

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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March 1, 2002

PRONGHORN DRILLING COMPANY,	:	EQUAL ACCESS TO JUSTICE
Applicant	:	PROCEEDING
	:	
v.	:	Docket No. EAJ 2001-4
	:	
SECRETARY OF LABOR,	:	Formerly WEST 2000-537-M / 538-M
MINE SAFETY AND HEALTH	:	A. C. Nos. 48-00837-05501 N5Y
ADMINISTRATION (MSHA),	:	48-00837-05502 N5Y
Respondent	:	
	:	Smith Ranch Project

ORDER DENYING MOTION TO RECONSIDER DECISION

A decision on the merits of this case was issued January 15, 2002, holding that the prevailing party below, Pronghorn Drilling Company (Pronghorn), was entitled to an award of fees and expenses pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504, the “EAJ Act.” That decision was interlocutory awaiting a final application for fees and expenses. On February 1, 2002, the Secretary filed a motion for reconsideration of the January 15 decision. The Applicant filed a response on February 19, 2002.

The Secretary first alleges in her motion that the decision did not “address the Secretary’s evidence and argument demonstrating the Secretary had a reasonable basis for interpreting the statute to cover the milling of uranium at the Smith Ranch Project.” The form and content required of a Commission judge’s decision in an EAJ Act case is set forth in Commission Rule 307, 29 C.F.R. § 2704.307. That rule provides, in relevant part, as follows:

In all decisions on applications, the administrative law judge shall include written findings and conclusions on the applicant’s eligibility, and an explanation of the reasons for any difference between the amount requested and the amount awarded. As to applications filed pursuant to § 2704.105(a), the administrative law judge shall also include findings on the applicant’s status as a prevailing party and whether the position of the Secretary was substantially justified; if at issue, the judge shall also make findings on whether the applicant unduly protracted or delayed the underlying proceeding or whether special circumstances make the award unjust.

The material issues presented in this EAJ Act case were (1) whether the Secretary's position in the underlying civil penalty proceeding was substantially justified and (2) whether special circumstances existed to make an award unjust. The January 15 decision provided the requisite findings, conclusions and the reasons for those findings and conclusions regarding those material issues. A party may reasonably infer that if its arguments have not been adopted in a decision then those arguments have been rejected.

The Secretary next alleges that the January 15 decision did not address her purported argument that fees and expenses incurred prior to November 1, 2000, should be denied because Pronghorn did not challenge MSHA's jurisdiction before that date.¹ She argues that even if her position "was ultimately found to have been unjustified, it was reasonably justified at least until the defendant pointed out to the government the evidence or defense that made it justified." The Secretary now claims that this argument was presented in footnote 3 on page 7 of its "Answer" filed December 5, 2001. That footnote reads as follows:

As late as October 2000, Pronghorn admitted, in its answer to the Petition for Assessment of Civil Penalty, that the Smith Ranch "mine" was "subject to the provisions of the Act." See Petition, Paragraph 2 (September 20, 2000), and Answer, Paragraph 2 (October 13, 2000) (West 2000-537-M) (see also Pronghorn's Answer, Paragraph 4 in WEST 2000-538-M) (October 3, 2000). The entire first year of the fees and expenses listed in the application therefore had nothing to do with the rationale for the decision and the position of the Secretary that Pronghorn now claims was without substantial justification.

This somewhat ambiguous statement, secreted in a footnote to the Secretary's "Answer," was not previously understood to have raised the precise assertion now presented, i.e., that her position in the civil penalty case was reasonably justified until the jurisdictional issue was raised by Pronghorn and that therefore Pronghorn is not, in any event, entitled to fees and expenses of \$26,718.00, incurred before that date. This is, however, essentially the same argument - - i.e., that the Secretary was "substantially justified" to proceed in the underlying case because Pronghorn did not challenge her jurisdiction until litigation had commenced - - that was specifically rejected in the January 15 decision.

In any event, the Secretary's argument is without merit. The EAJ Act does not on its face limit the award of fees and expenses to only periods after the government has been formally notified by the opposing party that the government's position is not substantially justified. Nor does the EAJ Act require, as a condition precedent to an award, that the prevailing party must raise a specific objection in the underlying proceedings on the grounds that the government's position is not substantially justified. The cases cited by the Secretary for the proposition that

¹ The Secretary does not claim for this reason that an award for periods before November 1, 2000, would be unjust or that Pronghorn unduly protracted or delayed the underlying proceedings.

partial awards under the EAJ Act may be appropriate in certain circumstances, *Lion Uniform, Inc. v. NLRB*, 905 F.2d, 125 (6th Cir. 1990) and *Leeward Auto Wreckers, Inc. v. NLRB*, 841 F.2d 1143, 1148-49 (D.C. Cir. 1988) are clearly distinguishable in that they involved the withholding by the opposing party of specific defenses and evidence, exclusively within the knowledge of the opposing party until the late stages of the proceedings. The *Lion Uniform* case did not, moreover, result in a partial award - - the principle it was cited for.

The underlying civil penalty cases herein, on the other hand, involved only a question of whether the Secretary had jurisdiction to proceed under the fundamental organic statute - - an issue the Secretary must always examine herself to determine whether she can proceed with litigation. In the civil penalty cases below there was never any doubt that the mineral at issue was being mined in liquid form with no workers underground and, because of the clear statutory language, that well know fact should have led the Secretary to immediately question her jurisdictional authority.

Pronghorn also notes that even if it had raised the jurisdictional issue from the beginning, the requested fees and expenses would in any event have reasonably been incurred. Pronghorn argues that it could not have known the outcome of a jurisdictional challenge in any event and it was prudent and necessary therefore to take prompt measures to defend the case on the merits and thereby incur the noted expenses.

ORDER

The Secretary of Labor's Motion to Reconsider Decision is hereby denied. A final decision awarding fees and expenses will accordingly be issued forthwith.

Gary Melick
Administrative Law Judge
(703) 756-6261

Distribution: (Certified Mail)

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