United States of America

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1120 20th Street, N.W., Ninth Floor

Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant,	:	
v.	:	OSHRC Docket No. 04-0781
MARTIN C. HECK BRICK CONTRACTING CO., Respondent	:	

APPEARANCES:

Ian Eliasoph, Attorney; Charles F. James, Counsel for Appellate Litigation for Occupational Safety and Health; Daniel J. Mick, Counsel for Regional Trial Litigation; Joseph M. Woodward, Associate Solicitor for Occupational Safety and Health; Howard M. Radzely, Solicitor of Labor; Department of Labor, Washington, DC

For the Complainant

Donald W. Jones, Esq.; Austin E. Williamson, Esq.; Hulston, Jones & Marsh, Springfield, MO

For the Respondent

DECISION

Before: RAILTON, Chairman; ROGERS and THOMPSON, Commissioners.

BY THE COMMISSION:

The issue on review before the Commission is whether Martin C. Heck Contracting Company (Heck) is entitled to an award for fees and expenses under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504. This case arose as a result of an inspection conducted on February 25, 2004, by compliance officer (CO) Larry O. Davidson from the Occupational Safety and Health Administration (OSHA) at a worksite in Troy, Missouri, where Heck was engaged in masonry work on a bank building. The Secretary issued Heck a citation alleging a repeat violation of 29 C.F.R. § 1926.451(g)(1) for failing to provide employees with adequate fall protection while working on a scaffold more than 10 feet above a lower level and a non-serious violation of 29 C.F.R.

§ 1904.40(a) for failing to provide an authorized government employee with records within four hours of a request. She proposed a total penalty of $2,400. Administrative Law Judge Ken S. Welsch vacated the repeat violation, affirmed the other-than-serious violation, and assessed a total penalty of $200.

Upon the judge's decision becoming a final order of the Commission, Heck filed a timely application under the EAJA for fees and expenses incurred in defending against the citation item alleging a repeat violation of section 1926.451(g)(1). The judge denied Heck's application based on his finding that the Secretary's position in issuing and pursuing the citation was substantially justified. For the following reasons, we reverse in part and remand this case to the judge to calculate the amount of fees and expenses to which Heck is entitled in accordance with this decision.

Background

On February 25, 2004, the CO observed two Heck employees standing on a scaffold platform without fall protection. He videotaped the conditions for two to four minutes before entering the site to conduct an inspection, which lasted about 30 minutes. During that time, the CO observed masonry materials, including cinder blocks and five-gallon buckets, on the scaffold platform, and he also saw Heck bricklayer Mark Cummisky walking along the scaffold platform.

After unsuccessfully trying to locate the general contractor on the site, the CO approached a worker standing on the ground near the scaffold, showed his credentials, and asked who was in charge. The worker identified Robert "Gene" Houston, who at that time was located on the scaffold. Houston testified that after he climbed down from the scaffold, he told the CO that Heck employees were in the process of raising the scaffold. However, the CO testified that Heck employees never provided this information to him at the site. He testified that based on his observation of the masonry materials on the scaffold platform next to Cummisky, he concluded that the employees were performing masonry work.

At an informal conference held at the OSHA area office in St. Louis on March 26, 2004, about a month after the inspection, Heck representative Jerry Brothers of Brittany Inc. presented Leland Darrow, the CO's supervisor and a Strategic Team Leader at OSHA's St. Louis office, with two written statements from Houston and another

employee, Perry Walsh. In the statements, the employees maintained that they were in the process of raising the scaffold at the time of the inspection. Upon receipt of these statements, Darrow reviewed the CO's videotaped observations and determined that Heck employees were not raising the scaffold at the time of the inspection. At the hearing before Judge Welsch, Heck submitted the employees' written statements into evidence, and testimony by Houston and Cummisky, both of whom the Secretary presented as witnesses, corroborated the written assertions that employees were raising the scaffold.[1]

In vacating the alleged repeat violation of section 1926.451(g)(1), the judge found that because the evidence failed to show that the employees on the scaffold were engaged in masonry work as alleged, the Secretary failed to establish the applicability of the standard.[2] *See Astra Pharmaceutical Prods. Inc.*, 9 BNA OSHC 2126, 2129, 1981 CCH OSHD ¶ 25,578, pp. 31,899-900 (No. 78-6247, 1981), *aff'd in pertinent part*, 681 F.2d 69 (1st Cir. 1982) (Secretary must establish applicability of cited standard, noncompliance with its terms, employee exposure to the hazard, and employer knowledge of the hazard). Crediting the corroborative testimony of employees Houston and Cummiskey that they were raising the scaffold, the judge found that such activity was covered by another standard, section 1926.451(g)(2), which applies to scaffold erecting and dismantling.[3]

Discussion

Under the EAJA, a prevailing party that meets certain size and financial eligibility requirements may be reimbursed for its fees and expenses unless the Secretary demonstrates that she was substantially justified or that special circumstances make an

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[1] Employee Perry Walsh did not testify at the hearing.

[2] Section 1926.451(g)(1) states in pertinent part: "Each employee on a scaffold more than 10 feet (3.1 m) above a lower level shall be protected from falling to that lower level."

[3] Section 1926.451(g)(2) states in pertinent part:

> … Employers are required to provide fall protection for employees erecting or dismantling supported scaffolds where the installation and use of such protection is feasible and does not create a greater hazard.

award unjust. 5 U.S.C. § 504(a)(1) and (b)(1); s*ee also* Commission EAJA Rule 105, 29 C.F.R. § 2204.105, and Commission EAJA Rule 106, 29 C.F.R. § 2204.106. The test of whether the Secretary's action is substantially justified is essentially one of reasonableness in law and fact. *Contour Erection and Siding Systems Inc.*, 18 BNA OSHC 1714, 1716 (No. 96-0063, 1999). Here, it is undisputed that Heck meets the eligibility requirements for an EAJA award. Thus, the only question at issue is whether the Secretary's action was substantially justified.

In denying Heck's EAJA application, the judge found that the Secretary had a reasonable basis for citing and prosecuting Heck for the alleged violation. *See* Commission EAJA Rule 106(a), 29 C.F.R. 2204.106(a) (position of Secretary includes her litigation position as well as her action or inaction prior to the litigation). Noting that his resolution of the case ultimately rested on a credibility determination in favor of the testimony of the two Heck employees over that of the CO, the judge reasoned that "the Secretary cannot be held accountable for not anticipating how the court would resolve credibility issues and weigh evidence."

We agree that the Secretary was substantially justified in issuing Heck a citation on March 5, 2004, for violating section 1926.451(g)(1). The record shows that the information gathered by the CO at the inspection reasonably supported his view at that time that Heck had failed to provide employees working on a scaffold with adequate fall protection. Specifically, the CO observed employee Cummisky standing and walking on a scaffold platform approximately twenty-one feet above the ground without any fall protection. The platform faced the wall of a building that appeared to be in the process of having bricks laid. Alongside Cummisky on the platform were masonry materials, including a supply of cinder blocks and one or more five-gallon buckets. In addition, the CO testified that an employee at the site told him that Heck was performing masonry work at the site. According to the CO, he saw none of the typical indicators that he would have expected to see where employees are raising a scaffold, such as "uprights placed up at a higher level than the scaffold," "platforms placed up on higher levels," and "cross braces placed on the uprights that they are placing on a higher level to take the scaffold up." Thus, he did not ask the employees during the inspection whether they were raising the scaffold, nor did they provide him with that information.

Contrary to Heck's claims on review, we find that the record lacks sufficient evidence to conclude that the CO was told during the inspection that employees were raising the scaffold. Houston was the only Heck employee to claim in both his written statement and his testimony that he relayed this information to the CO during the inspection.[4] However, in its EAJA application, Heck itself undercuts Houston's claim by stating "[r]espondent's foreman [Houston] and employees *would have* told the investigator they were raising the scaffold had he inquired of them during the inspection…" (emphasis added). Then, in a subsequent amendment to its EAJA application, Heck backpedaled by stating that the CO may not have heard this information. Under these circumstances, we see no reason to disturb the judge's finding that "neither Houston [n]or Cummisky told [CO] Davidson they were raising the scaffold." Accordingly, we find that the CO's observations of an unprotected employee in proximity of masonry materials on the scaffold platform, where there was no indication of dismantling or erecting the scaffold, provided a reasonable basis in law and fact for the Secretary to have cited Heck for a lack of fall protection in violation of section 1926.451(g)(1).

