

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 2, 2015

PORTABLE, INC.,
Applicant,

v.

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Respondent.

EQUAL ACCESS TO JUSTICE
PROCEEDING

Docket No. EAJA 2015-1-M
Formerly WEST 2013-526-M

Mine ID: 24-02016
Mine: Wash Plant

DECISION

Before: Judge Moran

Portable, Inc. (“Portable”), Applicant in this matter, has filed an application for an award of fees and expenses under the Equal Access to Justice Act (“EAJA”), contending that the Secretary of Labor’s action in WEST 2013-526-M was not substantially justified. Thereafter, the Secretary filed an Objection to the Application. Portable then filed a reply and the Secretary submitted a short surreply. Initially, the Secretary’s Objection challenged both Portable’s claim that the Secretary was not substantially justified in proceeding against it as well as the fees and expenses sought. However, the Secretary’s surreply reduced the issues to be resolved to the substantial justification question, the Secretary having conceded, upon reviewing the additional information provided by Portable in its reply, that Portable had subsequently provided additional information in the Declarations attached to its latest brief, which sufficed to show that it incurred the attorney fees and costs which it seeks. As a consequence of that additional supporting information, the Secretary’s surreply stated that he “concedes that Portable is eligible for an award, as it meets the size criteria and has incurred fees in defense of an action on which it was the prevailing party,” while maintaining that, on the merits, it is not entitled to such an award. Surreply at 1.

For the reasons which follow, the Court finds that the Secretary’s action was not substantially justified and awards the fees sought by Portable.

Background

As set forth in the Court's December 5, 2014, decision in WEST 2013-526-M, *Sec'y of Labor v. Portable, Inc.*, 36 FMSHRC 3249, 3250 (Dec. 2014) (ALJ), MSHA's Dennis Bellfi arrived at Portable Inc.'s mine on August 16, 2012, to perform a general inspection. Bellfi's inspection was delayed by approximately one-half hour. *Id.* at 3251. As a consequence of the delay, MSHA contends that Portable unreasonably delayed the inspection, in violation of section 103(a) of the Mine Act, 30 U.S.C. § 813(a) (2012).¹ The Court noted that the issue was whether, in the context of the findings of fact, there was an unreasonable delay in this instance. *Id.* at 3254. For the reasons detailed below, and as set forth in its decision, the Court found that "Portable did not unreasonably delay Bellfi's inspection or indirectly deny access to its mine on August 16, and therefore, did not violate section 103(a)." *Id.* at 3259.

EAJA Actions and the Substantial Justification Issue

In large measure, the parties are in agreement as to the legal test for determining whether the government's position was substantially justified. While the test for establishing substantial justification is not so minimal that the government need only show that it did not act frivolously, it does not require *more* than mere reasonableness to sustain the government's action. The Supreme Court has described the justification as being satisfied if "a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 566 n.2. (1988).

As the Commission stated in *Black Diamond Constr., Inc.*, 21 FMSHRC 1188, 1194, 1198 (Nov. 1999):

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

¹ As an alternative theory of liability, the Secretary much later asserted that Portable violated section 103(a)'s prohibition against giving mine personnel advance notice of an inspection. 36 FMSHRC at 3254. This alternative claim was hollow and was dismissed by the Court. *Id.* at 3258. The only theory worthy of discussion in this EAJA matter is the issue of whether the Secretary was substantially justified in pursuing its claim that the inspector was unreasonably delayed in beginning his inspection, running afoul of the right to conduct such inspections of mine property.

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. [The Commission then added, agreeing with the administrative law judge's characterization that] the essence of substantial justification is whether reasonable people could genuinely differ.

Portable's Application for an Award of Fees and Expenses under the Equal Access to Justice Act

In its application, Portable notes that,

[p]ursuant to 29 C.F.R. § 2700.69, Judge Moran's decision represents his final disposition of the matter where Portable unquestionably prevailed. The Secretary failed to appeal this decision and it has not been directed for review by the Commission. Therefore, pursuant to Section 113(d)(1) of the Mine Act, this decision is now the final decision of the Commission. As such, Portable meets the minimal standard required by the Act of having prevailing party status.

Application at 6. Portable also asserts that,

[a]s demonstrated at hearing, MSHA was never denied access to the Mine and the inspector was never told he could not inspect[,] . . . [and t]herefore, issuing a citation pursuant to Section 103(a) was contrary to the Mine Act as it was obvious that the inspector was never denied entry to the Mine, [and] he was not unduly delayed on the date of his inspection.

Id. at 7. Noting that the “burden is on the Secretary to establish that his position in this case was substantially justified in law and fact or that special circumstances make an award unjust,” Portable asserts that MSHA's enforcement action was not substantially justified. *Id.*

Although Portable acknowledges that section 103(a) explicitly provides for an inspector's right to conduct an inspection, it replies that Portable never contended otherwise and it asserts that there was never any direct or indirect denial of that right. Application at 8. A fair contention, Portable asserts that when the weakness of MSHA's claim became apparent, the Secretary added the alternative claim of advance warning. *Id.* at 10.

The Secretary's Objection to Portable's Application

Applying the standard for reviewing EAJA claims, the Secretary maintains that its position was based on "sound legal reasoning and factual support." Objection at 6. He argues that unreasonable delay of an inspection comes within the proscription of interference of a mine inspection. The Secretary characterizes the events associated with this matter as an "indirect denial." *Id.* at 7. As framed by the Secretary, "[t]he question before the Court was whether that delay was unreasonable, rising to the level of impeding the inspection."² *Id.*

It is true that the Court held that a thirty minute delay *could* constitute impeding in violation of section 103(a), and that, in finding no delay here, it limited its holding to the particular facts. However, the Secretary goes on to assert that

[a]fter weighing the evidence and making credibility determinations, the Court disagreed with the Secretary as to those facts and their impact, but that does not mean the Secretary's position was not substantially justified[, and that g]iven these facts and the governing law which had not yet dealt with the particularities at issue here, "reasonable people could genuinely differ."

Id. at 8.

This characterization seeks more than is warranted. The analysis is not simply a matter of observing that there was a 30 minute delay and then coupling that with the observation that the law has not yet dealt with "the particularities at issue here." One has to examine all that went on during the time from the inspector's arrival up to the point that he began his inspection, as those circumstances inform whether there was in fact an unreasonable delay. As the Court's decision clearly set forth, under the particular circumstances, there was no unreasonable delay.

The essence of the Secretary's argument asserts that it was the Court's conclusion "that the evidence did not adequately show Portable's intent to impede the inspection [and that] [t]he Court's conclusions were based largely on its credibility findings and its view of the import of the evidence." *Id.* at 9. Discounting that the Bellfi did not inform Portable that he had a legal right to conduct an inspection, the Secretary apparently believed it was sufficient for the inspector to "announce that he was an MSHA Inspector and that he was present to conduct an inspection." *Id.* He adds that "[t]here is no legal requirement that an inspector use any particular words in announcing his right and presence to inspect." *Id.* From this, the Secretary urges that

² Although the Secretary notes that, while the Court concluded that the delay was not unreasonable and that it did not rise to the level of impeding the inspection, he contends that this conclusion was reached through the process of the Court's evaluation of the evidence, by drawing inferences and conclusions and making credibility determinations. He asserts that simply because the Court's conclusions were different than the Secretary's does not mean that his case was not substantially justified. Objection at 7. As explained in this decision, the Court does not agree that the matter can be so described as merely different takes on the same evidence.

“any failure to expressly announce the statutory basis for [the inspector’s] legal authority does not detract from the fact that the Secretary’s position was substantially justified.”³ *Id.* at 9-10.

