United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, D.C. 20036-3457

SECRETARY OF LABOR, Complainant, v. HIGH VOLTAGE ELECTRIC SERVICE, INC., Respondent.	: : : : : : : : : :	OSHRC DOCKET NO. 04-1687

Before: G. Marvin Bober
Administrative Law Judge

DECISION AND ORDER ON APPLICATION FOR LEGAL FEES AND EXPENSES PURSUANT TO THE EQUAL ACCESS TO JUSTICE ACT

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"). Respondent High Voltage Electric Service, Inc. ("Respondent" or "HVES") has filed an application for attorney fees and expenses under the Equal Access to Justice Act, 5 U.S.C. § 504 *et seq*. ("EAJA"), and the Commission's implementing regulations set out at 29 C.F.R. § 2204.101 *et seq*., to recover the legal fees and expenses it incurred in defending against citation items and proposed penalties issued by the Occupational Safety and Health Administration ("OSHA"). The Secretary has filed her opposition to the application.

Factual Background [1]

The record shows that during the first week of June 2004, OSHA's Albany Area Office received a report from the Rensselaer Polytechnic Institute ("RPI"), located in Troy, New York, of an accident on its campus on May 27, 2004. According to the report, an electrician named Jordan Neissel received a severe electrical shock when he accidentally contacted energized switch gears in

[1]The background information set out herein is from the affidavits and other documents submitted with the Secretary's opposition to the EAJA application.

an electrical cabinet in the basement of RPI's Material Research Center ("MRC"). After OSHA received the report, Compliance Officer ("CO") Richard Yurczyk was assigned to investigate the accident. Pursuant to his investigation, CO Yurczyk learned the following. (Yurczyk Aff. ¶¶ 2-3).

On May 27, 2004, at about 11 a.m., RPI experienced a power failure at its MRC, and, when its electricians were unable to discover the cause of the failure, RPI contacted HVES pursuant to the contract it had had with HVES for several years. Gus Mininberg, the president of HVES, conducted a series of tests to ascertain the cause of the power failure. He determined it was due to a faulty cable splice in a manhole on RPI's campus and that "high voltage electricians" were needed to go into the manhole and find and repair the cable splice. Mr. Mininberg contacted M. Scher & Sons ("MS&S"), an electrical contractor specializing in high voltage electricity, and MS&S sent two electricians, Russell and Jordan Neissel (father and son, respectively), to RPI.[2] (Yurczyk Aff. ¶¶ 3-6).

After the Neissels arrived at RPI, they met with Mr. Mininberg and RPI personnel to discuss the power failure.[3] Mr. Mininberg then had Jordan Neissel go with him to the MRC basement, which contained numerous electrical switches, metal cabinets and steel pipes through which electrical cables traveled. The building was dark, and RPI employees thus guided Mr. Mininberg and Mr. Neissel to the basement with flashlights. The group arrived at a rear wall where two large cabinets, one open and one closed, were located; there was also an uncovered junction box next to the cabinets. Both cabinets held a variety of electrical cables and other equipment, and the open cabinet had several disconnected cables. Mr. Mininberg told Jordan Neissel the cables were disconnected earlier by RPI employees when they were trying to learn why the power failed. Mr. Mininberg asked Mr. Neissel to reconnect the cables in the open cabinet, and, when Mr. Neissel asked if the cables were "live," Mr. Mininberg said they were not. Jordan Neissel reconnected the cables and then went to rejoin his father at the manhole. In the meantime, due to RPI's concern that ongoing experiments

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[2]MS&S is organized as two separate entities, that is, MS&S and Mohawk Valley Utility, and Martin Scher owns and operates both companies. MS&S provides electricians to electrical contractors and then bills the contractors after the projects are completed. Jordan Neissel worked for Mohawk Valley, while his father, Russell Neissel, worked for MS&S. (Duncan Aff. ¶ 5).

[3]HVES hired the Neissels to perform the work to be done in the manhole. (Yurczyk Aff. ¶ 4, Duncan Aff. ¶ 5A, Exh. 2 ¶ 3).

in the MRC would be jeopardized without electricity, Mr. Mininberg and Kevin Surman, an RPI employee, decided to return power to the MRC by means of a back-up electrical system. Mr. Mininberg did not tell the Neissels about the decision to return power to the MRC. (Yurczyk Aff. ¶¶ 7-9 & 13, Duncan Aff. ¶¶ 5B-5C & 5I, Exh. 2 ¶ 4).