We disagree, however, with the judge's finding that the Secretary was substantially justified in pursuing the citation through litigation after Heck presented the written statements by Houston and Cummisky at the informal conference. Under the EAJA, Congress adopted the "substantial justification" standard as a "caution to agencies to carefully evaluate their case and not to pursue those which are weak or tenuous." *William B. Hopke Co.*, 12 BNA OSHC 2158, 2159, 1986-87 CCH OSHD ¶ 27,729, p. 36,255-6 (No. 81-206, 1986) (citing H.R. Rep. No. 1418, 96th Cong., 2d Sess. at 14, *reprinted in* 1980 U.S. Code Cong & Ad News at 4993). In this case, the employees' written statements weakened the Secretary's case by creating doubts about whether the alleged conditions were violative of the standard cited. Despite these doubts, the

[4] Heck's claim that Walsh also informed the CO at the site about raising the scaffold has no support in the record. Walsh, who did not testify, claimed in his written statement that employees were raising the scaffold, but he did not state that he or any other employee provided this information to the CO during the inspection.

Secretary proceeded with her case without making any attempt to develop additional facts with which to evaluate the validity and reliability of the statements provided by Heck.

As support for her claim that she was justified in proceeding with the citation as issued, the Secretary submitted in her response to Heck's EAJA application an affidavit by Darrow, the CO's supervisor, who conducted the informal conference with Heck representative Jerry Brothers on March 26, 2004. In his affidavit, Darrow maintained that he deemed the written statements submitted at that time by Brothers to be unreliable because they "seemed contrary to one another, and were contradicted by the CSHO's videotaped documentation." However, none of the statements he describes as contradictory are plainly inconsistent.[5]

Nor was Darrow's reliance on the CO's videotaped observations a reasonable basis for rejecting outright the assertions made in the written statements. The videotape showed only masonry materials and an unprotected employee walking on a scaffold platform. It neither bolstered the CO's interpretation of the conditions at the time of the inspection nor discredited the assertions made in the written statements. In fact, at the hearing, the CO himself recognized in the conditions depicted in his videotape that "to lay more block, the scaffold would have to be raised." Thus, by the CO's own assessment, reliance on the videotape was not a reasonable basis on which to dismiss the employees' written statements that they were raising the scaffold at the time of the inspection.[6] Rather than take reasonable steps, such as interviewing the employees in

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[5] According to Darrow, Houston's statement that he "was not ask[ed] who was in charge," conflicts with Walsh's statement that the CO "came on si[te] and asked who was in charge." However, the CO testified that when he entered the site, he asked an employee on the ground for the person in charge, and the employee called Houston down from the scaffold. As Walsh had already told the CO that Houston was in charge, there is no contradiction presented by Houston's statement that the CO did not ask him for the person in charge.

Darrow also regarded Houston's statement that the CO told employees "not to get back on the scaf[f]old" as contradictory to Walsh's statement that Gene [Houston] "said we could not continue on the job." However, we see no conflict between these statements.

[6] Unlike the judge, we do not believe the tension here between the CO's observations and Darrow's observations based on the videotape, on the one hand, and the statements and

question, to acquire additional information with which to evaluate the assertions made in the written statements, the Secretary chose to proceed with a case significantly weakened by the claims that the conditions alleged in her citation were not valid. Under these circumstances, we find that the Secretary's failure to conduct further factual investigation upon receipt of the written employee statements on March 26, 2004, was not reasonable, and therefore her position in litigation was not substantially justified. *See Consolidated Constr. Inc.*, 16 BNA OSHC 1001, 1005-6 (No. 89-2839, 1993) (where employer's submission of post-citation expert's report weakened Secretary's case-in-chief, no substantial justification in proceeding without further development of facts).[7]

ORDER

We remand this case to the judge with instructions to award in accordance with Commission EAJA Rule 107, 29 C.F.R. § 2204.107, the reasonable fees and expenses for work performed in connection with Heck's defense of the citation item alleging a section

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testimony of Heck employees, on the other, was susceptible to resolution through a credibility finding. What the CO saw and videotaped did not contradict the possibility that the scaffold was being raised. Because there was no inherent conflict in testimony, there were no true issues of credibility to be resolved. *See Hamilton Fixture*, 16 BNA OSHC 1073, 1093 (No. 88-1720, 1993) (judge's statement that testimony insufficient not a credibility determination where testimony of two witnesses not in direct conflict). Thus, this case did not "truly turn[] on credibility issues." *Consolidated Constr. Inc.*, 16 BNA OSHC 1001, 1006 (No. 89-2839, 1993). In light of that, further investigation by the Secretary might have uncovered evidence that either corroborated Heck's claim, or cast doubt on it.

