UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR, Complainant, v. MAUTZ & OREN, INC., Respondent.	OSHRC Docket No. 89-1366

DECISION

Before: FOULKE, Chairman; WISEMAN and MONTOYA, Commissioners.

BY THE COMMISSION:

Mautz & Oren, Inc. ("Mautz") seeks attorneys' fees and other expenses under the Equal Access to Justice Act ("EAJA"), 5 U.S.C. § 504,[1] for the costs incurred in defending against a citation issued by the Secretary of Labor. For the reasons set forth below, we affirm Administrative Law Judge James D. Burroughs' decision and deny Mautz' application for an award under the EAJA.

I. Background

Mautz was the general contractor on a project located in Salem, Illinois, where it was engaged in the restoration and expansion of a sewer treatment plant for the city. This work was performed under a federally funded grant administered by the Environmental Protection Agency ("EPA"). The EPA utilized the Army Corps of Engineers ("Corps") to provide field surveillance and technical assistance in the construction phase of the operation. A project

[1] 5 U.S.C. § 504(a)(1) provides, in relevant part:

> An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust.

engineer employed by the Corps visited Mautz' worksite in March 1989 and observed that extension cords plugged into receptacles inside two buildings did not have ground fault circuit interrupters ("GFCI's"). He notified by letter the Occupational Safety and Health Administration ("OSHA") area office of possible safety violations. An OSHA compliance officer conducted a referral inspection[2] of the worksite on March 15, 1989 and determined that Mautz used neither GFCI's nor an assured equipment grounding conductor ("AEGC") program at the site. Mautz' employees had used power tools connected to an extension cord on the day prior to the compliance officer's inspection.

As a result of the inspection, Mautz was issued a citation alleging a repeat violation of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"). The only citation item, Repeat Citation No. 1, Item 1, reads as follows:

> 29 C.F.R. § 1926.404(b)(1)(i): Employer did not use either ground-fault circuit interrupters as specified in paragraph (b)(1)(ii) of this section, or an assured equipment grounding conductor program as specified in paragraph (b)(1)(iii) of this section to protect employees on construction sites:
>
> In the filter building and behind the sludge pump room, the employer did not use either ground fault circuit interrupters or an assured equipment grounding conductor program on temporary wiring systems created by using extension cords on a fixed permanent wiring system exposing employees to the hazard of electric shock.

The Secretary issued the citation as a repeat violation because Mautz had been cited for a violation of the same standard in 1988. As Mautz did not contest the 1988 citation, it had become a final order of the Commission.

Section 1926.404(b) provides:

> **§ 1926.404 Wiring design and protection.**
>
> (b) *Branch circuits*--(1) *Ground-fault protection*--(i) *General.* The employer shall use either ground fault circuit interrupters as specified in paragraph (b)(1)(ii) of this section or an assured equipment grounding conductor program as specified in paragraph (b)(1)(iii) of this section to protect employees on construction sites. These requirements are in addition to any other requirements for equipment grounding conductors.

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[2] It is termed a "referral" and not a "complaint" because "complaints" are normally generated from employees or ex-employees from the private sector, while "referrals" are inter-agency complaints from within the government.

> (ii) *Ground-fault circuit interrupters.* All 120-volt, single-phase, 15- and 20-ampere receptacle outlets on construction sites, which are not a part of the permanent wiring of the building or structure and which are in use by employees, shall have approved ground-fault circuit interrupters for personnel protection. . . .
>
> (iii) *Assured equipment grounding conductor program.* The employer shall establish and implement an assured equipment grounding conductor program on construction sites covering all cord sets, receptacles which are not a part of the building or structure, and equipment connected by cord and plug which are available for use or used by employees.

Mautz contested the citation. A hearing was held before Administrative Law Judge Edwin G. Salyers on October 5, 1989. In his decision, the judge found that Mautz did not follow the provisions of both 29 C.F.R. § 1926.404(b)(1)(ii) requiring the use of GFCI's, and 29 C.F.R. § 1926.404(b)(1)(iii) requiring the establishment and implementation of an AEGC program. The judge also found that the violation was repeated. He affirmed the citation and assessed the proposed penalty of $980. However, the judge did not address Mautz' argument that the Secretary failed to prove a violation of section 1926.404(b)(1)(ii) because there was no evidence in the record regarding the voltage and amperage of the receptacles at issue. Section 1926.404(b)(1)(ii) applies to 120-volt electrical systems with 15- and 20-ampere receptacle outlets.

Mautz petitioned the Commission for discretionary review of Judge Salyer's decision. It was granted on June 5, 1990. Mautz filed a brief in support of its position on February 5, 1991. The Secretary then asked for two extensions of time in which to file his brief. The Commission granted the first extension, but denied the second. On April 2, 1991, the Secretary filed a notice of withdrawal of the citation, citing "prosecutorial discretion."[3] By order dated April 18, 1991, the Commission acknowledged receipt of the Secretary's notice of withdrawal and set aside Judge Salyers' decision and order affirming the citation.

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[3] In his brief before the Commission regarding the EAJA issue, the Secretary notes that he exercised his prosecutorial discretion to withdraw the citation "based on an interpretation of the cited regulations as addressing only 120-volt electrical systems." The Secretary argued that he was substantially justified in proceeding on the merits of his citation, as section 1926.404(b)(1)(iii) "on its face may reasonably be read to apply to all electrical systems regardless of voltage." The Secretary argued that the fact he "subsequently elected to dispose of the case based on a different interpretation does not render unreasonable [his] earlier interpretation, which had been formulated at the field level in the absence of a definitive national office interpretation."

On May 17, 1991, Mautz filed an application for award of attorneys fees and expenses under the EAJA. Judge Salyers granted Mautz' motion for change of judge, and the application was reassigned to Administrative Law Judge James D. Burroughs.

On December 11, 1991, Judge Burroughs issued his decision. The judge noted that the Secretary did not contest Mautz' eligibility and found that Mautz was an eligible applicant under the EAJA. However, the judge found that the Secretary's position was "substantially justified" and denied Mautz' application for an award. Pursuant to 29 U.S.C. § 661(j) and 29 C.F.R. § 2204.309, Mautz petitioned the Commission for review of Judge Burroughs' decision. Mautz now requests a total award of $14,195.10 ($10,543.50 for its work on the merits, $1,755.00 for its EAJA petition, and $1,896.60 for its appeal of the judge's EAJA decision).

II. Standard of Review and Burden of Proof

A judge's decision regarding an application for an award under the EAJA is reviewed by the Commission *de novo*. *Central Brass Mfg. Co.*, 14 BNA OSHC 1904, 1905, 1987-90 CCH OSHD ¶ 29,144, p. 38,955 (No. 86-978, 1990) (consolidated cases). To determine *de novo* whether the Secretary proved by a preponderance of the evidence that his position was substantially justified, the Commission must reexamine the underlying merits of the case. Although the outcome of the case on the merits may be some evidence of whether the Government's position was substantially justified, it is not dispositive of the issue. *Hadden v. Bowen*, 851 F.2d 1266, 1267 (10th Cir. 1988). "Conceivably, the Government could take a position that is not substantially justified, yet win; even more likely, it could take a position that is substantially justified, yet lose." *Pierce v. Underwood*, 487 U.S. 552, 569 (1988). Therefore, the fact that Judge Salyers found in favor of the Secretary on the merits does not automatically determine that his position was substantially justified within the meaning of the EAJA.

The test of whether the Secretary's action is substantially justified is essentially one of reasonableness in law and fact. *Hocking Valley Steel Erectors, Inc.*, 11 BNA OSHC 1492, 1983-84 CCH OSHD ¶ 26,549 (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) (citation omitted):

> [T]he reasonableness test breaks down into three parts: the government must show "that there is a reasonable basis . . . for the facts alleged . . . that there exists a reasonable basis in law for the theory it propounds; and that the facts alleged will reasonably support the legal theory advanced."

Id. (citation omitted).

In his decision on the EAJA application, Judge Burroughs determined that, despite the affirmance of the citation by Judge Salyers, Mautz was the prevailing party for purposes of the EAJA proceeding[4] and that Mautz was an eligible applicant under the EAJA.[5] The Secretary does not dispute that Mautz was the prevailing party or that it is an eligible applicant. The remaining issue is whether the Secretary demonstrated that his position was substantially justified.

Mautz argues that the Secretary was not justified in either issuing the citation or enforcing it through litigation. Under Commission Rule 2204.106(a), the position of the Secretary includes his litigation position as well as his action prior to the litigation. We therefore review whether the Secretary was substantially justified in inspecting and citing Mautz, as well as in pursuing the citation.

III. Did the Judge err in denying Mautz' application for an award under the EAJA?

A. Validity of the OSHA inspection.

i.

Mautz argued before Judge Burroughs that the Secretary failed to follow the proper procedure after receiving the letter from the Corps' project engineer. It argued that the letter was a nonformal complaint, and that the Field Operations Manual ("FOM") provides that in responding to nonformal complaints, the Area Director shall notify the employer by letter of the complaint against it and allow the employer to respond. Mautz relies on OSHA

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[4] The judge noted that the Secretary's withdrawal of the citation caused Judge Salyers' decision and order to be set aside, which resulted in Mautz' status as a prevailing party.

[5] Under Commission Rule 2204.105(b)(4), an eligible corporate employer is "[a]ny . . . corporation . . . that has a net worth of not more than $7 million and employees not more than 500." Mautz submitted an independent auditor's report as part of its petition for attorneys fees that establishes its net worth to be less than $7 million. The petition before the judge also shows that Mautz employed 29 employees at the time the citation was issued.

Instruction CPL 2.45A CH-11, *Field Operations Manual*, Chapter IX, section A.8.a (Oct. 1, 1986). Mautz contended that this procedure was not followed in the present case, because after receiving the project engineer's letter, the Area Director scheduled an inspection.

Judge Burroughs found that the FOM grants the Area Director the discretion on how to proceed when the referral identifies a hazard of a potentially serious nature, and that he can schedule an inspection if necessary. The judge relied on OSHA Instruction CPL 2.45A CH-12, *Field Operations Manual*, Chapter IX, section B.3.e (Sept. 21, 1987). The judge noted that "[i]n any event, the fact that he conducted an inspection rather than notify the employer by letter is no basis for a dismissal of the citation" because the FOM guidelines "do not have the force and effect of law nor do they accord important procedural or substantive rights to individuals." *FMC Corp.*, 5 BNA OSHC 1707, 1710, 1977-78 CCH OSHD ¶ 22,060, p. 26,573 (No. 13155, 1977).

