

CCASE:  
VENBLACK INC v. SOL (MSHA)  
DDATE:  
19850909  
TTEXT:

Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

VENBLACK, INC.,  
CONTESTANT

CONTEST PROCEEDING

Docket No. EAJ 85-1

v.

Austin Black Plant

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

DECISION

Appearances: J. Edgar Baily, Esq., George V. Gardner, Esq.,  
Roanoke, Virginia,  
for Contestant;  
James B. Crawford, Esq., Office of the Solicitor,  
U.S. Department of Labor, Arlington, Virginia,  
for Respondent;  
Mr. Bobby L. Lawson, Venblack, Inc., Raleigh County,  
West Virginia,  
Representative of Employees.

Before: Judge Lasher

This matter arises on the application of counsel for Contestant, VenBlack, Inc., for an award of attorney's fees and costs arising from their representation in a contest proceeding, VenBlack, Inc., v. Secretary of Labor, WEVA 84-152-R, and a related penalty proceeding. Contestant cites Section 204(a) of the Equal Access to Justice Act, (EAJA), 28 U.S.C. 2412, as authority for the relief requested and asserts that the Secretary's position "was not substantially justified." The Secretary opposes the application on the basis that its position was substantially justified. Both parties have submitted a memorandum in support of their position.

Although the EAJA was repealed effective October 1, 1984, pursuant to a savings provision therein the application was not vitiated since the underlying contest/penalty proceedings were initiated before the date of repeal. It should be noted that there is no provision in the Mine Safety and Health Act of 1977 for an award of attorney fees except in discrimination cases.

The issue in the underlying proceedings was not whether the Contestant should be regulated by the Secretary of Labor but whether the Secretary should wear his OSHA hat or MSHA hat in doing so. The Contestant, the party which ultimately prevailed, took the position that it should be regulated by OSHA, presumably a less severe regulating authority than the Mine Safety and Health Administration.

~1393

At the time the matter was in litigation, no judicial or Commission decision or authority was in existence which inevitably or predictably forecast an outcome in favor of Contestant, VenBlack. Indeed, the opposite was true. A considerable portion of the decision of the Administrative law judge (the undersigned) was spent in distinguishing the case of Donovan v. Carolina Stalite Company, 734 F.2d 1547 (D.C.Cir., 1984) which was unfavorable to the position of Contestant and lent strong support to the Secretary's. Carolina Stalite appeared to be the governing precedent throughout the trial stage and much of the post-hearing stage.

The contentions of the Secretary (listed at page 8 of the ALJ decision) were not unreasonable. Nor can it be said that the Secretary's action was inconsistent (FOOTNOTE.1) since MSHA had regulated Contestant's operation in the recent past albeit under different conditions.

Significantly, at the end of the ALJ decision, the following observation was made:

This proceeding involves difficult issues and the positions of the parties both have some merit in the present stage of the development of the law on the subject.

In view of the foregoing, one is constrained to conclude that both at the time of the Secretary's initiation of MSHA's regulatory processes with regard to Contestant and at the time of the administrative litigation a reasonable basis in both law and fact existed which supported the Secretary's position. Substantial justification for the Secretary's action and position are thus found to have existed. The points and authorities set forth in the Secretary's memorandum in support of his answer to the application are found meritorious and by reference are incorporated herein as part of this decision. VenBlack, Inc's application is denied (FOOTNOTE.2) and this proceeding is dismissed.

Michael A. Lasher, Jr.  
Administrative Law Judge

AAAAAAAAAAAAAAAAAAAAAAAAAAAA

FOOTNOTES START HERE:-

~Footnote\_one

1 There is no contention or indication that the Labor Department has acted oppressively or in bad faith in this matter.

~Footnote\_two

2 In view of this decision no ruling is made with respect to VenBlack's motion to withhold Confidential Financial Information from public disclosure and the same remains in a sealed envelope in the official case folder.