The Neissels conducted several tests in the manhole and concluded the cable splice was not the cause of the power failure. The Neissels left the manhole, and Mr. Mininberg asked the Neissels to go to the MRC basement and to the junction box (the one located next to the cabinet in which Jordan Neissel had earlier reconnected the cables) and to then locate and splice what was called the "C" phase cable. After arriving in the basement, which was now lit, Jordan Neissel went to the junction box and tried to locate the "C" phase cable but could not. He then reached into the open electrical cabinet in which he had reconnected the cables earlier, in an attempt to identify and move the "C" phase cable. As he reached into the cabinet, he contacted 4160 volts of electricity and received a severe shock. His father grabbed onto the harness that Jordan Neissel was wearing from his work in the manhole and pulled his son away from the cabinet. Jordan Neissel survived the accident, but he suffered severe third-degree burns to his shoulder, chest and right arm. (Yurczyk Aff. ¶ 9, Duncan Aff. ¶¶ 5D-5E).

Procedural Background

As a result of the investigation, OSHA issued to HVES a two-item serious citation with a proposed penalty of $1,500.00 for each item. Item 1 alleged a violation of 29 C.F.R. 1926.21(b)(2), as follows:

> The employer did not instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.
>
> Employees were not instructed that the control panel and switch gears were energized, 4160 volts, or what protective equipment was required for working on energized systems.
>
> Item 2 alleged a violation of 29 C.F.R. 1926.416(a)(1), as follows:
>
> Employees were permitted to work in proximity to electric power circuits and were not protected against electric shock by deenergizing and grounding the circuits or effectively guarding the circuits by insulation or other means.

> Employee was exposed to a severe burn hazard while working on energized 4160 volt system with no protective equipment for electric shock.

Respondent HVES contested the citation items and the proposed penalties, and this matter was docketed with the Commission.[4] The Secretary filed her complaint on January 18, 2005, in which she alleged violations of the construction standards set out above and also alleged, in the alternative, violations of general industry standards, as follows:

> Item 1 - 29 C.F.R. 1910.333(b)(2)(v)(B) - Employees exposed to the hazards associated with reenergizing the circuit or equipment were not warned to stay clear of circuits and equipment.
>
> Item 2 - 29 C.F.R. 1910.333(a) - Safety-related work practices were not employed to prevent electric shock or other injuries resulting from either direct or indirect electrical contacts, when work was performed near or on equipment or circuits which were energized. The specific safety related work practices shall have been consistent with the nature and extent of the associated hazards.

Instead of an answer, HVES filed a motion for summary judgment, alleging there was no genuine issue as to any material fact and that it was entitled to judgment as a matter of law. Alternatively, HVES moved for dismissal of the alleged violations as set out in the complaint. The Secretary opposed the motion and also moved to withdraw the alleged construction industry violations. The motion for summary judgment was denied, and the amendment of the complaint was granted. HVES filed its answer, the parties completed discovery, and the trial was set to begin on July 27, 2005. On July 13, 2005, the Secretary withdrew unilaterally both items of the citation. On July 29, 2005, an order was issued approving the Secretary's notice of withdrawal. The order became final on August 29, 2005, and on September 29, 2005, HVES filed its EAJA application.

Whether HVES is Eligible for an EAJA Award

A party seeking an EAJA award must file 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 HVES filed its EAJA application ("Application") within the required 30 days. There is also no dispute that HVES meets EAJA's 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

[4]This case was initially designated for E-Z Trial but was removed from E-Z Trial after the Secretary filed a motion requesting the removal because of the severe injury that had occurred.

than $7 million and employs not more than 500 employees." An affidavit of Gus Mininberg, president of HVES, is included with the Application. According to the affidavit, HVES has a total of six employees and had a net worth of about $680,000.00 for the year ending December 31, 2004. Further, Exhibit P to the Application is a financial disclosure statement showing the assets, liabilities and net worth for HVES for 2004. Based on its Application, HVES is eligible for an EAJA award.

