United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

SECRETARY OF LABOR,	:	
	:	
Complainant,	:	
	:	
v.	:	OSHRC DOCKET NO. 04-1055
	:	
E.P. GUIDI, INC.,	:	EAJA
	:	
Respondent.	:	

APPEARANCES:

For the Complainant:
Judson H. P. Dean, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania

For the Respondent:
James L. Curtis, Esq., Seyfarth Shaw LLP, Chicago, Illinois

Before: Covette Rooney
Administrative Law Judge

DECISION AND ORDER ON EAJA APPLICATION

This matter is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("the Act"). E.P. Guidi, Inc. ("Guidi") seeks attorney fees and expenses in this case under the Equal Access to Justice Act, 5 U.S.C. § 504 *et seq.* ("EAJA"), and the Commission's implementing regulations set forth at 29 C.F.R. § 2204.101 *et seq.*, for costs incurred in its defense against citation items and proposed penalties issued by the Occupational Safety and Health Administration ("OSHA").

On April 15, 2004, OSHA initiated an inspection after a trench collapse at a construction site located in Philadelphia, Pennsylvania. Guidi was the prime or general contractor at the site, and

Haines and Kibblehouse ("H&K") was the subcontractor of Guidi responsible for installing the sewer line in the trench that collapsed; an H&K worker was in the trench and was injured when it collapsed. As a result of the inspection, OSHA issued citations alleging violations of the same standards to both Guidi and H&K; specifically, Item 1 of the citations alleged a violation of 29 C.F.R. §1926.652(a)(1), for not implementing proper protective measures in the subject excavation, and Item 2 of the citations alleged a violation of 29 C.F.R. § 1926.651(h)(1), for allowing employees to work in an excavation containing accumulated water.[1] Respondents brought these matters before the Commission by filing timely notices of contest, and the cases were consolidated for hearing and decisional purposes. On the eve of the hearing, the Secretary withdrew Item 2 as to both Respondents, leaving only Item 1 in issue. After the hearing, which was held from March 21-23, 2005, the undersigned found that the Secretary had not shown either that Guidi was a "controlling employer" at the site or that Guidi had the requisite knowledge of the alleged violation, and, accordingly, Item 1 was dismissed as to Guidi.[2] The undersigned's Decision and Order (and Errata Order) with respect to both Guidi and H&K was issued on July 26, 2005 and became a final order of the Commission on September 16, 2005. Guidi filed its EAJA application on September 13, 2005.

Guidi contends that the Secretary's citation items were not substantially justified and that the Secretary's demand was substantially in excess of the undersigned's decision and unreasonable when compared to that decision. Guidi seeks $38, 280.46 in legal fees and expenses incurred in contesting and litigating the citation items.

EQUAL ACCESS TO JUSTICE ACT

The purpose of the EAJA in matters before the Commission is to ensure 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 a prevailing party if the

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[1]The citation issued to Guidi alleged "repeat" violations, while the citation issued to H&K alleged serious violations.

[2]Item 1 was affirmed as to H&K, and, as H&K has not filed an EAJA application, only the name and docket number relating to Guidi are reflected above. The docket number relating to H&K is 04-1056.

Secretary's action is found to be without substantial justification and there are no special circumstances which make an award unjust. *Asbestos Abatement Consultation & Engineering*, 15 BNA OSHC 1252 (No. 87-1522, 1991). While the applicant has the burden of showing it meets the eligibility requirements, the Secretary must show her position in the proceeding was substantially justified. *See* Commission Rules 105 and 106, 29 C.F.R. §§ 2204.105 and 2204.106.