[7] In response to the Chairman's dissent, we would note that the two employee statements were based on observations by workers at the scene with first hand knowledge. Furthermore, the dissent fails to consider that upon receipt of the written statements during the informal conference, the Secretary was on notice that the videotape (and her other evidence) did not contradict the written statements and thus substantiate that the employees were performing masonry work as alleged. At that point, the Secretary should have known that to prove a violation, she would have to overcome Heck's claim that employees were raising the scaffold. By failing to further develop her case, the Secretary proceeded without fully preparing for trial. "The Secretary may reasonably be expected to arrive at the hearing thoroughly prepared to defend a substantially justified position." *Consolidated Constr. Inc.*, 16 BNA OSHC at 1005.

1926.451(g)(1) violation after March 26, 2004, when the Secretary's position ceased to be substantially justified.

SO ORDERED.

/s/_____
Thomasina V. Rogers
Commissioner

/s/_____
Horace A. Thompson
Commissioner

Dated: August 2, 2006

RAILTON, Chairman, dissenting in part:

I agree with my colleagues that the Secretary was substantially justified in issuing the citation to Heck. I disagree with their conclusion that she was not substantially justified to proceed with the litigation upon receipt of the unsworn employee statements.

The Commission has previously held that while the Secretary may be substantially justified in issuing a citation, when subsequent evidence comes to light during later stages of the litigation, which weakens and undermines her case, she must make additional inquiry or take other steps to substantiate her continued prosecution of the matter. *See, e.g., Consolidated Constr., Inc.*, 16 BNA OSHC 1001, 1991-93 CCH OSHD ¶ 29,992 (No. 89-2839, 1993); *Secretary v. Contour Erection and Siding Systems Inc.*, 18 BNA OSHC 1714, 1999 CCH OSHD ¶ 31,822 (No. 96-0063, 1999). In those matters, objective evidence came to light at later stages in the litigation. That evidence challenged the reasonableness of the Secretary's position that the charged employer had violated the Act. The evidence relied upon by my colleagues in this matter does not rise to the level set by the precedents. Indeed, it is not objective in any sense of the word. Accordingly, I disagree with their decision to reverse the judge in part and find that the Secretary was not substantially justified in proceeding with the litigation of this case.

As they note:

> At an informal conference held at the OSHA area office in St. Louis on March 26, 2004, about a month after the inspection, Heck representative Jerry Brothers of Brittany Inc. presented Leland Darrow, the CO's supervisor and a Strategic Team Leader at OSHA's St. Louis office, with two written statements from Houston and another employee, Perry Walsh. In the statements, the employees maintained that they were in the process of raising the scaffold at the time of the inspection. Upon receipt of these statements, Darrow reviewed the CO's videotaped observations and determined that Heck employees were not raising the scaffold at the time of the inspection.

My colleagues believe, in essence, that two self-serving statements[8], only corroborated by each other at the time of the informal conference, allow them to second-guess the CO's videotaped observations. This selective use of hindsight, draws a line in ocean sand, always shifting, depending on how a case is later decided at trial. The key issue, as described below, is whether or not the secretary was *reasonable*, not omniscient, in continuing with her litigation. Unfortunately, the effect of the majority's decision is that both the Secretary and the employer must hereafter allocate additional resources and incur additional costs in order for the Secretary to meet the Commission's mandate that she conduct interviews or take other affirmative action to test the validity of unsubstantiated statements submitted by an employer in defense of a citation.

The EAJA only requires that the Secretary act reasonably. *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). It is not the Commission's role to play Monday morning quarterback by engaging in "*post hoc* reasoning" when evaluating her justification for proceeding with a case. *Christiansburg Garment CO. v. EEOC,* 434 U.S. 412, 421-22 (1978); *see also Beck v. Ohio,* 379 U.S. 89, 96 (1964) (courts must guard against being "subtly influenced by the familiar shortcomings of hindsight judgment"). Although the strength of the government's position in the litigation obviously plays an important role in a substantial justification evaluation, the reasonableness inquiry "may not be collapsed into [an] antecedent evaluation of the merits, for EAJA sets out a distinct legal standard." *Cooper v. United States R.R. Ret. Bd.*, 24 F.3d 1414, 1416 (D.C. Cir. 1994) (internal quotation marks omitted).