Whether HVES is the Prevailing Party

Commission Rule 101, 29 C.F.R. § 2204.101, provides 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." Moreover, Commission Rule 106, 29 C.F.R. § 2204.106, provides 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).

Here, the Secretary withdrew both of the citation items prior to the hearing. Respondent HVES, therefore, is clearly the "prevailing party" in this matter.

Whether the Secretary was Substantially Justified

Commission Rule 106(a) states as follows:

> 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. 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 action was substantially justified is essentially one of reasonableness in law and fact. *Mautz & Oren, Inc.*, 16 BNA OSHC 1006, 1009 (No. 89-1366, 1993), citing to *Hocking Valley Steel Erectors, Inc.*, 11 BNA OSHC 1492, 1496 (No. 80-1463,

1983). The Secretary's position must be "justified in substance or in the main–that is, justified to a degree that could satisfy a reasonable person." *Gatson v. Bowen*, 854 F.2d 379, 380 (10th Cir. 1988), citing to *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). The reasonableness test has three elements: (1) that there is a reasonable basis for the facts alleged; (2) that there is a reasonable basis in law for the theory propounded; and (3) that the facts alleged will reasonably support the legal theory. *Gatson v. Bowen*, 854 F.2d at 380. There is no presumption the Secretary's position was not substantially justified simply because she lost the case, and there is no requirement that the Secretary's decision to litigate was based on a substantial probability of prevailing. *Hocking Valley Steel Erectors, Inc.*, 11 BNA OSHC 1492, 1496 (No. 80-1463, 1983). The Secretary's position can be justified even though it is incorrect. *Pierce v. Underwood*, 487 U.S. 552, 565 n.2 (1988).

In assessing an agency's position, courts have looked at whether the agency was substantially justified in proceeding at each level of the litigation process; thus, the issue is whether the agency's position was substantially justified throughout. *See Herron v. Bowen*, 788 F.2d 1127 (5th Cir. 1986); *S&H Riggers & Erectors, Inc. v. OSHRC*, 672 F.2d 426, 430 (5th Cir. 1982). Not every argument the Secretary made need be substantially justified; rather, her position must be taken as a whole to determine if it was substantially justified. *Citizens Council of Delaware Co. v. Brinegar*, 741 F.2d 584, 595 (3d Cir. 1984); *Hanover Potato Prod., Inc.*, 989 F.2d 123, 131 (3d Cir. 1993).

Whether the Secretary's Recitation of the Facts is Credible

As a preliminary matter, Respondent disputes the Secretary's version of the facts, set out above. The Secretary's facts are based primarily on the affidavits of CO Yurczyk and Terrence Duncan, the Secretary's counsel.[5] In sum, those affidavits state that Jordan Neissel went to the MRC basement the first time at the request of Mr. Mininberg. Mr. Mininberg and RPI personnel went with Mr. Neissel. The power was out at that time, and the subject cabinet, which was open, had several disconnected cables. Mr. Mininberg asked Mr. Neissel to reconnect the cables, and Mr. Neissel asked if there was any electricity going through them; Mr. Mininberg said there was not, and Mr.

[5]CO Yurczyk states his affidavit is based on his investigation of the accident. Terrence Duncan states that his affidavit is based on his separate telephone interviews with Russell Neissel and Jordan Neissel; Mr. Duncan also states that he verified the information he obtained from the Neissels with their private attorney.

Neissel reconnected the cables. The affidavits further state that Jordan Neissel returned to the basement later, again at the request of Mr. Mininberg; this time, Jordan Neissel was to go to the junction box and find and splice the "C" phase cable. Russell Neissel accompanied him, the basement was now lit, and the subject cabinet was still open. Jordan Neissel first tried to locate the "C" phase cable in the junction box, and, when he was unable to do so, he reached into the subject cabinet to try to identify the cable, at which time he received a severe electrical shock. Both affidavits state that neither of the Neissels was aware power had been restored to the open cabinet in which Jordan had worked previously. (Yurczyk Aff. ¶¶ 3-13, Duncan Aff. ¶¶ 5A-5I).

