FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20006

November 3, 1999

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
v.	:	Docket No. EAJ 98-1
BLACK DIAMOND CONSTRUCTION, INC.	:	

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

DECISION

BY: Jordan, Chairman; Riley, Verheggen, 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 ("EAJA"). Black Diamond Construction, Inc. ("Black Diamond") prevailed over the Department of Labor's Mine Safety and Health Administration ("MSHA") in the underlying penalty proceeding under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), when the Secretary vacated two citations prior to trial. Thereafter, Black Diamond filed an application for fees on the ground that the Secretary's position was not substantially justified. Administrative Law Judge David Barbour ordered the Secretary of Labor to pay to Black Diamond fees and expenses of $14,390.25. 20 FMSHRC 1169 (Oct. 1998) (ALJ).[1] For the reasons that follow, we affirm the judge's award.

[1] Judge Jerold Feldman presided over the Mine Act proceeding and issued the order dismissing the proceeding; however, the EAJA application was assigned to Judge Barbour.

I.

Factual and Procedural Background

A. The Mine Act Proceeding[2]

On May 15, 1997, during a routine mine inspection at the Robin Hood Preparation Plant, MSHA Inspector Ernest Thompson observed Brian Casto on mine property and asked about his work duties. 20 FMSHRC at 1170, 1173; B.D. Reply to S. Answer to EAJA Appl., Ex. B at 6 ("Thompson Dep."). Casto responded that he had driven a fuel truck on three occasions. 20 FMSHRC at 1170. Thompson knew that Casto worked for a contractor, Black Diamond, which was at the mine to eliminate an impoundment. Thompson Dep. at 11. The impoundment, which had been in existence for several decades, was a dam, constructed out of rock and coal refuse, that was located between two hillsides with about 40 acres of water and slurry behind it. 20 FMSHRC at 1172; Thompson Dep. at 10-11, 87. Thompson was also aware that Black Diamond was going to pump the water out of the impoundment and push the coal fines from the face of the dam back into the impoundment area. Thompson Dep. at 11-12. Elimination of the dam would allow longwall mining of coal underneath the impoundment without fear of water seepage. 20 FMSHRC at 1172. At the completion of the work, there would be a refuse pile in place of the impoundment. S. Answer to EAJA Appl. at 2-3.

Thompson also observed Black Diamond employee Matthew Adkins operating sediment pumps in the impoundment. *Id.* at 3. Thompson concluded that both workers were performing general mine labor and therefore were "miners" for purposes of the MSHA training regulations. 20 FMSHRC at 1170.

Thompson issued two citations against Black Diamond. Citation No. 4404455 charged Black Diamond with violating 30 C.F.R. § 48.25(a) when Casto performed general labor duties at the work site without having received mandatory safety training.[3] *Id.* at 1169; Thompson Dep., Ex. 1. Citation No. 4404941 charged Black Diamond with violating 30 C.F.R. § 48.29(c) when it failed to certify that Adkins had received the required training and to keep his certification form at the mine.[4] 20 FMSHRC at 1169-70; Thompson Dep., Ex. 4.

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[2] The facts in this case were developed largely as a result of discovery during the Mine Act proceeding. However, because there was no hearing in that matter, those facts only became a part of the record during the EAJA proceeding. *See* 29 C.F.R. § 2704.306(c).

[3] Section 48.25(a) provides in pertinent part: "Each new miner shall receive no less than 24 hours of training as prescribed in this section."

[4] Section 48.29(c) provides: "Copies of training certificates for currently employed miners shall be kept at the mine site for 2 years, or for 60 days after termination of employment."

Later that day, Thompson met with William Casto, vice-president of Black Diamond, concerning the citations. Thompson Dep. at 79-80. Casto stated that Black Diamond was performing demolition work and was exempt from the training regulations. 20 FMSHRC at 1170-71; B.D. EAJA Appl., Ex. 1 at 11 ("Casto Dep."). At a later meeting with MSHA officials on June 25, 1997, Casto again asserted that Black Diamond employees were construction workers who were exempt from the training regulations, and he supported his position with pages from MSHA's *Program Policy Manual*.

The *Program Policy Manual*, Part 48 Training and Retraining of Miners, provides:

> **Independent Contractor Training**
> A. **Coverage and Training Requirements**
> Independent contractors working at a mine are miners for Part 48 training purposes, except as explained below.
>
> ****
>
> This policy does not cover independent contractors who are shaft and slope workers, surface construction workers . . . .
>
> ****
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> **Persons Performing Construction Work**
> Construction work includes the building or demolition of any facility, the building of a major addition to an existing facility, and the assembling of a major piece of new equipment . . . .
>
> ****
>
> B. **Surface Mines or Surface Areas of Underground Mines**
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> ****
>
> 2. If workers are performing shaft and slope construction work - no Part 48 training is required.
>
> **Persons Performing Maintenance or Repair Work**
> Maintenance or repair work includes the upkeep or alteration of equipment or facilities. . . .
>
> A person performing maintenance or repair work, whether or not the mine is operational, must receive the appropriate comprehensive or hazard training under Subpart A or B [of the Part 48 regulations].

III MSHA, U.S. Dep't of Labor, *Program Policy Manual*, Part 48, at 14-15 (1991) ("*PPM*"). Casto further stated that he had talked with MSHA officials at its Mt. Hope, West Virginia office who agreed with him. 20 FMSHRC at 1171; Casto Dep. at 34-35. MSHA supervisor Don Ellis responded that it was MSHA policy to apply its training regulations to the work that Black Diamond was performing. 20 FMSHRC at 1171.

