OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, S.W.
Atlanta, Georgia 30303-3104

Secretary of Labor, Complainant v. Benton-Georgia, LLC, Respondent.	OSHRC Docket No. **15-1539** **(EAJA)**

Appearances:

Jennifer Booth Thomas, Esquire, U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee
For the Secretary

Andrew N. Gross, Esquire, HB Next, Lawrenceville, Georgia
For the Respondent

BEFORE: Administrative Law Judge Heather A. Joys

DECISION AND ORDER DENYING EAJA APPLICATION

Benton-Georgia, LLC, seeks an award of attorney fees and expenses in accordance with the Equal Access to Justice Act, 5 U.S.C. § 504 (EAJA), and the Commission's *Rules Implementing EAJA*, 29 C.F.R. §§ 2204.101-.311, for costs incurred in litigating a one-item Citation and Notification of Penalty the Secretary ultimately withdrew. Benton-Georgia contends it meets the eligibility requirements (regarding net worth and number of employees) and the legal requirements (establishing it is the prevailing party coupled with the Secretary's failure to establish he was substantially justified in issuing the Citation) set out by EAJA, and is entitled to recover an award for fees and expenses incurred litigating the Citation. The Secretary denies Benton-Georgia established it meets either EAJA's eligibility or legal requirements. For the reasons that follow, I agree with the Secretary Benton-Georgia failed to establish it was the

prevailing party in the underlying proceeding. Accordingly, I **DENY** Benton-Georgia's *Application*.

BACKGROUND

Benton-Georgia is an underground utility excavation contractor. On February 28, 2015, at approximately 12:30 a.m., a Benton-Georgia employee sustained serious injuries when he was struck by a vehicle on a public road in Mountain Brook, Alabama, as he applied asphalt to a roadway lane near a natural gas valve. Following OSHA's investigation of the incident, the Secretary issued a Citation and Notification of Penalty to Benton-Georgia on August 13, 2015, alleging a serious violation of 29 C.F.R. § 1926.200(g)(2) and proposing a penalty of $6,300.00. On September 11, 2015, Benton-Georgia filed a timely Notice of Contest. The Secretary filed a complaint on September 30, 2015, to which Benton-Georgia filed an answer on October 16, 2015. The parties engaged in discovery in accordance with Commission Rule 52, 29 C.F.R § 2200.52.

I set February 25, 2016, as the hearing date for this proceeding. On January 20, 2016, the Secretary notified Benton-Georgia he intended to withdraw the Citation. On January 26, 2016, counsel for the Secretary emailed Ruth Wynn, the Court's Lead Legal Assistant, and stated in pertinent part, "The Secretary has agreed to withdraw the citation at issue in the above-referenced case. The parties are unable to stipulate to the language in the settlement agreement. The Secretary believes the hearing should be cancelled." I subsequently conducted a conference call with counsel for both parties to clarify the status of the case. Based on representations of the counsel, I issued an order on February 3, 2016, cancelling the hearing. The parties did not agree to a settlement and I, therefore, never issued an order approving settlement.

The Secretary filed Complainant's Motion to Withdraw (*Motion*) the Citation at issue on February 3, 2016, asking the Court "for an Order appropriate for final disposition of the Citation and Notification of Penalty." (*Motion*, p. 2) As grounds for the withdrawal, the Secretary stated "the evidence now available does not appear to sustain the violation as alleged." (*Motion,* ¶ 2) Benton-Georgia did not file a response to the *Motion*. On February 29, 2016, I issued an order (*Order)* granting the Secretary's *Motion*, which states:

> Respondent, by letter dated September 11, 2015, contested a serious citation issued to it on [August 13, 2015].[1]
>
> On February 3, 2016, the Complainant's Motion to Withdraw was received which resolves the issue pending before the Commission. Respondent represents it has conformed with the applicable posting and service requirements as fixed by the rules of the Commission.[2]
>
> After due consideration, it is ORDERED:
>
> 1. The Complainant's Motion to Withdraw the Citation is hereby **GRANTED** and incorporated herein as part of this order; and
> 2. The Citation and the proposed penalty issued to Respondent on [August 13, 2015], are hereby vacated.

The Commission docketed the *Order* on March 10, 2016. It became a final order of the Commission on April 11, 2016.

On March 4, 2016, Benton-Georgia filed an Application of Benton-Georgia, LLC for an Award of Fees and Costs Pursuant to the Equal Access to Justice Act (*Application*).[3] Benton-

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[1] The *Order* as issued twice stated June 3, 2015, was the date OSHA issued the Citation to Benton-Georgia. This is a clerical error. There is no dispute OSHA issued the Citation that gave rise to this proceeding on August 13, 2015. I now amend the *Order* to cite the correct date.