ELIGIBILITY

A party seeking an EAJA award must submit an application within 30 days of the final disposition in an adversary adjudication. *See* 5 U.S.C. § 504(a)(2); 29 C.F.R. § 2204.302(a). There is no dispute that Guidi filed its EAJA application ("Application") within the requisite 30 days. A party seeking an award must also meet certain eligibility requirements. Commission Rule 105(b)(4), 29 C.F.R. § 2204.105(b)(4), defines an eligible corporation as one "that has a net worth of not more than $7 million and employs not more than 500 employees." Further, Commission Rule 202(a), 29 C.F.R.§ 2204.202(a), requires that the applicant "provide with its application a detailed exhibit showing the net worth of the applicant as of the date [of the notice of contest]. The exhibit ... [must provide] full disclosure of the applicant's assets and liabilities and [be] sufficient to determine whether the applicant qualifies under the standards [herein]." Exhibit A to Guidi's Application is an affidavit of Paul Kaplan, the company's comptroller. According to the affidavit, Guidi had a net worth of $1,969,895.00 and a total of 20 employees at the time the notice of contest was filed. Based on Exhibit A, Guidi has met the requirements of Commission Rule 202(a).

PREVAILING PARTY

Commission Rule 101, 29 C.F.R. § 2204.101, states that "[a]n eligible party may receive an award when it prevails over the [Secretary], unless the Secretary's position in the proceeding was substantially justified or special circumstances make an award unjust." In addition, Commission Rule 106, 29 C.F.R. § 2204.106, states that "[a] prevailing applicant may receive an award for fees and expenses in connection with a proceeding, or in a discrete substantive portion of the proceedings, unless the position of the Secretary was substantially justified." Finally, the Commission has stated that "an applicant is considered to be the 'prevailing party' ... if it has succeeded on any of the significant issues involved in the litigation, and if, as a result of that success, the applicant has

achieved some of the benefit it sought in the litigation." *K.D.K. Upset Forging, Inc.*, 12 BNA OSHC 1856, 1857 (No. 81-1932, 1986) (citations omitted).

In this case, the Secretary withdrew one of the citation items prior to the hearing, and the other item was vacated following a hearing on the merits of the item. Thus, Respondent Guidi is plainly the "prevailing party" in this matter.

WHETHER GUIDI INCURRED LEGAL FEES AND EXPENSES

As the Secretary points out, a prevailing party is only entitled to an award under the EAJA for "fees and other expenses *incurred* by that party."[3] 5 U.S.C. § 504(a) (emphasis added). Thus, as the Secretary also points out, a "precondition" to an EAJA award is that the applicant must have actually "incurred" the claimed fees and expenses. *U.S. v. Paisley*, 957 F.2d 1161, 1164 (4th Cir.), *cert. denied*, 506 U.S. 822 (1992). The applicant has the burden of proving that it has incurred legal fees under the EAJA. *U.S. S.E.C. v. Zahareas*, 374 F.3d 624, 630-31 (8th Cir. 2004).

The Secretary notes that Guidi's contract with H&K required H&K to indemnify Guidi for any attorney fees and expenses for any claims or causes of action relating to the project. *See* GX-5, p. 6, Art. 14. The Secretary also notes that Guidi itself admits in its Application that "H&K ultimately paid E.P. Guidi's share of the fees and expenses incurred in defending this matter." (Application, p. 8). Finally, the Secretary notes that the claimed fees and expenses submitted with the Application are from Seyfarth Shaw, the law firm that represented both Respondents in this matter, and are addressed to "Reading Site Contractors, Attention Joseph F. Pyott, Risk Manager." (Application, Exh. E). The Application does not identify Reading Site Contractors or explain its relationship with H&K. However, as the Secretary observes, Joseph Pyott appeared at the hearing as H&K's risk manager, and it would therefore appear that the company is affiliated with H&K. (Tr. 599). The Secretary concludes this evidence shows Guidi did not in fact incur the claimed fees and expenses and that, accordingly, Guidi is not entitled to recover those fees and expenses. *See* Secretary's Answer to Application ("Answer"), pp. 2-7. I agree, for the following reasons.