In this case, aside from the bald assertions made by Heck's bricklayers, there was no objectively reliable indication that employees were raising the scaffold. OSHA team leader Darrow stated in his affidavit that, upon receipt of the written statements at the post-citation informal conference, he reviewed the CO's video and stills, which showed at least one employee standing and walking on the scaffold near masonry supplies. He saw none of the typical indicators that he would have expected to see in circumstances

[8] Although signed, the two statements where neither made under oath nor subject to cross-examination. Indeed, they are quite similar to general denial statements that are made in most Answers to Complaints in litigation.

where employees were raising a scaffold, such as upright extensions to support platforms at a higher level. He showed photographic stills from the videotape to Heck's representative, who also acknowledged that he could not see any indication in the depiction of the physical conditions at the site that employees were raising the scaffold. The cited standard's requirement for fall protection would apply to a bricklayer standing and walking on a scaffold platform. Thus, the Secretary's evaluation of her case at that juncture was reasonable in both law and fact.

At the hearing, foreman Houston's testimony regarding the method by which Heck employees were raising the scaffold was vague and inconsistent. When questioned about the conditions depicted in the videotape, Houston initially stated that employees had already raised the platform on which bricklayer Cummisky stood and walked, but later stated that the platform on which Cummisky stood was "where our material had been, and everything had to be raised up." Cummisky was similarly unclear in his testimony. When shown photo stills from the videotape, he initially stated that they showed him "conversing with a laborer about raising the boards … to the next level," but when asked how far along they were in raising the scaffold, he was unable to provide any specificity and merely repeated: "We were raising the board. That's all I know; raising the boards." At one point during his testimony when asked to describe scenes depicted in photos from the video, his response was to state, "I don't really recall what we were doing there."

When the Secretary rested her case-in-chief, Heck moved to dismiss the fall protection item. In denying the motion, the judge stated that the Secretary had "at least set out a prima facia case that there were no guardrails," and that the remaining issues were whether the company was engaged in raising the scaffolding, and if so, whether the standard applied in such circumstances. The Secretary's reliance throughout the proceedings on the compliance officer's documented observations of the physical conditions at the site over the unsubstantiated assertions of Heck's employees was reasonable even though the judge ultimately decided the weight of evidence against her. As the judge stated in his decision denying Heck's petition for an award under the EAJA, "[t]he Secretary cannot be held accountable for not anticipating how the court would … weigh the evidence." Under these circumstances, I would find that the Secretary's case

was "justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. at 565. Accordingly, I dissent from the majority's decision here to hold the Secretary accountable for how the judge weighed the evidence in this case.

/s/_____
W. Scott Railton
Chairman

Dated: August 2, 2006

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Secretary of Labor, Complainant v. Martin C. Heck Brick Contracting Co., Respondent.	OSHRC Docket No. **04-0781** **EAJA**

Appearances:

Leigh Burleson, Esquire
Kathleen Butterfield, Esquire
Office of the Solicitor r
U. S. Department of Labor
Kansas City, Missouri
For Complainant

Donald W. Jones, Esquire, Esquire
Hulston, Jones & Marsh
Springfield, Missouri
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER
DISMISSING EAJA APPLICATION

Martin C. Heck Brick Contracting Co. (MCHB) seeks an award for fees and expenses in accordance with the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, 29 C.F.R. §2204.101, *et seq*., which it incurred in its defense against repeat Citation No. 1, alleging a violation of 29 C.F.R. § 1926.451(g)(1), issued on March 5, 2004. The violation was vacated after a hearing by Decision and Order dated December 2, 2004. The decision became a final order of the Review Commission on January 7, 2005. MCHB's application for fees and expenses, dated January 31, 2005, as amended in its reply dated May 11, 2005, claims costs totaling $6,371.42.[1]

For the reasons discussed, MCHB's application is denied.

[1]See Revised Exhibit B attached to MCHB's reply in support of an EAJA Application dated May 11, 2005.