On review, in addition to renewing its arguments made before Judge Burroughs, Mautz also argues that under *Morton v. Ruiz*, 415 U.S. 199 (1974) and *NLRB v. Unifemme*, 570 F.2d 230 (8th Cir. 1978), the Secretary's failure to follow the procedures set forth in the FOM warranted vacating the citation. Mautz attempts to contrast *FMC Corp.* with the present case by arguing that *FMC Corp.* did not involve the procedural rights of the respondent, but rather was concerned with whether a violation was properly classified as willful or repeated.

ii.

Mautz' reliance on the FOM is misplaced. The FOM's primary purpose is not to give employers particular rights or defenses in adjudicatory proceedings. *See Del Monte Corp.*, 9 BNA OSHC 2136, 2140, 1981 CCH OSHD ¶ 25,586, p. 31,914 (No. 11865, 1981)(a citation should not be dismissed due to the Secretary's failure to follow the FOM's procedures because the purpose of the manual's guidelines is to promote agency efficiency, not to accord important procedural or substantive rights to individuals). More specifically, we have held that the Secretary has the statutory authority under section 8(a) of the Act to conduct inspections in response to non-formal complaints and can inspect without regard to the formality requirements of section 8(f) of the Act. *Adams Steel Erection, Inc.*, 13 BNA OSHC 1073, 1079, 1986-87 CCH OSHD ¶ 27,815, p. 36,404 (No. 77-3804, 1987). Therefore, we

find that the Secretary was within his rights in scheduling an inspection after receipt of the project engineer's letter, despite it being a non-formal complaint.

The cases relied on by Mautz are inapposite. In *Morton*, the Supreme Court found that the Bureau of Indian Affairs (BIA) must follow its own substantive procedures in deciding whether an applicant should receive general public assistance, and that "[b]efore the BIA may extinguish the entitlement of these otherwise eligible beneficiaries, it must comply, at a minimum, with its own internal procedures." *Morton*, 415 U.S. at 235. As Judge Burroughs noted, the procedures outlined in the FOM do not accord important substantive rights to individuals. In *Unifemme*, the court did not hold that the NLRB "should have followed the procedures established in its Field Operations Manual," as Mautz claims in its brief. In fact, the court noted that "[t]he NLRB Field Manual does not contain binding procedural rules. It is intended to provide procedural and operational guidance to the NLRB staff." *Unifemme*, 570 F.2d at 233 n.2. *FMC Corp.* may have only involved the characterization of a violation, but that does not dilute the effect of the rule on Mautz' claim.

B. 29 C.F.R. § 1926.404(b)(1)(ii) and GFCI's

i.

Judge Burroughs found that section 1926.404(b)(1)(i) gives the employer a choice of complying with subsequent paragraph (b)(1)(ii) by using GFCI's, or with subsequent paragraph (b)(1)(iii) by having an AEGC program. The judge noted that paragraph (b)(1)(ii) applies to 120-volt single-phase, 15- and 20-ampere receptacle outlets. The judge agreed with Mautz that the "Secretary failed to adduce a single iota of evidence regarding the voltage and amperage of the receptacle outlets at issue." He found that the Secretary failed to meet his burden of proving a violation of paragraph (b)(1)(ii), while noting the Secretary's contention that he "was never concerned with proving that the voltage was 120 volts as required by the first part of the cited [standard] because [he] was proceeding under the second part of the standard which on its face is applicable to all cord sets and receptacles regardless of their voltage." In reaching this decision, the judge determined that "[a]n objective reading of the transcript makes clear that the primary theory of the Secretary's case was that Mautz violated paragraph (b)(1)(ii) and that the theory of an

alleged violation of paragraph (b)(1)(iii) was a fall-back position." On review, Mautz argues that the judge did not address its argument that the Secretary was not substantially justified in refusing to withdraw all or part of the citation after failing to meet his burden of proof at the hearing.

ii.

The Secretary acknowledges his failure to introduce into the record evidence that 120-volt, single-phase, 15- and 20-ampere receptacle outlets were involved. However, the Secretary's citation was for a violation of (b)(1)(i), *not* for a violation of (b)(1)(ii), as Mautz appears to argue. We agree with the judge that the theory of an alleged violation of paragraph (b)(1)(iii) was not the main theory advanced at the hearing. However, we find that the Secretary was substantially justified in pursuing a violation of (i) as long as there was evidence that Mautz did not meet the requirements of (iii), which requires an AEGC program but makes no reference to voltage.

C. 29 C.F.R. § 1926.404(b)(1)(iii) and the AEGC program

i.

Judge Burroughs noted that this standard applies to "all cord sets" and to "equipment connected by cord and plug." The judge found that "because it is undisputed that Mautz was not using GFCI's, Mautz was required to have an assured equipment grounding conductor program." However, the citation and complaint both allege that Mautz failed to have a grounding program "on temporary wiring systems erected by using extension cords on a fixed permanent wiring system." There is no dispute that the receptacle outlets into which the extension cords were plugged were part of the permanent wiring of the building. The Secretary contends that where tools are powered by means of "extension cords," the receptacles at the end of the cords are receptacles which are not part of the permanent wiring of the building or structure, and that they therefore become a substitute for the fixed wiring. Mautz contends that using an extension cord to connect a power tool to a receptacle outlet which is part of the permanent wiring system does not constitute temporary wiring.