On October 17, 1997, the Secretary filed a petition for assessment of civil penalties against Black Diamond. *Id.* at 1169. The Secretary proposed penalties of $108 for the violation involving Brian Casto and $50 for the violation involving Adkins. *Id.* at 1170. Black Diamond denied that it violated the regulations, and the case was assigned to an administrative law judge. *Id.*

After the failure of settlement discussions, the judge ordered prehearing statements. *Id.* Black Diamond contended that Part 48 exempted the individuals performing construction work of the type that it was hired to perform. *Id.* In her statement, the Secretary contended that Black Diamond was hired to drain an impoundment at the preparation plant in order to allow longwall mining to commence under the impoundment. S. Preh. Statement at 2. Therefore, the Secretary concluded, the miners were hired to make alterations to the impoundment and were repair and maintenance workers subject to Part 48. *Id.*; 20 FMSHRC at 1170. The Secretary included in her list of proposed exhibits copies of the relevant pages of the *PPM* and Black Diamond's Impoundment Elimination Plan ("Plan"), which had been submitted to MSHA for approval. S Preh. Statement at 6.

On February 23, one day prior to the scheduled hearing, the Secretary vacated the underlying citations. 20 FMSHRC at 1170; S. Mot. to Dismiss at 3. The Secretary filed a motion to dismiss the penalty proceeding because it was moot. 20 FMSHRC at 1170; S. Mot. to Dismiss at 1. Attached to the motion were copies of the vacations, which stated: "After consultation with the Office of the Solicitor, [the citation] is hereby vacated." 20 FMSHRC at 1170. On February 25, the judge issued an order dismissing the proceeding. *Id.*; Unpublished Order dated February 25, 1998.

B. The EAJA Proceeding

Black Diamond filed an application for legal fees and expenses under the EAJA. 20 FMSHRC at 1170-71; EAJA Appl. at 1. Black Diamond asserted that, from the time the citations issued, it told MSHA Inspector Thompson that it was an independent contractor performing demolition work and that its employees were exempt from the training requirements. 20 FMSHRC at 1170-71. At the June 25, 1997 post-inspection conference, Black Diamond reiterated this position and supported its claim with the *PPM* and represented that MSHA officials at its Mt. Hope, West Virginia office confirmed that surface construction workers were exempt from the training regulations. *Id.* at 1171. Black Diamond further asserted that MSHA was aware that its employees were engaged in demolishing the impoundment but did not vacate the citations until the company was forced to go to the expense of defending itself. *Id.* at 1172.

The Secretary opposed the application, stating that her position that Brian Casto and Matthew Adkins were subject to the training requirements was substantially justified.[5] 20 FMSHRC at 1172. According to MSHA Inspector Thompson, Casto and Adkins were retained to make alterations to the impoundment and, therefore, were subject to the Part 48 training requirements. *Id.* at 1174. The Secretary explained that the decision to vacate the citations was due to "an internal dispute within the agency with respect to whether the overall nature of the work being done . . . was 'construction work' or 'maintenance or repair work.'" S. Answer to EAJA Appl. at 17. The Secretary further explained that the conflict within the agency became apparent during the deposition of Stuart Shelton, MSHA's impoundment specialist, who stated, on February 18, 1998, that a refuse site could not legally be both an impoundment and a refuse pile. *Id.*; Shelton Dep. at 1, 26. Until that time, it was the Secretary's position that Black Diamond was modifying a coal refuse facility from an impoundment to a refuse pile by eliminating the impounding capability of the facility.[6] S. Answer to EAJA Appl. at 17.

The judge viewed the primary issue in the underlying Mine Act proceeding as whether the work being performed at the impoundment was "construction work." 20 FMSHRC at 1176. Based on the *PPM*, the Plan, the deposition testimony of several witnesses, the regulatory scheme governing impoundments and coal refuse facilities, and dictionary definitions, the judge concluded that the Secretary had failed to establish that her position was substantially justified and that, therefore, Black Diamond was entitled to an award. *Id.* at 1177-79. The judge ordered the Secretary to pay fees and expenses totaling $14,390.25. *Id.* at 1180. Thereafter, the Commission granted the Secretary's petition for discretionary review.

II.

Disposition

A. Motions to Strike

Because the Mine Act proceeding ended prior to trial and a decision by the judge, there was limited evidentiary material in that proceeding. Commission EAJA Rule 306(c) specifically

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[5] The Secretary also opposed the application on the grounds that Black Diamond was ineligible for an award because its parent company exceeded the net worth requirements in EAJA and challenged the amount of fees sought because the hourly rate exceeded the statutory cap of $125 per hour in EAJA. 20 FMSHRC at 1172. The judge found in Black Diamond's favor on the net worth determination (*id.* at 1174-75), and the Secretary has not appealed. With regard to the statutory cap, the judge determined that Black Diamond could not recover fees at a rate higher than $125 per hour. *Id.* at 1179-80.

[6] The Secretary attached affidavits to its Answer to the EAJA Application that indicated that two additional MSHA officials had differing opinions on the nature of Black Diamond's work. S. Answer to EAJA Appl., Attach. F, G.

addresses this situation by allowing the applicant and the Secretary to supplement the record in the EAJA proceeding with affidavits and other documentary evidence. 29 C.F.R. § 2704.306(c).[7] However, each party's brief cites to deposition testimony not placed in the record in accordance with the Commission's rule.

