SECRETARY OF LABOR, Complainant, v. M & M ROAD RECYCLE, INC., Respondent.	OSHRC DOCKET NO. 97-0075

DECISION AND ORDER

M & M Road Recycle, Inc. (M & M) seeks attorney's fees and expenses incurred in its defense against citations and proposed penalties issued by the Occupational Safety and Health Administration (OSHA) in accordance with the Equal Access to Justice Act (hereinafter, the EAJA), 5 U.S.C. §504, implemented at Commission Rule §2204.101, et seq.

For the reasons enunciated below, M & M's petition is GRANTED in part.

Under the EAJA, a prevailing party meeting the basic requirements for eligibility is entitled to an award of attorney fees and other expenses, unless the Secretary shows that her position was substantially justified or that special circumstances make an award unjust. 5 U.S.C. §§504(a)(1), 504(b)(1)(B); *William B. Hopke Co.*, 12 BNA OSHC 2158 (No. 81-0206, 1986).

M & M submits that it is eligible for the recovery of fees under the EAJA, in that it has a net worth of not more than $7 million, and employs not more than 500 employees. M & M's eligibility is not disputed.

This judge's decision, which became a final order of the Commission on December 22, 1997, vacated Citation 1, item 1 and item 2b, alleging violations of §§1926.20(b)(3) and 601(b)(1), respectively. Citation 1, item 2(a) was affirmed, but was reduced from "willful" to "serious." A penalty of $3,500.00 was assessed for that item, rather than $70,000.00 proposed by the Secretary.

M & M claims to have been the prevailing party with regard to all three citation items, and seeks costs incurred in its defense of those items. The Secretary maintains that its position was substantially justified in all cases.

Willful citation 1, item 1/Alleged violation of §1926.20(b)(3)

Substantial Justification. The cited standard requires that equipment not in compliance with the applicable requirements, here §1926.601(b)(1), be tagged, locked out, or removed from the work site. This judge dismissed the citation as duplicative (Tr. 11-12). At page 11, Complainant's counsel admitted at the hearing that the items were duplicative:

> MR. KATES: Your Honor, the case law is extant, addressing this issue. Two citations do involve the same truck.
>
> Briefly summarizing, one is that the truck was defective and it was not removed from service. The other one is that it remained in use. Your Honor, the abatement for the two would indeed be the same.

In *Pentecost Contracting Corp.*, 17 BNA OSHC 1953, 1997 CCH OSHD ¶31,382 (Nos.92-3789 and 92-3790, 1997) the Commission noted that the grouping of duplicative violations is discretionary with the Secretary, but found that in an EAJA action the Secretary must justify her decision not to group penalties that the Commission is likely to group, *i.e.*, those which would be cured by a single abatement. *Id*. at 2135. *See, Capform, Inc.*, 13 BNA OSHC 2212, 1987-90 CCH OSHD ¶28,503 (No. 84-0556)[duplicative violation vacated where compliance under one standard would necessarily result in compliance with the other].

In *Pentecost* the Commission found that the facts in that case demonstrated a deliberate disregard of an extreme hazard, and justified the Secretary's decision not to group the penalties. In this case, the Secretary's decision not to group the penalties was based on M & M's decision to keep the cited vehicle in operation despite evidence that the service brakes on the vehicle were going out. The Secretary's evidence established M & M's constructive knowledge of the impending brake failure, but fell short of proving M & M's deliberate disregard for either OSHA regulations or employee safety. There was no evidence that M & M's conduct was so egregious as to justify duplicative citations for the single violative act cited. The Secretary was not substantially justified in pursuing this item, and an award of fees under the EAJA is warranted.

Amount of the Award. M & M admits in its petition that the work on this item was necessarily the same as that required to prepare to meet the allegations in item 2 (Respondent's reply, p. 3). Nonetheless, I find that M & M is entitled to an award of fees. In using duplicative citations to double the proposed penalty, the Secretary encouraged costly litigation which might otherwise not have been necessary. Because the EAJA was enacted to enable small employers to contest just such unreasonable governmental action, it would be inequitable to disallow an otherwise meritorious petition merely because

the prevailing party is unable to allocate costs specifically related to a vacated item. Prior Commission cases in which fees have been inadequately documented charge the hearing judge with determining a reasonable fee, based on his own knowledge and experience of the issues, after taking into account the level of the applicant's overall success in the litigation. *Central Brass Manufacturing Co.,* 14 BNA OSHC 1904, 1987-90 CCH OSHD ¶29,144 (No. 86-0978, 1990). Based on the relevant factors, I find that an award of $5,000.00 is reasonable in this case, and will be awarded.

