. 3911909. Inspector Frederick issued a citation to CSG charging a violation of 30 C.F.R. ' 56.12025,[1] in which she stated that A[e]ffective equipment grounding conductors have not been installed . . . . Frame

[1] Section 56.12025 provides:

> All metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection. This requirement does not apply to battery-operated equipment.

grounding has been forbidden for over fifteen years.@ *Id*. No tests were performed at the time the citation was issued to determine whether the motors were, in fact, grounded. 18 FMSHRC at 386. MSHA subsequently proposed a $7,000 penalty against CSG, and a $6,000 penalty against Schoonmaker pursuant to section 110(c) of the Mine Act.[2] *Id*. at 385, 389. CSG contested the penalty assessments and the case was assigned to Judge Cetti.

In July 1994, the judge issued a default order against CSG. Order dated July 21, 1994. Subsequently, CSG requested relief from the Commission, and the case was remanded to the judge to determine whether relief from default was warranted. 16 FMSHRC 1645, 1646 (Aug. 1994). There is no indication that the judge ever made such a determination. Following remand, CSG failed to respond to the judge=s September 1, 1994 prehearing order, and he again issued a show cause order. Order dated Nov. 16, 1994. By early December 1994, CSG retained its present counsel who asked for additional time to respond to the prehearing order.

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[2] Section 110(c) provides:

> Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this [Act] or any order incorporated in a final decision issued under this [Act], except an order incorporated in a decision issued under subsection (a) of this section or section 105(c) of this title, any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d) of this section.

30 U.S.C. ' 820(c).

In October 1995, CSG and the Secretary filed cross motions for summary decision, each arguing that there were no material facts in dispute. On March 25, 1996, the judge issued his Summary Decision in which he vacated the citations and penalties against CSG and Schoonmaker. 18 FMSHRC at 389.[3] He explained that the cited standard Aplainly and clearly requires that >metal enclosing . . . electrical circuits shall be grounded,=@ and that the standard Adoes not specify or require that the operator achieve an effective ground in a specific manner.@ *Id*. at 387. The judge further found that CSG complied with section 56.12025 because, as demonstrated in resistivity tests conducted by CSG, Athe motors in question were connected with the ground to make the earth part of the circuit.[4] There is no contrary evidence.@ *Id*. at 387-88 (footnote added).

The judge rejected the Secretary=s argument that frame grounding constitutes a per se violation of section 56.12025, noting that this position amounted to an attempt Athrough interpretation to expand the regulation beyond its plain meaning.@ *Id*. at 388. He also reasoned that Aa reasonable, prudent person familiar with the mining industry would have recognized that the two motors . . . were >grounded= and were, thus, in compliance with [section 56.12025].@ *Id*. In support of his conclusion, the judge cited decisions of two other Commission judges who had rejected the theory that frame grounding is a per se violation of section 56.12025. *Id*. at 389 (citing *Mulzer Crushed Stone Co.*, 3 FMSHRC 1238 (May 1981) (ALJ), and *McCormick Sand Corp.*, 2 FMSHRC 21 (Jan. 1980) (ALJ)).

B. The EAJA Proceeding

After the judge rendered his decision, CSG timely filed with the Commission an application for fees and expenses pursuant to EAJA. In its application, CSG stated that it was the prevailing party in the Mine Act proceeding, that it had fewer than 500 employees and a net worth under $7 million, and that the position of the Secretary in the underlying proceeding was not substantially justified. CSG sought attorney=s fees and expenses totaling $20,715.12. In several amendments to its application, CSG sought an award of $41,155.05.

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[3] The judge appended his Summary Decision in the Mine Act proceeding to his October 28, 1996 EAJA decision. 18 FMSHRC at 1837.

[4] On September 15, 1992, Schoonmaker conducted resistivity tests on the circuits that indicated that there was an effective path to the ground from both of the motors. 18 FMSHRC at 388.

In response to CSG=s application, the Secretary argued that his position was substantially justified because it had a reasonable basis in law and fact. S. Answer at 2-5. The Secretary further argued that CSG=s fee request was excessive because CSG sought fees in excess of the maximum rate of $75 per hour set forth in EAJA and because some of the fees sought were not attributable to the defense of the case in which CSG prevailed. *Id*. at 6-7. Finally, the Secretary objected to some of the costs included in the application, including various office expenses and interest on unpaid bills. *Id*. at 7.

The judge granted CSG=s application. 18 FMSHRC at 1835. He noted first that it was undisputed that CSG was a prevailing party in the underlying proceeding and that it met the eligibility requirements of EAJA. *Id*. at 1821. On the question of whether the Secretary=s position on the merits was substantially justified, the judge noted that he had Aclearly indicated@ in his decision in the underlying proceeding that Athe Secretary=s position was unreasonable.@ *Id*. at 1822. The judge concluded that any interpretation that Aignores the plain meaning of a cited standard, is per se unreasonable,@ and that Athere is no reasonable interpretation of the facts that supports the Secretary=s theory that the motors were not effectively grounded.@ *Id*. at 1822-23. Accordingly, the judge held that the Secretary=s position in the underlying proceeding was not substantially justified. *Id*. at 1824.

The judge adopted the apportionment suggested in CSG=s application to distinguish between fees and expenses that would be recoverable and those that would not because they were incurred in defending other citations. *Id*. at 1824-27. The judge also held that he had the discretion to increase EAJA=s cap on the hourly rate of fees, and that increases in the cost of living justified a retroactive increase in the rate from $75 to $121.50 per hour in the underlying Mine Act proceeding. *Id*. at 1827-30. With regard to expenses, the judge determined that the office expenses of CSG=s counsel attributable to the case would ordinarily be billed to clients and, therefore, should be recoverable from the government. *Id*. at 1830-31. As to CSG=s request for interest, the judge found it was a reasonable cost of providing legal services and would not have been incurred but for the Secretary=s unreasonable enforcement action. 18 FMSHRC at 1831-32. Finally, the judge held the EAJA proceeding was an Aadversary adjudication,@ within the meaning of EAJA, separate and distinct from the underlying merits proceeding. *Id.* at 1834. He consequently determined that, because the EAJA proceeding was an adversary adjudication initiated after the effective date of the EAJA amendments (Mar. 29, 1996), the higher fee rate of $125 per hour in the amendments was applicable. *Id.* at 1835. Therefore, the judge concluded that CSG was Aentitled to recover fees and expenses incurred in connection with its EAJA application,@ and that CSG had Anot unduly or unreasonably protracted [the] EAJA proceedings.@ *Id.* at 1832-35. He ordered the Secretary to pay CSG $41,155.05 in fees and expenses. *Id.* at 1835.

II.

Disposition

1. Jurisdiction

After the Commission granted the Secretary=s petition for discretionary review, CSG filed a motion to dismiss the petition. CSG argues in its motion that review of the judge=s decision is contrary to the Adistinct and noticeable absence of any provision for Commission review in the EAJA.@ CSG Mot. to Dismiss at 15. To the contrary, according to CSG, the reference in EAJA section 504(a) to Athe adjudicative officer@ indicates an intent to preclude administrative appeals in EAJA cases. *Id.* at 12-14.

CSG further argues that, by not providing for review of EAJA determinations, Congress intended to encourage agencies to appeal adverse determinations in underlying proceedings pursuant to their enabling statutes, rather than use EAJA proceedings to re-litigate issues on which review was not sought. *Id*. at 15-17. CSG contends that agency review of a judge=s EAJA decision undermines the purpose of the statute by allowing delay of the payment of fees and expenses without payment of interest, and that review is not Arational@ because the judge=s decision is entitled to deference, leading to only marginal benefits on review. *Id*. at 18-19. Finally, CSG asserts that the Commission=s EAJA rules preclude the Secretary from appealing an award because those rules only explicitly require a judge to set forth in full the reasons for a *denial* of a fee request. *Id*. at 20-22 (citing 29 C.F.R. ' 2704.307).