Respondent's facts are based primarily upon the affidavit of Gus Mininberg, which is attached to the Application. According to his affidavit, Mr. Mininberg went to the basement with RPI personnel upon arriving at the site; he saw that the cabinet doors to the primary feed were open and that its cables had been disconnected pursuant to RPI's testing. Mr. Mininberg did some testing of his own and made an initial assessment, but he needed additional equipment to determine the exact location of the fault. RPI's Mr. Surman told Mr. Mininberg that the MRC needed to be re-energized as soon as possible because of scientific equipment that was in the building, and he and Mr. Mininberg agreed that RPI would re-energize the MRC by switching its power from the non-working feed to an operable feed. (Mininberg Aff. ¶¶ 8-10).

Before switching feeds, HVES contacted MS&S for two high voltage electricians to assist in finding and correcting the fault. Once the Neissels arrived, they, along with Mr. Mininberg and Mr. Surman, went to the MRC basement. Upon reaching the open electrical cabinet, Mr. Mininberg manually operated the switchgear to change the MRC's feed from the non-working feed to the operable feed. Mr. Mininberg told the Neissels that they needed to reconnect the cables in the open cabinet so they would not have to go back in the cabinet when the building was re-energized. Once the cables were reconnected, Mr. Surman and Mr. Mininberg disabled and disconnected the switchgear controls to prevent the changing of the switch positions. An RPI electrician on Mr. Surman's staff then bolted the inner cabinet door closed and closed and locked the outer door. Mr. Mininberg verified the doors were locked, and the RPI electrician put the key away in a location unknown to the Neissels. (Mininberg Aff. ¶¶ 11-13).

After additional testing indicated the fault was located in a manhole, the Neissels went into the manhole to perform testing there. However, their tests revealed the fault was not in fact located in the manhole. The Neissels then met with Mr. Mininberg and some RPI personnel to decide what to do next, and it was decided that the "C" phase cable at the junction box next to the subject cabinet would be cut. This job would not require entry into the subject cabinet because the "C" cable could be seen through the windows to the subject cabinet; thus, one worker could look through the windows of the locked cabinet while the other moved the cables at the junction box to determine when the "C" cable moved in the cabinet. There was, therefore, no discussion about either of the Neissels entering the subject electrical cabinet. (Mininberg Aff. ¶¶ 15-20).

When the Neissels went to cut the cable at the junction box, the MRC building had already been re-energized. Mr. Mininberg did not go with them as he had to go to RPI's main substation to get his test set; however, he learned later what had happened. Unknown to Mr. Surman and Mr. Mininberg, an RPI employee had unlocked and reopened the outer door to the subject cabinet. In addition, Jordan Neissel unbolted the inner cabinet door with his channel lock pliers and accessed the inside of the cabinet; he contacted some of the energized equipment and was severely shocked. RPI employees at the scene contacted Mr. Surman, who was with Mr. Mininberg, and both went to the accident site. RPI called for an ambulance and also called the police. After an ambulance had taken Jordan Neissel to the hospital, the Troy Police Department arrived and conducted an investigation of the accident. (Mininberg Aff. ¶¶ 21-22, 24-26, 32-33, 35).

There are clearly discrepancies between the Secretary's version of the facts and Respondent's version of the facts. I find the Secretary's version to be more reliable, for the following reasons. HVES fails to mention in its filings a report of the accident that Mr. Mininberg made on May 28, 2004.[6] The report has much of the same information that is contained in Mr. Mininberg's affidavit, but there are some very significant differences. First, the second paragraph of the report, wherein Mr. Mininberg describes going to the MRC basement with RPI personnel and manually operating the switchgear to switch from the non-working feed to the operable feed, is substantially the same as the second paragraph of Respondent's version of the facts, set out *supra*, with one exception. The second

[6]This report is Exhibit 2 to the Secretary's opposition to the Application.

paragraph in the report does not mention MS&S or the Neissels at all, and the third paragraph in the report indicates that HVES did not subcontract with MS&S until after the events described in the second paragraph. Second, while the third paragraph of the report goes on to describe the meeting held after the Neissels exited the manhole, which included RPI, HVES and the Neissels, there is no indication that the Neissels were told the MRC building had been re-energized. Third, the fourth paragraph states, after describing how Jordan Neissels' injury occurred, "[t]he S&C 4160V cubicle had energized equipment in it which was apparently unknown to the workers at that time."

The final reason for finding the Secretary's version of the facts to be the more credible is the written statement of a witness the CO obtained on June 4, 2004.[7] Both the Secretary and HVES note in their filings that when the Neissels went to the basement to locate the "C" phase cable, another electrician named Timothy Beasock went with them; Mr. Beasock worked for O'Connell Electric, and HVES had apparently also subcontracted with that company to assist with the power failure problem. According to his statement, he and an RPI employee were standing behind the Neissels in the basement, the lights were on, and Jordan Neissel was trying to identify a cable suspected to be bad. Jordan Neissel "went into the switch" to identify the cable, and, as he moved a cable that went to the junction box where his father was looking for it, Jordan Neissel starting getting a shock; his father grabbed him by the harness he had on and pulled him away. The last sentence of the statement notes that "I wasn't aware of the switch being hot or if anyone [tested] it to be dead."

Respondent contends that the CO's interview of Mr. Beasock was inadequate and that because he did not "properly and thoroughly" interview him the statement was incomplete. HVES notes that its counsel interviewed Mr. Beasock by phone on December 15, 2004, and obtained a complete statement. According to that statement, Mr. Beasock was at the meeting at which it was decided that the Neissels would go to the basement to locate and cut the "C" phase cable. When he and the Neissels entered the MRC, it was obvious the building had been re-energized because the lights were on and the transformer in the electrical room was humming loudly. When he and the Neissels got to the basement, two RPI employees were already there and had unlocked and opened

[7]This statement is Exhibit 1 to the Secretary's opposition to the Application.

the outer door to the subject cabinet. In addition, Jordan Neissel used his channel lock pliers to take the bolts off and to open the inner door to the subject cabinet.[8]

In considering the above, I note that the statement the CO obtained is in writing, is signed, and is dated only eight days after the accident. I also note that the CO states in his affidavit that Mr. Beasock did not tell him he saw Jordan Neissel use a crescent wrench to open the inner door of the electrical cabinet; the CO also states that he credited Mr. Beasock's account of the accident before recommending the citation that was issued. (Yurczyk Aff. ¶ 15). I conclude that a signed and written statement taken close in time to the incident is more reliable than an account of a phone interview taken nearly seven months after the event. I find, therefore, that Mr. Beasock's written statement of June 4, 2004, is more credible than the account of his phone interview of December 15, 2005.

For all of the foregoing reasons, the Secretary's version of the facts in this matter is found to be more reliable than Respondent's version. The Secretary's version is thus credited.

Whether the Secretary was Substantially Justified in Citing HVES as the Employer

Respondent contends it was improperly cited as the employer because RPI, not HVES, had control of the work site. The Secretary, on the other hand, contends she appropriately cited HVES because of the control it exercised over the activities of the Neissels during their work at RPI. She states that the key factor to consider when determining if a party is an employer under the Act is its right to control the work at the site; thus, an employer that creates or controls a hazard must protect not only its own employees but also those of other employers who are exposed to the hazard. *See C. Abbonizio Contractors, Inc.*, 16 BNA OSHC 2125, 2126-27 (No. 91-2929, 1994) (citations omitted). She also states that HVES was a "joint employer" of the Neissels, noting the Commission has found that two unrelated employers may each have an employment relationship with a particular employee acting in the service of both. *Froedtert Mem'l Lutheran Hosp., Inc.*, 20 BNA OSHC 1500, 1508 (No. 97-1839, 2004). *See also Clinton's Ditch Coop. Co., Inc. v. NLRB*, 778 F.2d 132, 138 (2d Cir. 1985), where the court held that "an essential element under any determination of joint employer status in a subcontracting context is ... evidence of immediate control over the employees." Finally, she states that HVES was liable as the controlling employer on a multi-employer work site. *See*

[8]This statement is set out in paragraphs 7-11 in the affirmation of Respondent's counsel that is attached to Respondent's Application.