Willful citation 1, item 2(a)/Alleged violation of §1926.601(b)(1).

Substantial Justification. Citation 1, item 2(a) was affirmed as a serious violation of the Act, in that the service brakes on the cited vehicle were not maintained in operable condition. M & M succeeded in challenging both the proposed "willful" classification and penalty, and so qualifies as the prevailing party, for EAJA purposes, on those discrete portions of the citation. *Pentecost Contracting Corp.,* 17 BNA OSHC 2135 (No. 92-3789 and 92-3790, 1997). The Secretary, however, maintains that she was substantially justified in classifying the cited violation as "willful" and in proposing a commensurate penalty. This judge agrees.

No presumption that the Secretary's case was not substantially justified is raised by the mere fact that she failed to prevail on an issue. The test of whether government action is substantially justified is essentially one of reasonableness in law and fact. *Hocking Valley Steel Erectors, Inc.*, 11 BNA OSHC 1492, 1983 CCH OSHD ¶26,549 (80-1463, 1983). That is, there must be in the record some basis of fact from which a violation can be reasonably inferred. The evidence, however, need not be uncontradicted. If reasonable people may fairly differ as to whether certain evidence establishes a fact in issue, it must be deemed substantial. "Substantial justification" is more than a scintilla, but less than a preponderance. *John W. McGrath Corp. v. Hughes*, 264 F.2d 314 (2d Cir. 1959).

In her case the Secretary introduced ample evidence establishing that M & M was made aware of problems with the service brakes on the cited vehicle. Repeated incidents of brake failure over a period of two days were inadequately addressed by M & M; the brake problems were never identified or corrected. The parties introduced contradictory expert testimony which failed to definitively establish either the cause or the foreseeability of the final brake failure. The violation was reclassified as "serious" based solely on the unresolved and conflicting expert testimony.

Despite her failure to prove, by a preponderance of the evidence, that M & M's failure to remove the cited vehicle from service was "willful" in nature, the Secretary produced more than a scintilla of evidence in support of her position. No award of fees associated with this item, therefore, is appropriate.

Willful citation 1, item 2(b)/Alleged violation of 1926.601(b)(1).

Substantial Justification. Item 2(b) alleged that M & M failed to maintain an operable emergency brake on the cited vehicle. Both M & M's expert and the expert testifying for the Secretary agreed that the vehicle was equipped with an electronic micro-lock system which served as an effective secondary parking brake, and that said micro-lock system was fully functional when they examined the vehicle after the accident. The Secretary maintains, however, that the citation was justified because the micro-lock operates by locking in the hydraulic pressure from the service brakes. If the service brakes do not produce any hydraulic pressure, the micro-lock is useless.

This judge agrees that the Secretary's position was substantially justified. Item 2(b) was combined with item 2(a), alleging failure of the service brake, and a single penalty was proposed. The Secretary established that the service brakes on the cited vehicle failed, and that M & M should have anticipated the failure, based on past problems with the brake system.

The citation for violation of §1926.601(b)(1) was vacated based on the expert testimony stating that the micro-lock system was operational. None of the prior instances of brake failure were associated with the parking brake system, and this judge declined to draw the inference suggested by the Secretary, *i.e.*, that M & M was, or should have been aware of the interrelationship between the two systems, and the consequences thereof.

Nonetheless, the Secretary's inference is a reasonable one, and the Secretary was justified in pursuing this portion of the cited item. Because a violation could reasonably have been inferred based on the Secretary's theory, no award of fees is appropriate for this item.

ORDER

M & M's motion is GRANTED in part, and $5,000.00 in attorney fees is awarded.

Stanley M. Schwartz
Judge, OSHRC

Dated: