

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

March 28, 2000

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

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

ORDER

BY THE COMMISSION:

In this proceeding under the Equal Access to Justice Act, 5 U.S.C. § 504 et seq. (1996) (“EAJA”), Contractors Sand and Gravel, Inc. (“Contractors”), sought recovery of attorney’s fees and expenses following the decision in *Contractors Sand and Gravel, Inc.*, 18 FMSHRC 384 (Mar. 1996) (ALJ), in which Contractors prevailed over the Mine Safety and Health Administration (“MSHA”) in a proceeding under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act” or “Act”). Administrative Law Judge August Cetti ordered the Secretary to pay attorney’s fees and expenses because her position in the merits proceeding was not substantially justified. *Contractors Sand and Gravel, Inc.*, 18 FMSHRC 1820 (Oct. 1996) (ALJ). The Secretary filed a petition for review with the Commission. Following the direction for review, Contractors challenged the Commission’s jurisdiction to review the judge’s award. On review, the Commission ruled against Contractors on the issue of jurisdiction, and a majority further concluded that the Secretary’s position in the underlying Mine Act adjudication was substantially justified, thereby reversing the judge. *Contractors Sand and Gravel, Inc.*, 20 FMSHRC 960, 967-76 (Sept. 1998) (Chairman Jordan and Commissioners Marks and Beatty). The dissenting Commissioners held that the Secretary’s position was not substantially justified. *Id.* at 978-85 (Commissioners Riley and Verheggen).

Contractors subsequently petitioned for review of the Commission's decision to the United States Court of Appeals for the District of Columbia Circuit. The court affirmed the Commission's disposition of the jurisdictional issue. *Contractor's Sand and Gravel, Inc. v. FMSHRC*, 199 F.3d 1335, 1339-40 (D.C. Cir. 2000). The court agreed with the dissenting Commissioners that the Secretary's position before the administrative law judge in the Mine Act proceeding lacked substantial justification because the Secretary's interpretation and application of the regulation at issue had no reasonable basis in law or fact. *Id.* at 1340-42. The court ordered that the award of fees and expenses granted by the administrative law judge be restored, and remanded the case to the Commission for further proceedings to determine the amount of an award to compensate Contractors for pursuing review before the court. *Id.* at 1343.

Subsequently, the Secretary and Contractors each filed with the court a motion for clarification. The Secretary requested that the court clarify its decision to permit the Commission to consider on remand several issues that it did not reach because it reversed the judge. Those issues included whether the judge properly awarded Contractors attorney's fees at an hourly rate that was higher than the maximum rate specified in EAJA, and properly ordered interest on the award that accrued as a result of Contractors' failure to pay its bills for attorney's fees on time. Contractors requested that the court clarify that on remand the Commission should award, in addition to fees and expenses accrued in pursuing court review, those attorney's fees and expenses that were incurred in defending the administrative law judge's decision before the Commission.

The court issued an order in which it granted Contractors' motion and denied the Secretary's. *Contractor's Sand and Gravel, Inc. v. FMSHRC*, No. 98-1480, slip op. at 1 (D.C. Cir. Mar. 3, 2000). With regard to the Secretary, the court stated that the issues she raised in her motion "were not raised before the court at any time" and therefore the motion could not be granted. *Id.* With regard to Contractors' motion, the court stated that it was not the court's intent "to foreclose such fees and expenses otherwise awardable." *Id.* (citation omitted).

Pursuant to the court's orders, we reinstate the judge's original EAJA award and remand the case to the judge for further proceedings on attorney's fees and expenses incurred in defending the judge's decision before the Commission and those incurred in seeking review of the Commission's decision before the court.

---

Mary Lu Jordan, Chairman

---

James C. Riley, Commissioner

---

Theodore F. Verheggen, Commissioner

---

Robert H. Beatty, Jr., Commissioner

Distribution

Ronald E. Meisburg, Esq.  
Heenan, Althen & Roles  
1110 Vermont Avenue, N.W., Suite 400  
Washington, D.C. 20005

C. Gregory Ruffennach, Esq.  
Ruffennach Law Offices  
450 East 3<sup>rd</sup> Avenue  
Durango, CO 81301

Jack Powasnick, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
4015 Wilson Blvd., Suite 400  
Arlington, VA 22203

Administrative Law Judge August Cetti  
Federal Mine Safety & Health Review Commission  
Office of Administrative Law Judges  
1244 Speer Blvd., Suite 280  
Denver, CO 80204