FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20006

April 28, 2000

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. EAJ 99-1
L & T FABRICATION & CONSTRUCTION, INC.	:	

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

DECISION

BY THE COMMISSION:

This proceeding arises under the Equal Access to Justice Act, 5 U.S.C. § 504 ("EAJA"), and involves an application for attorney fees and expenses by L & T Fabrication & Construction, Inc. ("L & T"). L & T filed its application following the decision in *L & T Fabrication & Constr., Inc.*, 21 FMSHRC 71 (Jan. 1999) (ALJ), a proceeding under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), in which Administrative Law Judge T. Todd Hodgdon assessed a penalty of $20,000 for a violation of 30 C.F.R. § 77.203. The Department of Labor's Mine Safety and Health Administration ("MSHA") had proposed a penalty of $40,000. L & T based its EAJA application on the grounds that the proposed penalty was substantially in excess of the penalty assessed by the judge and unreasonable when compared to his decision. Judge Hodgdon denied L & T's application. 21 FMSHRC 607 (June 1999) (ALJ). For the reasons that follow, we affirm the judge's decision.

I.

Factual and Procedural Background

A. The Mine Act Proceeding

Cordero Mining Company retained Production Industry Corporation ("PICOR") to remove old coal silo loading facilities at its Cordero Mine in Campbell County, Wyoming, and

replace them with a new batch weighing system. 21 FMSHRC 71; Tr. 84. PICOR, in turn, subcontracted with L & T to do the structural portion of the work. 21 FMSHRC 71. L & T, which was wholly owned by Edward and Catherine Crain, had a work force of 12 to 15 employees and was primarily involved in construction work at mine sites. *Id.*; Tr. 29, 77.

On the morning of August 6, 1997, L & T employees at silo number 2 at the Cordero Mine installed metal flooring on an elevated deck approximately 18½ feet above the floor in the north half of the silo. 21 FMSHRC at 71. After the flooring had been put in place, L & T foreman Glen Belt began installing a section of hand rail along the edge of the deck while the flooring was being welded. *Id.* at 71-72. The section of hand rail was approximately four feet high and five feet long, and weighed between 60 and 90 pounds. *Id.* at 72. Ironworker Shayne DeGaugh, who had been employed by L & T for 3 weeks and was assisting Belt, went to get bolts to attach the handrail to the deck. *Id.* at 72.

Belt set the handrail on a barricade at the top of the stairs leading up to the deck. *Id.* As Belt was crossing the barricade, the handrail slipped and fell to the floor below just as DeGaugh was returning to the deck with the bolts. *Id.* The falling handrail struck DeGaugh on the head, breaking his neck and permanently paralyzing him from the neck down. *Id.*

MSHA subsequently investigated the accident and issued a citation charging L & T with violating 30 C.F.R. § 77.203, which provides:

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

The citation alleged that "[a]dequate protection was not provided in silo number 2 where people were working on an elevated walkway 18.5 feet above the concrete floor. A section of handrail . . . fell and struck a person walking underneath the elevated platform." 21 FMSHRC at 72. The MSHA inspector who issued the citation determined that the violation was significant and substantial ("S&S")[1] and resulted from high negligence and the operator's unwarrantable failure[2] to comply with the regulation. *Id.* Less than 3 months earlier, on May 21, 1997, L & T had been cited for a violation of the same regulation. *Id.* at 72 n.3.

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[1] The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard."

[2] The unwarrantable failure terminology is taken from section 104(d)(1) of the Act, which establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards."

At the hearing, the only issue contested was the amount of the proposed penalty. *Id.* at 73. L & T and the Secretary stipulated to the violation and the events surrounding the violation. *Id.* at 72. In addition, L & T stipulated that the violation was significant and substantial S&S, caused by high negligence, and the result of its unwarrantable failure to comply with the regulation. *Id.*

With regard to the proposed penalty, the parties also stipulated at the hearing that L & T had acted in good faith in abating the violation. *Id.* at 73. L & T put on evidence to show that it had few prior violations, including two during the last 2 years (including the one at issue and another citation issued for a violation of the same regulation), and a total of six citations over 18 years (including three citations that were vacated). *Id.* L & T's primary defense to the proposed $40,000 penalty was that it would adversely affect L & T's ability to continue in business. *Id.* In support of this position, L & T submitted financial statements, and Edward Crain, its president, testified concerning the financial burden that the proposed penalty would purportedly create. *See id.* at 73-74; Tr. 28.