Universal Constr. Co., Inc. v. OSHRC, 182 F.3d 726, 730 (10th Cir. 1999), where the court held that "the general rule regarding multi-employer construction worksites is that employers will be liable ... for hazards the employer either created *or* controlled, regardless of whose employees are threatened by the hazard." (Emphasis in original).

As the Secretary points out, it was Mr. Mininberg of HVES who directed and controlled the activities of the Neissels at RPI. *See, e.g.*, Yurczyk Affidavit ¶¶ 7, 9 14; Duncan Affidavit ¶¶ 5A-5D. As she also points out, HVES was ultimately responsible for resolving the electrical problem at RPI, and HVES instructed the Neissels as to the type of electrical repair work to perform as well as when, where and how to do that work. *See* Exhibit 2 to Secretary's Opposition. The Secretary asserts that because of Respondent's control of the Neissels' work at the site and the means by which that work was done, HVES was clearly the employer of the Neissels. I agree, and I find that the Secretary was substantially justified in citing HVES as the employer of Jordan and Russell Neissel.

Whether the Secretary was Substantially Justified in Issuing Item 1

As set out above, this item, as issued, alleged employees were not instructed that the control panel and switch gears were energized or what protective equipment was required for working on energized systems; as amended, the item alleged that employees exposed to the hazards associated with re-energizing the circuit or equipment were not warned to stay clear of circuits and equipment. Respondent contends this item would not have been issued if the CO had obtained a complete statement from Mr. Beasock and if he had also obtained the Troy Police Department's investigation of the accident. As discussed *supra*, Mr. Beasock's written statement that the CO secured on June 4, 2004, has been found more reliable than the account of the phone interview held with Mr. Beasock on December 15, 2004. Respondent's first contention is accordingly rejected.

With respect to Respondent's second contention, the record shows that HVES requested all documents, including reports, witness statements and photographs, relating to the investigation the Troy Police Department conducted in this matter. *See* Exhibit D to Application. On June 21, 2005, Respondent's counsel provided copies of the photographs it had obtained to the Secretary's counsel. *See* Exhibit M to Application. On June 25, 2005, the Secretary's counsel informed Respondent's counsel that the Secretary was withdrawing her complaint, and on July 13, 2005, the Secretary filed

her notice of withdrawal of the citation items. *See* Duncan Affidavit ¶¶ 18-20. On July 29, 2005, the undersigned issued an order approving the notice of withdrawal.

HVES asserts that the withdrawal of the citation items after receipt of the photographs shows that the Secretary's position in this matter was not substantially justified and that the Secretary could have discovered this much earlier had she herself requested the photographs. However, the Secretary notes she withdrew the items only after her counsel learned from the private attorney of Jordan Neissel that he would not make him available to testify at the hearing due to a concern that his testimony would prejudice his private lawsuit against HVES.[9] She also notes that her counsel told Respondent's counsel of this fact on or about June 25, 2005. *See* Duncan Affidavit ¶¶ 15, 18.

As to the photographs themselves, HVES asserts they show that Jordan Neissel was warned that the subject electrical cabinet was energized, in that the inner door to the cabinet, which he himself unbolted, had a sign stating: "WARNING OPEN SWITCH BLADES ARE ENERGIZED." However, Respondent's claim that Mr. Neissel unbolted the inner door has been rejected. Moreover, as the Secretary points out, the cabinet had been open on Mr. Neissel's first visit to the basement and he had worked in it without incident as it had been de-energized; since Mr. Mininberg said nothing about the cabinet having been re-energized when he asked him to return to the basement, it was reasonable for Mr. Neissel to assume, upon seeing the cabinet in the same open condition, that it was still de-energized. As the Secretary also points out, that the lights were on in the MRC when Mr. Jordan returned to the basement is of no moment, especially since Mr. Mininberg did not explain to the Neissels how the MRC's electrical system worked or how power had been restored. *See* Yurczyk Affidavit ¶¶ 10, 12. Finally, the Secretary points out that, after receiving the photographs, her counsel spoke with Respondent's counsel and advised him that they did not add any additional information to the case that the Secretary was not already aware of. *See* Duncan Affidavit ¶ 16.