In response, the Secretary argues that CSG=s position is contrary to the language and legislative history of EAJA. S. Br. at 7-8. The Secretary also notes that model agency EAJA rules developed by the Administrative Conference of the United States, upon which the Commission rules were based, provided for such appeals because unreviewable adjudicative officer decisions would be inconsistent with traditional agency practice. *Id*. at 8 n.6.

We find CSG=s arguments unpersuasive. The language in the final sentence of EAJA section 504(a)(3), added to EAJA in 1985, plainly states that the Adecision of the agency,@ as distinguished from the Aadjudicative officer=s decision,@ will be the Afinal administrative decision.@ *See Lion Uniform, Inc. v. NLRB*, 905 F.2d 120, 123 (6th Cir.) (AWhile the decision on an application for fees is initially made by the adjudicative officer, the final administrative decision is that of the agency.@), *cert. denied*, 498 U.S. 992 (1990).[5] Moreover, CSG acknowledges that no other court or administrative decision supports its position. CSG Reply Br. at 9.

[5] Even if EAJA were silent as to administrative review of judges= decisions, the Commission could establish such review. The Commission has created a right of administrative appeal from judges decisions on applications for temporary reinstatement under section 105(c) of the Mine Act, 30 U.S.C. ' 815(c), even though the Act does not provide for such review. *See* 29 C.F.R. ' 2700.45(f).

We also note that the legislative history accompanying the 1985 re-enactment and amendment of EAJA unambiguously supports Commission review of EAJA determinations made by our administrative law judges. The House Committee Report submitted with the legislation (there were no Senate or conference reports) states: AThe legislation allows the agency rather than the adjudicative officer to make the final decision on fee award at the agency level.@ H.R. Rep. No. 99-120, 99th Cong., 1st Sess. 7 (1985), *reprinted in* 1985 U.S.C.C.A.N. 132, 135. In the section-by-section analysis, regarding section 504(a)(3) the report further states:

> This provision explicitly adopts the view that the agency makes the final decision in the award of fees in administrative proceedings under section 504. This follows the view adopted by the Administrative Conference and recognizes the fact that decisions in administrative proceedings are generally not final until they have been adopted by the agency.

Id. at 142.

Moreover, we find that policy considerations compel us to reject CSG=s arguments. Commission review of EAJA decisions by our judges will lead to the formulation of a uniform body of case law under the statute. Administrative review also provides protection against either arbitrary actions of judges or actions that could be perceived as arbitrary, and also controls and regulates the quality of judicial decision-making. Accordingly, we deny CSG=s motion to dismiss.

2. Standard of Review

The Secretary has not addressed the question of which standard of review the Commission should apply in EAJA proceedings. CSG argues, albeit implicitly, that our review of the judge=s factual findings is governed by the substantial evidence test and that his legal determinations are reviewed as to whether they are Acorrect.@ CSG Resp. Br. at 4-13.

EAJA provides for a substantial evidence standard of review for appellate courts reviewing final agency decisions under the Act. 5 U.S.C. ' 504(c)(2). However, EAJA is silent on the appropriate standard of review of an administrative law judge=s decision in the course of an internal agency appellate review. In *Pierce v. Underwood*, 487 U.S. 552 (1988), the Supreme Court addressed the standard of review for appellate courts in civil EAJA actions tried in district courts. The Court held that a district court judge=s EAJA determination is to be reviewed by a court of appeals using an abuse of discretion standard. *Id*. at 562.

The holding in *Pierce* suggests that, by analogy, the Commission should adopt a similar standard in reviewing the judge=s decision here. However, our adoption of the more deferential abuse of discretion standard would lead to the anomalous result of having our decision reviewed on appeal under the less deferential substantial evidence standard required by EAJA.

In *Lion Uniform*, the Sixth Circuit considered and rejected the argument that the abuse of discretion standard approved by the Supreme Court in *Pierce* should apply to review by the National Labor Relations Board (ANLRB@) of an administrative law judge=s decision, stating:

> The rationale of the opinion in *Pierce* is, of course, sound in the context of the relationship between a court of appeals and a district court, where the EAJA litigation begins in the district court. But, where the EAJA litigation begins before an agency, with appeals contemplated to the courts, a highly deferential review by the Board, followed by a less deferential review by the courts, makes little sense. In the absence of more specific legislative direction, we must assume the more logical scheme applies **C** that the standard of deference is heightened as the appeal process progresses **C** de novo review at the agency level, and substantial evidence review before the courts.

905 F.2d at 124. The court found de novo review to be the appropriate standard of review for the NLRB, since making de novo findings of fact is part of the Board=s Anormal function.@ *Id*.

We agree with the court=s rationale in *Lion Uniform*. Thus, our standard of review of a judge=s EAJA determination should not be more deferential than the standard of review employed by an appeals court in reviewing a Commission decision under EAJA. Unlike the NLRB, however, the Commission does not generally make de novo findings of fact. Instead, when reviewing an administrative law judge=s factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test.[6] 30 U.S.C.

[6] ASubstantial evidence@ means A>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)). In reviewing the whole record, an appellate tribunal must consider anything in the record that Afairly detracts@ from the weight of the evidence that supports a challenged finding. *Midwest Material Co.*, 19 FMSHRC 30, 34 n.5 (Jan. 1997) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

' 823(d)(2)(A)(ii)(I). We find this test to be the more appropriate standard of review for factual determinations made by our judges in EAJA cases.[7] Applying the substantial evidence test to findings of fact, together with de novo review of questions of law, is consistent with the Commission=s Anormal function@ under the Mine Act and ensures that our decision will not be reviewed on appeal under a less deferential standard.

A. Substantial Justification

EAJA provides that a prevailing party may be awarded attorney=s fees unless the position of the United States is substantially justified. *Cooper v. United States R.R. Retirement Bd.*, 24 F.3d 1414, 1416 (D.C. Cir. 1994). The Supreme Court has defined a Asubstantially justified@ position as Ajustified in substance or in the main@ or one that has Aa reasonable basis both in law and fact.@ *Pierce*, 487 U.S. at 565. In *Pierce* the court set forth the test as follows: Aa position can be justified even though it is not correct, and we believe it can be substantially (i.e., for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact.@ *Id*. at 566 n.3. In EAJA proceedings the agency bears the burden of establishing that its position was substantially justified. *Lundin v. Mecham*, 980 F.2d 1450, 1459 (D.C. Cir. 1992).

The standard CSG was charged with violating in this case requires that A[a]ll metal enclosing or encasing electrical circuits shall be grounded . . . .@ 30 C.F.R. ' 56.12025. Electrical grounding is defined elsewhere in Part 56 as Ato connect with the ground to make the earth part of the circuit.@ 30 C.F.R. ' 56.2. At issue, therefore, is whether the Secretary=s position regarding CSG=s compliance with this regulation was substantially justified. For the reasons discussed below, we conclude that the Secretary=s position had a reasonable basis in law and fact, and therefore reverse the judge=s EAJA determination.

1. The Judge Failed to Independently Evaluate the Secretary=s Legal Position

[7] In this case, however there are no factual findings to review, as the judge, finding that A[b]oth parties agree that there is no dispute as to any material fact,@ 18 FMSHRC at 386, ruled on summary judgment motions. He therefore made no independent findings of material fact in the merits proceeding and did not even reach the question of whether frame grounding is effective. This issue, which was essential to a resolution of the underlying proceeding, was never resolved, and remains in dispute. Thus, the case on the merits was actually not appropriate for summary judgment, and the judge should have resolved this factual disagreement.

Generally, such a lack of factual findings would lead us to remand. *See Western Fuels-Utah, Inc.*, 19 FMSHRC 994, 1000 (June 1997). In this EAJA proceeding, however, remand is not necessary since the record (in this case, depositions the parties submitted in support of their motions) compels the conclusion that the Secretary=s position had a reasonable basis in fact.

As stated above, the issue in this case is not the success or failure of the Secretary=s underlying case on the merits, but instead whether or not the Secretary=s position was substantially justified. To determine substantial justification, a judge is required to *independently* ascertain in his or her EAJA decision whether the Secretary=s position had a reasonable basis in law and fact. In this case, however, the judge based his EAJA decision entirely on his determination of the standard=s Aplain meaning@ in the underlying merits proceeding, finding again that the Secretary=s interpretation ignored the plain meaning of the standard and thus was per se unreasonable. 18 FMSHRC at 1822-23. This approach is incorrect as a matter of law. *See F. J. Vollmer Co. v. Magaw*, 102 F.3d 591, 596 (D.C. Cir. 1996) (reviewing court=s role in reviewing lower court=s EAJA award is to ascertain whether court relied on proper legal standard). The D.C. Circuit has held that Athe inquiry into reasonableness for EAJA purposes may not be collapsed into [the] antecedent evaluation of the merits, for EAJA sets forth a >distinct legal standard.=@ *Cooper*, 24 F.3d at 1416 (citation omitted). As the First Circuit has noted, while there may be overlap between the merits determination and the substantial justification determination under EAJA, A[a]n exercise of *independent* judgment is essential to determine whether an EAJA award is warranted; the answer is not >wedded to the underlying judgment on the merits.= . . . Any other approach would demean the precise language of the [EAJA].@ *Sierra Club v. Secretary of the Army*, 820 F.2d 513, 517 (1st Cir. 1987) (emphasis added) (citation omitted). Under an EAJA analysis, A[t]he government=s failure to prevail does not raise a presumption that its position was not substantially justified.@ *Kali v. Bowen*, 854 F.2d 329, 332 (9th Cir. 1988).

A review of the record in this case indicates that the judge=s determination regarding the scope and meaning of section 56.12025 hopelessly tainted his EAJA decision because he simply carried over his analysis from the merits proceeding into the EAJA proceeding.[8] As the judge stated:

> In the *underlying* proceeding, I clearly indicated that the Secretary=s position was unreasonable. . . . *I again find* that the Secretary=s legal theory was not reasonable and that there was no reasonable connection between the Secretary=s legal theory and the undisputed facts.

18 FMSHRC at 1822 (emphasis added).

[8] In fact, the judge attached his decision on the merits to the EAJA decision. 18 FMSHRC at 1837-42.

Of course, in disposing of the citation in the underlying proceeding, the judge did not reach the issue of substantial justification of the Secretary=s position, nor should he have. However, the judge=s failure to *independently* review the Secretary=s position in the EAJA proceeding and apply a distinct analysis under the appropriate EAJA standard was erroneous and, in itself, precludes affirmance of the judge=s determination. Indeed, as the D.C. Circuit has noted in the context of EAJA litigation, A[m]echanical jurisprudence will not do.@ *FEC v. Rose*, 806 F.2d 1081, 1089 (D.C. Cir. 1986). As we discuss below, an independent examination of the Secretary=s legal position, uncoupled from the underlying merits decision, leads to the ineluctable conclusion that the Secretary=s position was Areasonable in law and fact,@ and as such substantially justified under EAJA.[9]

2. The Secretary=s Position Had a Reasonable Basis in Law

We begin our analysis of whether the Secretary=s position was substantially justified by examining whether her position had a reasonable basis in law. For purposes of this case, we need not decide whether MSHA was correct; rather, we must only ascertain whether its view was a reasonable one.

MSHA cited CSG because of the operator=s undisputed use of the crusher frame as a ground path. In MSHA=s view, frame grounding violated the standard because it was an inherently unreliable system which exposes miners to the risk of electrocution. The Secretary argued that the wiring on the unsheltered equipment at CSG=s rock quarry was exposed to the elements and subject to extreme vibration. Therefore, under the Secretary=s theory, using the frame to ground the electrical equipment carried a risk that metal-to-metal, metal-to-bolt, and metal-to-wire connections would deteriorate or come loose. S. Cross Mot. for Sum. Dec. at 6; Decl. of Paul Price, Oct. 27, 1995 (APrice Decl.@) at 4. The Secretary=s litigation position was supported by its expert, Paul Price. Further, according to MSHA=s expert, no nationally recognized industry association accepted the use of an equipment structure or frame on an outdoor portable crusher to serve as a grounding conductor. S. Cross Mot. for Sum. Dec. at 10; Price Decl. at 5-6.

The judge determined that the Secretary=s legal position (that frame grounding was prohibited under the regulation) was unreasonable because it Aexpand[ed] the regulation beyond its plain meaning.@ 18 FMSHRC at 1822 (quoting 18 FMSHRC at 388) (emphasis omitted). According to the judge, A[a]ny interpretation that >impermissibly= ignores the plain meaning of a cited standard, is *per se* unreasonable.@ *Id.* at 1822-23. In the judge=s view, since the two motors

[9] The D.C. Circuit explained that the Afresh look occasioned by application of the >substantially justified= standard@ is required to honor Congress= intent Anot to permit a prevailing party automatically to recover fees@ under EAJA. *Rose*, 806 F.2d at 1087 (citation omitted).

in question Awere connected to earth through a series of metal frame and wire connections, [they] *were grounded and were, thus, in compliance with [the] requirement of the cited regulation.*@ *Id.* at 1823 (quoting 18 FMSHRC at 388) (emphasis in original).

During the EAJA proceeding, the judge erred in not looking beyond the merits of the underlying case, and in failing to consider whether the Secretary=s interpretation was substantially justified and consistent with the Mine Act. He improperly considered the Secretary=s position unreasonable because in his merits decision he had found section 56.12025 satisfied so long as the electrical equipment was connected to earth. The judge=s approach failed to consider the reasonableness of the Secretary=s argument as to the importance of an *effective* grounding connection. In fact, the judge did not discuss the Secretary=s theory as to the reliability of the grounding technique employed by CSG, even though GSG conceded that the regulation required an effective path to ground. CSG Mot. for Sum. Dec. at 6 n.6.

From our review of the record, we conclude that MSHA=s interpretation of the standard requiring effective grounding had a reasonable basis in law, because restricting the standard to its literal terms could expose individuals to the harm the standard was designed to prevent.[10] *See Arch of Kentucky, Inc.*, 13 FMSHRC 753, 756 (May 1991) (rejecting operator=s argument that its procedure fell within the literal terms of the standard because procedure was unsafe and did not comport with the safety goals of the regulation and the Act). In fact, a narrow reading of section 56.12025 could create a situation where an individual could be fatally injured before a problem in the grounding system is detected. This is because under a literal approach, an unreliable system would not violate the standard until the connection with the ground was severed.[11] But as MSHA=s expert explained:

> You must have an effective path for the ground fault to flow. It=s essentially the lifeline of the guy standing there touching it. The worker=s **C** if that=s poor, *he=s just going to die*. Just as simple as that.

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[10] Our dissenting colleagues wrongly assert that we have somehow transformed the issue in this case into whether frame grounding is effective. Slip op. at 20-22. What the dissent overlooks is that the issue before us is whether the Secretary=s position was substantially justified and the Secretary=s position was that frame grounding was ineffective. *See* S. Cross Mot. for Sum. Dec. at 5 (A[t]o satisfy the standard, the ground path must be effective@).

[11] Our dissenting colleagues appear to have also adopted the judge=s mistaken theory, finding that the Secretary=s interpretation of the regulation is inconsistent with its plain meaning because A[it] simply requires . . . that electrical circuits be grounded.@ Slip op. at 20. Like the judge, our colleagues= also fail to address the essential question before us: whether the Secretary=s position was substantially justified, not whether the Secretary should have prevailed on the merits.

Deposition of Paul Price, July 25, 1995 (APrice Dep.@) at 47 (emphasis added). The protective purpose of the standard is to prevent injury from electrocution caused by a malfunctioning or improper grounding system. The Secretary=s interpretation certainly is consistent with this goal.

Historically, the Commission has rejected a narrow, technical interpretation of a regulation that Athwarts the standard=s protective purpose and does not serve the safety objectives recognized in the legislative history.@ *Pyramid Mining Inc.*, 16 FMSHRC 2037, 2040 (Oct. 1994). For example, in *Consolidation Coal Co.*, 15 FMSHRC 1555 (Aug. 1993), the Commission considered whether an escapeway was separated from a belt and trolley haulage entry, because the stopping between the two had a substantial hole. The judge had found that a Aseparation@ existed, despite the existence of the hole. In reversing that determination, the Commission concluded that a construction of the standard requiring physical separation but allowing free movement of air current thwarted the standard=s purpose of permitting only intake air in escapeways, and could lead to Aabsurd results,@ because in the event of a fire, the hole could permit contaminated air to enter the escapeway. *Id.* at 1557. In *Western-Fuels Utah, Inc.*, 19 FMSHRC at 998-1000, the Commission reversed the judge=s conclusion that a regulation requiring a conveyor be Aequipped with slippage and sequence switches@ was not violated as long as the belt contained the requisite switches and that any malfunction of those switches was Airrelevant.@ The Commission agreed with the Secretary that the standard must be construed to require that the belt be equipped with Afunctional@ slippage and sequence switches. *Id. See also Fluor Daniel, Inc.*, 18 FMSHRC 1143, 1145-46 (July 1996) (rejecting, *sub silentio*, operator=s claim that 30 C.F.R. ' 56.14101(a)(1) did not require brakes to be maintained in functional condition); *Mettiki Coal Corp.*, 13 FMSHRC 760, 768 (May 1991) (construing 30 C.F.R. ' 77.507 to require that switches be installed with *functioning* lockout devices). The Secretary=s interpretation requiring effective grounding is consistent with this line of Commission authority. The judge, by adhering to the analysis of his merits decision, which relied on a literal approach, erred by disregarding Commission precedent holding that if a regulation requires specified equipment, that equipment must be functional, effective, and safe.

In line with this authority, we can only conclude that the Secretary=s interpretation of the regulation to require a grounding system Aof adequate design so as to be expected to provide the necessary ground path on a *continuing* basis@ (Price Decl. & 9 (emphasis added)) had a reasonable basis in law and furthered the safety protective purposes of the Act.

Our dissenting colleagues, citing *Pierce*, seek to rely on Aobjective indicia@[12] in an attempt to support their view that the Secretary=s position was unreasonable. Slip op. at 23. The dissent seizes on the language in *Pierce* which identifies the Aviews of other courts on the merits@ as a factor in determining the reasonableness of the government=s position. *Id.* To support its

[12] In *Pierce*, the court noted that certain A>objective indicia= such as the terms of a settlement agreement, the stage in the proceedings at which the merits were decided, and the views of other courts on the merits@ can be relevant to the inquiry of whether the government=s position was substantially justified. 487 U.S. at 568.

argument the dissent relies on four *unreviewed* administrative law judge decisions that have disagreed with the Secretary=s interpretation of section 56.12025. Slip op. at 24.[13]

The dissent=s reliance on these cases is misplaced for several reasons. The most obvious one is that, pursuant to Commission Procedural Rule 72, 29 C.F.R. ' 2700.72, unreviewed administrative law judge decisions have *no* binding precedential impact. It is, therefore, erroneous to portray these rulings as having any appreciable relevance to the current status of the law regarding the issue of frame grounding. They cannot be found to constitute the type of Astring of

[13] The two decisions which predate the judge=s decision on the merits in this case are distinguishable. In *Mulzer Crushed Stone Co.*, the issue of whether frame grounding was permissible under section 56.1205 was never squarely decided. Rather, the case centered on the fact-based question of whether bolts used to connect the motor frame to the conveyor belt frame were rusted. 3 FMSHRC at 1241. The judge never discussed the regulatory interpretation question at issue here. In addition, *McCormick Sand Corp.* is distinguishable because in that case the judge found that the circuit met the National Electric Code (ANEC@) grounding requirements. 2 FMSHRC at 24. The two other cases relied on by the dissent (*Tide Creek Rock, Inc.*, 18 FMSHRC 390 (Mar. 1996) (ALJ), and *F. Palumbo Sand & Gravel*, 19 FMSHRC 1440 (Aug. 1997) (ALJ)) were decided after the judge=s ruling in the underlying decision on the merits in this case, and therefore are not relevant in determining whether the Secretary=s position was substantially justified. As the Supreme Court made clear in *Pierce*, the legal question on an appeal from an attorney=s fee award is Anot what the law now is, but what the Government was substantially justified in believing it to have been.@ 487 U.S. at 561. Of course, even now these cases do not represent Awhat the law . . . is@ because they are administrative law judge decisions, which are not legal precedent. *Id.*

losses@ referred to by the Supreme Court in *Pierce* as bearing on whether an agency=s position lacks substantial justification. 487 U.S. at 569.

The *Kali* case underscores this point. In *Kali*, an EAJA case in which the plaintiffs had successfully challenged a government welfare regulation in the merits proceeding, every court that had ruled on the issue (generally federal district courts) had rejected the Secretary=s position. 854 F.2d at 334. Nonetheless, the Ninth Circuit found that the district court in the EAJA case had not abused its discretion in finding the government=s position substantially justified.

Moreover, when federal courts inquire as to whether the government=s position was substantially justified on legal grounds, they generally look to federal court of appeals precedent. *United States v. One 1984 Ford Van*, 873 F.2d 1281, 1282 (9th Cir. 1989) (government did not have a reasonable basis in law because there was no distinction between this case and an earlier Ninth Circuit case); *Fraction v. Bowen*, 859 F.2d 574, 575 (8th Cir. 1988) (government=s position was not substantially justified because the government=s mistakes were Acontrary to clearly established circuit precedent@). Similarly, in the administrative law context, Commission decisions serve as legal precedent, since the role of the Commission as a reviewing body is similar to that of a federal circuit court in the judicial setting. But, as we have discussed, the Commission has never addressed the issue of frame grounding, and therefore no binding precedent exists to establish a meaningful interpretation of section 56.12025.

Our dissenting colleagues also take exception to the Secretary=s decision not to appeal any of the aforementioned cases. Slip op. at 25. However, we note that, in *Pierce*, the Supreme Court held that A[t]he unfavorable terms of a settlement agreement, [which the Court also considered as Aobjective indicia@ of whether the government=s position was substantially justified] *without inquiry into the reasons* for settlement, cannot conclusively establish the weakness of the Government=s position.@ 487 U.S. at 568 (emphasis added). In the same vein, the Commission, as a reviewing body, should likewise be extremely cautious about concluding that the Secretary=s position was unreasonable if the support for such a finding would involve second-guessing her decision of whether to appeal a case. This is particularly important because we are not privy to the complex legal, factual, and policy reasons underlying the Secretary=s decision not to appeal. Furthermore, to suggest that the Secretary=s underlying position in a case was unreasonable based on her decision not to appeal an adverse ruling could result in the filing of needless appeals by the Secretary to avoid the threat of liability for attorney=s fees under the EAJA.