Black Diamond filed a motion to strike citations in the Secretary's brief to pages in the deposition testimony of Don Ellis and Brian Casto that were not included in the record before the judge. B.D. Mot. to Strike at 3-4. In response, the Secretary cross-moved to strike references in Black Diamond's brief to pages of the depositions of Brian Casto, Matthew Adkins, Raymond Brown, and Don Ellis that were not before the judge. S. Resp. to B.D. Mot. to Strike at 5-6.

Black Diamond also objects to the Secretary's reference in her brief to an MSHA handbook entitled "Coal Mine Impoundment Inspection Procedures" and to the regulatory history and findings of fact by the Mining Enforcement and Safety Administration ("MESA"), because these materials were not considered by the judge and were submitted for the first time to the Commission on appeal. B.D. Mot. to Strike at 1, 3-4. In response, the Secretary argues that the Commission can take judicial notice of the MSHA handbook and the MESA regulatory history contained in the Federal Register. S. Resp. to B.D. Mot. to Strike at 1-3.

Consideration of the non-record deposition testimony is unnecessary to disposition of the case. Further, we do not rely on the secondary authorities cited in the Secretary's brief that were objected to by Black Diamond. Therefore, the motions to strike the disputed testimony and authorities are denied as moot. *See Secretary of Labor on behalf of Glover v. Consolidation Coal Co.*, 19 FMSHRC 1529, 1535 n.7 (Sept. 1997).

B. EAJA Application

The Secretary argues that the judge erred in failing to independently evaluate the reasonableness of the Secretary's position and impermissibly commingled a substantial evidence standard, appropriate for an evaluation of the merits of the case, with the substantial justification standard — whether there is a reasonable basis in fact and law for the government's position. S. Br. at 10. The Secretary contends that, in the absence of a definition of "alteration" in the regulations or the *PPM*, her position that elimination of the water-impounding capability was an alteration of the impoundment was reasonable. *Id.* at 15-20. The Secretary also argues that the employees of Black Diamond were exposed to the same hazards as miners and that coverage

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[7] Commission EAJA Rule 306(c) provides:

> If the proceeding for which fees and expenses are sought was conceded by the Secretary on the merits, withdrawn by the Secretary, or otherwise settled before any of the merits were heard, the applicant and the Secretary may supplement the administrative record with affidavits or other documentary evidence.

under the Mine Act was reasonable. *Id.* at 26-29. Finally, the Secretary argues that her position, on which the underlying litigation was based, was consistent and reasonable. *Id.* at 29-33.

Black Diamond responds that the Secretary's position was not reasonable and that such an analysis cannot be divorced from a consideration of the merits of her position. B.D. Resp. Br. at 7-9. Black Diamond contends that Inspector Thompson, who issued the citations, was unfamiliar with the Plan, and that his deposition testimony indicates that he failed to adequately analyze Black Diamond's work. *Id.* at 10-12. Black Diamond argues that the Secretary acted contrary to her own regulations and *PPM* in taking the position that construction workers were "miners" and that, therefore, her position was not justified. *Id* at 16-18. Further, Black Diamond contends that the MSHA inspector erroneously overlooked the nature of the work at the impoundment site and instead looked exclusively at the hazards to which the workers were exposed. *Id.* at 19-20. Finally, Black Diamond concludes that the Secretary pursued the citations until hearing was imminent, without regard to her own policies, and that the judge's award of fees should be affirmed. *Id.* at 24-25.

EAJA provides that a prevailing party may be awarded attorney's fees unless the position of the United States is substantially justified. *Contractors Sand and Gravel, Inc.*, 20 FMSHRC 960, 967 (Sept. 1998), *appeal docketed*, No. 98-1480 (D.C. Cir. Oct. 20, 1998). The Supreme Court has defined substantially justified as "justified in substance or in the main," or a position that has "a reasonable basis both in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). In *Pierce*, the Court set forth the test for substantial justification as follows: "a position can be justified even though it is not correct, and we believe it can be substantially (i.e., for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact." *Id.* at 566 n.2. The Court also noted that certain "'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. *Id.* at 568. 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). When reviewing an administrative law judge's EAJA decision, the Commission applies the substantial evidence test for factual issues and de novo review for legal issues. *Contractors*, 20 FMSHRC at 966-67.

"Position of the agency" is defined as "in addition to the position taken by the agency in the adversary adjudication, the action or failure to act by the agency upon which the adversary adjudication is based." 5 U.S.C. § 504 (b)(1)(E). Here, the focus is on the Secretary's prelitigation conduct — the action or inaction that gave rise to the litigation that was aborted. The Secretary states in her brief that she chose to withdraw the citations against Black Diamond when she became aware of "disagreement among MSHA's personnel" concerning whether the work in question was construction work. S. Br. at 32-33. The Secretary further argues that her

position throughout the prelitigation period, until the time of depositions, was consistent.[8] *Id.* at 30-32. The facts surrounding the issuance of the citations are, for the most part, undisputed. S. Br. at 27. Substantial justification turns largely on the language of the *PPM* and Black Diamond's Impoundment Elimination Plan. Therefore, whether there is a reasonable basis in law and fact for the Secretary's position involves primarily a legal analysis of these operative documents and the undisputed facts.