Background

In February 2004, MCHB, a masonry contractor, was engaged in laying bricks and blocks to the exterior of a new addition to a bank in Troy, Missouri. On February 25, 2004, Occupational Safety and Health Administration (OSHA) Compliance Officer Larry Davidson observed, from across the street of the bank, an employee of MCHB standing on a supported frame scaffold approximately 21 feet above the ground. The scaffold lacked guardrails, and the employee was not utilizing personal fall protection. Based on the inspection, OSHA issued repeat and other-than-serious citations to MCHB on March 5, 2004. MCHB timely contested the citations.

Citation No. 1 alleged a repeat violation of 29 C.F.R. §1926.451(g)(1) for failing to protect an employee on a supported scaffold by guardrails from falling approximately 21 feet to the ground. The citation proposed a penalty of $2,000.00.

Citation No. 2, alleged an other-than-serious violation of 29 C.F.R. §1904.40(a) for failing to provide copies of OSHA Forms 300 and 330-A within four hours of their request. The citation proposed a penalty of $400.00.

The hearing was held in St. Louis, Missouri, on September 2, 2004. By Decision and Order dated December 2, 2004, Citation No. 1, alleging a repeat violation of §1926.451(g)(1), was vacated. Citation No. 2, in violation of §1904.40(a), was affirmed and a penalty of $200.00 was assessed.

On November 29, 2004, MCHB petitioned the Review Commission for discretionary review. The Commission declined to review the case and the court's Decision and Order became final on January 7, 2005. MCHB then moved for an award of fees and expenses under the EAJA on January 31, 2005. The Secretary filed her answer in response to the EAJA application on April 7, 2005. MCHB filed its reply on May 11, 2005. MCHB's application, as amended, seeks attorney's fees totaling $5,306.25 plus expenses in the amount of $1,065.17

Equal Access to Justice Act

EAJA applies to proceedings before the Commission through §10(c) of the Occupational Safety and Health Act of 1970 (Act), 29 U.S.C. §651, *et seq.* The purpose of the EAJA is to ensure that an eligible applicant is not deterred from seeking review of, or defending against, unjustified actions by the Secretary of Labor. *K.D.K. Upset Forging Inc.*, 12 BNA OSHC 1857,

1859 (No. 81-1932, 1986). An award of fees and expenses under the EAJA is made to an eligible applicant who is the prevailing party if the Secretary's action is found to be without substantial justification and there are no special circumstances which make the award unjust. *Asbestos Abatement Consultation & Engineering*, 15 BNA OSHC 1252 (No. 87-1522, 1991). While the applicant has the burden of persuasion to show that it meets the eligibility requirements, the Secretary has the burden to establish that her position in the proceeding was substantially justified. See Commission Rules, 29 C.F.R. §§ 2204.105 and 2204.106.

The Secretary argues that MCHB is not entitled to an award under the EAJA because she was substantially justified in prosecuting the case; special circumstances render an award unjust; and MCHB seeks fees and expenses unconnected or unrelated to MCHB, or the matter it prevailed upon and in amounts above those allowable (Secretary's Answer, p. 2).[2]

Eligibility

The party seeking an award for fees and expenses must submit an application within thirty days of the final disposition in an adversary adjudication. 5 U.S.C. §504(a)(2). There is no dispute that MCHB timely filed its application.

The party seeking an award must also meet the eligibility requirements. Commission Rule 2204.105(b)(4) requires an eligible employer to be a "corporation. . . .that has a net worth of not more than $7 million and employs not more than 500 employees." Eligibility is determined as of the date the notice of contest was filed. See Commission Rule 29 C.F.R. § 2204.105(c).

The record in this case shows that MCHB, a Missouri corporation, employed approximately 15 employees in February 2004 (Tr. 229). MCHB's EAJA application provides financial information in the form of a balance sheet showing assets and liabilities as of March 24, 2004, the date of the notice of contest.[3] The net worth reflected in the balance sheet is substantially less than $7 million.

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[2] Because it is determined that the Secretary was substantially justified in prosecuting this case, it is not necessary to address the other issues raised by the Secretary involving special circumstances and the amount of the award sought by MCHB.

[3] MCHB's motion to seal the balance sheet was GRANTED.

Although the balance sheet is not signed by the preparer, there is little doubt that MCHB meets the eligibility requirements of the EAJA. The Secretary agrees that MCHB is an eligible applicant (Secretary's Answer, p. 2). Even if there was doubt about MCHB's eligibility, it is not necessary to require MCHB to file an amended balance sheet because, as discussed, the Secretary was substantially justified in prosecuting this case.