3. The Secretary=s Position Had a Reasonable Basis in Fact

We now turn to the question of whether the Secretary=s position had a reasonable basis in fact. *Pierce*, 487 U.S. at 565. To ascertain the answer, we review the record before us with the understanding that the Secretary need not prove in this EAJA proceeding by a preponderance of the evidence that frame grounding is ineffective. Rather, she need only demonstrate that her

position was a reasonable one. Our review of the entire record compels the conclusion that her position that frame grounding is not effective is reasonable in fact.[14]

The purpose of section 56.12025 is to protect individuals from the threat of electrocution. In the event of a fault in the electrical current, such as a broken wire or worn insulation in the cable carrying the electrical power supply to the motor, or excessive moisture, undirected electrical current must be carried by way of a grounding conductor back to the power source. When the system is properly grounded, fault current will pass through a circuit breaker, trip the switch and de-energize the system, and then pass to the ground. S. Cross Mot. for Sum. Dec. at 4; CSG Mot. for Sum. Dec. at 6. If the fault current does not have an effective ground conductor, the breaker may not trip quickly, allowing the equipment frame to become energized. When this occurs, an individual who comes into contact with an energized frame faces the hazard of electrical shock or death by electrocution. S. Cross Mot. for Sum. Dec. at 4.

In asserting that the frame grounding method employed by CSG was so inherently unreliable that it could not provide reasonable assurance that the miners would be protected from electrocution, the Secretary relied on the fact that CSG=s frame grounding system depends on the integrity of many connections (metal to bolt, metal to metal, metal to wire) to move the fault current to the breaker. *Id.* at 10. MSHA=s expert, Paul Price, was emphatic about the hazard posed by such a system:

> Crushers, screens, conveyors and other steel structures vibrate and rust resulting in the loosening of the connections of the frame and thereby increasing the resistance of the grounding path . . . . The

[14] Our dissenting colleagues describe the statements made by MSHA safety expert Paul Price in a deposition and declaration as Aallegations.@ Slip op. at 22. This characterization is incorrect, however, since these were not mere allegations by the Secretary but rather statements submitted by both CSG and the Secretary with their summary judgement pleadings. CSG had the opportunity to cross-examine Price about his statements during his deposition and to rebut them through the introduction of competing views submitted in affidavits at the summary judgement stage. Accordingly, the Secretary could appropriately rely on Price=s statements in the underlying proceeding to support her position, and we are not precluded from considering them in determining whether the Secretary=s position was substantially justified.

> connections at the motors and other electrical enclosures depend on bolts which are also subject to rust and vibration. Thus, the use of the crusher and conveyor frames as the grounding conductor, as was attempted here, is extremely unreliable as any increase in resistance anywhere along the ground path (motor to bolt to frame part to adjoining frame part to jumper, etc.) could subject anyone touching any of the metal frames during a ground fault condition to a potentially fatal shock. Accordingly, the frame is wholly unreliable as a conductor and does not provide for an effective path to ground.

Price Decl. at 4-5.

MSHA=s expert Price was unshakeable in his conviction that problems with rusty bolts and vibration were insurmountable, and caused this system to be fundamentally flawed. He testified that Ait=s impossible to maintain them in a low impedance[15] cause you have to grind the rust off every day and it=s kind of essentially impossible to maintain them like that.@ Price Dep. at 22. *See also* Price Dep. at 24 (A[T]he conveyors all vibrate . . . The bolts are . . . all rusty because they=re outside . . . . You can=t maintain them . . . unless you check them every hour. They=re essentially impossible to maintain.@); Price Dep. at 55-56 (AThe reason we do not accept grounding by frames or conveyors is it=s impossible to maintain the thing . . . It can=t be done . . . [I]t can vibrate loose within just a few seconds@).

[15] CSG concedes that low impedence is critical to an effective grounding system. Reply to S. Cross Mot. for Sum. Dec. at 6.

The declaration of Gordon Vincent, an electrical contractor who was retained by CSG, in the fall of 1992, to perform grounding and continuity tests, also supports the reasonableness of the Secretary=s position. Decl. of Gordon Vincent dated Oct. 26, 1995 (AVincent Decl.@) at 1-2; *see also* Deposition of Eric Schoonmaker, General Manager of CSG Montague plant, dated July 14, 1995 (ASchoonmaker Dep.@) at 39. When Vincent arrived at the plant and found only 3-conductor leads without a fourth grounding conductor, he determined that the grounding was inadequate and ended his inspection. Vincent Decl. at 3; Schoonmaker Dep. at 41, 50. He informed the operator that the plant was not properly grounded, and that he would not certify to MSHA that it was, whereupon CSG terminated his contract. Vincent Decl. at 4.[16]

CSG provided no expert testimony. In the merits case before the ALJ, it based its factual case almost completely on the affidavit and deposition of Eric Schoonmaker. He asserted that when the motors were serviced, they were inspected to ensure that they were securely bolted to the frame and that the bolts were not rusted. Schoonmaker Aff. at 3. He also stated that the grounding system was periodically tested, and that it passed the test in September 1992. *Id.* at 4. The operator relied on the fact that MSHA could not produce test results that showed excessive resistance and that the mandatory testing conducted annually by CSG always indicated a sufficiently low resistance path to ground.[17] CSG=s evidence does not undermine the reasonableness of MSHA=s position that frame grounding fails to satisfy the standard=s grounding requirement. The fact that a feared accident has not yet occurred, or that the system could pass resistance tests on a particular day does not render unreasonable the Secretary=s charge that CSG=s grounding was ineffective and violative of the standard. *See Ace Drilling Coal Co.*, 2 FMSHRC 790, 791 (Apr. 1980) (AIt is not necessary. . . that a condition contribute to an accident before the standard is violated. The Act does not condition the existence of a violation upon the occurrence of an event it is designed to prevent.@). *See also Western Fuels*, 19 FMSHRC at 997-1000 (an unexpected malfunction of switches would constitute a violation, notwithstanding the fact that the switches were in proper working order 3 days before the fire that triggered the

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[16] The dissent=s dismissive appraisal of Vincent=s declaration (slip op. at 22-23) appears to be based on a possible misunderstanding of what kind of evidence is relevant in making a determination that the government=s position was substantially justified. His statement represents the views of the operator=s own contractor who quickly determined (without even needing to examine the crusher motors) from his review of the starter control box that the absence of a fourth grounding conductor was unacceptable. Vincent Decl. at 3. This is relevant to the question of whether the operator had instituted Aeffective grounding,@ which even CSG concedes is required by the regulation. Vincent=s views strongly corroborate the Secretary=s position, which she long ago arrived at independently and has consistently enforced.

[17] We note that CSG=s annual test results may not be an entirely accurate indicator of how well the system usually performs if, prior to such testing, the connections are cleaned and tightened. Commenting on a test administered by MSHA after the citation had been issued, Price stated that Aevery one of . . . [the bolts] . . . had been cleaned recently. They were still shiny.@ Price Dep. at 24.

MSHA inspection at issue, the cause of the malfunction was never determined, and the switches were still functional 2 years afterwards, at the time of the hearing). Finally, even Schoonmaker admitted that a four-wire grounding system (as opposed to frame grounding) would provide Abetter protection.@ Schoonmaker Dep. at 53.

Under the approach of the judge and the dissent, MSHA could only cite an ineffective path to ground after it discovers the condition based on results of continuity and resistance tests on a particular piece of equipment. MSHA=s theory of violation, however, was that a design that was inherently unreliable, such as frame grounding, failed to comply with the standard=s grounding requirement, regardless of what test results may show at any particular point in time.[18] Under the facts of this case, this was a reasonable view and one that furthered the safety purposes of the Act.

In conclusion, the record as a whole indicates that the Secretary=s position regarding the inherent unreliability of CSG=s frame grounding system had a reasonable basis in fact. As we set forth in the preceding section, her position also had a reasonable basis in law. Accordingly, we find that her position was substantially justified, and we therefore vacate the judge=s order awarding fees and other expenses to CSG.[19]

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[18] The judge mistakenly relied on post-citation tests for the proposition that the Secretary=s position was not substantially justified. *See* 18 FMSHRC at 1824. The Secretary, however, pointed out the distinction between one or more isolated satisfactory test results and an effective grounding design. As MSHA=s expert explained, Aa faulty design can in fact provide a sufficient ground for an instant in time, but will offer insufficient protection at the next moment.@ Price Decl. at 5. Thus, the fact that the system passed post-citation resistivity tests is in no way conclusive of whether MSHA=s position in the underlying case was reasonable.

