UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, **Complainant**, **v.** **K.E.R. ENTERPRISES, INC. d/b/a ARMADILLO UNDERGROUND,** **Respondent**	OSHRC Docket No. 08-1225

ON BRIEFS:

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Before: Dennis L. Phillips
Administrative Law Judge

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

K.E.R. Enterprises, Inc. d/b/a Armadillo Underground ("Armadillo" or "Petitioner"), seeks attorneys' fees and expenses pursuant to the Equal Access to Justice Act, 5 U.S.C. §504 ("EAJA"), for costs incurred in its defense of a two item citation issued by the Secretary on July 21, 2008. The application for fees and expenses is granted to the extent indicated herein.

Background

Armadillo is an underground utility excavation contractor that installs water, drainage and sewer systems. On March 28, 2008 Armadillo was part of a multi-year project to install five

miles of PVC piping for Collier County, Florida. A small leak was found in a section of recently installed 20-inch PVC pipe. To stop the leak, two crew members tightened the T-head bolts on the mega lug with hand wrenches. The pipe exploded. Three workers were hit by pipe fragments and received lacerations. Additionally, Armadillo's foreman was struck by the pipe as it exploded, knocking him over a rock ledge and breaking both of his legs.

As a result of an inspection by OSHA, the Secretary issued a citation alleging two violations on July 21, 2008. Item 1 of the citation alleged that Armadillo violated the General Duty Clause, § 5(a)(1) of the Occupational Safety and Health Act, 29 U.S.C. § 651 *et seq.* (the "Act"), on the grounds that "employees were exposed to the hazard of being struck by fragments of a water main PVC pipe, whose mechanical joints and restraining glands were not being installed in accordance with the manufacturer's specifications." According to the citation, "one feasible and acceptable method to correct the hazard is to install the mechanical joints and restraining glands in accordance with the manufacturer and as required by ANSI/AWWA[1] C111/605." A penalty of $3,000 was proposed for the alleged violation.

Item 2 of the citation alleged a serious violation of 29 C.F.R. § 1926.20(b)(2) on the grounds that "deficiencies in the safety and health program were [not] identified to include hazard prevention and control, and worksite analysis." The Secretary proposed a penalty of $3,000.

On August 8, 2008, Armadillo filed its notice of intent to contest the citation.

On March 30, 2009, the Secretary withdrew Item 2 at the beginning of the hearing. The hearing involved only Item 1, the alleged violation of the General Duty Clause. Central to the Secretary's case was the assertion that tightening the bolts to stop a leak without first depressurizing the water line constituted a recognized hazard. The Secretary also asserted that

[1] American Water Works Association.

employees violated the AWWA instructions by using hand wrenches rather than torque wrenches when trying to stop the leak. As a result, they allegedly over tightened the T-bolts which contributed to the explosion.

On December 14, 2009, this Court issued a decision vacating Item 1, finding that the Secretary failed to establish that the cited condition presented a hazard or that Armadillo or its industry recognized the hazard. The Secretary failed to present adequate and persuasive evidence that it is never appropriate under the manufacturer's instructions or industry standards to tighten the T-bolts while the water line is pressurized, or that tightening the T-bolts with a hand wrench created a hazardous condition. To the contrary, the evidence was persuasive that Armadillo's procedures at the site on the day of the accident were proper and in accordance with industry practice.

The Secretary's Petition for Discretionary Review was granted by the Commission. On January 9, 2013 the Commission issued its decision affirming this Court's decision. The Commission found that neither the manufacturer's installation instructions nor the AWWA standard contain a safety warning or suggest a link between noncompliance and a safety hazard. The Commission also agreed that while the manufacturer's instructions and the AWWA standards recommend that a torque wrench be used, neither required the use of a torque wrench under these circumstances. To the contrary, the AWWA standard contemplates that an experienced employee could tighten the T-bolts to the proper torque without a torque wrench.

The Secretary did not appeal the Commission's decision and it became a final order sixty days later, on March 11, 2013. On April 8, 2013 Armadillo filed a timely Petition for Fees and Costs under the EAJA.[2] The Secretary filed an Opposition to the Application and Armadillo

[2] An Application for Fees and Expenses under the EAJA must be filed within 30 days of the final disposition of the adversary adjudication. 5 U.S.C. § 504(a)(2); 29 C.F.R. § 2204.302(a).

filed a reply to the Secretary's opposition.

EAJA

The Equal Access to Justice Act entitles eligible parties who prevail in litigation against the government to receive related attorney's fees and expenses. 29 C.F.R. § 2204.101. An EAJA eligible corporation is one with a net worth not exceeding $7 million that employs no more than 500 employees. 29 C.F.R. § 2204.105. A prevailing party, who meets the financial qualifications, may receive an award of attorney fees and expenses unless the Secretary's position throughout the proceeding was substantially justified or special circumstances make an award unjust. 29 C.F.R. § 2204.101.

Eligible Party

The Secretary asserts that Armadillo failed to establish that it is a party eligible to receive an award under the EAJA. The Secretary observes that, under Commission rules, the employer must demonstrate that, at the time that the Notice of Contest was filed, its net worth was not more than $7 million. 29 C.F.R. § 2204.105(c). The Notice of Contest was filed on August 8, 2008. Armadillo produced Summary Balance Sheets for years 2007 through 2009. While each of these statements demonstrated a net worth well under $7 million, the dates on the statements were as of September 30 of each year.

The relevant Commission rule, 29 C.F.R. § 2204.105(c) states:

> For the purpose of eligibility, the net worth and number of employees of an applicant shall be determined as of the date the notice of contest was filed, or, in the case of a petition for modification of abatement period, the date the petition was received by the Commission under § 2200.37(d).

The Secretary argues that this rule requires a determination of the applicant's actual net worth on the precise date the Notice of Contest was issued.[3] This Court finds the Secretary's

[3] The Secretary does not dispute that Armadillo had fewer than 500 employees.

reading of the rule to be overly technical and unreasonable. The rule clearly states that , " [f]or the purpose of eligibility, the net worth … of an applicant shall be determined as of the date the notice of contest was filed." Nothing in the rule requires the applicant to submit a net worth exhibit only as of the date of the Notice of Contest.[4] Rather, it is sufficient that the applicant submit sufficient documentation to establish that its net worth was not greater than $7 million on the date of the Notice of Contest.

In *Information Sciences Corp. v. U.S.,* 86 Fed. Cl. 269 (Fed. Cl. 2009) (*amended on denial of reconsideration,*88 Fed. Cl. 626 (Fed. Cl. 2009), the adversary adjudication began on October 29, 2007. On reconsideration, the court amended the award relating to attorney fees, but left undisturbed the calculation regarding the company's net worth. In this case, the employer submitted financial reports establishing that it had a financial worth below $7,000,000 on December 31, 2006 and December 31, 2007. Also submitted was an unaudited balance sheet as of October 24, 2007 showing a net worth of under $7,000,000 and a statement by its accountant that "it would not have been possible for [the company] to achieve a net worth of $7 [m]illion at any time during the 2007 calendar year." *Id.* at 281. Despite the government's protestations that the company failed to establish that its net worth did not exceed $7,000,000 on October 29, 2007, the Federal Claims Court found that the company presented sufficient evidence to ascertain and verify that its net worth was below $7,000,000 when the Complaint was filed. *Id.*

In *Sosebee v. Astrue*, 494 F.3d 583 (7th Cir. 2007), the party seeking fees failed to submit an application that adequately established its financial eligibility under standard accounting practices. Also, it did not submit an affidavit attesting to its net worth. Instead, it filed a letter

[4] In establishing the sufficiency of net worth exhibits as of the contest date, 29 C.F.R. § 2204.202, Net worth exhibit, states that: "[t]he exhibit may be **in any form convenient to the applicant** that provides full disclosure of the applicant's assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards in this part." [emphasis added].

setting forth its financial condition, asserting that its net worth fell well below the statutory maximum. The court observed that the statute has been interpreted to require varying levels of supporting evidence depending, in part, on whether there was a serious doubt about the applicant's eligibility. *Id.* at 588. The court also noted that EAJA is not intended to duplicate in complexity a public commission's rate of return proceeding. Rather it is intended to open the doors of the courthouse to parties, not keep them locked in the courthouse disputing fees well after the resolution of the underlying case. *Id.* at 588-89. The court concluded that:

> In denying Sosebee's EAJA application, the district court either applied an impermissibly high standard of proof or it improperly exalted form over substance. The court asserted that it "need not draw inferences" from the evidence, but this is exactly what factfinders do. Drawing inferences is not the same thing as speculation. Indeed, nothing but wild speculation would have supported a finding that Sosebee was worth more than $2,000,000. Nowhere in his brief does the Commissioner seriously suggest that Sosebee does not meet the EAJA's net worth requirement.

Id. at 589.

Here, Armadillo submitted summary balance sheets as of September 30 for years 2007 through 2009. Armadillo's net worth (total equity) was $4,214,497.06 as of September 30, 2007; $4,932,460.09 as of September 30, 20008; and $3,723,652.02 as of September 30, 2009. At no time during this period is there any suggestion that Armadillo's net worth equaled or even approached the $7,000,000 threshold. Significantly, the summary balance sheet for 2008 established Armadillo's net worth less than two months after the August 8, 2008 Notice of Contest. The Secretary produces no evidence to suggest that the summary balance sheets are inaccurate, or that some unusual circumstance temporarily raised the applicant's net worth above the $7,000,000 limit. This Court finds that the evidence submitted by Armadillo establishes that the net worth of the company was less than seven million dollars as of August 8, 2008.

Accordingly, this Court finds that Armadillo established that it was an "eligible party"

under the EAJA.

