

No. 21-4202

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jan 27, 2023
DEBORAH S. HUNT, Clerk

POLYWEAVE PACKAGING, INC.,)
)
Petitioner,)
)
v.)
)
UNITED STATES DEPARTMENT OF)
TRANSPORTATION, Pipeline and Hazardous)
Materials Safety Administration,)
)
Respondent.)

ORDER

Before: WHITE, MURPHY, and DAVIS, Circuit Judges.

Polyweave Packaging, Inc. petitions for review of a decision of the Chief Safety Officer of the Department of Transportation’s (“the Department”) Pipeline and Hazardous Materials Safety Administration (“PHMSA”) affirming an order of PHMSA’s Chief Counsel finding Polyweave in violation of federal regulations and assessing a \$14,460 civil penalty. Among other issues raised in its principal brief, Polyweave asserts that PHMSA’s Chief Safety Officer was unconstitutionally insulated from removal, *see Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 495–97 (2010), and had not been delegated the authority to issue the decision under review, *see* 49 U.S.C. § 108; 49 C.F.R. §§ 107.301, 107.325(b), (d). The Department now concedes that the Chief Safety Office was not properly appointed at the time of the decision. *See Lucia v. SEC*, 138 S. Ct. 2044, 2051–55 (2018). The Department moves to vacate and remand “so that the agency can determine on remand whether to proceed any further with this matter and, if it does so, can have

the matter reviewed by a new and properly appointed official.” Polyweave opposes the Department’s motion as an improper attempt to manipulate judicial review. The Department replies.

An agency typically moves for a voluntary remand in one of three situations: (1) “the agency may seek a remand to reconsider its decision because of intervening events outside of the agency’s control”; (2) “even in the absence of intervening events, the agency may request a remand, without confessing error, to reconsider its previous position”; or (3) “the agency may request a remand because it believes that its original decision was incorrect on the merits and it wishes to change the result.” *SKF USA Inc. v. United States*, 254 F.3d 1022, 10228 (Fed. Cir. 2001). Although the Department’s motion “do[es] not fall neatly into this taxonomy,” it corresponds most closely with the third scenario given the absence of intervening events and the agency’s concession of error, albeit procedural rather than substantive error. *Id.* We have indicated that “it is an abuse of discretion to prevent an agency from acting to cure the very legal defects asserted by plaintiffs challenging federal action.” *Citizens Against the Pellissippi Parkway Extension, Inc. v. Mineta*, 375 F.3d 412, 416 (6th Cir. 2004). Thus, “when an agency seeks a remand to take further action consistent with correct legal standards, courts should permit such a remand in the absence of apparent or clearly articulated countervailing reasons.” *Id.* “Otherwise judicial review is turned into a game in which an agency is ‘punished’ for procedural omissions by being forced to defend them well after the agency has decided to reconsider.” *Id.*

Polyweave suggests that the timing of the Department’s motion, filed one week before the Department’s principal brief was due, countervails its voluntary-remand request. “To be sure, an agency’s reconsideration of its own decision may in some contexts be unwarranted, or even abusive.” *Id.* at 417. The Department’s motion, however, relates to an issue raised in Polyweave’s principal brief and is “not . . . the sort of ‘novel, last second motion to remand,’ that could indicate bad faith.” *FBME Bank Ltd. v. Lew*, 142 F. Supp. 3d 70, 75 (D.D.C. 2015) (internal citation

omitted) (quoting *Lutheran Church–Missouri Synod v. FCC*, 141 F.3d 344, 349 (D.C. Cir. 1998)). Polyweave’s concerns about the agency’s posture on review are furthermore conjectural at this juncture. The parties agree that the final agency decision under review was issued without proper adjudicatory authority, and remand is required in these circumstances. *See SKF USA*, 254 F.3d at 1029–30; *Citizens Against the Pellissippi Parkway Extension*, 375 F.3d at 416. Polyweave may file another petition for judicial review following any adverse decision below.

Accordingly, the motion to vacate and remand is **GRANTED**, the final agency decision is **VACATED**, and the case is **REMANDED** to the agency for further proceedings.

ENTERED BY ORDER OF THE COURT

A handwritten signature in black ink, appearing to read "Deborah S. Hunt", written over a horizontal line.

Deborah S. Hunt, Clerk