Noting that the “Court concluded that Portable did not definitively tell Bellfi that he could not inspect the mine,” the Secretary asserts that Portable did this indirectly by pointing to Bellfi’s testimony that he “normally waits five minutes before proceeding with his inspection.” *Id.* at 10. A long stretch, the Secretary contends that Bellfi’s failure to start his inspection within his normal five minute wait “evidence[s] his view that he was being barred from inspecting without an escort.” *Id.* The Secretary then adds that “Bellfi also testified that he told Edwards that the longer he had to wait, the more likely he would be to issue a citation for impeding the inspection.” *Id.* However, this observation undercuts the Secretary’s claim of impedance, because it shows that at that point in time Bellfi acknowledged that no impeding had yet occurred.

The Secretary would have it that he “was entitled to rely upon the statements, observations and opinions of an experienced mine inspector, and could not have anticipated that the Court would credit Portable’s witnesses rather than the inspector’s[.]” again describing any finding of EAJA liability as simply grounded upon credibility findings. *Id.* at 10. As explained below, the Court’s conclusions did not rest only on credibility findings but on the testimony from MSHA’s own witnesses, which significantly undercut the claim that there had been an impeding of the inspection.

The Secretary further contends that Portable asserts “that it is automatically entitled to an award because the Secretary’s ‘enforcement position [] is the subject of an internal disagreement within the agency.’” Surreply at 1. Addressing that contention, the Secretary points out that

Supervisor Petty testified that his internal office procedure is for inspectors to contact him prior to issuing a citation for impeding, and noted that he has waited for 15-20 minutes at Portable for Ms. Rather to walk around with him. But he also stated that an inspector has the right to inspect immediately upon arrival, and did not opine that the citation issued here was improper.

Id. The Secretary then observes that

this Court stated in its decision that a thirty minute delay could constitute impeding an inspection in violation of section 103(a) of the Mine Act[, adding that t]here simply was no internal dispute within the agency of the type at issue in *Black Diamond Construction*, 21 FMSHRC 1188 (1998) and [accordingly the Secretary urges that] Portable’s argument on this issue must be rejected.

Id. at 1-2.

³ The Secretary also adds that the inspector’s failure to first contact a supervisor does not diminish that there was substantial justification because such a requirement was not an established MSHA policy. Objection at 9-10.

Discussion

Having considered the parties' arguments, and upon applying the applicable standard for determining Portable's eligibility for an EAJA award, the Court finds that the Secretary was not substantially justified in bringing an action under section 103(a) of the Mine Act in this instance.

As noted, MSHA contended that Portable unreasonably delayed the inspection, in violation of section 103(a) of the Mine Act, 30 U.S.C. § 813(a).⁴ While the Court agrees with the Secretary that, as a general principle, the section is violated if a mine operator *unreasonably delays* the start of an inspection by denying the inspector access to the mine, the issue here is whether, in the context of the findings of fact, there was an unreasonable delay in this instance.

The length of the delay was minimal. Although the Secretary's civil penalty petition alleges that the MSHA's inspection "was delayed by approximately one-half hour," and that the Court stated that a delay of 30 minutes, or possibly less time, could constitute an interference with the right to inspect, it cannot be ignored that the delay here was minimal and, realistically measured, was far less than 30 minutes.

It is true that the delay stemmed from the operator's claim that a safety escort was needed to accompany the inspector, but that is not the entire measure of ascertaining whether the Secretary was substantially justified in bringing this action. For a significant period of time the inspector acceded to the basis for the delay. To begin, although the inspector told employee Eric Edwards that he was ready to start the inspection and advised that he did not need to sign in, he still agreed to go to the front office to obtain an escort. Importantly, the inspector did not then tell Edwards that he had the right to inspect the mine without an escort, nor did he advise that a citation could be issued for denying him access to the mine. Instead, he told Edwards that the longer it took to obtain an escort, the more inclined he was to issue a citation for impeding the inspection. But that stance meant that the inspector was not then announcing that his inspection would commence forthwith. Accordingly, the clock for measuring any claim of an unreasonable delay could not have started at that time. In fact, Bellfi told Edwards that he would "go ahead and wait downstairs for [Edwards] to get an escort." *Portable*, 36 FMSHRC at 3251. Approximately 20 minutes then elapsed and it was only then that he informed Edwards that he had waited "longer than necessary" and that he was going to issue a section 103(a) citation for impeding his inspection. *Id.* "Edwards' response was that Ms. Rather advised that the inspector could start his inspection by himself." *Id.* at 3. Accordingly, when the inspector announced that he would wait no longer, the Respondent immediately accepted his demand. Thus, a key part of the analysis is that rather than proceeding with his inspection, the inspector went along with the delay and, when he decided he would wait no longer, Portable did nothing to stall or interfere with that decision. Restated, when the inspector advised that no additional delay would be