Prevailing Party

In the instant case, MCHB seeks EAJA based on the court's vacating Citation No. 1, alleging a repeat violation of §1926.451(g)(1), by Decision and Order dated December 2, 2004. The Secretary agrees, and the record supports a finding that MCHB was the prevailing party as to Citation No. 1 (Secretary's Answer, p. 2). *K.D.K. Upset Forging, Inc.*, 12 BNA OSHC 1856, 1857 (No. 81-1932, 1986).

Substantially Justified

In order for MCHB to be awarded costs under the EAJA, it must be determined that the Secretary's position in bringing this case was not substantially justified. "The test of whether the Secretary's action is substantially justified is essentially one of reasonableness in law and fact." *Mautz & Oren, Inc*., 16 BNA OSHC 1006, 1009 (No. 89-1366, 1993). This reasonableness test comprises three parts. The Secretary must show that: (1) there is a reasonable basis for the facts alleged; (2) there exists a reasonable basis in law for the theory the Secretary propounds; and (3) the facts alleged will reasonably support the legal theory advanced. *Gaston v. Bowen*, 854 F.2d 379, 380 (10th Cir. 1988). There is no presumption that the Secretary's position was not substantially justified simply because she lost the case. The Secretary's decision to litigate does not have to be based on a substantial probability of prevailing. *See S&H Riggers & Erectors, Inc. v OSHRC*, 672 F.2d 426, 430 (5th Cir. 1982).

In this case, OSHA cited MCHB for a repeat violation of §1926.451(g)(1) which provides:

> Each employee on a scaffold more than 10 feet (3.1 m) above a lower level shall be protected from falling to that lower level. Paragraphs (g)(1)(i) through (vii) of this section establish the types of fall protection to be provided to the employees on each type of scaffold. Paragraph (g)(2) of this section addresses fall protection for scaffold erectors and dismantlers.

The citation alleged that MCHB failed to protect an employee on a supported scaffold approximately 21 feet above the ground level by a guardrail system.

In establishing her case, the Secretary relied on the observations and videotape of Compliance Officer Davidson who testified that the employee was standing on the scaffold. He testified he saw the employee stand facing the building a couple of minutes and then saw him walk off the scaffold (Exh. C-1; Tr. 28, 79-80, 101). MCHB did not dispute the scaffold lacked guardrails and that the employee on the scaffold was not protected from falls by guardrails or a personal fall arrest system (Exhs. C-1, C-2). Nothing in the videotape or Davidson's interview of employees during his inspection on-site indicated the employee was in the process of raising the scaffold. The compliance officer's testimony was supported by his written inspection narrative (Exh. R-3; Secretary's Answer, Exh. 1). In adddition, it is noted MCHB's counsel initially asserted unpreventable employee misconduct and argued that the employee on the scaffold was not working. Counsel claimed the employee was conversing with another person below in preparation of the next day's work (Secretary's Answer, Exh. 2, Attachment B; Tr. 5).

Therefore, a reasonable basis existed for the facts alleged in the citation. Also, those undisputed facts supported a violation of the requirements of §1926.451(g)(1). It was not until after the citation was issued that MCHB argued that §1926.451(g)(1) did not apply. In two employee statements prepared and furnished to OSHA by MCHB, there was an indication the employees were in the process of raising the scaffold at the time of OSHA's inspection. Erecting and dismantling a scaffold is covered under §1926.451(g)(2)[4] and not §1926.451(g)(1).

OSHA apparently discounted the employee statements since they came from MCHB and instead relied upon the observations and videotape made by CO Davidson. MCHB argues that OSHA should have conducted an additional inspection to confirm the validity of the two employee statements. Although in hindsight this possibly should have been done, it was not unreasonable for

[4]Section 1926.451(g)(2) provides:

> Effective September 2, 1997, the employer shall have a competent person determine the feasibility and safety of providing fall protection for employees erecting or dismantling supported scaffolds. Employers are required to provide fall protection for employees erecting or dismantling supported scaffolds where the installation and use of such protection is feasible and does not create a greater hazard.

the Secretary to pursue the citation as issued. CO Davidson observed no work being performed while the employee was standing on the scaffold (Tr. 80). He observed no activity raising the scaffold. When Davidson spoke to owner Martin Heck the next day to discuss the inspection findings and request the OSHA 300 log, there is no evidence that raising the scaffold was discussed (Tr. 56, 120). According to CO Davidson, if someone had indicated the scaffold was being raised, he would have evaluated the scaffold under §1926.451(g)(2) and a citation may still have been issued for the lack of fall protection (Tr. 60). At the hearing, it became a issue of credibility between CO Davidson's observations and the employee's testimony which was resolved in favor of the employee testimony.