[2] Commission Rule 102, 29 C.F.R. § 2200.102, requires a notice of withdrawal of a citation to be "served in accordance with §2200.7(c) upon all parties and authorized employee representatives that are eligible to elect, but have not elected, party status. It shall also be posted in the manner prescribed in §2200.7(g) for the benefit of any affected employees not represented by an authorized employee representative who are eligible to elect, but have not elected, party status. Proof of service shall accompany the notice of withdrawal." Commission Rule 7(g), 29 C.F.R. § 2200.7(g) requires the employer to post the notice of withdrawal. By order dated February 8, 2016, I directed Benton-Georgia to provide proof of posting; the company did so on February 24, 2016.

[3] In this Decision, I will quote from various decisions and opinions from various courts and agencies addressing EAJA. In researching this issue, I have found inconsistent references to the name of the award for which EAJA provides. A lengthy footnote (considerably abridged here) from the Court of Appeals for the Sixth Circuit elucidates the inconsistencies:

> As a threshold matter, we must decide a matter of style and usage. Should we refer to "attorney fees," "attorneys fees," "attorney's fees," or "attorneys' fees?" In federal statutes, rules and cases, we find these forms used interchangeably, nay, promiscuously. There is sometimes no consistency within even the same body of law. *Compare,* for example, Fed.R.Civ.Proc. 16(f) ("attorney's fees") *with* Fed.R.Civ.P. 54(d) ("attorneys' fees"). Statutes providing for the award of payments to lawyers are similarly divided. . . . We acknowledge that even some published opinions of this court have been marked by unexplained inconsistency. *See, e.g., Armistead v. Vernitron Corp.,* 944 F.2d 1287, 1301-02 (6th Cir.1991) ("attorneys fees" and "attorney's fees" in same paragraph.) . . . We find the following entry and discussion in Bryan A. Garner, A Dictionary of Modern Legal Usage 91 (2d ed. 1995):
>
> > **attorney's fees; attorneys' fees; attorney fees.** The first of these now appears to be prevalent. See Attorney's Fee Act, 42 U.S.C. § 1988. The plural possessive

Georgia seeks an award in the amount of $9,846.25.[4] Benton-Georgia attached several documents to its *Application,* including statements pursuant to 28 U.S.C. § 1746 from two of its management employees, financial information, and investigative reports of the vehicular accident that triggered OSHA's inspection. The Secretary filed his *Answer* to Benton-Georgia's *Application* on April 29, 2016. On that date, the Secretary also filed a Motion to Conduct Discovery *(Discovery Motion)* to allow the Secretary to explore whether Benton-Georgia meets the eligibility requirements of EAJA. Benton-Georgia filed a Memorandum of Law in Reply to the Secretary's Answer Opposing a Fee Award (*Reply*) on June 3, 2016.

RELEVANT COMMISSION RULES IMPLEMENTING EAJA

Commission Rule 101, 29 C.F.R § 2204.101, provides in pertinent part:

> The Equal Access to Justice Act, 5 U.S.C. 504, provides for an award of attorney or agent fees and other expenses to eligible individuals and entities who are parties to certain administrative proceedings (called "adversary adjudications) before the Occupational Safety and Health Review Commission. An eligible party may receive an award when it prevails over the Secretary of Labor, unless the Secretary's position in the proceeding was substantially justified or that special circumstances make an award unjust.

Commission Rule 104(a), 29 C.F.R § 2204.104(a), provides:

> > *attorneys' fees* is just as good, and some may even prefer that term in contexts in which there is clearly more than one attorney referred to. *Attorney fees* is inelegant but increasingly common. It might be considered a means to avoid having to get the apostrophe right. (But cf. *expert-witness* fees.) *Counsel fees* is another, less-than-common variant.
> > The only form to avoid at all costs is *attorneys fees,* in which the first word is a genitive adjective with the apostrophe wrongly omitted.
>
> In line with the form used in the statute we are interpreting, we will use "attorney fees" in this case, except where quoting.

Stallworth v. Greater Cleveland Reg'l Transit Auth., 105 F.3d 252, 254 n. 1 (6th Cir. 1997).

Part 2004 of the Commission's *Rules Implementing the Equal Access to Justice Act* consistently refers to "an award of attorney or agent fees and other expenses" or "an award of fees and expenses." In this Decision, I will refer to the award of attorney fees and other expenses as "award," except when quoting from case law, statutes, or documents submitted by the parties.