⁴ As an alternative theory of liability, the Secretary asserts that Portable violated section 103(a)'s prohibition against giving mine personnel advance notice of an inspection." *Portable*, 36 FMSHRC at 3249. "It was not until after the inspection that Bellfi determined that such safety corrections could have been made during the time that he was waiting for an escort. It was such afterthoughts that prompted MSHA's alternative theory of liability, that Portable gave advance notice of the inspection." *Id.* at 3252.

allowed, he was immediately advised by Jennifer Rather, Safety Director, via the dispatcher, that the inspection could commence without an escort. *Id.*

Because the inspector was pacified up to that point in time, which was approximately 20 minutes later, when Edwards came back, Portable's response from Ms. Rather that the inspector could start his inspection by himself demonstrates both that there was no unreasonable delay and that the Secretary's position, *under these particular facts*, was not substantially justified. This is because that was the first point in time when the inspector made an unqualified assertion of the right to inspect and it was then that the Respondent immediately acceded to the start of the inspection, as Edwards' response was that Ms. Rather advised that the inspector could start his inspection by himself. Therefore, the delay was minimal to non-existent, once the inspector insisted that the inspection occur.

Other testimony of record only serves to confirm the correctness of this conclusion that the Secretary was not substantially justified in bringing the section 103(a) action. Inspector Bellfi informed that, prior to becoming an MSHA Conference and Litigation Representative, at a time "when he used to conduct MSHA mine inspections on a full-time basis, he would generally wait about 5 minutes for an escort." *Portable*, 36 FMSHRC at 3251. He advised that if an escort was not present within that period of time, he would begin the inspection and tell mine personnel that the escort could meet up with him. *Id.* Yet, in this instance he did not follow his own announced practice. Instead, he accepted the brief delay. In fact, he advised that "he was trained to allow time for an operator to get a mine representative to accompany him during an inspection, as long as doing so did not unduly delay the inspection." *Id.* at 3252. But, the Court observes that a mine operator must not be left to guess when, by Inspector Bellfi's particular lights, undue delay would be deemed to have occurred.

Thus, it was Bellfi's view that Portable was in violation of section 103(a) of the Act because it refused to allow him to inspect the mine by telling him that he needed an escort to enter mine property, and thereafter failing to provide one for 30 minutes, before then allowing him to begin his inspection without an escort. While that could be true in the abstract, in this instance the inspector did not act in a manner which was consistent with his own professed practices. Instead, even Bellfi considered Portable's actions to be *an indirect denial* of the inspection and, by so characterizing Portable's actions, he conceded that they were in an enforcement gray area. Further, the inspector admitted that he never explained to Eric Edwards, or to anyone at Portable, that there are inspection requirements under section 103(a). This admission does not aid the Secretary's claim that its action was substantially justified.

The Secretary noted that Inspector Bellfi was "legally entitled to commence the inspection without undue delay." *Id.* at 3255. But this is a straw man argument, as the point was not disputed; both sides agreed that an inspector is entitled to inspect without undue delay. The pertinent issue involved the claim of indirect denial of entry. The Court found that did not occur, while also noting that the inspector never attempted to explain his authority, nor did he simply start his inspection. "On these facts it is clear that the Inspector chose to wait much longer than his normal amount of time for an escort. As he stated, he would usually start the inspection after five (5) minutes, proceeding unaccompanied, if necessary." *Id.*

Beyond these observations, the Court noted in its decision:

There was no testimony or documentary evidence presented by either side that Bellfi was told that he was *not permitted* to inspect the mine at any point during the 30 minute waiting period despite the description in the citation suggesting otherwise.⁵ On the contrary, Edwards had returned to Bellfi to tell him the crusher was being shut down and he could begin the inspection unaccompanied when Bellfi decided to issue the citation. Further, Bellfi never told Edwards he had a right to inspect the mine, nor did he attempt to start his inspection despite testifying that he would normally only wait 5 minutes for an escort before beginning. These actions also diminish the Inspector's claim that Portable's actions constituted an indirect denial. In the Program Policy Manual (PPM), a source of MSHA's interpretation and guidelines on enforcement of the Act, indirect denials are "those in which an operator or his agent does not directly refuse right of entry, but takes roundabout action to prevent inspection of the mine by interference, delays, or harassment. There must be a clear indication of intent and proof of indirectly denying entry." Ex. R-27 at 2. Based on the above actions taken by Portable, the court [found] that the record does not evidence such 'clear indication of intent and proof of indirectly denying entry,' and accordingly it is found that the Respondent did not exhibit the intent to indirectly deny access or otherwise delay the inspection.

Id. at 3255-56. The Court also observed that

[i]n addition, testimony from Supervisor Petty and Ms. Rather regarding past practices were particularly enlightening. Petty had performed or accompanied hundreds of inspections in the past, sometimes waiting 30 or more minutes for an escort before beginning the inspection. No citations for impeding were issued as a result of those prior wait times. Petty also explained that MSHA protocol was for inspectors to tell mine personnel that they had a right to inspect the mine immediately and that, after so informing, there was no timeline for issuing the citation for impeding. There is no indication that Bellfi did this. Ms. Rather had been present for all inspections at Portable, except for one, prior to August 16, 2012, and she never had an issue with an inspector waiting up to 30 minutes for her to arrive and be an escort. While a lack of past enforcement by MSHA cannot be the sole reason for vacating this citation, the Secretary's previous interactions with Portable set the stage for its expectations, and was indicative of the amount of time it considered to be a reasonable period to wait.

⁵ As the Court noted at footnote 9 in its December 2014 decision, "[t]his is distinguishable from the facts in *F.R. Carroll* where the inspector repeatedly asked the operator to allow him to proceed with the inspection, and told mine personnel that a 5 hour delay could not be granted. *F.R. Carroll*, 26 FMSHRC at 102.

Thus, it is fair to state that Portable's past experience with MSHA inspections led it to believe that it was acting in a manner consistent with those experiences, and therefore that it was not thwarting any inspection.

Id. at 3256.

Finally, the Court took note that

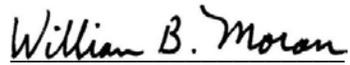
[i]t is important to recognize [] the Secretary's valid concern that "excusing" a 30 minute delay "would severely impair MSHA's ability to protect miners." . . . Under a different set of facts, intentionally and unreasonably delaying an MSHA inspector for 30 minutes, or possibly, in some circumstances, a delay of less time, could indeed weaken MSHA's ability to protect miners. Accordingly, the Court's decision here is not meant to be broadly interpreted but instead is limited to the specific circumstances of this [] case.

Id. at 3259. Thus, the Court limited its decision to the record evidence and was not making a broader assertion about acceptable delays for inspections. It takes the same approach for this EAJA Application, ruling only that the Secretary was not substantially justified in bringing this particular action.

Conclusion

As noted, after the Application was filed and the Objection to it submitted, Portable then filed a reply and the Secretary submitted a brief surreply. The surreply reduced the issues to be resolved to the substantial justification question, the Secretary having conceded "that Portable is eligible for an award, as it meets the size criteria and has incurred fees in defense of an action on which it was the prevailing party." Surreply at 1. Having found that the Secretary's action was not substantially justified, the Court awards the \$65,217.82 sought by Portable.

So Ordered.


William B. Moran
Administrative Law Judge

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