MCHB's evidence at the hearing contradicted the conclusions drawn by Davidson. MCHB's journeymen bricklayers who were on the scaffold testified they were preparing to raise the scaffold when Davidson initiated the OSHA inspection. They testified the scaffold needed to be raised in order for them to continue laying blocks (Tr. 142, 180, 182). The bricklayers stated the guardrails were removed to allow them to raise the walk boards (Tr. 149).

Unlike §1926.451(g)(1), which the Secretary cited, §1926.451(g)(2) permits an employer to not require employees to utilize fall protection while erecting or dismantling the scaffold if a competent person determines under the circumstances that the installation of such fall protection is not feasible or would create a greater hazard. Davidson agreed the guardrails in this case may have had to be removed to raise the scaffold (Tr. 85).

After considering the factual dispute between the parties and weighing the testimony of witnesses, it was determined the Secretary failed to establish the applicability of §1926.451(g)(1) to the activities performed by the bricklayers at the time of the OSHA inspection.

Despite not finding §1926.451(g)(1) applicable, it was reasonable for the Secretary to accept Davidson's observations and videotape in support of the alleged violation. During the OSHA inspection, Davidson testified that neither MCHB's foreman nor the bricklayer told him they were in the process of raising the scaffold (Tr. 59-60). If he had been told, Davidson testified he would have made further inquiry to see if fall protection was feasible. In addition to not being told, there was no indication to Davidson the scaffold was being raised (Tr. 63). Along with the employee who was merely standing on the scaffold, he observed water buckets, grout and blocks used to make the

wall were on the scaffold (Exh. C-2; Tr. 28, 30, 68, 146). It was reasonable for Davidson to conclude that MCHB was still performing masonry work (Tr. 27, 104).

The decision in this case was resolved in favor of MCHB based on weighing the evidence and the credibility of witnesses. In cases before the Commission, facts need to be proven by a preponderance of the evidence, and evidence is considered persuasive if a reasonable mind might accept it as adequate to support a conclusion. *Capital Tunneling Inc.,* 15 BNA OSHC 1304 (No. 89-2248, 1991). Based on her burden, the Secretary was unable to show the scaffold was not being raised at the time of OSHA's inspection.

Although §1926.451(g)(2) applied to the conditions at the worksite, the Secretary was substantially justified in prosecuting the case under §1926.451(g)(1). She had a reasonable basis for the facts alleged based on the observations of the compliance officer which were supported by a videotape. MCHB did not deny the employee was on the scaffold without fall protection. MCHB did not tell OSHA during the inspection that it was raising the scaffold. The facts alleged supported the legal theory advanced by the Secretary that MCHB violated §1926.451(g)(1). Thus, a reasonable basis in fact and law existed for the theory the Secretary propounded.

The EAJA is not read to deter the Secretary from prosecuting in good faith cases which are reasonable in advancing the objective of workplace safety and health, if such cases are reasonably supportable in fact and law. The facts forming the basis of the Secretary's position do not need to be uncontradicted. Also, credibility determinations which are not resolved in favor of the Secretary do not render the Secretary's position unjustified. If reasonable persons fairly disagree whether the evidence establishes a fact in issue, the Secretary's evidence can be said to be substantial.

If the credibility determinations in this case had been resolved in favor of the Secretary, as opposed to MCHB, the Secretary's claim of violation would have been supported. "[A] case which truly turns on credibility issues is particularly ill-suited for the reallocation of litigation fees under the EAJA." *Consolidated Construction, Inc.,* 16 BNA OSHC 1001, 1006 (No. 89-2839, 1993). The Secretary's failure to prevail in this case does not constitute a lack of substantial justification. The Secretary cannot be held accountable for not anticipating how the court would resolve credibility issues and weigh the evidence.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is ORDERED that:

MCHB's EAJA application for attorney fees and expenses is **DENIED.**

/s/ Ken S. Welsch
KEN S. WELSCH
Judge

Date: May 31, 2005