The judge rejected L & T's defense that the proposed penalty would affect its ability to continue in business. 21 FMSHRC at 74. The judge concluded that the operator had not carried its burden of proof because it had presented unaudited financial statements. *Id.* Further, the judge found that even the statements L & T submitted did not establish that its ability to continue in business would be adversely affected if it had to pay the full $40,000. *Id.* The judge found that the gravity of the violation and L & T's high negligence in committing a violation for which it had been cited several months earlier justified a $40,000 penalty. *Id.* However, he found that the company's very good record of prior violations, its rapid abatement of the violation, and its small size mitigated the penalty. *Id.* Therefore, the judge concluded that a penalty of $20,000 was appropriate. *Id.*

B. The EAJA Proceeding

On March 30, 1999, L & T filed an EAJA application for fees and expenses of $14,809.82. The Secretary opposed the application because, inter alia, the proposed penalty was not substantially in excess of the judge's award and the proposed penalty was not unreasonable when compared to the judge's decision. Following the submission of pleadings, the judge concluded that L & T was an eligible party and addressed its entitlement to fees and expenses. 21 FMSHRC at 608.

In his decision, the judge stated that the burden was on L & T to establish that the Secretary's demand was substantially in excess of the penalty approved by the Commission. *Id.* After reviewing the underlying facts and the legislative history of the EAJA amendments, the judge concluded that L & T had failed to show that the proposed penalty was substantially in excess of the penalty finally assessed. *Id.* at 608-09. In addressing L & T's contention that a 50 percent reduction in the proposed penalty met the substantially-in-excess test, the judge stated that he rejected a mechanical, mathematical comparison approach. *Id.* at 609. Relying on floor

comments accompanying the passage of the amendments, however, the judge stated, "[c]learly, a greater discrepancy is required." *Id.*

The judge further addressed whether the proposed penalty was reasonable. The judge noted that the Secretary had considered all six of the statutory penalty criteria under section 110(i) of the Mine Act. *Id.* at 610. The judge stated that the fact that he gave "greater weight" to some criteria than the Secretary did not indicate that the Secretary's position was unreasonable. *Id.* In this regard, the judge noted the statutory obligation of the Commission to assess penalties de novo. *Id.* Finally, the judge found that there was no evidence that the Secretary proposed the $40,000 penalty to pressure L & T into a quick settlement — one of the primary reasons given for amending the EAJA to protect small entities from the pressures of the federal government. *Id.* at 610 n.5 (citing the *Joint Managers Statement of Legislative History and Congressional Intent*, 142 Cong. Rec. S3242, S3244 (Mar. 29, 1996) ("*Joint Statement*")). The judge therefore denied L & T's EAJA application. *Id* at 610.

II.

Disposition

L & T contends that, contrary to the judge's conclusion, the Secretary's proposed penalty was excessive. PDR at 4.[3] L & T asserts that the judge failed to consider all the facts and circumstances of the case and instead focused only on the gravity of the violation and the operator's negligence. *Id.* at 5-6. L & T further argues the judge erred when he concluded that, based on the legislative history of the EAJA amendments, a 50 percent reduction in a proposed penalty was not excessive. *Id.* at 7. L & T also argues that courts have found that disparities of less than 50 percent were excessive in analogous circumstances. *Id.* at 8-9. L & T argues that the proposed penalty was excessive under the facts and circumstances of this proceeding. *Id.* at 9. *See also* L & T Reply Br. at 1-5. L & T asserts that the Secretary's proposed penalty was unreasonable because she did not consider all the penalty criteria under section 110(i) and, even if she did consider all the criteria, she did not carry her burden of proving that the penalty was reasonable. PDR at 10-12. Finally, L & T argues that no special circumstances or any willfulness associated with the underlying violation made an EAJA award unjust. L & T Reply Br. at 8.

The Secretary responds that the judge properly found the proposed penalty was not excessive when compared to the final award. S. Br. at 7. Relying on floor statements that accompanied passage of the EAJA amendments, the Secretary argues that "excessive" must mean more than a 50 percent disparity. *Id.* at 7-9. The Secretary also argues that, based on numerous facts and circumstances of the case she sets forth in her brief, the proposed penalty was not unreasonable when compared to the judge's decision. *Id.* at 10-14. The Secretary further contends that she took into account the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), and properly followed her penalty assessment procedures and criteria set forth in 30

[3] L & T designated its petition for discretionary review as its opening brief.

C.F.R. Part 100, in proposing the penalty. S. Br. at 14-18 & n.12. Moreover, the Secretary continues, because of the judge's statutory duty to review proposed penalties de novo under section 110(i), it should not be surprising that the judge arrived at a different penalty from that proposed by the Secretary. *Id.* at 19-22. Finally, the Secretary argues that the judge's conclusion that the proposed penalty was reasonable is supported by substantial evidence. *Id.* at 22.

The 1996 amendments to EAJA expanded the basis for recovering fees and expenses to include certain claims against private parties who did not prevail against the government. EAJA Amendments of 1996, Pub. L. No. 104-121, 110 Stat. 862. The pertinent portion of EAJA, as amended, provides:

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

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

The legislative history of the 1996 EAJA amendments is meager. The committee report published following the passage of the amendments provides a one-paragraph explanation for the new category of EAJA claims:

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

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

> This test should not be a simple mathematical comparison. The Committee intends for it to be applied in such a way that it identifies and corrects situations where *the agency's demand is so*

> *far in excess of the true value of the case, as demonstrated by the final outcome*, that it appears the agency's assessment or enforcement action did not represent a *reasonable effort to match the penalty to the actual facts and circumstances of the case.*

Joint Statement at S3244 (emphasis added). Finally, as the judge noted (21 FMSHRC at 608), Commission EAJA Rule 105(b) provides that "[t]he burden of proof is on the applicant to establish that the Secretary's demand was substantially in excess of the Commission's decision; the Secretary may avoid an award by establishing that the demand was not unreasonable when compared to that decision." 29 C.F.R. § 2704.105(b).

This case presents us with our first opportunity to interpret the 1996 EAJA amendments.[4] We find that the amendments set forth a two-part test for determining whether fees should be awarded. The first prong is largely quantitative, focusing on whether, in the context of Mine Act cases, the Secretary has proposed a penalty that is "substantially in excess of" the penalty ultimately assessed by the Commission pursuant to section 110(i). Consistent with the intent of the drafters of the amendments, we view this test as more than merely "a simple mathematical comparison." *Joint Statement* at S3244. Instead, whether an applicant meets the "substantially in excess" test will depend on the facts and circumstances of each case.[5]

While the first prong of the test is quantitative, the second prong is qualitative, and presents the issue of whether the Secretary has acted reasonably in proposing a particular penalty. Again, any determination of reasonableness will depend on the facts and circumstances of each case. For the Secretary to prevail, a penalty she proposes must "represent a reasonable effort to match the penalty to the actual facts and circumstances of the case." *Id*. Finally, we note that the two prongs of the test set forth in the 1996 EAJA amendments are conjunctive (i.e., joined by the word "and"). Thus, for an applicant to prevail, both prongs of the test must be met.

Turning to the instant case, although the judge recognized that Congress did not intend the "substantially in excess" test to be "a simple mathematical comparison," he nevertheless found that "[c]learly, a greater discrepancy [than 50%] is required" to meet this test. 21 FMSHRC at 609. "I do not find," the judge wrote, "as a general proposition, that a fifty percent reduction demonstrates that the original penalty was [substantially in excess of the penalty he ultimately

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[4] At issue in all our prior EAJA cases has been whether the Secretary's position was substantially justified. *See Black Diamond Constr., Inc.*, 21 FMSHRC 1188 (Nov. 1999); *James Ray, empl'd by Leo Journagan Constr. Co.*, 20 FMSHRC 1014 (Sept. 1998); *Contractor's Sand and Gravel, Inc.*, 20 FMSHRC 960 (Sept. 1998), *rev'd*, 199 F.3d 1335 (D.C. Cir. 2000).

[5] Contrary to L & T's argument (L & T Reply Br. at 3-5), we conclude that "substantially," when used in the phrase "substantially in excess," means "'[c]onsiderable in amount, value or the like; large.'" *See Pierce v. Underwood*, 487 U.S. 552, 564-65 (1988) (citation omitted).

assessed]." *Id*. We find that the judge's reasoning on this point represents application of a per se greater-than-fifty-percent rule, which we do not accept.[6]

We also note that in support of its position that the Secretary's demand was substantially in excess of the Commission's decision, L & T cites (PDR at 8-9) *U.S. v. 101.80 Acres of Land*, 716 F.2d 714 (9th Cir. 1983), a land condemnation case, which addresses whether an applicant was a "prevailing party" under EAJA. Land condemnation cases and the resolution of whether an applicant is a "prevailing party" under EAJA, however, are not determinative of whether a proposed penalty is substantially in excess of the final determination in a Mine Act proceeding.

We need not reach the merits of the judge's determination on this prong of the test,[7] however, because we find his conclusion that the Secretary's penalty proposal was reasonable amply supported by substantial evidence.[8] We begin by noting that MSHA's Petition for Assessment of Penalty, filed in the underlying merits proceeding, included narrative findings for a special assessment under 30 C.F.R. § 100.5. MSHA stated that it had considered the inspector's findings with regard to the violation, recited the penalty criteria in 30 C.F.R. § 100.3(a), and concluded by stating that, based on the penalty criteria and information available to it, the agency was proposing a civil penalty of $40,000.[9] Pet., Attach. at 5. In particular, MSHA noted the operator's high negligence, a prior similar violation, and the severe injury sustained by DeGaugh when he was hit by the falling rail. Pet., Narrative Findings for Special Assessment. Clearly, the Secretary made "a reasonable effort [here] to match the penalty to the actual facts and circumstances of the case." *Joint Statement* at S3244.

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[6] Chairman Jordan and Commissioner Marks note that, although their colleagues reject, in dicta, the judge's "fifty-percent rule," they see no need to reach this issue, as this case is ultimately decided on an entirely separate ground, the reasonableness of the proposed penalty. *See infra* at 8.

[7] Commissioner Verheggen believes that in the case *Unique Electric*, 20 FMSHRC 1119 (Oct. 1998), the Secretary's proposed penalty of $8,500 against an unincorporated sole proprietorship with no employees or assets was clearly substantially in excess of the $400 penalty ultimately assessed in that case by the judge on remand. *See Unique Electric*, 21 FMSHRC 91, 97 (Jan. 1999) (ALJ).

[8] 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. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

[9] The highest penalty amount permitted was $55,000. *See* 30 C.F.R. § 100.3 (Penalty Conversion Table).

As for L & T's assertion that the proposed penalty would have adversely affected its ability to stay in business, we find supported by substantial evidence the judge's conclusion that "the company has the capacity to absorb the penalty and still remain in business."[10] 21 FMSHRC at 74. We note, for example, that L & T "absorbed a loss of $85,000.00 on a project in 1996 and still remained in business." *Id*. We also agree with the judge as a matter of law that the reduction in the penalty after hearing "does not establish that the Secretary's assessment was unreasonable," but rather "only that the judge viewed it differently based on the hearing evidence." 21 FMSHRC at 610. After all, section 110(i) delegates to the Commission sole "authority to assess all civil penalties provided in [the] Act," 30 U.S.C. § 820(i), and in fulfilling this statutory mandate, our judges must assess penalties de novo, "based upon the statutory penalty criteria and the record evidence developed in the course of the adjudication." *Wallace Bros., Inc.*, 18 FMSHRC 481, 484 (Apr. 1996). Thus, we do not find it at all unusual that the judge, in reducing the penalty proposed by the Secretary, determined to give greater weight to some of the other penalty criteria under section 110(i) — the company's good history of prior violations, its small size, and its rapid abatement of the violation. 21 FMSHRC at 610; *see* 21 FMSHRC at 74.

In sum, the record supports the judge's determination that the Secretary's proposed penalty of $40,000 was not unreasonable when compared with the $20,000 penalty finally assessed.[11]

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[10] We thus need not reach the judge's holding that L & T failed to meet its burden of proof on this issue because it relied on unaudited financial statements. *See* 21 FMSHRC at 74. We also do not reach L & T's argument that MSHA's proposed penalty posed a financial hardship on Edward and Catherine Crain, made for the first time on review (PDR at 9), and thus not properly before us. 30 U.S.C. § 823(d)(2)(A)(iii) ("[e]xcept for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the [ALJ] had not been afforded an opportunity to pass").

[11] The Secretary also argues the exclusion in EAJA for awards in situations in which "willful violations, bad faith actions and in special circumstances that would make such an award unjust" is applicable to the facts of this proceeding. S. Br. at 23 (citation omitted). In light of the disposition of this case, the Commission will not address this argument.

III.

Conclusion

For the foregoing reasons, we affirm the decision of the administrative law judge denying the EAJA application for fees and expenses filed by L & T.

Mary Lu Jordan, Chairman

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James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

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