Substantial Justification

Once an eligible applicant establishes that it is the prevailing party, the Secretary bears the burden of establishing that his position was substantially justified. *Joseph Watson, d/b/a Joseph Watson Masonry,* 21 BNA OSHC 1649, 1651 (No. 00-1726, 2006); *See Consol. Constr. Inc.*, 16 BNA OSHC 1001, 1002 (No. 89-2389, 1993) (EAJA). A position is substantially justified if it has a "reasonable basis in both law and fact" or is "justified in substance or in the main - that is, justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood,* 487 U.S. 552, 563-66 (1988); *C.J. Hughes Constr. Inc.*, 19 BNA OSHC 1737, 1740 (No. 93-3177, 2001) (EAJA). The Secretary bears the burden to show that: (1) there exists a reasonable basis for the facts alleged, (2) there exists a reasonable basis in law for the theory he propounds, and (3) the facts alleged reasonably support the legal theory. *Joseph Watson,* 21 BNA OSHC at 1651; *Contour Erection & Siding Sys. Inc.*, 18 BNA OSHC 1714, 1716 (No. 96-0063, 1999).

A. Item 1- 5(a)(1)(Respondent's employees were exposed to being struck by fragments of a water main PVC pipe, whose mechanical joints and restraining glands were not being installed in accordance with the manufacturer's specifications.)

The underlying basis for the citation was the Compliance Officer's (the "CO") assumption that the bolts were overstressed when tightened to stop a leak in a pipe that was not first depressurized. The evidence revealed that virtually every basis for the Secretary's issuance of the 5(a)(1) allegation was not only unsupported by the record, but also fundamentally flawed as outlined below.

1. At the beginning of the hearing, the CO contended that the AWWA standard requires that, when a pipe leaks, the pipe needs to be depressurized and dismantled. According to the CO, if the bolts are torqued within their acceptable range, the only reason why a leak would

occur is that the pipe was improperly installed. (Tr. 68-71).

Contrary to the CO's testimony, the evidence established that the most common reason for a pipe to leak is that the bolts are not tight. The AWWA standard clearly requires that a leaking pipe should be disassembled only if the leak continues when the bolts are tightened to "*maximum torque."* Therefore, the first step to resolve a leak is to tighten the bolts to maximum torque. Only if that fails is the pipe depressurized and dismantled to ensure that the seals are set correctly. The relevant AWWA instruction clearly states that "[i]f effective sealing is not attained at the maximum torque indicated, the joint should be disassembled, thoroughly cleaned, and reassembled." The CO admitted that he had no evidence that the bolts on the leaking pipe were at maximum torque before they were tightened. The CO refused to concede that, if the bolts are torqued to the minimum part of the range, a leak might be resolved by further tightening the bolts. (Tr. 70-71).

Engineer Michael Shea, introduced as an expert on behalf of the Secretary, also disagreed that it is routine practice to tighten bolts while the pipe is still under pressure. In his expert report, Mr. Shea testified that:

> [a]ccording to the manufacturer's specifications and industry standards relied upon by the utility pipe installation industry, the installers, upon learning of a leak during a pressure and/or leak test, should have depressurized the line. Then, rather than tightening the hex head shank bolts on the mechanical joint restraining gland, the mechanical joint restraining gland should have been disassembled, and the installation procedure repeated until an effective seal was attained.

(Ex. G-26, at p.3)

Mr. Shea's report continued that

> the water line should have been de-pressurized, the Sigma ONE-LOK system disassembled, and then reassembled by tightening the hex head shank bolts with a torque wrench to the recommended torque. This is common sense and is in agreement with industry standard ANSI/AWWA C111/21.11-00, Rubber-Gasket

> Joints for Ductile-Iron Pressure Pipe and Fittings, Appendix A, page 1122, which states, "*If effective sealing is not attained at the maximum torque indicated, then the joint should be disassembled, thoroughly cleaned, and reassembled. Overstressing the bolts to compensate for poor installation practice is not acceptable.*

(Id., at p. 4*)(*emphasis in original).

Not only was Mr. Shea's expert testimony directly at odds with the AWWA standard, which requires disassembly only when the bolts are at maximum torque, but he also quoted that precise section of the standard to support his position that any leak during a pressure test requires the depressurization and disassembly of the water line. When it became clear that neither the ANSI/AWWA standard nor the manufacturer's instructions supported his position, Mr. Shea deemphasized the ANSI/AWWA standard and the manufacturer's instruction. He relied heavily on "common sense" which he asserted mandated that the lines be depressurized before tightening the bolts. The evidence not only failed to support the Secretary's basic theory of the case, but directly contradicted it. (Tr. 173, 176, 193-94).

2. The Secretary asserted that Armadillo should have used a torque wrench to tighten the bolts. At the hearing, the Secretary's witnesses admitted that neither the AWWA procedure nor the Sigma (manufacturer) specifications required the use of a torque wrench, as long as the employees were properly trained. There is nothing in the record to suggest that either Armadillo or any reasonable employer in its industry would have recognized that the failure to use a torque wrench constituted a hazard.