Judge Burroughs found that the question of whether the use of extension cords in these circumstances creates a temporary wiring system involved a legal interpretation. He noted two Commission judges' decisions, both involving section 1926.404(b)(1)(i), that

reached different conclusions on the issue of whether an extension cord is temporary wiring[6] and found that, since the law on the question was in its formative stages, the Secretary was substantially justified in proceeding on the theory that Mautz was in violation of paragraph (b)(1)(iii) for failing to have an AEGC program.

On review, Mautz argues that it "complied with the substantive requirements of the AEGC standard" because its job superintendent visually inspected the extension cords on a regular basis, tested them with a continuity checker and removed defective and suspect cords from service. Mautz stated in its brief that its "failure to keep written records of its cord testing was at most a *de minimis* violation of Section 1926.404(b)(1)(iii)." Mautz further argues that the Secretary's position that the precautions it took did not meet the AEGC program requirements in 29 C.F.R. § 1926.404(b)(1)(iii) was not substantially justified.

ii.

As Judge Burroughs correctly noted, the Commission has not yet decided whether the use of extension cords in these circumstances creates a temporary wiring system. As a result, there is no basis for finding that the Secretary was in error when he contended that conductors at Mautz' workplace required compliance with section 1926.404(b)(1)(iii). We therefore find that he was substantially justified in pursuing the citation. The fact that Mautz admits noncompliance with the standard in its brief further supports our finding that the Secretary was substantially justified in pursuing his complaint.

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[6] In *Levi Case Co.*, 14 BNA OSHC 2047 (No. 89-584, 1991), the judge found that an extension cord was considered temporary wiring even though the receptacle it was plugged into was part of the permanent wiring of the structure. In *DKS Constr., Inc.*, 14 BNA OSHC 1855, 1987-90 CCH OSHD ¶ 29,095 (No. 90-91, 1990), the judge found that an extension cord was considered part of the permanent wiring of the building because it was plugged into a receptacle which was part of the permanent wiring of the structure.

D. The "Repeat" designation of the violation

i.

As noted above, in 1988 Mautz was issued an other-than-serious citation for a violation of 29 C.F.R. § 1926.404(b)(1)(i).[7] The citation became a final order of the Review Commission because it was not contested by Mautz. Judge Burroughs found that the Secretary established a prima facie repeat violation under *Potlatch Corp.*, 7 BNA OSHC 1061, 1979 CCH OSHD ¶ 23,294 (No. 16183, 1979), by showing that, at the time of the alleged repeat violation, there was a Commission final order against the same employer for a failure to comply with the same standard. Judge Burroughs found that Mautz had not presented sufficient evidence to refute the prima facie case established by the Secretary, and that the determination of a repeat violation was correct under Commission precedent.

On review, Mautz argues that the citation at issue involved an extension cord, while the prior citation did not involve an extension cord. Mautz cites the testimony of its president at the hearing. However, there is no evidence in the record that the prior violation did not involve an extension cord. The president only admitted that the prior violation involved temporary wiring that did not have circuit interrupters.

ii.

Recently, the Commission reaffirmed the holding in *Potlatch* that the Secretary establishes a prima facie case of similarity by showing that both violations are of the same standard, as long as the standard at issue is not a general standard. *Edward Joy Co.*,

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[7] The citation issued in 1988 was as follows:

> 29 C.F.R. § 1926.404(b)(1)(i): Employer did not use either ground-fault circuit interrupters as specified in paragraph (b)(1)(ii) of this section, or an assured equipment grounding conductor program as specified in paragraph (b)(1)(iii) of this section to protect employees on construction sites:
>
> In the new garage area, there [were] no ground fault circuit interrupters on the temporary wiring system, nor was an assured equipment grounding conductor program in use, exposing employees to an electric shock hazard.

15 BNA OSHC 2091, 1993 CCH OSHD ¶ 29,938 (No. 91-1710, 1993).[8] Here, Mautz did not dispute that it had previously been cited for violating the same standard and that the prior citation had become a final order.

We do not need to determine whether the alleged violation is properly classified as repeated. Instead, the issue is whether the Secretary was substantially justified in classifying the alleged violation as repeated. Since Mautz did not rebut the Secretary's showing of similarity, we find that the Secretary was substantially justified in classifying the alleged violation as repeated.

IV. Order

Accordingly, we find that Judge Burroughs did not err in denying Mautz' application for an award of fees and expenses under the Equal Access to Justice Act.

Edwin G. Foulke, Jr.
Chairman

Donald G. Wiseman
Commissioner

Velma Montoya
Commissioner

Dated: March 8, 1993

[8] In the absence of evidence that both violations are of the same standard, the Secretary must present other evidence that the violations are substantially similar. Evidence that the violations involve similar hazards would be relevant. *Potlatch Corp.*, 7 BNA OSHC at 1263, 1979 CCH OSHD at p. 28,172.

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SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	Docket No. 89-1366
MAUTZ & OREN, INC.,	:	
Respondent.	:	

NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on March 8, 1993. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

Ray H. Darling, Jr.

March 8, 1993
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 89-1366

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR
Complainant,
v.
MAUTZ & OREN, INC.
Respondent.