[19] To support their position, our dissenting colleagues rely on the Secretary=s proposed penalty assessments and the charges of section 110(c) liability in the underlying proceeding. Slip

op. at 25-26. These issues were not raised before nor argued to the Commission in this EAJA case. Further, the record evidence on these issues was not fully developed because the case on the merits was decided on summary judgement. Accordingly, we will refrain from reaching these issues, especially since we have before us neither the benefit of argument from the parties nor analysis by the judge.

III.

Conclusion

For the foregoing reasons, we reverse the judge=s EAJA decision and vacate the EAJA award.

_____
Mary Lu Jordan, Chairman

_____
Marc Lincoln Marks, Commissioner

_____
Robert H. Beatty, Jr., Commissioner

Commissioners Riley and Verheggen, dissenting:

This case stands out as an unfortunate example of unreasonable regulatory enforcement, especially when viewed in the context of the Secretary=s position on frame grounding over the past 17 years **C** a long history of regulatory inaction that reveals the Secretary=s unwillingness to address an issue that she herself emphatically pronounces to involve a serious safety risk to miners. Viewing the record as a whole in this context, we find that the Secretary=s litigation position was not substantially justified. Therefore, although we join with our colleagues in Sections I, II.A, and II.B of their opinion (with the exception of footnote 7, Section II.B), we dissent from their reversal of the judge=s award of fees to CSG in Section II.C.

Under EAJA, an eligible party engaged in litigation with a federal agency may, upon prevailing over the agency and filing a timely application, recover attorney=s fees and related expenses unless the agency can prove that its position was Asubstantially justified@ or special circumstances would render such an award Aunjust.@ 5 U.S.C. ' 504(a)(1). There is no dispute in this case that CSG is a prevailing party eligible for an award under EAJA, and that its application was timely filed. Nor has the Secretary alleged that any special circumstances exist that would render an award unjust. Solely at issue is whether the Secretary has proven that her litigation position was substantially justified and, if not, the propriety of the award made by the judge. *See F.J. Vollmer Co. v. Magaw*, 102 F.3d 591, 595 (D.C. Cir. 1996) (AThe Government bears the burden of establishing that its position was substantially justified.@).

An agency position that is substantially justified has a Areasonable basis both in law and fact@ and is Ajustified to a degree that could satisfy a reasonable person.@ *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). Here, the Secretary asserts that her position on the citation in the underlying merits proceeding was reasonable in light of industry practice and because it furthered the goal of protecting the health and safety of miners. S. Br. at 9-14. The Secretary also argues that the judge erred by relying in his EAJA decision only on his reasoning for rejecting the Secretary=s position in the merits proceeding. *Id*. at 13-16. In response, CSG argues that the judge correctly concluded that the Secretary=s position was not substantially justified because the Secretary=s interpretation of the cited standard was unreasonable, her litigation position was not supported by the evidence, and a reasonable person familiar with the mining industry would have concluded that the cited motors were effectively grounded. CSG Resp. Br. at 4-17.

We begin our review of this case with the Secretary=s interpretation of section 56.12025, which **C** like the judge **C** we find to be at odds with the plain meaning of the regulation.[1] The requirements of section 56.12025 are clear and unambiguous. The regulation requires that A[a]ll metal enclosing or encasing electrical circuits . . . be grounded or provided with equivalent protection.@ It does not contain any requirements for grounding design, nor does it prohibit any

[1] Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written. *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989).

particular method of grounding. The regulation simply requires, in the context of this case, that electrical circuits be grounded. Electrical grounding is defined elsewhere in Part 56 as Ato connect with the ground to make the earth part of the circuit.@ 30 C.F.R. ' 56.2. Since the meaning of section 56.12025 is clear and unambiguous, the judge properly refused to grant deference to the Secretary=s interpretation of the regulation as constituting a per se prohibition against frame grounding. *Contractors Sand & Gravel Supply, Inc.*, 18 FMSHRC 384, 387-88 (Mar. 1996) (ALJ); *see Pfizer Inc. v. Heckler,* 735 F.2d 1502, 1509 (D.C. Cir. 1984) (deference is considered A*only* when the plain meaning of the rule itself is doubtful or ambiguous@) (emphasis in original).

The judge properly noted that, under the plain meaning of section 56.12025, the Secretary failed to establish that CSG violated the regulation. 18 FMSHRC at 387-88. The Secretary offered no evidence to show that the motors in question were not, in fact, grounded as required by the regulation. Indeed, no tests were conducted by MSHA at the time the citation was issued to determine whether the stacker or crusher motors were grounded. *Id.* at 386. CSG=s own continuity and resistance test, conducted as required under 30 C.F.R. ' 56.12028, indicated the motors were properly grounded 6 months prior to MSHA=s investigation. *Id.* at 388. Post-citation tests conducted by MSHA also showed that the motors were grounded, evidence which, as the judge noted, the Secretary chose to ignore. *Id.* Given this singular lack of evidence, we find amply supported by the record the judge=s conclusion that the Secretary=s position on the merits was unreasonable and without justification.

Our colleagues state that the judge Amade no independent findings of material fact in the merits proceeding and did not even reach the question of whether frame grounding is effective,@ which they characterize as an Aissue . . . essential to a resolution of the underlying proceeding@ that Aremains in dispute.@ Slip op. at 7-8 n.7. This statement reveals a fundamental misapprehension of the issue before the Commission. Our colleagues go to great lengths to justify the Secretary=s position based on the alleged inherent ineffectiveness of frame grounding. Slip op. at 10-17. As explained further below, we view this case differently, and believe that the majority=s approach is an invalid exercise of de novo fact finding. *Island Creek Coal Co.*, 15 FMSHRC 339, 347 (Mar. 1993) (AIt would be inappropriate for the Commission to reweigh the evidence in [any] case or to enter de novo findings based on an independent evaluation of the record.@); *see also Wellmore Coal Corp. v. FMSHRC*, No. 97-1280, 1997 WL 794132 at *3 (4th Cir. Dec. 30, 1997) (A>[T]he ALJ has sole power to . . . resolve inconsistencies in the evidence=@) (citations omitted).

This case began when MSHA Inspector Ann Frederick alleged that CSG was using A[t]he frame of the crusher . . . as the grounding conductor.@ 18 FMSHRC at 385 (quoting Citation No. 3911909). She went on to describe the ground in some detail, then stated that A[f]rame grounding has been forbidden for over fifteen years.@ *Id.* Agreeing that there was no dispute as to any material fact, the parties filed cross motions for summary decision Aon the single *legal* issue of whether [CSG=s] reliance on the crusher and stacker frames to serve as the path to ground for the electric current violates the provisions of 30 C.F.R. ' 56.12025.@ *Id.* at 386 (emphasis added). In support of their positions, both parties filed extensive discovery documents to be made part of the

record. Among the Secretary=s submissions were various allegations of Paul Price, contained in a declaration and deposition transcript, regarding the effectiveness **C** or lack thereof **C** of frame grounding.

Here, it is important to take note of just what was before the judge. In essence, the parties asked the judge to dispose of the threshold legal question of whether frame grounding was per se prohibited by section 56.12025. This was a central part of the Secretary=s theory. The inspector=s statement that A[f]rame grounding has been forbidden for over fifteen years@ (18 FMSHRC at 385), and her subsequent failure to collect any evidence as to whether the cited ground was, in fact, functioning can only be explained logically in the context of the application of a per se rule. The record reveals that the Secretary was not concerned with proving that the particular equipment in question was not grounded. Instead, she argued that, as a general proposition, frame grounding is inherently ineffective and, therefore, illegal under section 56.12025. S. Cross Mot. for Sum. Dec. at 4-6.