In *U.S. v. Paisley*, noted above, the court stated that the principal purpose of the EAJA is "to avoid the deterring effect which liability for attorney fees might have on parties' willingness and

[3]The Commission's rules implementing the EAJA contain no analogous statement.

ability to litigate meritorious civil claims or defenses against the Government." 957 F.2d at 1164. The court then went on to find that the applicants in that case were not eligible for an EAJA award because they had been fully indemnified for their legal fees and expenses by their former employer, who was obligated under Delaware law to do so. In so finding, the court stated that "a claimant with a legally enforceable right to full indemnification of attorney fees from a solvent third party cannot be deemed to have incurred that expense for purposes of the EAJA, hence is not eligible for an award of fees under that Act." *Id*.

In a similar case, *S.E.C. v. Comserv Corp.*, 908 F.2d 1407 (8th Cir. 1990), the court found that the applicant there had not incurred attorney fees and was not entitled to an EAJA award because Comserv, the applicant's former employer who was legally obligated to indemnify the applicant pursuant to a severance agreement, paid the legal fees. In so finding, the court stated as follows:

> In the instant case, Comserv, not Johnson, was legally obligated to pay Johnson's attorneys' fees. Whether the source of Comserv's legal obligation was grounded in contract or statute is immaterial. What is relevant is that, from the inception of the underlying lawsuit, Johnson was able to pursue his defense in the SEC action secure in the knowledge that he would incur no legal liability for attorneys' fees. To hold he "incurred" such fees is to turn the word upside down. *Id*. at 1414-15.

Applying the foregoing to this case, it is clear that Guidi did not incur legal fees and expenses for purposes of the EAJA because H&K was legally obligated to pay those fees and expenses and did in fact pay them. In concluding that Guidi is not entitled to an EAJA award, I have considered the case Guidi cites in support of its position that it is entitled to an award. In *Ed A. Wilson, Inc. v. Gen. Serv. Admin.*, 126 F.3d 1406 (Fed. Cir. 1997), the court addressed whether an EAJA applicant had incurred legal fees when its insurer was responsible for paying them. The court held that in that situation, the party is considered to have incurred the fees itself. However, as the Secretary points out, the court's holding was based on the fact that the applicant had essentially paid for legal services in advance by paying insurance premiums. In that regard, the court stated as follows:

> Had [the applicant] known that no fee award would be available upon a successful board disposition, it most likely would have been discouraged from appealing the denial of its claim. The reason, of course, is that once [the insurer] learned that [the applicant] would not be entitled to an attorney fee award, it almost certainly would increase [the applicant's] insurance premiums. Thus, the denial of attorney fees would reintroduce the cost of litigation as a factor in the small business' decision whether to contest governmental action it deems unreasonable. *Id*. at 1410-11.

Based on the facts of this case and the circuit court precedent set out above, Guidi did not incur legal fees and expenses and consequently is not entitled to an EAJA award.[4]

WHETHER THE SECRETARY WAS SUBSTANTIALLY JUSTIFIED

In order for Guidi to be awarded fees and expenses under the EAJA, there must be a finding that the Secretary's position in issuing the citation and litigating this matter was not substantially justified.[5] *See* 5 U.S.C. § 504(a)(1); 29 C.F.R. § 2204.101. Moreover, Commission Rule 106, 29 C.F.R. § 2204.106, provides as follows:

> The position of the Secretary includes, in addition to the position taken by the Secretary in the adversary adjudication, the action or failure to act by the Secretary upon which the adversary adjudication is based. The burden of persuasion that an award should not be made to an eligible prevailing applicant because the Secretary's position was substantially justified is on the Secretary.

The test of whether the Secretary's position was substantially justified is essentially one of reasonableness in law and fact. *Mautz & Oren, Inc*., 16 BNA OSHC 1006, 1009 (No. 89-1366, 1993). The reasonableness test has three elements, that is, the Secretary must show: (1) that there was a reasonable basis for the facts alleged, (2) that there was a reasonable basis in law for the theory propounded; and (3) that the facts alleged reasonably supported 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. Further, the Secretary's decision to litigate did not have to be based on a substantial probability of prevailing. *S&H Riggers & Erectors, Inc.* v. OSHRC, 672 F.2d 426, 430 (5th Cir. 1982). Finally, the Secretary's withdrawal of a citation item does not create a presumption that her position was not substantially justified. *Ashburn v.*

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[4]In so finding, I have noted that the court in *Ed A. Wilson* specifically distinguished the facts there from those in *Comserv Corp.* due to Comserv's legal obligation to indemnify. 126 F.3d at 1411 n.4. I have also noted that while the court in *Ed A. Wilson* also found that prevailing applicants represented by a union, where they have paid union dues, or by an organization on a *pro bono* basis, are entitled to fee awards, such cases are plainly distinguishable from this case. 126 F.3d at 1409-10. Finally, I have considered Guidi's assertion in its reply to the Secretary's Answer that *Ed A. Wilson* is "directly on point here." *See* Guidi's Reply, p. 3. I disagree, and I find that *Ed A. Wilson* does not apply to the circumstances of this case.

[5]Although the foregoing is sufficient to dispose of this matter, I address the issue of substantial justification in order to fully resolve this case.

United States, 740 F.2d 843, 850 (11th Cir. 1984). Rather, withdrawing a citation item is the proper action to avoid liability under the EAJA where the Secretary is initially justified in issuing the item but later discovers that her position lacks substantial justification. *See K.D.K. Upset Forging, Inc.*, 12 BNA OSHC 1856, 1859 (No. 81–1932-1986).

Whether the Secretary's Position as to Item 2 was Substantially Justified

Guidi contends that Item 2 had no basis in fact from the outset and that the withdrawal of the item establishes that it was without merit. The Secretary, on the other hand, contends that she was substantially justified in issuing Item 2 and that her decision to withdraw the item was based on the re-interview of a witness prior to the hearing and the recollection of the witness being different from the information he had previously given the CO.

As set out in the citation, Item 2 states that "[a]n employee was making a connection in an excavation with vertical walls approximately 5'3" in depth with water located at the bottom of the trench." The cited standard, 29 C.F.R. § 1926.651(h)(1), prohibits employees from working 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 standard does not define "accumulated water" or identify a minimum quantity or depth to establish "accumulated water."

The Secretary points out that at the time the citation was issued, OSHA had the following information to substantiate the alleged violation of 29 C.F.R. § 1926.651(h)(1):

> • OSHA Compliance Officer ("CO") Wylie Hinson interviewed George Illingworth, the H&K employee injured in the collapse, shortly after the accident; Illingworth told the CO that while he was working in the trench before it collapsed, there had been water at the bottom of the trench and the trench walls were wet. (Tr. 223).
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> • During his inspection immediately after the collapse, the CO saw and documented in photos (a) water at the bottom of the trench and (b) a wet area of the wall, where water was actually dripping, on the side of the trench where the collapse occurred. (Tr. 211-18). *See also* Answer, Exh. B.
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> • CO Hinson also interviewed Charles Morgan, H&K's foreman, shortly after the accident; Morgan told the CO that (a) water had been coming in through the walls of the trench before the collapse and (b) Morgan believed that the water had been a contributing factor to the collapse. (Tr. 223-24).

The Secretary further points out that in a re-interview with Illingworth shortly before the hearing, Illingworth's recollection about the accumulated water at the bottom of the trench differed from the information he had given to CO Hinson in the initial interview. Thus, according to the Secretary, she reevaluated her case with respect to Item 2 and decided to withdraw that item, based on "a calculated assessment of the likelihood of prevailing at the hearing given the new information that had come to light." *See* Answer, p. 12.

In support of its contention that Item 2 was not substantially justified, Guidi notes the deposition testimony of CO Hinson, wherein he stated that the only accumulated water he saw was a small puddle at the end of the pipe that H&K was installing; the CO was unable to describe the hazard presented by the puddle, and he could not recall if he had concluded at any time if the puddle was actually a hazard. *See* Application, Exh. B. However, the CO's inability to describe the hazard that the puddle at the end of the pipe represented is of no moment, in my view. First, the photos the CO took of the trench just after the accident show that the area of the wall that collapsed was some distance from the end of the pipe where the CO saw the puddle. Therefore, it could well be that that puddle had dripped from the end of the open pipe rather than accumulating from the area of the wall that had been dripping on the side that collapsed. Second, the bottom of the trench in the area of the collapse would have been at least partially covered over with soil when the CO observed it, which likely would have prevented him from determining whether any water had accumulated in that area. (Tr. 64-79, 88-92, 113-115, 178-79, 202-04, 208-19). Third, Illingworth told the CO there had been water in the bottom of the trench before the collapse, and OSHA did not become aware that his recall of the accumulated water in the trench was different until his re-interview shortly before the hearing. Under these circumstances, I find that OSHA's initial belief that the trench was a serious hazard was reasonable; clearly, water dripping from the wall of a trench and accumulating in the bottom of the trench is an indication of an unstable trench wall. I also find that the Secretary's decision to withdraw Item 2, due to Illingworth's changed recollection about the accumulated water in the trench, was reasonable.

Based on the record, I find the Secretary's position with respect to Item 2 was substantially justified. In so finding, I have noted Guidi's assertion that the Secretary attempted to force Guidi to capitulate to a settlement by offering to withdraw Item 2 if Guidi would agree it was responsible for

Item 1. I have also noted Guidi's further assertion that the Secretary's issuance of *ex parte* subpoenas to the firm that Guidi hired to perform engineering consulting services at the site, in order to obtain documents in support of Item 2, was improper. *See* Application, p. 4. However, I do not find the Secretary's offer to withdraw Item 2 in an attempt to settle this matter, as a result of the re-interview of Illingworth just before the hearing, to be inappropriate. Moreover, while I found at the hearing that the *ex parte* subpoenas were in violation of Rule 45(b) of the Federal Rules of Civil Procedure, I also found that Guidi had not been prejudiced because it already had the documents the Secretary had obtained. (Tr. 12-21).

For all of the foregoing reasons, the Secretary was substantially justified in issuing Item 2 and pursuing it up until the point the item was withdrawn.[6]

Whether the Secretary's Position as to Item 1 was Substantially Justified

It is clear from my decision on the merits that there was a violation of 29 C.F.R. §1926.652(a)(1), for not implementing proper protective measures in the excavation at the job site, and Guidi does not dispute that the violation occurred.[7] Rather, Guidi contends that the Secretary's position that it was the controlling employer at the site was unfounded because she undertook no meaningful analysis to determine whether that was in fact the case. The Secretary, however, contends that her position that Guidi was the controlling employer was at all times substantially justified, even though she did not prevail on this issue. I agree with the Secretary, for the following reasons.

As the Secretary notes, OSHA had the following information at the time the citation was issued. First, John Edwards, the Guidi superintendent who was at the job site on a daily basis, told CO Hinson that Guidi controlled work activities at the site and was overseeing the pipe installation work being done by H&K.[8] (Tr. 186). Second, Edwards also told the CO that Guidi was ultimately responsible for safety at the site. (Tr. 186). Third, OSHA had cited Guidi in 2001 as the "controlling employer" at a multi-employer work site under nearly identical circumstances, where a subcontractor

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[6]This includes a finding that the Secretary was substantially justified in regard to the knowledge element relating to this item. *See* knowledge discussion, *infra*, pp. 13-14.

[7]As noted at the beginning of this decision, the alleged violation was affirmed as to H&K. *See* Decision and Order issued July 26, 2005, p. 6.

[8]Edwards was the sole Guidi representative at the work site. (Tr. 50-51, 178, 473-74).

Guidi had hired had created conditions constituting violations of 29 C.F.R. §§ 1926.651(h)(1) and 1926.652(a)(1).[9] In that case, Guidi and OSHA entered into a settlement agreement in which Guidi withdrew its notice of contest, the violations were affirmed as "other" rather than serious, and no penalty was assessed. *See* Answer, Exh. C. On the basis of the information it had at that time, I find that OSHA was substantially justified in issuing Item 1 of the citation. This is particularly so in light of Guidi's entering into a settlement agreement in which it acknowledged that, in 2001, it had been the controlling employer at a work site under conditions very similar to those here.

As the Secretary also notes, her position when the citation was issued was that Guidi, the controlling employer, was liable for the alleged violations pursuant to the multi-employer work site doctrine. Under that doctrine, the Secretary had to show not only the four elements required to show any violation (that is, the applicability of the standard, the failure to comply with the standard, employee exposure and actual or constructive knowledge) but also that Guidi could reasonably have been expected to prevent and/or abate the violations based on its supervisory capacity at the site. *See Astra Pharmaceutical Prod.*, Inc., 9 BNA OSHC 2126, 2129 (No. 78-6247). *See also Grossman Steel & Aluminum Corp.*, 4 BNA OSHC 1185, 1188 (No. 12775, 1975); *Centex-Rooney Constr. Co.*, 16 BNA OSHC 2127, 2130 (No. 92-0851, 1994).

To establish that her position that Guidi was the "controlling employer" at the site was substantially justified, the Secretary points to the following provisions in the prime contract between Guidi and BB Development Associates ("BBD"), the owner/developer of the project:[10]

> • Guidi was "responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the Contract." *See* Answer, "Exh. H" to Exh. D, p. 34 Art. 10.1.1.
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> • Guidi was to "take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to ... employees on the Work and other persons who may be affected thereby." *Id*. at p. 34 Art. 10.2.1.1.
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> • Guidi was to "designate a responsible member of [Guidi] at the site whose duty shall be the prevention of accidents." *Id*. at p. 35 Art. 10.2.6.

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[9]The 2001 citation also alleged violations of 29 C.F.R. §§ 1926.651(c)(2) and (j)(2).

[10]The prime contract was expressly incorporated into Guidi's subcontract with H&K. *See* Answer, Exh. A, p. 3 Art. 2.

The Secretary also points to the following provisions in Guidi's subcontract with H&K:

• H&K was to "provide GUIDI with a copy of [its] written accident prevention program." If the program did not meet the contract requirements, Guidi was to supply its own written accident prevention program. *See* Answer, Exh. A, p. 9 Art. 32.

• The work under the contract was to be done under Guidi's direction and to the satisfaction of Guidi, BBD and the architect/engineer. *Id*. at p. 3 Art. 3.

• Guidi had the right to terminate the contract if, in its opinion, H&K failed to "properly prosecute" its work. *Id*. at p. 3 Art. 5.

• Guidi had the authority to direct changes in the work. *Id*. at p. 4 Art. 10.

• Guidi had the authority to demand that H&K redo within 24 hours any designated portion of the work found not in compliance with the contract. *Id*. at p. 4 Art. 11.

• Guidi had the authority to direct H&K as to the time, order and manner of its performance of the contract. *Id*. at p. 5 Art. 13.

• Guidi had the authority to take over and complete the performance of the contract if H&K failed to comply with any provision of the contract. *Id*. at p. 8 Art. 20.