[4] Benton-Georgia claimed $7,937.50 in fees and $163.35 in expenses in its *Application* (p. 2). Benton-Georgia later claimed an additional $1,718.75 in fees and $26.65 in expenses for "allowable fees and expenses incurred since filing its original EAJA application." (Attachment to *Reply*)

> The EAJA applies to adversary adjudications before the Commission. These are adjudications under 5 U.S.C. 554 and 29 U.S.C. 659(c) in which the position of the Secretary is represented by an attorney or other representative. The types of proceedings covered are the following proceedings under section 10(c), 29 U.S.C. 659(c), of the OSH Act:
>
> (a) Contests of citations, notifications, penalties, or abatement periods by an employer [.]

Commission Rule 201(a), 29 C.F.R § 2204.201(a), provides in pertinent part:

> The application shall show that the applicant has prevailed and identify the position of the Secretary that the applicant alleges was not substantially justified.

Commission Rule 302(a), 29 C.F.R § 2204.302(a), provides:

> An application may be filed whenever an applicant has prevailed in a proceeding or in a discrete substantive portion of the proceeding, but in no case later than thirty days after the period for seeking appellate review expires.

Eligibility

The party seeking an award for fees and expenses must submit an application "no later than thirty days after the period for seeking appellate review expires." Commission Rule 302(a), 29 C.F.R § 2204.302(a). The *Order* acknowledging receipt of the Secretary's motion to withdraw the Citation became a final order of the Commission on April 11, 2016. Benton-Georgia timely filed its *Application* on March 4, 2016.

The prevailing party must meet the established eligibility requirements before it can be awarded attorney fees and expenses. Commission Rule 105(b)(4), 29 C.F.R § 2204.105(b)(4), requires that an eligible employer be a "corporation . . . that has a net worth of not more than $7 million and employs not more than 500 employees." Commission Rule 105(c), 29 C.F.R § 2204.105(c), provides, "For the purpose of eligibility, the net worth and number of employees shall be determined as of the date the notice of contest was filed." Commission Rule 202(a), 29 C.F.R § 2204.202(a), requires the applicant to:

> provide with its application a detailed exhibit showing the net worth of the applicant as of the date [it filed the notice of contest]. The 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.

As proof of its net worth, Benton-Georgia submitted the statement of its senior vice-president, Mahlon C. Rhaney Jr. Attached to Rhaney's statement is an unaudited balance sheet purporting to represent Benton-Georgia's net worth as of December 31, 2014, and December 31, 2015. The Secretary argues the balance sheet fails to comply with Commission Rule 202(a) "because it is not a detailed exhibit showing the respondent's net worth as of the contest date of September 11, 2015. Additionally, the balance sheet does not provide full disclosure of the applicant's assets and liabilities." (*Discovery Motion,* pp. 2-3) In its *Reply,* Benton-Georgia argues its original submissions attached to its *Application* were sufficient to establish its eligibility, but it attached a new statement from Rhaney that "updates, corrects and supplements" his prior statement.

The Secretary also contends Benton-Georgia failed to demonstrate it employed fewer than 500 employees at the time of the notice of contest. Rhaney asserts in his statement, "As of the September 11, 2015 Contest Date, Benton-Georgia, Inc. employed 425 employees." (*Rhaney Statement* ¶ 4) The Secretary issued the Citation to Benton-Georgia, *LLC*, not *Inc.* The Secretary attached a copy of a page from Benton-Georgia, LLC's website that refers to "[o]ur staff of over 800 employees." The Secretary argues Benton-Georgia's EAJA application should be dismissed because the company failed to establish it met the eligibility requirements. Alternatively, the Secretary seeks an order granting additional discovery "to determine if the respondent, Benton-Georgia, LLC employed more than 500 people on the notice of contest date, September 11, 2015." (*Discovery Motion*, p. 3). In its *Reply*, Benton-Georgia states Rhaney's statement attached to its *Application*

> mistakenly referred to Benton-Georgia, Inc. The corporate reference was mistaken because Benton-Georgia, Inc. was a corporation that has not existed since December 31, 2011 when it was merged into Benton-Georgia, LLC. Benton-Georgia, LLC is a Delaware limited liability company that survived the 2011 merger.

(*Id.* at 3)

Benton-Georgia contends, "[A]lthough the Secretary may have looked at the Benton-Georgia website on April 16, 2016, the web page was not created on that date, nor was it ever updated to reflect the steadily declining payroll attested to by Mr. Rhaney in his Statements." (*Id.* at 4) Benton-Georgia attached a copy of a "Certificate of Merger" signed by the Secretary of State for the State of Georgia identifying Benton-Georgia, LLC, as the surviving entity and Benton-Georgia, Inc., as the nonsurviving entity. The certificate is dated December 30, 2011.