We find it significant that the Secretary did not ask in her cross motion for leave to proceed further to prove a violation under an alternative theory if the judge refused to accept her interpretation of section 56.12025. For example, the Secretary could have attempted to prove that the cited ground was, in fact, ineffective **C** which would have been an admittedly difficult case for the Secretary to prove given the paucity of evidence she collected on the actual performance of the cited ground. This may explain why she did not style her motion as one for APartial Summary Decision.@

But when the judge rejected the Secretary=s interpretation of section 56.12025, the Secretary=s case failed *as a matter of law.* The judge was not obliged to go any further. We are thus left with a merits decision made on a minimal factual record[2] **C** and justifiably so given the dispositive nature of the judge=s decision under the circumstances. We also note that the Secretary opted not to appeal the judge=s decision to the Commission. She placed all her litigation eggs in the basket of a per se rule that frame grounding violates section 56.12025. And that is the posture in which the Secretary=s litigation position arrived before us in this EAJA proceeding.

As mightily as our colleagues try to transform this case into one involving the issue of whether frame grounding is effective, that is simply not the issue before us on review. Instead, we must decide whether the Secretary has proven that her litigation position **C** that frame grounding is per se illegal under section 56.12025 **C** was substantially justified. Thus, this case does not require us to determine whether frame grounding is inherently ineffective, a question the judge did not have to reach, and which we thus should not reach. Yet this is precisely what the majority

[2] On this point, our colleagues go so far as to say Athere are no factual findings to review@ in this EAJA appeal. Slip op. at 7 n.7.

does based on the Secretary=s unsubstantiated factual allegations. In so many words, they conclude that CSG=s grounding method was inherently ineffective, based primarily on their acceptance of allegations made by Price, and that, therefore, the Secretary was justified in proceeding against CSG (in this respect, the majority merely follows the Secretary=s lead **C** the Secretary=s EAJA pleadings also rest primarily on Price=s allegations).

The problem with the majority=s reliance on the Secretary=s allegations to decide this case is easily illustrated. For example, the majority highlights Price=s Aunshakeable . . . conviction[3] that problems with rusty bolts and vibration were insurmountable, and caused [CSG=s] system to be fundamentally flawed.@ Slip op. at 15. Yet they fail to mention that Schoonmaker testified that there was no corrosion or rust between the stacker motor and the frame, that a bolt had never Acome loose@ due to vibration (AMotors are pretty stable. They don=t make a lot of noise or bumps.@), and that during its 12 years of operation, the motor and frame had always provided a sufficiently low resistance path to ground. Schoonmaker Dep. at 46-49. *The Secretary failed to rebut this testimony.* In fact, Price agreed on cross-examination that the bolts did not affect the grounding path when he tested them after the citation had been issued. Price Dep. at 24.

We note that MSHA requires regular annual testing of *all* types of grounding conductors. *See* 30 C.F.R. ' 56.12028. In fact, this is so even where Agrounding conductors . . . are exposed or subjected to vibration, flexing or corrosive environments.@ IV MSHA, U.S. Dep=t of Labor, *Program Policy Manual*, Part 56/57, at 51 (1996). This leads us to question whether lack of continuity and high resistence due to vibration and corrosion may be inherent dangers in virtually any grounding system on heavy machinery or equipment.

The majority also quotes Price=s statement that to maintain a ground such as used by CSG, A>you have to grind the rust off every day.=@ Slip op. at 15 (quoting Price Dep. at 22). Yet nowhere in the record can we find any data to substantiate this statement. CSG=s Montague Plant is located near Yreka, California. 18 FMSHRC at 384. The record is devoid of any evidence regarding Yreka=s weather or how machinery maintained outdoors holds up to the elements in

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[3] Interestingly, this is just the sort of credibility determination that is within the sole province of an ALJ to make. *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 266 (1987) (AFinal assessments of the credibility of supporting witnesses are appropriately reserved for the administrative law judge.@).

Yreka.[4] Based on the record before us, we find it impossible to conclude that conditions in Yreka would require daily de-rusting of outdoor ground connections.

The majority also relies on the declaration of Gordon Vincent to argue in support of the reasonableness of the Secretary=s position. Slip op. at 15-16. In his declaration, Vincent opined that CSG=s plant was not properly grounded A[b]ecause the use of 3-conductor leads without a fourth grounding conductor does not meet the requirements of the National Electric Code [NEC].@ Vincent Decl. at 3. Vincent stated that he Awould not certify to MSHA or anyone else that [CSG=s] electrical system was properly grounded.@ *Id* at 4. There are several problems with Vincent=s declaration. First, we note that, as a matter of law, Vincent=s opinion is Anot an authoritative interpretation of [MSHA=s] regulation@ on grounding. *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 157 (D.C. Cir. 1986). In addition, the record contains no indication that any MSHA personnel knew of Vincent=s inspection at the time Inspector Frederick issued the citation at issue in the underlying proceeding. Vincent=s opinion is thus irrelevant to whether the Secretary=s decision to cite CSG was reasonable. Insofar as the declaration might be relevant at all to this proceeding **C** and we do not believe that it is **C** it is based on an inspection of a Astarter control box,@ not the cited equipment. In fact, there is no indication in the record that Vincent ever looked at the cited crusher motors.

[4] Yreka=s average annual precipitation is approximately 19 inches **C** arid in comparison to Crescent City (approximately 100 miles west of Yreka), where the average annual precipitation is approximately 65 inches. *See* http://www.weatherpost.com. In light of these data, we view Price=s statement with some skepticism.

These examples illustrate how unwise it is to accept the Secretary=s unsubstantiated allegations on their face, as the majority has done. Had the case proceeded beyond summary decision, the judge could have reached the issue of whether frame grounding is effective, and could have resolved any factual inconsistencies in the record before him. But given the posture of the merits case, he did not have to reach this issue and thus made no factual findings on either the Secretary=s or CSG=s factual allegations. They remain mere allegations. We thus find the majority=s treatment of the Secretary=s allegations as if they were record facts inappropriate.[5]

The posture in which this EAJA case arrived at the Commission dictates that we look elsewhere to determine whether the Secretary=s position had a reasonable basis in law and fact. We have already found that the judge properly determined that the Secretary=s interpretation of section 56.12025 was unreasonable. But there are other Aobjective indicia@ of the unreasonableness of the government=s case. *See Pierce*, 487 U.S. at 568 (noting that certain A>objective indicia= such as the terms of a settlement agreement, the stage . . . at which the merits were decided, and the views of other courts on the merits . . . can be relevant@ to the inquiry of whether the government=s position was substantially justified). In keeping with *Pierce*, we thus look to other relevant Aextraneous circumstances@ that may have a bearing on the reasonableness of the Secretary=s position. *Oregon Natural Resources Council v. Madigan*, 980 F.2d 1330, 1331 (9th Cir. 1992); *see also FEC v. Rose,* 806 F.2d 1081, 1090 (D.C. Cir. 1986). As the court in *Oregon Natural Resources Council* stated:

> Examination of the government=s litigation position encompasses examination of the position on the merits, then focuses upon Aextraneous circumstances bearing upon the reasonableness of the government=s decision to take a case to trial.@ Extraneous circumstances include relevant legal or factual precedents.

980 F.2d at 1331-32 (citations omitted).

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[5] Although the majority regards the Secretary=s submissions in the underlying summary decision proceeding as something more than allegations (slip op. at 14 n.14), until a trier of fact resolves conflicts between the factual allegations made by litigants, the litigants= conflicting submissions remain allegations. *See Wellmore*, 1997 WL 794132 at *3 (A>[T]he ALJ has sole power to . . . resolve inconsistencies in the evidence=@) (citations omitted). But more to the point, given the posture of this case and the fact that the Secretary lost the underlying proceeding on a narrow question of law, we find it unnecessary to reach the Secretary=s factual allegations at all.

The Supreme Court has noted that Aa string of losses,@ while not determinative, Acan be indicative@ that an agency=s position lacks substantial justification. *Pierce*, 487 U.S. at 569. Here, the judge correctly noted in his EAJA decision that Aall the other administrative law judges that have considered the Secretary=s legal theory have concluded that it is not reasonable.@ 18 FMSHRC at 1823-24 (citing *Tide Creek Rock, Inc.*, 18 FMSHRC 390 (Mar. 1996) (ALJ); *Mulzer Crushed Stone Co.*, 3 FMSHRC 1238 (May 1981) (ALJ); and *McCormick Sand Corp.*, 2 FMSHRC 21 (Jan. 1980) (ALJ)). These cases illustrate the Secretary=s inability to convince any trier of fact that section 56.12025 requires particular types of grounds.[6] It is just the sort of Astring of losses@ to which the Supreme Court referred in *Pierce*.

The majority=s statement that Ano binding [Commission] precedent exists to establish a meaningful interpretation of section 56.12025@ (slip op. at 13) misses the point. At issue in this EAJA proceeding is not determining authoritatively what section 56.12025 means as applied to CSG=s frame grounded crusher motor. Instead, at issue here is the reasonableness of the Secretary=s position that such frame grounding was per se prohibited under section 56.12025. Moreover, the absence of any binding Commission decision on this question should not prevent us from considering how Commission judges have ruled on the Secretary=s efforts Ato require performance which is not specified in [section 56.12025].@ *McCormick Sand*, 2 FMSHRC at 23.

Notwithstanding the statement on the face of the citation at issue here that frame grounding had been forbidden for 15 years, it has never been found by any adjudicator to be forbidden under section 56.12025. In fact, as recently as August 1997, well after the judge in this case granted CSG=s EAJA application, yet another Commission judge flatly rejected the Secretary=s theory that section 56.12025 per se prohibits frame grounding. *F. Palumbo Sand & Gravel*, 19 FMSHRC 1440 (Aug. 1997) (ALJ). In *Palumbo*, Judge David F. Barbour quoted Judge Cetti=s suggestion made in the merits decision of the instant case that A>[i]f the Secretary believes frame grounding should be prohibited, the Secretary should initiate appropriate rule making to achieve this goal.=@ *Id*. at 1444 (quoting 18 FMSHRC at 388). Judge Barbour concluded: AIt is a good suggestion.@ 19 FMSHRC at 1444. We agree.

We are troubled by the Secretary=s apparent indifference to the hazards she forcefully alleges are associated with frame grounding. She has inexplicably failed to seek review of four decisions by Commission judges which have declined to accept her position on frame grounding. Nor has she published an information bulletin or interpretive memorandum setting forth her interpretation of section 56.12025, much less made any effort to engage in rulemaking to clarify

[6] In all three cases we cite, Commission judges rejected the Secretary=s attempts to expand the requirements of section 56.12025 and its predecessor, section 56.12-25, well beyond their plain meaning.

the requirements of the standard. The Secretary has simply been unwilling to clarify the scope and meaning of section 56.12025, even though she herself pronounces frame grounding to be a serious safety risk to miners. We find this to be a compelling indicator of the unreasonableness of the Secretary=s position. If the consequences of relying on frame grounding are as dire as the Secretary suggests, we find it baffling that the Secretary has so utterly failed to clarify the scope and meaning of section 56.12025 as applied to such grounding. We can take her no more seriously than the fabled boy who cried wolf.

The Secretary=s litigation strategy also illustrates the unreasonableness of her litigation position. Regarding cases decided on the pleadings, Congress warned:

> Certain types of case dispositions may indicate that the Government action was not substantially justified. A court should look closely at cases, for example, where there has been a judgment on the pleadings or where there is a directed verdict or where a prior suit on the same claim has been dismissed. Such cases clearly raise the possibility that the Government was unreasonable in pursuing the litigation.

H.R. Rep. No. 96-1418, 96th Cong., 2d Sess. 11 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4953, 4989-90. Here, the Secretary argued for application of a per se rule that frame grounding violated section 56.12025 *on the pleadings*, without leaving open the possibility of pursuing her case under any alternative theories. The judge rejected her arguments on a narrow and dispositive question of law, in accord with two judges before him. The Secretary then failed to appeal the judge=s decision. In the face of two prior losses, we find the Secretary=s pursuit of such a strategy unreasonable.[7]

We also find MSHA=s proposed penalties in this case ($6,000 against Schoonmaker individually and $7,000 against CSG) to be particularly excessive, given that the alleged violation was based on an interpretation of the regulation that had been rejected twice before by Commission judges at the time the citation was issued. As a standard of comparison, the Secretary has proposed only nominal penalties in other attempts to enforce her, so far, unpersuasive interpretation of section 56.12025. We have determined administratively that in the 1981 *Mulzer Crushed Stone* case, the Secretary proposed a penalty of $67. In the two section

[7] Nor did the Secretary plead in this case any Aspecial circumstances [that] would make an [EAJA] award unjust,@ 5 U.S.C. ' 504(a)(1), among which Congress noted is Aadvancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts.@ H.R. Rep. No. 96-1418, at 11.

56.12025 cases that have been decided since the instant case, nominal penalties were also proposed: $50 in *Tide Creek Rock* and $81 in *Palumbo*. The excessive increase in penalties proposed in the instant case over an average penalty of $66 proposed in the other section 56.12025 cases is left completely unexplained by the Secretary and unquestioned by the majority. This penalty escalation, coupled with the deliberate personalization of sanctions under section 110(c), leads us to wonder why the Secretary failed to litigate such a Asignificant@ case beyond summary decision.

Finally, we note that, because the burden of showing substantial justification rests with the Secretary, it is incumbent upon her to provide additional support for her position beyond what was argued on the merits. *Oregon Natural Resources Council*, 980 F.2d at 1332. On this question, the judge found:

> The Secretary offered nothing in this [EAJA] proceeding to persuade me that my findings of unreasonableness in the underlying proceeding were incorrect. *The Secretary merely reiterates arguments that I have previously considered and rejected.*

18 FMSHRC at 1823 (emphasis added). And again, on appeal, the Secretary has offered no additional support for her position. She Aonly reasserts [her] position on the merits, and supplies nothing new to justify [her] position and meet [her] burden.@ *Oregon Natural Resources Council*, 980 F.2d at 1332. Similarly, the majority collapses their EAJA analysis into an endorsement of the Secretary=s allegations made in the merits proceeding.[8] Their primary focus is on the issue of whether frame grounding is effective **C** an issue not before us.

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[8] We reject the majority=s conclusion that the judge incorrectly collapsed his decision on the merits into his evaluation of the reasonableness of the Secretary=s position for purposes of the EAJA proceeding. Slip op. at 9-10. The judge=s decision clearly indicates he took a fresh look at the record. 18 FMSHRC at 1822-23 (AHaving considered both aspects of this argument, I again find . . .@; AAgain, on review of the record, I find . . .@). Moreover, given that the Secretary

merely reiterated her merits arguments in the EAJA proceeding (*id.* at 1823), with so little to respond to, we find it hard to imagine what more the judge could have done. But even assuming arguendo that the judge inadequately set forth the reasons and bases for his EAJA decision, we believe that the majority is required to remand the case for further development. It is well established that Commission judges must analyze and weigh all probative record evidence, make appropriate findings, and explain the reasons for their decisions, *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1222 (June 1994) **C** which, by the way, we believe the judge did here adequately.

Accordingly, for the foregoing reasons, we find that the judge correctly determined that the Secretary failed to meet her burden of establishing that her position in the underlying proceeding was substantially justified.[9]

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

[9] In light of the majority=s disposition, we do not reach the issues of whether the judge=s award of fees was legally correct and supported by substantial evidence. *See* S. PDR at 11-14 (raising the issue of whether judge erred in increasing the cap on fees above the maximum specified in EAJA); 14 (raising the issue of whether the judge erred in awarding to CSG interest costs incurred on unpaid legal bills).

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