3. The Secretary's expert, Michael Shea, produced an analysis of the accident after identifying the bolts as hex head shank bolts, whose heads break off when turned to the proper talk. The bolts were T-bolts that do not break off. That Mr. Shea believed that the crew was working with hex head bolts underscores the lack of justification in the Secretary's position. If

Armadillo was tightening hex head bolts, the heads on the bolts would have snapped off when the crew got to the proper torque. It would have been impossible for the crew to have tightened the bolts beyond the prescribed tolerance. (Tr. 121-22; Ex. G-26, at p. 3).

Despite Mr. Shea's belief that hex head bolts were being used, critical to the Secretary's theory of the case was that the bolts were tightened beyond their maximum tolerance. Similarly, the Secretary asserted that Armadillo's failure to use a torque wrench constituted a recognized hazard. However, the purpose of a torque wrench is to prevent an employee from over-tightening a bolt. If, as the Secretary believed, Armadillo was tightening hex head nuts, using a torque wrench would have been redundant.

4. Both the CO and the Secretary's expert, Michael Shea, conceded that the AWWA C111, which the Secretary alleged Armadillo was required to follow, was neither a specification, nor incorporated into OSHA's standards and that the document itself stated that its use was entirely voluntary.

Of particular relevance is *Paramount Advanced Wireless, LLC,* 23 BNA OSHC 1634 (No. 09-0178, 2011) (ALJ). After an employee fell from a communication tower, the Secretary cited the employer for a violation of 29 C.F.R. § 1926.501(b)(1), in the alternative, on the grounds that employees "were working on a communication tower 60 feet above the ground without any fall protection." *Id.* at 1636. Employees were using a device called a "Fisk Descender" for fall protection. The Secretary alleged that the employer failed to provide adequate fall protection because it improperly used the Fisk Descender to perform controlled descents without back-up protection consisting of a hooked up second line with a rope grab. In her initial decision, Judge Rooney concluded that at the time of the accident, the employee was using the device to position himself and was not engaged in a controlled descent. The evidence

established that, while being used as a positioning device, a Fisk Descender need not be accompanied by a second line, but with a shock absorbing lanyard which the employee was using. The judge observed that the Secretary based her case on the assumption that the sole use of a Fisk Descender was as a device used in a controlled decent. At the hearing, it became clear that the Secretary's position was based on a misunderstanding of the uses of a Fisk Descender and the type of back-up equipment that should be used with it. Granting the employer's petition for EAJA fees and expenses, the Judge noted that, had the Secretary consulted the Fisk Descender Manual, he would have learned that one of the uses of a Fisk Descender is as a positioning device. Moreover, had the Secretary consulted the Training Manual, he would have learned that a secondary line with a rope grab is the most frequently used, but not the only acceptable method of back-up when using a Fisk Descender. Both of these documents were available to the Secretary and, with the exercise of reasonable diligence, he could have learned of the multiple uses of a Fisk Descender and the appropriate use of back-up devices other than a secondary line with rope grab. Much of the Secretary's case was based on the testimony of the CO which the judge found to be tainted by this fundamental misunderstanding of the Fisk Descender; a misunderstanding that had no basis in fact and, as noted, could have been easily cured by doing appropriate pre-hearing preparation. Accordingly, the Judge found that the Secretary lacked substantial justification and granted an award of EAJA fees and expenses.

The parallels between the instant case and *Paramount* are striking. In both cases, the backbone of the Secretary's case was a fundamental misunderstanding of the procedure used at the worksite and a failure to properly accurately read the instructions for the respective devices. In both cases, the CO was inexperienced in the nature of the work and had he properly read those instructions, he would have learned that the basis of the cases was erroneous. Here, the CO had

no field experience in installing pipes and had never conducted inspections dealing with water pipe explosions or installations of mechanical joint assemblies for water pipes. Despite this lack of experience, he testified that, in forming his opinion, he did not speak to any pipe or gland manufacturers, or to any utility contractors.

Similarly, in *D.C. Pagers, Inc., d/b/a Superior Service,* 19 BNA OSHC 1804 (No. 01-0162, 2002, Judge Schoenfeld found a lack of substantial justification where the Secretary issued the citation "without a sufficient understanding of the electrical equipment involved …, and on his failure to fairly evaluate the employer's training, both of which could have been discovered well before the hearing *with the exercise of reasonable diligence."* (emphasis added). On another item, the judge noted that "[w]ith the exercise of reasonable diligence, the secretary, through her solicitors, could have discovered well before the hearing that the CO's conclusions ... were without a sound basis." *Id.* at 1807.