OSHRC DOCKET
NO. 89-1366

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on December 19, 1991. The decision of the Judge will become a final order of the Commission on January 21, 1992 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before January 8, 1992 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
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Petitioning parties shall also mail a copy to:

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If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: December 19, 1991

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 89-1366

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR, Complainant, v. MAUTZ & OREN, INC., Respondent.	OSHRC Docket No. 89-1366

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For Complainant

Michael J. Bobroff, Esquire
Husch, Eppenberger, Donohoe,
Cornfeld & Jenkins
St. Louis, Missouri
For Respondent

Before: Administrative Law Judge James D. Burroughs

DECISION AND ORDER

Mautz & Oren, Inc. ("Mautz") seeks attorneys' fees and other expenses, pursuant to the Equal Access to Justice Act ("EAJA"), 5 U.S.C. § 504, 29 C.F.R. § 2204.101, *et*

seq.,[1] incurred as a result of its defense against a citation issued by the Secretary on February 22, 1989. The EAJA applies to adversary adjudications before the Commission under § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651, *et seq.*, ("Act").

Procedural History

Mautz was the general contractor on a project located in Salem, Illinois, where it was engaged in the restoration and expansion of a sewer treatment plant for the city. On March 7, 1989, a project engineer employed by the U. S. Army Corps of Engineers, Elvin Pauls, made a referral to the Occupational Safety and Health Administration ("OSHA"), notifying that agency of possible safety violations that he had observed on the sewer project. On March 1 and March 3, 1988, Pauls observed an extension cord at the rear of the sludge pump building that was connected to the electric power and was available for use. Although there were damp conditions in the area, Mautz was not using ground fault circuit interrupters ("GFCIs") at the site (Tr. 25). In response to Pauls' letter, OSHA Compliance Officer John Giefer conducted an inspection on March 15, 1989[2]. As a result of the inspection, Mautz was issued a citation alleging a repeat violation of 29 C.F.R. § 1926.404(b)(1)(i) for failing to use either GFCIs or an assured equipment grounding conductor program ("AEGC program") to protect its employees on the sewer project.

Mautz contested the citation. A hearing was held in the matter on October 5, 1989, presided over by Judge Edwin G. Salyers. In a decision issued on April 25, 1990, Judge Salyers affirmed the citation and assessed a penalty of $980.00. Mautz petitioned the Commission for discretionary review, which was granted on June 5, 1990. Mautz filed a brief

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[1] The EAJA took effect on October 1, 1981. It was enacted as a three-year experiment in the allocation of the costs of litigation involving the government. The Act contained a "sunshine provision" that repealed it on October 1, 1984, except that the Act continued to apply through final disposition of any adversary adjudication initiated before the date of repeal. The Act was allowed to expire pursuant to the "sunshine provision" but was amended and re-enacted into law on August 5, 1985. Public Law 99-80, 99 Stat. 183 (1985). The re-enacted EAJA makes clarifying technical and substantive amendments to the original EAJA.

[2] Compliance Officer Giefer had previously conducted an inspection of the project on May 18, 1988, which resulted in the issuance of a serious citation and "other" citation to Mautz on May 24, 1988.

in support of its position on February 5, 1991. The Secretary did not file a brief in support of her position, but on April 2, 1991, filed a notice of withdrawal of the citation citing "prosecutional discretion." By order dated April 18, 1991, the full Commission acknowledged receipt of the Secretary's notice of withdrawal and set aside Judge Salyers' decision and order affirming the citation.

On May 17, 1991, Mautz filed an application for award of attorneys' fees and expenses under the EAJA[3]. On June 27, 1991, Judge Salyers granted Mautz's motion for change of judge, and the application was reassigned to this Judge. The Secretary filed an answer to Mautz's application and Mautz filed a reply to the answer. United Technologies Corporation filed an amicus curiae brief concerning the Secretary's answer to Mautz's application.

The Equal Access to Justice Act

One of the primary goals of the EAJA is to encourage parties to contest unreasonable Government action; reimbursement, however, is not to be routinely awarded to a prevailing party. An award is to be made to an eligible prevailing party only if the agency is found to have acted without substantial justification and there are no special circumstances which make the award unjust.[4] While an applicant has the burden of proving eligibility, the agency has the burden of demonstrating that fees should not be awarded in a given case. *Dole v. Phoenix Roofing, Inc.*, 922 F.2d 1202, 1209 (5th Cir. 1991). "The standard . . . should not be read to raise a presumption that the Government position was

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[3] The fees and expenses are sufficiently itemized to comply with the requirements of § 2204.203 of the Commission's rules pertaining to the EAJA.

[4] Section 504(a)(1) of the Act, 5 U.S.C. § 504(a)(1) provides:

> An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the proceeding finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

not substantially justified, simply because it lost the case." H. R. Rep. No. 1418, 96th Cong., 2d Sess. at 10, 18, 1980 U. S. Code Cong. & Admin. News at 4989, 4997.

Mautz Was the Prevailing Party

Despite the affirmation of the citation in Judge Salyers' decision and order, Mautz was the prevailing party for the purposes of this proceeding because the Secretary withdrew the citation while the matter was on review by the Commission.

> Although the term is not defined in the EAJA, an applicant is considered to be the "prevailing party" for the purpose of attorneys' fees statutes 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 Forgery, Inc., 12 BNA OSHC 1856, 1857, 1986 CCH OSHD ¶ 27,612 (No. 81-1932, 1986).

In *K.D.K.*, the Commission found that the employer was the prevailing party when the Secretary withdrew her citation prior to the scheduled hearing. "First, K.D.K.'s primary purpose in filing its notice of contest was to have the citation vacated. That purpose has been achieved. Second, tangible benefits have accrued to K.D.K. as a result of the withdrawal." *Id.*, 12 BNA at 1858. The Commission goes on to list the benefits accrued by K.D.K., which include the avoidance of compliance with an abatement order and avoidance of paying a penalty.

The Secretary's withdrawal of the citation caused Judge Salyers' decision and order to be set aside, which is a success for Mautz. It is a prevailing party. The Secretary does not dispute this determination.

Criteria for Eligibility

The prevailing party in an EAJA case must meet the established eligibility requirements before it can be awarded attorneys' fees and expenses. Commission Rule 2204.105(b)(4) requires that an eligible corporate employer be "[a]ny . . . corporation

. . . that has a net worth of not more than $7 million and employees not more than 500 employees . . ."

Mautz submitted an independent auditor's report as part of its petition for attorneys fees that establishes its net worth to be less than $7 million. The petition states that at the time the citation in this case was issued, Mautz employed 29 employees. The Secretary does not dispute either of these factual representations. Mautz is an eligible applicant under the EAJA.

Substantial Justification

Where, as here, the non-governmental party has clearly "prevailed," the burden is on the Government to demonstrate that its position was "substantially justified." Commission Rule § 2204.106. Whether an agency's position is substantially justified will, of course, depend upon the circumstances of the particular case. The Secretary points to the decision of Judge Salyers as proof that her position was substantially justified. Judge Salyers heard all the evidence, considered all arguments raised by Mautz, and concluded that there was a violation of 29 C.F.R. § 1926.404(b)(1)(i). In reaching his decision, Judge Salyers determined the facts and concluded that there was relevant and credible evidence of a quality and quantity that justified his determination.

While the EAJA uses the words "substantially justified," it nowhere defines what was intended by their use. The phrase "substantially justified" has a recognized meaning in law, albeit sometimes nebulously defined. Generally speaking, the phrase refers to a conclusion arrived at by a process of reasoning which is a rational and logical deduction from facts admitted and established by the evidence of record. Evidence must be of ponderable legal significance, reasonable in nature, credible and rationally related to the facts essential to resolving the issues in dispute. The evidence 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. "Substantially justified" means that the supporting evidence was more than a scintilla but less than a preponderance. The evidence must create more than a mere suspicion of the existence of facts sought to be established; it must establish a substantial

basis of fact from which the issue can be reasonably inferred. A legal position is not substantially justified when it is based on supposition or conjecture. Evidence is substantial if it is the kind of evidence a reasonable mind might accept as adequate to support a conclusion. *John W. McGrath Corp. v. Hughes*, 264 F.2d 314 (2d Cir. 1959).

Whether the Secretary was "substantially justified" in this matter must be based on the same evidence considered by Judge Salyers in reaching his decision.[5] This raises the question of what weight must be accorded his decision. The nature and extent of any review of his decision must be limited in scope. In determining the merits of the EAJA application, his decision is not in issue. The decision on the application must be based on the facts of record, and those facts must reflect that the Secretary was substantially justified in proceeding with the matter in order to deny payment of fees and expenses. It is immaterial as to how Judge Salyers decided the case; facts considered by him and arguments advocated by him, however, need not be routinely rejected since he had the only opportunity to observe the demeanor of the witnesses and was in the best position to weigh their credibility. In addition, it is unnecessary to make a determination of the appropriate interpretation of the standard in considering the merits of the application. Quite obviously, the parties disagree on what the standard requires. The question for determination involves whether the Secretary was substantially justified in proceeding with her position.

Mautz contends that the Secretary was not substantially justified in bringing her complaint against the company. Mautz advocates four reasons why it believes the Secretary was not justified:

> (1) OSHA's failure to follow the procedure set out in its Field Operation Manual ("FOM") in investigating Elvin Pauls' referral letter, was not substantially justified;
>
> (2) The Secretary was not substantially justified in alleging that Mautz violated 29 C.F.R. § 1926.404(b)(1)(ii);

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[5] The Commission rules specify that an award shall be made on the basis of the written record except that on request of the applicant or the Secretary, or the Judge's own initiative, the Judge may order further proceedings as necessary. 29 C.F.R. § 2204.307. Neither party requested further proceedings.

(3) The Secretary was not substantially justified in alleging that Mautz violated 29 C.F.R. § 1926.404(b)(1)(iii); and

(4) The Secretary's classification of the alleged violation as a repeat violation was not substantially justified.

Validity of OSHA Inspection

Mautz has argued strenuously throughout this litigation that the Secretary improperly handled the follow-up procedure after receiving Pauls' letter. This argument is based on its classifying the referral as a nonformal complaint. The *Field Operations Manual* ("*FOM*") provides that the Area Director should notify the employer by letter of the complaint against it and allow the employer to respond where the referral involves a nonformal complaint. Paragraph A.8.a. of Chapter IX. If the employer responds that the appropriate corrective action has been taken, the case file is to be closed. This procedure was not followed in the present case. After receiving Pauls' letter, the Area Director scheduled an inspection.

Referrals are handled in a manner similar to that of a complaint. Paragraph B.1. of Chapter IX of the *FOM*. The classification of the referral under the *FOM* is to be made by the Area Director and not by an employer. Paragraph A.4.a. of Chapter IX requires classification of a complaint as formal or nonformal. The *FOM* grants the Area Director the discretion as to how to proceed when the referral identifies a hazard of a potentially serious nature. It is clear that he can schedule an inspection in such circumstances if he deems it necessary. Paragraph B.3.e. of Chapter IX of *FOM*. In any event, the fact that he conducted an inspection rather than notify the employer by letter is no basis for a dismissal of the citation. If the Area Director was in error in proceeding with an inspection, his failure to adhere strictly to the guidelines of the *FOM* was a procedural error and is not grounds for vacating the citation. The *FOM* guidelines "do not have the force and effect of law nor do they accord important procedural or substantive rights to individuals." *FMC Corp.*, 5 BNA OSHC 1707, 1710, 1977-78 CCH OSHD ¶ 22,060 (No. 13155, 1977).

Alleged Violation of 29 C.F.R. § 1926.404(b)(1)(ii)

The wording of the cited standard and the wording of the citation and complaint are of crucial importance to the determination of this case. Section 1926.404(b)(1)(i), the standard for which Mautz was cited, provides:

> (i) The employer shall use *either* ground fault circuit interrupters as specified in paragraph (b)(1)(ii) of this section *or* an assured equipment grounding conductor program as specified in paragraph (b)(1)(iii) of this section to protect employees on construction sites. These requirements are in addition to any other requirements for equipment grounding conductors. (*Emphasis added*)

Section 1926.404(b)(1)(i) gives the employer a choice: it can comply with paragraph (b)(1)(ii) by using GFCIs, or it can comply with paragraph (b)(1)(iii) by establishing and maintaining an assured equipment grounding program.

Section 1926.404(b)(1)(ii) provides in pertinent part:

> (ii) All 120-volt, single-phase, 15- and 20-ampere receptacle outlets on construction sites, *which are not a part of the permanent wiring of the building* or structure and which are in use by employees, shall have approved ground-fault circuit interrupters for personal protection. (*Emphasis added*)

The citation charged the following:

> In the filter building and behind the sludge pump room, the employer did not use either ground fault circuit interrupters or an assured equipment grounding conductor program *on temporary wiring systems created by using extension cords on a fixed permanent wiring system*, exposing employees to the hazard of electric shock. (*Emphasis added)*

Paragraph V(b) of the Secretary's complaint alleged that Mautz violated § 1926.404(b)(1)(i) because it "did not use either ground fault circuit interrupters or an assured equipment grounding conductor program *on temporary wiring systems created by using extension cords on a fixed permanent wiring system*, exposing employees to the hazard of electric shock." (*Emphasis added*) Paragraph (b)(1)(ii) applies to 120-volt single-phase, 15- and 20-ampere receptacle outlets. As Mautz points out, the Secretary failed to adduce a single iota of evidence regarding the voltage and amperage of the receptacle outlets at issue.

No mention of this crucial element of the standard appears anywhere in the record. Thus, the Secretary has failed to meet her burden of proving a violation of paragraph (b)(1)(ii).

Apparently realizing that she failed to carry her burden of proof as to the use of the GFCIs, the Secretary states in her answer to Mautz's petition for an award of attorneys' fees that she "was never concerned with proving that the voltage was 120 volts as required by the first part of the cited standards because she was proceeding under the second part of the standard which on its face is applicable to all cord sets and receptacles regardless of their voltage" (Secretary's Answer, pg. 17). A review of the record in this case refutes the Secretary's argument that she was proceeding solely under the provision relating to the assured equipment ground conductor program and not the provision relating to GFCIs.

Elvin Pauls' letter to OSHA specifically mentions the "need for ground fault circuit interrupters" (Exh. C-1). An assured equipment grounding conductor program is not mentioned. In his testimony, Pauls never mentions Mautz's lack of a grounding program but testifies at length concerning Mautz's lack of GFCIs (Tr. 7-63). John Giefer's testimony is initially and primarily directed to the GFCI provision and Mautz's noncompliance with it. Giefer was questioned directly about this by Judge Salyers (Tr. 80):

> Q. You are saying once you obtained admissian [*sic*] from the respondent that they were not using those circuit interrupters, that was sufficient for you to base the citation as you did in this case?
>
> A. That's correct.

Giefer's testimony goes on for approximately thirty pages regarding his investigation of Mautz's lack of GFCIs (Tr. 63-91). Giefer does mention that he inquired about Mautz's assured equipment grounding program and was told that it did not have one (Tr. 91-93). An objective reading of the transcript makes clear that the primary theory of the Secretary's case was that Mautz violated paragraph (b)(1)(ii) and that the theory of an alleged violation of paragraph (b)(1)(iii) was a fall-back position.

Alleged Violation of 29 C.F.R. § 1926.404(b)(1)(iii)

Section 1926.404(b)(1)(iii) provides in pertinent part:

> (iii) The employer shall establish and implement an assured equipment grounding conductor program on construction sites covering all cord sets, receptacles which are not a part of the building or structure, and equipment connected by cord and plug which are available for use or used by employees.

This standard applies to "all cord sets" and to "equipment connected by cord and plug." Section 1926.404(b)(1)(i) provides that an employer must use either GFCIs *or* an assured equipment grounding conductor program. Because it is undisputed that Mautz was not using GFCIs, Mautz was required to have an assured equipment grounding conductor program. Mautz did not have such a program in place, so it would seem to follow that Mautz was in violation of § 1926.404(b)(1)(i). But reference to the citation and complaint reveal a wrinkle in the case. The citation and complaint both specifically charge that Mautz failed to have a grounding program "on *temporary wiring systems* erected by using extension cords on a fixed permanent wiring system." This is the specific offense with which Mautz was charged, and it is the only offense which Mautz must defend against. Therefore, if the use of extension cords does not create a temporary wiring system, as Mautz argues, no violation can be found.

There is no dispute that the receptacle outlets into which the extension cords were plugged were part of the permanent wiring of the building. The standard does not mention "temporary wiring"; that is the Secretary's phrase. The standard makes clear that receptacle outlets which are part of the permanent wiring of the building or structure are not required to be protected by GFCIs. Accordingly, if a power tool is plugged directly into the permanent receptacle outlet, no GFCI is required. Where tools are powered by means of "extension cords," the Secretary contends that the receptacles at the end of the cords are receptacle outlets which are not part of the permanent wiring of the building or structure. She submits that the extension cord becomes a substitute for the fixed wiring.

Mautz argues that using an extension cord to connect a power tool to a receptacle outlet which is part of the permanent wiring system does not constitute temporary wiring.

Judge Salyers found the Secretary's argument that extension cords create a temporary power source at the end of the extension cord to be reasonable. He gave several reasons to support his conclusion. It cannot be concluded from the limited evidence in the record that such a position is unreasonable. The standard itself is vague, and no definition is given for what constitutes "receptacle outlets . . . which are not a part of the permanent wiring." The only evidence Mautz adduced to support its contention that extension cords are not temporary wiring was the hearsay testimony of Mautz's job superintendent, Bud Tewell, recounting what Mautz's electrician, John Luthe, said at the closing conference (Tr. 158-159).

The crucial question involves a legal interpretation. The Commission has not ruled on the issue of whether the use of extension cords in these circumstances creates a temporary wiring system. Judges of the Commission have decided the issue both ways.[6] The law on the question is in the formative stages. The Secretary was substantially justified in proceeding on the theory that Mautz was in violation of § 1926.404(b)(1)(iii) for failing to have an assured equipment grounding program.

Repeat Classification

Mautz also contends that the Secretary's classification of the violation as repeat was not substantially justified. This argument is without merit. On May 24, 1988, Mautz was issued an "other" citation and Notification of Penalty. Item 3 of the citation alleged a violation of 29 C.F.R. § 1926.404(b)(1)(i). The citation became a final order of the Review Commission because it was not contested by Mautz (Exhs. C-4, C-5; Tr. 95-97, 110-114).

In *Potlatch Corporation*, 7 BNA OSHC 1061, 1979 CCH OSHD ¶ 23,294 (No. 16183, 1979), at 28,171, the Commission held that a violation is repeated under section 17(a) of the Act if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation. The Secretary may establish

[6] Compare *Levi Case Co.*, 14 BNA OSHC 2047, 1991 CCH OSHD ¶ ___ (No. 89-584, 1991), wherein an extension cord is considered temporary wiring even though the receptacle it was plugged into was part of the permanent wiring of the structure, with *DKS Construction, Inc.*, 14 BNA OSHC 1855, 1987-90 CCH OSHD ¶ 29,095 (No. 90-91, 1990), wherein an extension cord is considered part of the permanent wiring of the building.

a *prima facie* case of similarity by showing that the prior and present violations are for failure to comply with the same standard. Once a *prima facie* case is established, the burden shifts to the employer to show that the past and present violations are not substantially similar. Mautz has not presented sufficient evidence to refute the *prima facie* case established by the Secretary. The determination of a repeat violation was, under Commission precedent, correct.

Withdrawal of the Notice of Contest

The last issue needing some clarification is whether the Secretary was substantially justified in pursuing this litigation in light of her subsequent withdrawal of the citation. The Secretary submits that her decision to seek dismissal of the case in no way reflects upon the reasonableness of her position or the correctness of Judge Salyers' disposition of the case. A decision to seek withdrawal can be based on any of several factors. The motion of withdrawal filed in this case cited "prosecutional discretion." Mautz is a prevailing party solely because of the motion to withdraw filed by the Secretary.

Should the motion to withdraw filed by the Secretary be deemed an admission that her position was not substantially justified? This question must be answered in the negative. The determination of whether the Secretary's position was justified must be based on whether the facts, as developed in the record, support her position as being substantially justified. The awarding of fees and other expenses on the basis of the motion to withdraw would in essence be making a determination on conjecture and speculation and contrary to the general intent of the Act's use of the phrase "substantially justified." The Secretary does not concede that her position was not substantially justified by her agreeing to dismiss the matter, and there is no evidence to prove the contrary.

Even if it was concluded that the case should be decided for Mautz on the merits, this would not automatically result in approval of the application. The legislative history of the Act makes it clear that there was no intent to raise a presumption that the Government was

without substantial justification merely because the agency lost the case. The court in *Dole v. Phoenix Roofing, Inc.*, 922 F.2d 1202, 1209 (5th Cir. 1991), makes this clear by stating:

> The government's burden of showing substantial justification for a case is not, however, insurmountable. *Id.* "The standard . . . should not be read to raise a presumption that the Government position was not substantially justified, simply because it lost the case."

(*Citation omitted*)

A review of the facts of record establishes that the Secretary's position in issuing the citation and litigating the matter before Judge Salyers was substantially justified. The application for fees and expenses is denied.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is hereby

ORDERED: That Mautz's application for attorney's fees and expenses is denied.

James D. Burroughs

JAMES D. BURROUGHS
Judge

Date: December 11, 1991