Finally, the Secretary points to the testimony of Dennis Detweiler, H&K's estimator, who conceded at the hearing that Guidi's authority to direct changes in the work could involve directing H&K in how it should go about digging an excavation. (Tr. 573-74). The Secretary asserts that, in view of the foregoing, she had a reasonable basis in fact for concluding Guidi was the controlling employer at the site. She further asserts that she had a reasonable basis in law. In this regard, she notes well-settled Commission precedent holding that an employer with overall supervisory authority at a multi-employer work site, who has hired and entered into contractual relationships with subcontractors who are performing the work at the site, can be found liable for violations created by the subcontractors, as long as the controlling employer "could reasonably have been expected to prevent or abate by reason of its supervisory capacity." *Grossman Steel & Aluminum Corp.*, 4 BNA OSHC at 1188; *Centex-Rooney Constr. Co.*, 16 BNA OSHC at 2130. Based on the evidence set out above and the cases cited by the Secretary, I find that the Secretary was substantially justified in litigating her position that Guidi was the controlling employer at the site.

In so finding, I am, of course, aware that my decision on the merits reached a different conclusion. That conclusion was reached after considering not only the contract provisions set out *supra* but also certain testimony in the record. For example, Detweiler, H&K's estimator, testified

that he negotiated H&K's contract with Guidi, that it was the intent of the parties that H&K be responsible for the safety of its own employees at the site, and that H&K did not intend to give any control or authority to Guidi on safety issues. (Tr. 544-45). In addition, Christopher Bleeker, a Guidi project manager, testified Guidi performs no construction work and acts as a construction manager, not a general contractor; he also testified Guidi subcontracted out all the work on the site, that its sole function was to monitor schedules and costs and to act as the intermediary for the owners, and that it did not attempt to monitor H&K's compliance with its safety program. (Tr. 731, 736-39). Finally, John Edwards, Guidi's superintendent on the site, testified his job was to ensure the work proceeded according to the plans. Edwards was not designated as a safety coordinator at the site, but he had the authority to make safety recommendations if he observed a dangerous condition. Edwards did not believe he had any responsibility to ensure H&K complied with its safety program, although he had the authority to do so, and he did not in fact advise H&K's crew in safety matters. Edwards did not make any recommendations about using protective measures in the trench before its collapse, as he did not observe a hazardous condition, and, even if he had, he did not believe he had the authority to stop H&K's work. Edwards observed the trench on April 15 but did not inspect it until after the collapse, and he relied on H&K to comply with the safety regulations applicable to its industry.[11] (Tr. 671-76, 678-82, 684, 700-01, 704, 708-10, 719).

Based on the foregoing, I found in my decision on the merits that Guidi had "overall contractual authority for all aspects of the project management." In particular, Guidi was responsible for administering and coordinating work, inspecting for conformity to specifications, certifying work for payment, processing change orders, and monitoring schedules and maintaining job progress. I further found Guidi's role at the site was "not appreciably different" from other cases in which the Commission had concluded that those employers had had "broad administrative and coordination responsibility." Finally, I found that Guidi's responsibilities were all indicia of what the Commission had termed "far-reaching or global responsibility for diverse activities at the site," citing to *Kulka*

[11]CO Hinson testified Edwards told him that he was not a trencher and that he was not familiar with OSHA's trenching regulations. (Tr. 326). Further, Charles Morgan, H&K's job site foreman, testified he did not believe that Guidi had the authority to order him to take additional safety precautions. (Tr. 474).

Constr. Mgmt. Corp., 15 BNA OSHC 1870 (No. 88-1167, 1992), and *Fleming Constr., Inc.*, 18 BNA OSHC 1708 (No. 97-0017, 1999). *See* Decision and Order, pp. 8-9.

I then went on to find that, as in *Kulka* and *Fleming*, Guidi was performing solely administrative duties on the site and its authority lacked the indicia of control necessary to conclude that the construction standards applied to it. Specifically, while Guidi's contract with BBD stated that Guidi was to review and approve the subcontractors' safety programs, there was no evidence that Guidi was expected to examine the programs for content or substantive adequacy. Moreover, Guidi in practice did not prescribe safety measures for the site; rather, it merely ensured the subcontractors had their own safety programs and "coordinated" those programs. I also found that Guidi had no authority to stop work and was not empowered in any way to compel compliance by contractors, even in those areas for which it had contractual responsibility; further, neither Guidi nor H&K employees believed Guidi's superintendent had any authority to direct the means or methods by which H&K performed its work. *See* Decision and Order, p. 9.