Part 48 of the Secretary's regulations, which covers the training and retraining of miners, excludes "construction workers" from the definition of "miner" at surface areas of underground mines. 30 C.F.R. § 48.22(a)(1)(i). The regulations do not further define construction workers or describe their work functions. MSHA's *PPM* also excludes the employees of independent contractors who are involved in surface construction work. III MSHA, *PPM*, Part 48, at 14. The *PPM* further provides that "[c]onstruction work includes the building or demolition of any facility." *Id.* at 14b. The *PPM* also specifies that a person performing maintenance or repair work must be trained in accordance with the regulations, and that "[m]aintenance or repair work includes the upkeep or alteration of equipment or facilities." *Id.* at 15. The relevant terms in the *PPM* are not further defined or given a technical usage. Accordingly, the Commission looks to the ordinary meaning of these terms. *See Bluestone Coal Corp.*, 19 FMSHRC 1025, 1029 (June 1997) (applying this rationale to the language of a regulation).

The record shows that Inspector Thompson was aware that Black Diamond was an independent contractor performing construction work at the mine site. 20 FMSHRC at 1177. Further, the Plan, which was submitted to MSHA, described the essential nature of the work that Black Diamond was performing. Thus, the Plan stated that the impounding capability of the Spruce Lick Fork coal refuse facility[9] was being eliminated to facilitate longwall mining in an underground mine. Plan at 2. In order to eliminate the impoundment, it had to be drained, filled with over 1.4 million cubic yards of coarse coal refuse over coal fines, and graded. *Id.*; 20 FMSHRC at 1177. As the impoundment was pumped dry, coal refuse was to be pushed down

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[8] Significantly, the Secretary continues to argue in support of the position that was the basis for the citations and that she abandoned when the citations were vacated because of disagreement among her experts (*supra* at 5 & n.6). Thus, the Commission has not been asked to determine if the Secretary's position at the time of the issuance of the citations was reasonable and became unreasonable at some later time. *Cf. Leeward Auto Wreckers, Inc. v. NLRB*, 841 F.2d 1143, 1148 (D.C. Cir. 1988) (resolving conflict in evidence available to the NLRB General Counsel at different stages in the litigation process for purposes of determining whether the General Counsel's position was substantially justified). Rather, the Secretary's prelitigation position that the Commission must examine is the same as her litigation position would have been had she gone to trial — application of the Part 48 training regulations and the *PPM* to the work being performed under the Plan.

[9] According to the Plan, the Spruce Lick Fork coal refuse facility had been idle during the 5 years preceding the submission of the Plan. Plan at 2.

from the slope of the impoundment. 20 FMSHRC at 1177. In addition, coal refuse that made up the dam would be used as fill. *Id.* Black Diamond would build diversion ditches, dikes, and ponds to ensure that the storm water did not go back into the impoundment area. Plan at 3.

The *PPM* specifically provides that construction work includes "demolition." *PPM* at 3. As the judge noted, the dictionary definition of "demolition" is "the act or process of demolishing," and "demolish" means to "do away with" something. 20 FMSHRC at 1178, *quoting Webster's Third New Int'l Dictionary* 600 (1986). The judge found that Black Diamond's work was directed at eliminating the impoundment. *Id.* The essential elements of the impoundment, the dam and the water behind it, were being eliminated. *Id.* The basic structural design of the impoundment was changing. *Id.* As the judge concluded: "In effect, the dam would cease to be a dam." *Id.* at 1177. Thus, based on the undisputed facts and the Plan, the judge concluded that Black Diamond was engaged in the demolition of the impoundment. *Id.* at 1178.

In addition to the demolition work, the record further indicates that Black Diamond was engaged in construction work at the site as well. Thus, once the water behind the dam was drained, Black Diamond's work included filling and grading in the impoundment area, and building sludge cells, drainage ditches, and ponds. 20 FMSHRC at 1178; *see* Plan at 2-4; Shelton Dep. at 12. In short, the work being performed by Black Diamond involved both demolition and building and, therefore, fell well within the parameters of the *PPM*'s description of construction work.

The Secretary's primary argument in support of her position that the impoundment elimination work constituted "alteration" work is that the impoundment was a coal refuse facility before its elimination and remained one after. S. Br. at 16-19. However, as the judge noted, the fact that impoundments and coal refuse facilities are governed by separate regulations (*see* 30 C.F.R. §§ 77.214 through 77.215-4 and 30 C.F.R. §§ 77.216 through 77.216-5), and treated as "totally different facilities" undercuts the Secretary's position that Black Diamond was only maintaining or repairing the impoundment when it eliminated its impounding capabilities. 20 FMSHRC at 1178.[10]

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[10] The judge noted two decisions by other administrative law judges that the Commission did not review. In *Dakco Corp.*, 10 FMSHRC 1259, 1259, 1289-90, 1293 (Sept. 1988) (ALJ), the judge vacated citations, which charged violations of the training regulations, against a contractor who was renovating a coal preparation plant. The work involved "extensive demolition, rebuilding, renovation, and installation" of new equipment. *Id.* at 1289. In *Frank Irey, Jr., Inc.*, 11 FMSHRC 990, 991-94, 996 (June 1989) (ALJ), the judge upheld citations against a contractor who failed to comply with the training regulations when his employees were performing renovation work on a coal preparation plant, "the basic structural design" of which did not change. *Id.* at 993. The instant case appears similar to *Dakco* and, in contrast to *Frank Irey*, the basic structure of the impoundment was being materially changed. As the Supreme Court noted in *Pierce v. Underwood*, the views of other courts can be relevant to the inquiry of