The evidence demonstrates that the Secretary did not exercise reasonable diligence during its pre-hearing preparation leading up to the hearing in this case with regard to Item 1. The evidence strongly suggests that the Secretary assumed that the accident *ipso facto* established that a violation occurred and read both the AWWA and the manufacturer's instructions in a strained manner to support his theory of the case. The Secretary relied on the CO and Mr. Shea who maintained a seriously flawed reading of the AWWA standard and the manufacturer's instructions. Had the Secretary exercised reasonable diligence during his pre-hearing investigation, he would have learned that Armadillo was acting reasonably and in a manner accepted by the industry. The record fails to establish that the Secretary took these reasonable measures. For example, there is no indication that the Secretary or his expert spoke with a representative of the mechanical joint restraining gland's manufacturer who could, as a

representative did at the hearing, explain the nature of the work and why the Secretary's theory of the case was seriously flawed.[5] Instead, the Secretary's representatives and his expert seemingly ascertained the particulars of pressure testing during the hearing and seemed genuinely surprised that little more than tightening bolts to their maximum torque could stop a leak without requiring dismantling the entire line.

In the Answer to the EAJA Application, the Secretary makes several arguments, all of which are unconvincing:

1. As discussed *supra*, Mr. Shea disagreed with Armadillo that it is routine practice to tighten bolts while the pipe is still under pressure. The Secretary argues that this Court discounted Mr. Shea's opinion and instead credited the testimony of Respondent's non-expert witnesses. He contends that had this Court credited Mr. Shea, he would have won the case. Therefore, the case turned on a credibility finding. The Secretary notes that a case hinging on credibility determinations are not typically eligible for an EAJA award. *Consol. Constr., Inc.,* 16 BNA OSHC at 1006. (SOL Reply at p. 8).

The Commission has held that cases that *truly* turn on credibility issues are inappropriate for an EAJA award. *Id.* The key word is *"truly."* While Armadillo's witnesses were credited over Mr. Shea, the Court's findings were not based solely on the traditional credibility factors uniquely within the province of the judge to evaluate, such as demeanor. *Waste Mgmt. of Palm Beach,* 17 BNA OSHC 1308, 1309-10 (No. 93-128, 1995) (Giving deference to judge's findings based upon demeanor as those factors are peculiarly observable by the hearing judge at the hearing.). Here, credibility was only incidental to this Court's findings. This Court was more persuaded by the overwhelming weight of the evidence that the pipes would be depressurized

[5] The Secretary's expert testified that he did not speak to any pipe or gland manufacturer, or to any utility contractor, when formulating his opinion in this case. (Tr. 182-202).

and dismantled only when the bolts are already set to maximum torque. Another determining factor in the decision was the Secretary's obvious misreading of both the AWWA standards and the manufacturer's instructions and his erroneous assumption that they constituted mandatory safety warnings rather than recommendations. *See also Paramount Advanced Wireless, LLC,* 23 BNA OSHC at 1637 (holding that the EAJA award of attorney's fees and expenses appropriate when witness credibility only incidental to findings.).

2. The Secretary relies heavily on *Young Sales Corp.,* 7 BNA OSHC 1297 (No. 8184, 1979), where the Commission found that a manufacturer's warnings constituted an explicit safety warning that establish recognition of a hazard. The Secretary asserts that here, rather than analogizing the facts to *Young Sales*, the Commission erroneously cast this case in the mold of *Oberdofer Industries, Inc.,* 20 BNA OSHC 1321 (No. 97-0469, 2003), where a citation for violation of § 5(a)(1) was vacated for lack of recognition because the relevant industry standard did not establish that noncompliance with its instructions created a hazard. *Id.* at 1326-27. Taking exception to the Commission decision on review here, the Secretary asserts that the AWWA warning against overstressing the bolts by exceeding the maximum torque constituted an implicit warning that overstressing the bolts could result in a catastrophic failure.

Although the Secretary recognizes that, on review, the Commission rejected this argument, he improperly attempts to re-litigate a finally decided issue in this EAJA application. (SOL Reply at pp. 15-18). *Cleaver v. Shinseki,* No. 10-0830 E, 2013 WL 364212, at *2 (Vet.App. Jan. 31, 2013) (holding it improper for the Secretary of Veterans Affairs to attempt to re-litigate a finally decided issue through an EAJA response); *McCormick v. Principi*, 16 Vet. App. 407, 411 (2002) (ruling that the court should not revisit the logic of the merit's decision at the EAJA stage.); *Abramson v. U.S.*, 45 Fed. Cl. 149, 153 (1999) (holding that application of the

EAJA "should not require the court to re-litigate the merits and reassess the competence of defendant's legal theories in terms not only of their legal merit, but also in terms of their margin of failure."); *Nat'l. Law Ctr. on Homelessness and Poverty v. U.S. Dept. of Veterans Affairs,* 799 F. Supp. 148, 152 (D.D.C., 1992) ("It is not the purpose of the EAJA to re-litigate issues that have already been decided.").

Commission judges are bound to follow precedents set by the Commission. *See Dun-Par Engineered Form Co.*, No. 82-0928,1983 WL 142530, at *7 (O.S.H.R.C.A.L.J., June 17, 1983) (*aff'd* 12 BNA OSHC 1962 (1986). This Court is unwilling to hold that the Commission's decision in this case was erroneously decided.

3. The Secretary asserts that he was reasonable in interpreting the instructions as a means to avoid the failure of the bolts through overstressing, "which would logically mean that the bolts might fail and lead to an explosion." The problem with the Secretary's position is that it relies on assumptions, not evidence. There may be many reasons other than the possibility of catastrophic failure why bolts should not be over tightened. For example, over tightening might strip the bolts and make them difficult to remove if necessary. Also, it might crack or damage the pipe leading to further leaks, rather than lead to a catastrophic failure.

4. The Secretary's cites to Exhibit C-17, which is a memorandum prepared by an AIM[6] engineer and utility coordinator, requiring that the pressure rating for pipes be raised from 165 psi to 250 psi. The memorandum also stated that the "Recent incident was caused by improper torque applied to mega lug. It is imperative that mega bolts be tightened in rotation with equal torque to all bolts." This memorandum was dated April 2, 2008, nearly four months before the citation was issued. This memorandum has virtually no probative value and was not sufficient to justify either the citation or the lack of diligence by the Secretary in her pre-hearing investigation

[6] AIM was the inspection company at the job.

of this matter. Armadillo asserts that the memorandum was prepared to protect other parties in litigation. The memorandum is little more than a short and conclusory statement attempting to place blame of the accident on Armadillo. At the hearing, the Secretary did not make even a cursory attempt to authenticate the memorandum. Neither of the authors testified, and the Secretary made no attempt to establish methodology or the basis for the authors' conclusion. Despite its lack of probative value, the Secretary used this memorandum to support his conclusion that Armadillo improperly tightened the bolts. (Tr. 40).

Considering the Secretary's fundamental misunderstanding of the leak stoppage procedure, his misinterpretation of the relevant industry standards and manufacturer's instructions, and the lack of reasonable diligence in investigating these procedures and standards prior to the hearing, the Court finds it difficult to find that the Secretary could have reasonably expected that he could meet his burden of proof. The Secretary failed to show that: (1) there existed a reasonable basis for the facts alleged, (2) there existed a reasonable basis in law for the theory he propounds, and (3) the facts alleged reasonably supported the legal theory. Finally, there is no evidence to suggest that an EAJA award would be unjust.

Accordingly, the Court finds that the Secretary was not substantially justified in either law or fact in issuing Item 1 for violation of the General Duty Clause. Armadillo is entitled to recover its reasonable fees and expenses for defending itself against this item.

B. Item 2- § 1926.20(b)(2)(deficiencies in the safety and health program were [not] identified to include hazard prevention and control, and worksite analysis)

Because the item was withdrawn prior to the hearing, the Secretary never put on any evidence directly relevant to the item. Neither did the Secretary provide any explanation for the withdrawal. However, at the hearing the Secretary introduced evidence directed at Item 1 that does explain the reason why Item 2 was issued:

1. During the inspection, employees were not able to explain to the CO the procedure used to stop the leak. (Tr. 35).

2. Respondent's foreman, Mr. Davis, could not describe the AWWA standard. (Tr. 38).

3. Mr. Davis was also unfamiliar with the manufacturer's specifications. (Tr. 38).

4. When discussing the daily safety meetings held with the crew, Mr. Davis could not locate any meetings where the topic involved dealing with a leak when a pipe is under pressure. (Tr. 147).

Armadillo counters that this Court's December 14, 2009 decision complimented it on its training program. The decision noted that "Mr. Davis testified he had worked with the same crew for over six months before the accident. He trained the crew, including in tightening bolts. He checked their work by watching them and by using a torque wrench at times to check bolts they had tightened."

The decision concluded that Armadillo takes safety very seriously. In particular, it was noted that Mr. Davis' holds safety meetings in the field and has received safety training and certifications while working for Armadillo. The decision also took note of the evidence regarding the safety orientation and training employees receive, the safety meetings held in the field, and the site inspections conducted by Armadillo's management and outside safety consultants. The decision also noted that although Mr. Davis was somewhat familiar with the AWWA, he could not explain or define AWWA. He had not reviewed, or been trained in, the AWWA standards. He was not aware of an AWWA procedure to disassemble a pipe if the pipe had not attained an effective seal, and he had no knowledge of AWWA describing a recommended procedure. He was also not aware of a written pressure test procedure, but he described the unwritten procedure he followed in the field. (Tr. 93-94, 113-14, 117-19, 142-49, 208-18, 275-78).

Even though the AWWA standards are voluntary, it was not unreasonable for the Secretary to expect that Armadillo's employees be familiar with them. The Occupational Safety and Health Administration's belief that Armadillo's employees, including the foreman, were uninformed about the AWWA is suggestive of improper training.[7] It was not unreasonable for the Secretary to issue the citation for Item 2 on the grounds that employees were improperly trained. Armadillo asserts that, even if justified in issuing the Item 2 citation, the Secretary was not justified in not waiting to withdraw it until the start of the hearing. Armadillo suggests that the Secretary should have realized that the item was untenable upon review of Armadillo's safety materials. (EAJA Application at p. 17).

That the Secretary withdrew a citation prior to hearing does not create the presumption that he was not substantially justified. *Ashburn v. 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 when 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).

In his Opposition to the Fee Award, the Secretary asserts that the decision to withdraw Item 2 was made following a final review of the item in an effort to streamline the issues to be presented at the hearing. The Court finds the Secretary's explanation to be reasonable. The Court finds that the Secretary was substantially justified in both issuing Item 2 and in withdrawing the item at the beginning of the hearing.

Fee Award

Armadillo submits attorney fees and expenses dating from the time of the accident. Fees

[7] As part of OSHA's pre-citation investigation, the CO interviewed the crew members and foreman that had been injured. The crew members were not able to explain to the CO the procedure they had used and stated that the day of the accident was the first time they had tightened the bolts with the pipe pressurized. (See ALJ Decision, at p. 4).

and expenses are recoverable only from the beginning of the adversary adjudication. For proceedings before the Commission, the adversary adjudication begins with issuance of the citation in most cases. *Cent. Brass Mfg. Co.* 14 BNA OSHC 1904, 1906 (No. 86-978, 1990)(consolidated). To allow fees for legal services incurred before issuance of the citation would be tantamount to holding that the Secretary was not substantially justified in investigating a workplace injury. Armadillo is not entitled to any fees and expenses incurred before the citation was issued on July 21, 2008.

To determine an appropriate award, the judge must determine the "lodestar," which is the number of hours reasonably expended multiplied by a reasonable hourly rate. *Action on Smoking & Health v. C.A.B.,* 724 F.2d 211, 221 (D.C. Cir. 1984). When determining the "lodestar" the judge should consider the complexity and novelty of the issues based on his own knowledge, experience and expertise of the time required to complete similar activities. *Cent. Brass Mfg. Co.,* 14 BNA OSHC at 1907; *William B. Hopke,* 12 BNA OSHC 2158, 2160 (No. 81-206, 1986).

In support of its petition, Armadillo has submitted detailed billings setting forth the relevant fees and expenses. The Court finds the hourly billings submitted by Armadillo's attorneys' are reasonable given the complexity of the issues in this case. However, the invoices do not indicate which hours were relevant to Item 1, and which were pertinent to Item 2. Finding that Armadillo is only entitled to fees and expenses incurred in its defense of Item 1, it is necessary to determine an appropriate apportionment of the fees and expenses incurred.

To prepare for Item 2, Armadillo needed to gather its training materials and documents relating to its training programs. Because the item was not withdrawn until the start of the hearing, it also had to interview and prepare its witnesses. The pre-hearing witness lists show

that Armadillo intended to call several employees who were to testify largely about their training. Armadillo also intended to introduce several documents related directly to its training program. It is reasonable that Armadillo spent some time preparing witnesses to testify directly to Item 2. A significant portion of Armadillo's case revolved around its training of employees to stop leaking pipes, which was also relevant to Item 1. Even if Item 2 had never been cited, Armadillo would have adduced some evidence related to its training program.

Item 1 was the far more complex of the two items. It required statutory interpretation, learning the procedures and techniques involved in leak repair and relating those procedures and techniques to the accident. Considering these factors, the Court concludes that 20% of the claimed attorney fees and compensable expenses incurred prior to the hearing are reasonably allocated to Armadillo's preparation to defend Item 2. *Hensley v. Eckerhart,* 461 U.S. 424, 436-37 (1983) (noting that the court may use its equitable judgment in eliminating hours for noncompensable hours).

In his opposition to the Fee Application, the Secretary states that Respondent seeks to recover "non-compensable items on its "expenses" sheets." (Opposition at p. 23). However, he fails to specify which of the expenses are non-compensable. The EAJA states, in pertinent part that:

> "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case, and reasonable attorney or agent fees.

5 U.S.C. § 504(b)(1)(A).

The Commission has held that the list of compensable expenses set forth in the 5 U.S.C. § 504(b)(1)(A) are only examples and that other costs such as travel and transcript expenses are compensable. *Ruhlin Co.,* 17 BNA OSHC 1068, 1069 (No. 93-1507, 1995) (EAJA)

(Commission held that EAJA awards include "the reasonable and necessary expenses of an attorney in a specific case which are customarily charged to the client."). This issue arose in the 11th Circuit which similarly holds that the list of expenses provided in 28 U.S.C. § 2412(d)(2)(A) was not meant to be all-inclusive. *Jean v. Nelson*, 863 F.2d 759, 777 (11th Cir. 1988), *aff'd* 496 U.S. 154 (1990), *Hoopa Valley Tribe v. Watt*, 569 F. Supp. 943, 947 (N.D. Cal. 1983). Respondent lists travel expenses, including parking and travel meals, which this Court finds to be reasonable and compensable under the EAJA. Accordingly, this Court awards fees and expenses as follows:

A. **Attorney *Fees and Expenses expended before Judge***

1. Attorney Fees

a) Pre-citation fees (before 7/21/2008) (invoices from 5/20/2008 to 5/30/2008): $1,022.50

Compensable: 0.00

b) Fees from 7/21/2008 up to hearing date (invoices from 7/31/2008 - 4/16/2009 for hours expended through March 29, 2009[8]):

claimed 126.25 hours @ $125 = $15,781.25, compensable at 80% = $12,625.00

c) Fees incurred from the hearing date through the filing of briefs to the Judge (invoices from 4/16/2009 through 12/31/2009 for hours expended from 3/30/2009 – 12/14/2009 date of ALJ Decision):

Fully compensable 67.25 hours @ $125 = $8,406.25

Recoverable attorney fees before judge: $21,031.25

2. Expenses:

[8] The withdrawal of Item 2 occurred at the start of the trial on March 30, 2009.

a) Expenses prior to citation: $748.41[9]

Compensable: 0.00

b) Expenses from citation to hearing: $ 863.23, compensable @ 80% = $690.58

c) Fully compensable expenses from hearing on: $1,169.14[10]

Compensable expenses before judge: $1,859.72

B. Costs on Review Before the Commission

Armadillo included the time and expense sheets for its work done when the case was reviewed by the Commission.[11] In its billings from 12/31/2009 to 4/19/2010, Armadillo sets forth 43 hours devoted to its work on Review before the Commission which, at $125 per hour, comes out to $5,375. Additionally, Respondent lists $32 in postage charges. This comes out to a total of $5,407. An ALJ has the authority to determine a fee award that includes fees and expenses expended on review before the Commission. *See Saipan Koreana Hotel,* 21 BNA OSHC 1403, 1406 (No. 02-2129, 2006) (Judge can assess reasonableness of EAJA request where company entitled to the award of fees incurred in matter pending before Commission).

Attorney Fees and expenses for work before the Commission: $5,407.00

C. Attorney Fees/Expenses of EAJA Petition

Fees incurred preparing a petition for fees and costs under EAJA are compensable. *Timothy Victory,* 18 BNA OSHC 1023, 1027-28 (No. 93-3359, 1997); *See also Gonzalez v. City of Maywood,* 729 F.3d 1196, 1210 (9th Cir. 2013) (finding that fees and expenses incurred in preparing fee petition under Civil Rights Act are compensable).

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[9] This amount is calculated as follows: $408.42 + $369.49 - $29.50 non-billing, including 2/23 airfare.

[10] The April 30, 2009 invoice for attorney fees also includes $1,024.29 identified as "Court Costs/Fees." The expense sheets show that this amount is for the hearing transcript ($1,021.65) and a pre-hearing phone call made on 3/15/09 ($2.64). This Court treats costs relating to the transcript and phone call as expenses and not attorney fees.

[11] Armadillo's did not specifically list those fees and expenses in its summary sheet.

Armadillo is entitled to recover for its preparation of the EAJA petition as to Item 1. It is not entitled to recover for the attorney fees and expenses incurred in its preparation of the petition as to Item 2, which includes Armadillo's presentation of the reasons why it alleged that the Secretary was not substantially justified in issuing Item 2. As before, the Court finds that 20% of the fees and expenses spent in preparing the EAJA petition as to Item 2 represent a reasonable allocation of the expended costs.

In its EAJA petition, Respondent lists fees and expenses from its invoice of 4/8/2013, which was for costs associated with the EAJA application.

Attorney Fees 13.25 hours at $125 =	$1,656.25 @ 80% =	$1,325.00
Expenses (copying and mailing):	$94.00 @ 80% =	$75.20

Review of the various billings sent by Armadillo's attorney also reveals that certain preliminary work in anticipation of a future EAJA application was performed while the case was still in litigation. The billing of 12/31/2009 lists a total of 1.5 hours spent on work compiling material for the preparation of a future fee award application. The billing of 1/15/2010 lists a total of two hours similarly spent. At $125 per hour, these 3.5 hours yield a total of $437.50. This Court finds that Armadillo is entitled to recover 80% of these fees as part of its recovery for the preparation of its EAJA petition, or $350.00.

Attorney Fees 3.5 hours @ $125 = $437.50 @ 80% =	$350.00

Accordingly, the Court awards the following to Armadillo for costs incurred in the preparation of its EAJA petition:

Compensable Attorney Fees:	$1,675.00
Compensable Expenses:	$75.20
Attorney fees and expenses for the preparation of EAJA Petition:	**$1,750.20**

ORDER

Accordingly, Complainant is ORDERED to compensate Respondent in the amount of $30,048.17 for attorney fees and expenses pertaining to this case that the Court finds are justly due pursuant to the EAJA.

SO ORDERED.

/s/
The Honorable Dennis L. Phillips
U.S. OSHRC JUDGE

Date: Dec. 9, 2013
Washington, DC