I find the Secretary's arguments in regard to the photographs persuasive, particularly as they are supported by the facts of this case and by the affidavits of her counsel and the CO. Respondent's second contention is therefore rejected. I further find that the Secretary was substantially justified in issuing this citation item. The Secretary's facts, which I have credited, show that Jordan Neissel

[9]The decision to withdraw was also based on Russell Neissel's lack of first-hand knowledge of information that was crucial to the Secretary's case. *See* Duncan Affidavit ¶ 17.

was exposed to the hazard of electrical shock when he went to the MRC basement the second time and tried to locate the "C" cable by reaching into an open, energized electrical cabinet. Mr. Neissel had worked in the same cabinet earlier that day, at which time it was open, and he was told then that it was de-energized; he was not told the cabinet had been re-energized when he was instructed to return to the basement and locate and splice the "C" cable. HVES knew or should have known that the cabinet was energized and that Mr. Neissel might have reason to access the cabinet in order to accomplish the work he was told to do. Respondent's position in regard to this item is rejected.

Whether the Secretary was Substantially Justified in Issuing Item 2

As set out above, this item, as issued, alleged that an employee was exposed to a severe burn hazard while working on an energized system with no protective equipment for electric shock; as amended, the item alleged that safety-related work practices were not employed to prevent electric shock or other injuries resulting from either direct or indirect electrical contacts, when work was performed near or on equipment or circuits which were energized. Respondent's contentions as to this item are the same as those noted in the preceding discussion. In regard to the statements of Mr. Beasock, that contention has been addressed and rejected. With respect to the photographs, HVES notes that the photographs from the police investigation show, on the floor near the subject cabinet, a pair of high-voltage rubber gloves and a Tic Tracer voltage tester. *See* Exhibit C to Application. HVES asserts that the photos establish that Jordan Neissel had all the equipment he needed to safely perform the work he had been asked to do, that is, to locate and splice the "C" cable at the junction box; HVES notes that this task did not require entry into the cabinet because one worker could identify the "C" cable by simply observing the cables in the cabinet to see which one moved when the other worker moved a cable in the junction box. However, as the Secretary points out, the subject cabinet was open on Jordan Neissel's second visit to the basement, just as it had been on his first, and, because he had not been told that it had been re-energized, he reasonably believed it was still de-energized. As she further points out, to work in the energized cabinet, Jordan Neissel would have needed safety equipment such as rubber sleeves on the exposed blades of the cabinet and a rubber mat on the floor in front of the cabinet and junction box or insulated clothing or shoulder-length insulated electrical gloves. No such equipment was provided.

I find the Secretary's arguments persuasive, based on the foregoing, and Respondent's contention as to the photographs is rejected. I also find the Secretary was substantially justified in issuing this citation item. The Secretary's facts show that Jordan Neissel was exposed to the hazard of electrical shock when he reached into the energized cabinet in an attempt to locate the "C" phase cable. He was not told the cabinet had been re-energized, and he was not provided the appropriate protective equipment to work in the energized cabinet. Respondent HVES knew or should have known that the cabinet was energized and that Mr. Neissel might have reason to access the cabinet to perform the task he had been given. Respondent's position in regard to this item is rejected.

Whether the Secretary was Substantially Justified in Continuing to Litigate this Matter

HVES contends that even if the Secretary was substantially justified in issuing the citation items, she was not justified in continuing to litigate this case after March 9, 2005, when the Neissels would not sign the declarations the Secretary had prepared. However, my review of the affidavit of her counsel convinces me the Secretary was substantially justified throughout this proceeding.[10]

According to the affidavit, on or about January 5, before filing the complaint, the Secretary's counsel advised Respondent's counsel that the Secretary was willing to settle if HVES would accept the citation items and pay a reduced penalty.[11] The parties were unable to settle, as HVES would not agree to a settlement unless the items were classified as "other" rather than "serious." On February 16, after the complaint was filed, HVES filed a motion for summary judgment. On or about February 24, the Secretary's counsel held separate phone interviews with Russell and Jordan Neissel to obtain the relevant facts; the facts were confirmed with the Neissels' private attorney, and both Russell and Jordan Neissel agreed to sign declarations to support the Secretary's opposition to the motion for summary judgment. (Duncan Aff. ¶¶ 3-6).