Finally, the Secretary makes two related arguments in contending that the judge erred when he rejected her interpretation of the *PPM*. The Secretary asserts that she broadly construed the *PPM* in order to maximize coverage of workers under the Mine Act. S. Br. at 20-22. The Secretary further argues that she sought to cover Black Diamond's workers in order to protect them from hazards similar to those miners are exposed to.[11] *Id.* at 25-29. However, both arguments ignore the plain meaning of the term "construction work" as it is used in the *PPM*. Moreover, as the judge noted, giving undue emphasis to the hazards contractor employees are exposed to would render meaningless the exceptions to Mine Act coverage. 20 FMSHRC at 1178.

The dissent's assertion (slip op. at 16) that "up until the time of the Shelton Deposition, the Secretary's action in pursuing this action had a reasonable basis in law and fact," is inconsistent with the record.[12] MSHA did not first learn of the "internal dispute" within the

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whether the government's position was substantially justified. 487 U.S. at 567. While unreviewed judges' decisions are not binding legal precedent (*see* 29 C.F.R. § 2700.72), nonetheless the reasoning in the decisions discussed above is helpful in this proceeding.

[11] Commissioner Marks states that "[u]ntrained persons on mine property present a grave safety risk to themselves and others." Slip op. at 16. We certainly agree with this fundamental principle. The Secretary never argued that the training exclusions in these regulations were based on a determination that construction workers on a mine site are exposed to less hazardous conditions than workers covered under the training regulations, nor is that a premise of our opinion. The problem is that, for reasons unknown to us, a void exists in MSHA's training regulations regarding construction workers. *See* 43 Fed. Reg. 30990 (1978) ("[T]hese two categories of workers [construction workers and shaft and slope sinkers] were to be covered under subpart C, which is still in the drafting stages. . . ."); *cf.* 64 Fed. Reg. 53080, 53130 (1999) (to be codified at 30 C.F.R. pt. 46) (requiring training and retraining at sand and gravel mines for "[a]ny construction worker who is exposed to hazards of mining operations"). We are certainly cognizant of this problem, but are not prepared to ignore the explicit language of 30 C.F.R. § 48.22(a)(1)(i) or sanction actions by the Secretary that unilaterally permit her to expand the existing standard to fill the vacuum.

[12] Contrary to our dissenting colleague's suggestion (slip op. at 16), no evidence emerged at the deposition of MSHA's impoundment expert, Shelton, that changed the factual basis for the citations in this case. Rather, as the Secretary readily admits (S. Answer to EAJA Appl. at 17-18; S. Br. at 32-33), the deposition simply resulted in a realization that there was an "internal dispute" at MSHA regarding the legal interpretation of impoundment sites and refuse facilities. This disclosure is readily distinguishable from the cases cited by the dissent in which there was disclosure of factual evidence at trial by non-governmental witnesses. *See Blaylock Elec. v. NLRB*, 121 F.3d 1230, 1235-36 (9th Cir. 1997) (NLRB's General Counsel had reasonable basis for pursuing complaint through trial where employer's rebuttal case was dependent on judge crediting employer witnesses); *Quality C.A.T.V., Inc. v. NLRB*, 969 F.2d 541, 545 (7th Cir. 1992)

agency (concerning whether Black Diamond's employees were covered by the training regulations) at the February 18, 1998 deposition or the meeting of its experts on February 20. Rather, MSHA learned of it no later than June 25, 1997, at the post-inspection conference with Black Diamond, when president William Casto explained why Black Diamond was not in violation and brought to MSHA's attention the disagreement among its own personnel. It is hardly reasonable for a litigant to be forced to bear the considerable cost of defending itself over many months, including preparing for trial, while an enforcement agency ignores essential information brought to its attention at the outset.[13] The conflicting interpretations of the regulation by MSHA's own officials that led MSHA to drop this case could have been discovered much sooner, with a minimum of effort by agency personnel.

In agreement with the administrative law judge, we conclude that the Secretary has failed to establish that her position was substantially justified during the pre-litigation stage of the case. As the judge noted, the essence of substantial justification "is whether 'reasonable people could genuinely differ.'" *Id.* at 1175. On the basis of the clear language of the *PPM*, the Impoundment Elimination Plan, and the uncontested facts, we agree with the judge's determination that the Secretary's position was not reasonable in law and fact.

(General Counsel was substantially justified in issuing complaint but evidence adduced at trial made further pursuit unreasonable); *Leeward Auto Wreckers*, 841 F.2d at 1148 (General Counsel should have withdrawn complaint once employer presented undisputed evidence at trial).

[13] Commissioner Riley observes that such matters should be resolved at the earliest possible opportunity during the pendency of a case, preferably when, or soon after, the litigant first raises them at the post-inspection conference. He notes there is little point to a post-inspection conference, if this last informal opportunity to resolve misunderstandings and provide clarification before formal charges are brought is squandered because MSHA does not exercise due diligence in ascertaining its own position on its regulation or give any consideration to the operator's position.

III.

Conclusion

For the foregoing reasons, we affirm the judge's decision to grant the award, and we remand this case to the judge to provide Black Diamond the opportunity to amend its EAJA application to include the reasonable fees and expenses incurred in defending its award before the Commission.

