SECRETARY OF LABOR, Complainant, v. PENTECOST CONTRACTING CORP., Respondent.	OSHRC Docket Nos. 92-3789 & 92-3790

DECISION

BEFORE: WEISBERG, Chairman and GUTTMAN, Commissioner.

Before the Commission is an order of Administrative Law Judge John H. Frye, III, denying Pentecost's application for fees and expenses under the Equal Access to Justice Act (EAJA) 5 U.S.C. § 504. The judge determined that Pentecost was not entitled to an award because the Secretary was substantially justified in proposing individual penalties for violations of several excavation standards even though compliance with one standard would have abated the violations of the other standards at each excavation. For the reasons stated below, we affirm the judge's decision.

Background

The two willful citations that give rise to Pentecost's application for attorney's fees were issued following an inspection of Pentecost's worksite in Tarrytown, N.Y., Docket No.

92-3789 involves a willful citation that alleged violations of §§ 1926.651(h)(1)[1] because Pentecost failed to take special precautions in trenches where employees were exposed to water accumulation; 1926.651(k)(2)[2] because a competent person failed to remove employees from working inside of an unshored, unsheeted, unsloped, and unprotected trench; and 1926.652(a)(1)[3] because the company failed to slope or otherwise protect employees working in the trench from the hazard of trench collapse. Docket No. 92-3790 involves a different trench. At issue here is a willful citation which, as in Docket No. 92-3789, alleged violations of both 29 C.F.R. §§ 1926.651(k)(2) and 1926.652(a)(1). Penalties of $21,000 were proposed for each willful item for a total proposed penalty of $105,000 for the two willful citations.

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[1]**§ 1926.651 Specific excavation requirements.**

> . . . .
> (h) *Protection from hazards associated with water accumulation.* (1) Employees shall not work in excavations in which there is accumulated water, or in excavations in which water is accumulating, unless adequate precautions have been taken to protect employees against the hazards posed by water accumulation. The precautions necessary to protect employees adequately vary with each situation, but could include special support or shield systems to protect from cave-ins, water removal to control the level of accumulating water, or use of a safety harness and lifeline.

[2]**§ 1926.651 Specific excavation requirements.**

> . . . .
> (k) *Inspections.*
> . . . .
> (2) Where the competent person finds evidence of a situation that could result in a possible cave-in, indications of failure of protective systems, hazardous atmospheres, or other hazardous conditions, exposed employees shall be removed from the hazardous area until the necessary precautions have been taken to ensure their safety.

[3]**§ 1926.1926.652 Requirements for protective systems.**

> (a) *Protection of employees in excavations.* (1) Each employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) or (c) of this section . . . .

Judge's Decision on the Merits

The parties entered into a stipulation in which Pentecost admitted the violations, but continued to argue that the penalties were duplicative. After a hearing, the judge issued a decision affirming each item of the two willful citations. However, he found that a single abatement would have eliminated the violations in Docket No. 92-3789 and a single abatement would have eliminated the violation in Docket No. 92-3790. Relying on *Capform, Inc.*, 13 BNA OSHC 2219, 1987-90 CCH OSHD ¶ 28,503 (No. 84-0556, 1989), and *Dec-Tam Corp.*, 15 BNA OSHC 2072, 1991-93 CCH OSHD ¶ 29,942 (No. 88-523, 1993), he grouped each set of violations and assessed a $21,000 penalty for each willful citation, for a total penalty of $42,000.[4]

Judge's Decision on the EAJA Application

Under the EAJA, a party that has prevailed against the federal government in an administrative adjudication and meets certain limits on net worth and number of employees, is entitled to an award of attorney fees and other expenses, unless the government as a party to the proceeding was substantially justified in its position or special circumstances make an award unjust. 5 U.S.C. §§ 504(a)(1) and 504(b)(1); *K.D.K. Upset Forging, Inc.*, 12 BNA OSHC 1856, 1857, 1986-87 CCH OSHD ¶ 27,612, p. 35,879 (No. 81-1932, 1986). The judge denied Pentecost's EAJA application, concluding that the Secretary was substantially justified in demanding separate penalties. He found that the Secretary had the authority to propose separate penalties for each standard violated because employers are required to comply with all standards.

Prevailing Party

As a threshold matter, we first consider whether successfully challenging a penalty proposal qualifies an employer as the prevailing party under the EAJA. We conclude that

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[4]The judge found that the two inspections were separate and distinct and that, in that regard, the penalties would not be combined.

it does. For purposes of attorney's fees statutes, a "prevailing party" is one that has succeeded on any of the significant issues in the litigation, and, as a result of that success, achieves some of the benefit sought in the litigation. *Hensley v. Eckerhart*, 461 U.S. 424, 431(1983); *K.D.K. Upset Forging, Inc.*, 12 BNA OSHC at 1857, 1986-87 CCH OSHD at p. 35,879. The party seeking fees need not have prevailed as to the central issue in the case, but only as to a discrete substantive portion of the proceeding. *H.P. Fowler Contracting Corp.*, 11 BNA OSHC 1841, 1845, 1983-84 CCH OSHD ¶ 26,830, p. 34,357 (No. 80-3699, 1984).