Although I concluded that the Secretary had not met her burden of showing that Guidi was a "controlling employer" for purposes of finding liability under the Act, it should be noted that this was a very close case and easily could have been decided consistent with the Secretary's position. However, I determined that, on balance, the facts and circumstances of this case were more like those in *Kulka* and *Fleming* than those in the multi-employer work site cases the Secretary cited. Accordingly, as the Secretary contends, despite the fact that she did not prevail on the "controlling employer" issue, her position was nevertheless substantially justified.

The final issue to resolve with respect to this item is whether the Secretary was substantially justified in her position that Guidi had knowledge of the trench's condition. My decision on the merits found Guidi did not; specifically, I found there was no evidence that Edwards knew or should have known that the trench was over 5 feet deep and that soil in the trench was wet. *See* Decision and Order, pp. 9-10. However, this issue was also a very close question and easily could have been decided in the Secretary's favor, especially if I had concluded Guidi was the "controlling employer." In this regard, I note the Secretary's citation to *Southwestern Acoustics & Specialty, Inc.*, 5 BNA OSHC 1091, 1092 (No. 12174, 1997), wherein the Commission held that the knowledge element "is directed not to the requirements of the law, but to the physical conditions which constitute a

violation of section 5(a)." I note also the Secretary's reliance on evidence in the record showing that Edwards was at the site every day; that his trailer was 30 yards from the trench; that he saw the trench on the day of the accident, both while it was being dug and when employees were in it; that he saw that the walls of the trench went straight up, without benching or sloping; and that he was 20 to 25 yards from the trench when it collapsed. (Tr. 661-63). Thus, again, while the Secretary did not prevail on this issue, I conclude that her position as to knowledge was substantially justified.

WHETHER GUIDI IS ELIGIBLE FOR AN AWARD UNDER 5 U.S.C. § 504(a)(4)

Guidi also seeks its legal fees and expenses under 5 U.S.C. § 504(a)(4), which provides that:

> If, in an adversary adjudication arising in an agency action to enforce a party's compliance with a statutory or regulatory requirement, the demand by the agency is substantially in excess of the decision of the adjudicative officer and is unreasonable when compared with such decision, under the facts and circumstances of the case, the adjudicative officer shall award to the party the fees and other expenses related to defending against the excessive demand, unless the party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust.[12]

Guidi contends it is entitled to fees and expenses pursuant to the above provision due to the Secretary's "highly aggressive" and "win-at-all-costs" approach to this case. *See* Application, p. 7. However, as the Secretary notes, the purpose of 5 U.S.C. § 504(a)(4) is to permit a *non-prevailing* party to recover fees and expenses where the United States obtained a judgment that was substantially – and unreasonably – exceeded by its initial demand. *American Wrecking Corp. v. Secretary of Labor*, 364 F.3d 321, 328 (D.C. Cir. 2004), citing to *One 1997 Toyota Land Cruiser*, 248 F.3d 899, 904 (9th Cir. 2001).[13] Since Guidi is a prevailing party, it is ineligible for an award under 5 U.S.C. § 504(a)(4). Moreover, I do not agree with Guidi's characterization of the Secretary's actions in this matter, based on my knowledge of the case and on my review of Guidi's Application and the Secretary's Answer thereto.

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[12]The Commission's procedural rules have no equivalent provision.

[13]The courts in the *American Wrecking* and *One 1997 Toyota* cases addressed 28 U.S.C. § 2412(d)(a)(D), which is the analogous provision in the EAJA that applies to judicial proceedings.

ORDER

In view of the foregoing, Guidi's application for legal fees and expenses is DENIED.

So ORDERED.

/s/

Covette Rooney
Judge, OSHRC

Dated: December 12, 2005
Washington, D.C.