Mary Lu Jordan, Chairman

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

Commissioner Marks, dissenting:

Because I conclude that the Secretary was "substantially justified" in bringing this action and in litigating it as far as she did, I dissent and would reverse the judge's EAJA award.

Under EAJA, a prevailing party may receive an award unless the position of the agency was "substantially justified" or special circumstances make an award unjust. 5 U.S.C. § 504(a)(1). The position of the agency can be justified within the meaning of EAJA even though it is not correct or prevailing. *Pierce (HUD) v. Underwood*, 487 U.S. 552, 566 n.2, 569 (1988). Moreover, the government's position cannot be viewed as unjustified simply on the ground that proceedings were voluntarily terminated on terms unfavorable to it. *Id.* at 568-69; *Kuhns v. Board of Governors of Fed. Reserve Sys.*, 930 F.2d 39, 44 (D.C. Cir. 1991).

In interpreting "substantially justified," the Supreme Court rejected any connotation of the phrase that required "justifi[cation] to a high degree" and instead held that substantial justification was met when a position was "'justified in substance or in the main' — that is, justified to a degree that could satisfy a reasonable person." *Pierce,* 487 U.S. at 565. A position is substantially justified if it has a reasonable basis both in law and fact." *Id.* The Court of Appeals for the D.C. Circuit has held that "[t]o show substantial justification for its position, the [government] did not have to demonstrate that a large amount of evidence supported it." *Kuhns,* 930 F.2d at 43. In addition, the Secretary's position can be substantially justified even if the position is unsupported by substantial evidence on the record as a whole. *Welter v. Sullivan*, 941 F.2d 674, 676 (8th Cir. 1991).

At issue in this case is not whether the Secretary would have succeeded on the merits, but instead whether the Secretary's position, which required the two workers to have training pursuant to 30 C.F.R. § 48.25(a), was substantially justified. The judge however incorrectly evaluated the merits when making his EAJA determination. 20 FMSHRC at 1179 ("I conclude a reasonable person would have found the Secretary was both *wrong* and unreasonable . . . ."). Not only did the judge fail to employ the proper and lesser standard for EAJA cases, but the judge failed to adequately consider the Secretary's justification for her position as well as the circumstances that led up to the Secretary's dismissal of her case.[1]

[1] I disagree with the majority's characterization of the Secretary's argument to the Commission and the judge. Slip op. at 8 n.8. The Secretary asked the judge to make a determination on the reasonableness of its action in dismissing its case once a conflict of opinion was discovered within the agency. S. Answer to EAJA Appl. at 18-19. The Secretary now seeks review of that determination, asking the Commission to review the reasonableness of her decision to dismiss the case (S. Br. 33) as well as the reasonableness of her litigating position from the time Black Diamond was cited to the time the case was dismissed.

After a complete review of the Secretary's position and her responsible action of dismissing this case, I conclude that the record can support only one conclusion — that the Secretary was eminently justified in bringing this action and in dismissing it when she did.

Prior to the February 18, 1998 deposition of MSHA Impoundment expert, Stuart Shelton, the agency's position was that the work being performed was "maintenance or repair work" not construction work. S. Answer to EAJA Appl. at 17. The Secretary asserted that "Black Diamond was modifying a refuse facility from an impoundment to a refuse pile by eliminating the impounding capability of the facility" and that "Brian Casto and Matthew Adkins were not demolishing an existing facility and constructing a new one." *Id.* The Secretary's position that Black Diamond was performing alteration work to the refuse site was a reasonable view of the evidence and the law and, as such, it was a reasonable position in law and fact. *Welter*, 941 F.2d at 676 (stating that, because "'at least one permissible view of the evidence' shows a reasonable basis in law and fact for the Secretary's position," claimants were not entitled to fees).

MSHA Inspector Thompson who issued the citation determined that Black Diamond was only modifying the refuse site from an impoundment to a refuse pile. Thompson Dep. at 11, 40. He stated that "they were going to pump the impoundment dry and backfill it with refuse." Thompson Dep. at 29. As they were performing alteration work, the workers did not qualify as construction workers that were exempt from training under Part 48.[2] Additionally, Thompson observed that the two workers were performing general labor duties on mine property and were exposed to the hazards of mining. Thompson Dep. at 79-80, 101. Without proper training, these workers were a hazard to themselves and others on the mine property. Thompson Dep., Ex. 1. Thompson's view was supported by MSHA Supervisor Ellis, who similarly considered the work being done by Black Diamond as an "alteration" of a refuse site. Ellis Dep. at 15. Ellis informed William Casto at the Health and Safety Conference that MSHA never considered the elimination of an impoundment to be major construction. W. Casto Dep. at 35; S. Answer to EAJA Appl. at 7.

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[2] In order to conclude that Black Diamond's work was characterized as "construction," the majority and the judge incorrectly refer to Inspector Thompson's isolated comment that, prior to inspecting the mine, he heard that construction was going on at the site. Slip op. at 8; 20 FMSHRC at 1177 (citing Thompson Dep. at 29). However, Inspector Thompson's comment does not indicate that he or MSHA had evaluated the mine and determined that construction, as the term "construction" is used in the Secretary's regulations, was underway. Instead, Thompson was consistent in his testimony that Black Diamond was performing maintenance/alteration work and not construction work under the Secretary's regulations. Thompson Dep. at 11, 40. In the case of *Frank Irey Jr., Inc.*, 11 FMSHRC 990, 995 (June 1989) (ALJ), Judge Melick likewise recognized that maintenance workers that are subject to the existing MSHA training regulations could perform work that might be colloquially considered construction work. Thus, Thompson's reference that he heard that construction work was underway is certainly not dispositive of whether the work was construction or maintenance work under the Secretary's regulations.

MSHA's view was based on the premise that both impoundments and refuse piles are refuse sites and that altering one to the other did not qualify as major construction. Such a view was not unreasonable given that both impoundments and refuse piles are for refuse disposal. *See* MSHA Handbook 89-V-4, *Coal Mine Impoundment Inspection Procedures* (Sept. 1989) (refuse facilities are classified as impounding and non-impounding).[3] Similarly, the dictionary definition of "alter" is "to make different: modify." *Webster's II New Riverside University Dictionary* 96 (1994). "Modify" is in turn defined as "to change in form or character." *Id.* at 762. The dictionary definitions support MSHA's view that modification of the refuse site was an alteration as set forth in the *PPM*. Moreover, both the judge and the majority incorrectly view that MSHA was unreasonable because refuse piles and impoundments are subject to different regulations. However, there was nothing in the Act, in the regulations, or in binding Commission law that conclusively stated that they were distinct structures, such that the Secretary's view was an unreasonable construction of her own regulations and policies. Indeed, the judge erred in failing to account for the deference owed to the Secretary's interpretations of her own regulations. 30 C.F.R. § 48.22 excludes construction workers from the definition of miner. The standards however are silent as to the meaning of a construction worker. Where a regulatory provision is unclear or silent, deference is accorded to an agency's reasonable interpretation of its own regulations. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984); *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1994); *Secretary of Labor ex rel. Bushnell v. Cannelton Industries*, 867 F.2d 1432, 1435 (D.C. Cir. 1989) ("The Secretary is emphatically due this respect when she interprets her own regulations."). The majority also fails to consider the deference owed to the Secretary's construction of section 48.22.

Further, the Secretary's construction of the *PPM* was reasonable because there has been no governing precedent by this Commission that alteration of an impoundment to a refuse site qualified as a construction project.[4] It must be remembered that MSHA's *PPM*s are not binding

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[3] The Commission may take judicial notice of MSHA public documents. *Secretary of Labor on behalf of Acton v. Jim Walter Resources, Inc.*, 7 FMSHRC 1348, 1355 n.7 (Sept. 1985).

[4] In concluding that the Secretary's position was not correct, the judge relied on two judge's decisions which involved this issue. 20 FMSHRC at 1178 & n.4. Of course, these decisions do not represent "what the law is" because administrative law judge decisions are not legal precedent. *Contractors Sand and Gravel, Inc.*, 20 FMSHRC 960, 972 (Sept. 1998); Commission Rule 72, 29 C.F.R. § 2700.72. In any event, neither case dealt with modification of refuse sites and the *Irey* case, 11 FMSHRC 990, can be reasonably viewed to support the Secretary's position. In that case, the judge held that in maintenance work "the basic structural design was not changed" and that maintenance work could involve work that was considered construction work. *Id.* at 993, 995. Under the Secretary's view, the refuse facility would be altered by work that could be considered construction work, but its basic purpose as a refuse site

on the Secretary and do not have the same force and effect of law as the Mine Act itself or the Secretary's standards and regulations. *D.H. Blattner & Sons, Inc.*, 18 FMSHRC 1580, 1586 (Sept. 1996); *King Knob Coal Co.*, 3 FMSHRC 1417, 1420 (June 1981); *see also Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 538-39 (D.C. Cir. 1986) (reversing Commission which improperly regarded the Secretary's general statement of his enforcement policy as a binding regulation which the Secretary was required strictly to observe). Thus, the judge erred when he stated that "the pronouncements and policies set forth in the *PPM* are equivalent to the Act and regulations for EAJA purposes, and the Secretary cannot take an enforcement position that unreasonably varies from the *PPM* without subjecting herself to EAJA liability." 20 FMSHRC at 1176.

In addition, the Secretary's position was reasonable because she is charged with enforcing the Mine Act in a manner that furthers its remedial purposes. *Cannelton*, 867 F.2d at 1437; *Menlo Service Corp.*, 765 F.2d 805, 809 (9th Cir. 1985). Accordingly, the Secretary was justified in narrowly construing any exemption to mine safety training. These individuals posed a grave risk of harm to themselves and others. According to the deposition of Inspector Thompson, Brian Casto had trouble getting the truck into gear. Thompson Dep. at 33-34. He did not know how to make a pre-shift examination of a truck. Thompson Dep. at 34. The UMWA representative observed Brian Casto not only driving the truck on mine property but out on a boat on the impoundment, which posed a high danger of drowning. Thompson Dep. at 67-69, 78-80. In addition, the dozer operator William Adkins had gotten too close to the edge of the impoundment in one instance. Thompson Dep. at 77, 98-99. The slurry that is located on the edge of impoundment is like quicksand and very hazardous. Thompson Dep. at 98. Untrained persons on mine property present a grave safety risk to themselves and others. Thompson Dep. at 101. Therefore, I can only view Inspector Thompson's decision to issue the citation and order to withdraw these two individuals from the mine property until adequate training and training certification were obtained as completely reasonable and in furtherance of his duties as a safety inspector.

I conclude that, up until the time of the Shelton Deposition, the Secretary's action in pursuing this action had a reasonable basis in law and fact. On the afternoon of Wednesday, February 18, 1998, Shelton, an impoundment expert, testified that a site cannot be both legally an impoundment and a refuse pile. Shelton Dep. at 29. On Friday, February 20, Secretary's counsel met with agency experts who gave conflicting opinions as to whether the work was construction or alteration and maintenance work. S. Answer to EAJA Appl. at 18, Attach. F, G. Although in *Public Citizen Health Research Group v. Young*, 909 F.2d 546, 552 (D.C. Cir. 1990), the court held that conflicting expert opinions on a particular issue indicated that the government's litigating position was substantially justified, the Secretary chose to dismiss the case. One business day after the experts were consulted, on Monday, February 23, MSHA dismissed the suit. The judge never addressed the Secretary's argument that "the decision to vacate the order

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would remain. Thus, the *Irey* case supports the Secretary's interpretation that Black Diamond was engaged in maintenance work at the mine.

and citation" was grounded in a conflict of opinions within the agency. S. Answer to EAJA Appl. at 16. Nor did he discuss the reasonableness of the Secretary's action in dismissing the claim three business days after the deposition of Shelton and one business day after consultation with the MSHA experts.

When other agencies have similarly acted, no award has been granted. In *Blaylock Elec. v. NLRB*, 121 F.3d 1230 (9th Cir. 1997), the General Counsel withdrew its complaint one month after hearing and the day before post-hearing briefs were due. In denying fees under EAJA, the court opined that, although the General Counsel was unlikely to prevail on the merits, the ultimate determination would depend upon whether the judge credited certain testimony. *Id.* at 1235-36. Because of this, the General Counsel was substantially justified in pursuing the case through trial, notwithstanding the relative weakness of its case. *Id.* So too, examining the evidence prior to the Shelton deposition, if the judge had credited the testimony of the Inspectors Thompson and Ellis, although it might have been a close case, the Secretary may well have prevailed on the merits. See *Welter*, 941 F.2d at 676 (holding that the Secretary's reliance on experts and on some contradictory and inconsistent evidence was sufficient to support the Secretary's position, although the court recognized that the case was a close one, because "[c]loseness itself is evidence of substantial justification"). Thus, an EAJA award was not warranted for the time preceding the Shelton deposition.[5]

Moreover, the Secretary's prompt dismissal, only three business days after the deposition and prior to hearing, was a reasonable action, certainly undeserving of a fee award. In *Blaylock*, the Court of Appeals for the Ninth Circuit determined that the agency's action of dismissing its case a month after the hearing and one day before post-hearing briefs were due was objectively reasonable and did not warrant an EAJA award. 121 F.3d at 1236. In *Quality C.A.T.V., Inc. v. NLRB*, 969 F.2d 541 (7th Cir. 1992), and *Leeward Auto Wreckers, Inc. v. NLRB*, 841 F.2d 1143, 1148 (D.C. Cir. 1988), the courts held that the government was substantially justified in initially raising and arguing its cases, but that when the hearings revealed conclusively that the cases lacked merit, the protective mantle of substantial justification was lost at the hearings' end. Fee awards began at the conclusion of, and not before or during, the trial. *Leeward Auto*, 841 F.2d at 1149 (judge decided that EAJA fees accured during the hearing, but appellate court clarified that EAJA fees should accrue at the conclusion of the hearing). Applying the same reasoning to the instant case, even if the Secretary's theory arguably lost its substantial justification once the

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[5] Contrary to the majority's misapprehension of my view and the record, the deposition testimony of MSHA's expert Shelton never changed the factual basis of this case. Slip op. at 10-11 & n.12. The facts were largely undisputed right from the start of this case and never changed. What changed is that MSHA realized that there was an internal conflict in its interpretation on the afternoon of February 18, 1998. Prior to that time (and probably even following, *see Public Citizen*, 909 F.2d at 552), MSHA was completely justified in pursuing its complaint against Black Diamond because its case was dependent on whether a judge, charged with weighing the merits, was going to credit the testimony of MSHA Inspectors Thompson and Ellis. *See Blaylock*, 121 F.3d at 1235-36.

conflict of opinions became apparent, no EAJA award would accrue because she acted so quickly in dismissing the case and before any hearing began.[6]

MSHA's decision to prosecute this case as long as she did and then to dismiss it promptly, before any expenses of trial were incurred, was reasonable in law and fact. The Secretary's conduct was laudable and responsible, certainly not the type of action where an EAJA award is justified. Therefore, I would reverse the judge and vacate the EAJA award.

Marc Lincoln Marks, Commissioner

[6] The majority relies on a slim morsel to harshly criticize the timing of the Secretary's dismissal. Relying on the uncorroborated deposition testimony of William Casto (W. Casto Dep. at 35-36), who alleges that, at the June Health and Safety Conference, he stated that the MSHA Mt. Hope Office informed him that construction workers are not subject to training, the majority speculates that MSHA could have discovered the agency conflict much sooner. Slip op. at 11 & n.13. The problem with the majority's speculation is that Mr. Casto did not testify that the Mt. Hope Office gave him an opinion that the specific work Black Diamond was performing qualified as construction work as opposed to maintenance work, as those terms are construed in the Secretary's regulations.

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