Section 10(a) of the OSH Act, 29 U.S.C. § 659(a), specifically allows a party to contest either the underlying citation, the penalty, or both. Thus where, as here, a party succeeds in its challenge to the proposed penalty it has prevailed in a discrete portion of the case and has achieved some of the benefit it sought by the litigation. Under *Hensley*, this qualifies it as the prevailing party for EAJA purposes.

Our conclusion is not affected by the 1996 amendment to the EAJA which specifically allows a party to seek fees and expenses when the agency's demand "is substantially in excess of the decision of the adjudicative officer and is unreasonable when compared with such decision. . ." 29 U.S.C. § 504(a)(4). The Secretary argues that because Congress specifically amended the EAJA to provide for fee awards where no such provision previously existed, it must be presumed that Congress previously considered penalty reduction alone as ineligible for a fee award.

We do not need to reach the import of the 1996 EAJA amendments, however. We find that considering the language of the OSH Act even prior to its amendment, EAJA was available to parties that substantially prevailed on penalty issues before the Commission. *Cf. Dole v. Phoenix Roofing, Inc.*, 922 F.2d 1202, 1204 (5th Cir. 1991)(language peculiar to OSH Act supplements that of EAJA). Thus, prior to the 1996 EAJA amendments, if an employer had successfully contested the penalties on the grounds that the Secretary

proposed a penalty in excess of the statutory maximum, we would have concluded that the employer was a "prevailing party."[5]

Substantial Justification

Because Pentecost has established that it was the prevailing party, it is entitled to an award of fees and costs unless the Secretary establishes that her position was substantially justified or the record shows special circumstances that would make an award unjust. *K.D.K. Upset Forging, Inc.*, 12 BNA OSHC at 1858, 1986-87 CCH OSHD at p. 35,880. To establish "substantial justification" the Secretary must show that her position was reasonable in law and fact. *William B. Hopke Co.*, 12 BNA OSHC 2158, 2159, 1986-87 CCH OSHD ¶ 27,729, p. 36,255 (No. 81-0206, 1986). We conclude that the Secretary has carried this burden.

Pentecost correctly points out that at least in cases where the issue of grouping has been raised, if the Secretary has proposed separate penalties for similar violations that could be cured by a single act of abatement, the Commission has grouped the penalties. *E.g., L.E. Myers Co.*, 16 BNA OSHC 1037, 1048, 1993-95 CCH OSHD ¶ 30,016, p. 41,135 (No. 90-945, 1993); *Dec-Tam Corp.*, 15 BNA OSHC 2072, 2081, 1991-93 CCH OSHD at p. 40,927. However, a Commission decision to group violations for penalty purposes is a *discretionary* exercise of the Commission's power to assess penalties, based on a factual assessment of the case. In no case has the Commission ruled out the assessment of separate penalties where they are justified by the facts of the case. Nonetheless, given the Commission precedent, it is incumbent on the Secretary to show substantial justification for her decision to group penalties where, as here, she seeks separate penalties for violations that the Commission would likely group.[6] Although the question of whether it was appropriate to group penalties here is not before us, our review of the record establishes that the Secretary

[5]Whether the employer satisfied the other EAJA requirements would have still been at issue.

[6]We also note that the Secretary groups penalties under some circumstances.

had a substantial basis for her determination that the violations in this case justified a separate penalty for each standard violated.

At the threshold, the Secretary recognized and addressed our prior rulings. The Secretary also points out that the record discloses that employees were working in several trenches that were neither properly shored or sloped. One of the cited trenches had water seeping into it , which had caused part of the trench to collapse. While this partial collapse should have warned Pentecost of the severity of the hazard, it nonetheless allowed employees to work in the trench, knowingly exposing them to an extreme hazard of trench collapse. The record also establishes that Pentecost has a history of prior violations for similar trenching violations that should have given it a heightened awareness of the trenching standards and the hazards associated with noncompliance.[7]

[7]Pentecost was cited for trench violations in 1988.

Accordingly, we find that the Secretary's determination that separate penalties were appropriate was substantially justified. The judge's decision denying Pentecost's EAJA application is affirmed.[8]

/s/
Stuart E. Weisberg
Chairman

/s/
Daniel Guttman
Commissioner

Dated: August 6, 1997

[8]The Secretary also contends that Pentecost improperly documented and justified its legal fees, seeks reimbursement of unallowable expenses and seeks reimbursement at an hourly rate in excess of the statutory maximum. In view of our decision, it is unnecessary for us to reach these issues.