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[10]While I have also reviewed the affirmation of Respondent's counsel, I find the affidavit of the Secretary's counsel to have more veracity. For example, the affirmation states in paragraph 41 that on June 17, 2005, the Secretary's counsel offered to settle on terms that the Respondent's counsel proposed in January 2005 (*i.e.*, classifying the violations as "other" instead of "serious"). The Secretary's counsel specifically denied this statement, noting that no settlement discussions took place beyond April 2005 and that the Secretary always maintained and still believes that the violations at issue were serious. (Duncan Aff. ¶ 14).

[11]All dates set out in this summary of the affidavit refer to the year 2005.

Towards the end of February, the Secretary's counsel received a phone call from David Klausner, the attorney the Neissels had retained to file a lawsuit against HVES. Mr. Klausner asked to review Jordan Neissel's declaration before it was sent to him for signature. The Secretary's counsel agreed. On March 3, the Secretary's counsel sent the proposed declaration of Jordan Neissel to Mr. Klausner; he also sent a proposed declaration to Russell Neissel. On March 8, Mr. Klausner sent a revised proposed declaration to the Secretary's counsel, and the two counsel discussed the changes by phone. On March 9, Mr. Klausner e-mailed some additional changes to be incorporated and again asked that the declaration be sent to him for review. Later that day, Mr. Klausner indicated he would provide a fax number so that the Secretary's counsel could forward the declaration to Jordan Neissel. The Secretary's counsel did not hear from Mr. Klausner again until more than a month later. In addition, Russell Neissel did not return his declaration, even after the Secretary's counsel left him two phone messages in that regard. (Duncan Aff. ¶¶ 7-10).

On March 14, the Secretary filed her opposition to the motion for summary judgment. In her submission, she withdrew the alleged construction industry violations, thus leaving only the alleged general industry violations. On April 8, the motion for summary judgment was denied, and on April 18, HVES filed its answer to the complaint. Later that month, the Secretary's counsel again advised Respondent's counsel he was willing to settle the items on the same terms as before. Respondent's counsel advised that HVES would not settle unless the terms it requested before were agreed to. The Secretary's counsel refused, and the parties did not discuss settlement again. (Duncan Aff. ¶¶ 11-14).

Around the end of April or early in May, the Secretary's counsel called Mr. Klausner to ask if Jordan Neissel would be available to testify at the trial in this matter, which was set to begin on July 27. Mr. Klausner said he could not make Mr. Neissel available because he was concerned that his testimony would prejudice his private lawsuit. When the Secretary's counsel asked if he would honor a subpoena ordering Mr. Neissel to appear and testify at the trial, Mr. Klausner said he would fight the subpoena. (Duncan Aff. ¶ 15).

On or about June 21, Respondent's counsel called the Secretary's counsel to discuss the photographs from the police investigation, which he claimed contradicted the Secretary's version of the events of the accident. Respondent's counsel forwarded the photographs, and the Secretary's

counsel, after reviewing them, called Respondent's counsel and told him the photographs did not add any more information to the case that the Secretary did not already know of. (Duncan Aff. ¶ 16).

The Solicitor's Office further discussed Mr. Klausner's unwillingness to make Jordan Neissel available for trial and the fact that Russell Neissel did not have first-hand knowledge of information crucial to the Secretary's case. The Solicitor's Office decided that it did not want to try to force the Neissels to testify and that it could not proceed with the trial. Around June 25, the Secretary's counsel advised Respondent's counsel that the Secretary was withdrawing the citation items because of Jordan Neissel's unwillingness to testify at the hearing. The Secretary's counsel forwarded a final stipulation of withdrawal, but, because Respondent's counsel would not agree to the paragraph stating that each party agreed to bear its own fees and expenses incurred in the proceeding, the Secretary's counsel filed a unilateral notice of withdrawal on July 13. (Duncan Aff. ¶¶ 17-20).

In view of the foregoing, I find that the Secretary's position throughout this proceeding was substantially justified. Respondent's Application is DENIED. So ORDERED

/s/

G. MARVIN BOBER
Judge, OSHRC

Dated: March 10, 2006
Washington, D.C.