Having reviewed the relevant arguments and attachments, I hereby **DENY** the Secretary's *Discovery Motion* as moot. Had I found for Benton-Georgia on the issues of prevailing party status, I would have granted the Secretary's motion to conduct discovery and afforded Benton-Georgia the opportunity to provide supplementary documentation in order to establish its eligibility under EAJA. *See Salco Constr., Inc.*, 21 BNA OSHC 2143 (No. 05-1145, 2007). I did not make that determination. It is not, therefore, necessary to dispose of the issue of Benton-Georgia's eligibility.

PREVAILING PARTY

Positions of the Parties

In its *Application,* Benton-Georgia claims its "qualification as a prevailing party cannot be disputed as the Citation was withdrawn by the Secretary." (*Application*, p. 7) In his *Answer*, however, the Secretary contends the very fact he withdrew the Citation disqualifies Benton-Georgia as a prevailing party as the Supreme Court interpreted that term in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources,* 532 U.S. 598 (2001). In *Buckhannon*, the Court held a plaintiff's status as a prevailing party is limited to one who obtains relief sought by a court order. Here, the Secretary withdrew the Citation, an action the Secretary contends "lacks the necessary judicial *imprimatur* on the change[,]" as required by *Buckhannon. Id.* at 605 (emphasis in original).

In its *Reply*, Benton-Georgia questions the relevance of *Buckhannon*, arguing that case "only addressed how and when a Plaintiff is a prevailing party." (*Reply*, p. 1)[5] Benton-Georgia

[5] In Commission cases, the Secretary is in the position of the plaintiff in the original proceeding and the respondent is in the position of the defendant.

contends the more germane Supreme Court case is the recently-decided *CRST Van Expedited, Inc. v. Equal Employment Opportunity Commission,* 136 S.Ct. 1642 (2016), in which the Court addressed the status of a *defendant* as a prevailing party and held, "[A] defendant need not obtain a favorable judgment on the merits in order to be a 'prevailing party.'" *Id.* at 1651.

The Secretary's argument that Benton-Georgia is not a prevailing party under *Buckhannon* is, as far as I can tell, one of first impression before the Commission.[6] After reviewing *Buckhannon* and *CRST*, as well as apposite cases in the Federal Courts of Appeals,[7] I agree with the Secretary that Benton-Georgia is not a prevailing party in the underlying proceeding.

The Supreme Court's *Buckhannon* Opinion

In *Buckhannon*, the Court considered the question of whether the term *prevailing party* "includes a party that has failed to secure a judgment on the merits or a court-ordered consent decree, but has nonetheless achieved the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." 532 U.S. at 601. The Court concluded a party in such a situation does not qualify as a prevailing party.

Buckhannon Board and Care Home, Inc. operated assisted living residences. It failed an inspection conducted by the fire marshal's office based on a "self-preservation" requirement, as defined in state law, and received orders to close its facilities. Buckhannon brought suit in district court against the State of West Virginia and other state agencies and officials

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[6] Respondents have applied for EAJA awards in other cases following the Secretary's withdrawal of citations. However, I have not found, and the parties have not brought to my attention, another case before the Commission where the Secretary argued, under *Buckhannon,* the withdrawal of a citation without prejudice disqualifies the respondent as a prevailing party.

[7] The Commission has held, "Where it is highly probable that a case will be appealed to a particular circuit, the Commission generally has applied the precedent of that circuit in deciding the case— even though it may differ from the Commission's precedent." *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000). Benton-Georgia's principal place of business is in Georgia, part of the Eleventh Circuit. The alleged violation occurred in Alabama, also in the Eleventh Circuit. Either party may appeal to the Court of Appeals for the Eleventh Circuit; in addition, Benton-Georgia may appeal to the Court of Appeals for the D.C. Circuit. *See* 29 U.S.C. § 660(a) & (b).

(respondents), seeking declaratory and injunctive relief. The state legislature subsequently eliminated the "self-preservation" requirement and the district court granted the respondents' motion to dismiss the case as moot.

Buckhannon, claiming status as the prevailing party, requested an award under the fee-shifting sections of the Fair Housing Amendments Act (FHAA) and the Americans with Disabilities Act (ADA). Buckhannon "argued they were entitled to attorney's fees under the 'catalyst theory,' which posits that a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." *Id.*

"Prior to 1994, every Federal Court of Appeals (except the Federal Circuit, which had not addressed the issue)" followed the catalyst theory. *Id.* at 626. In 1994, the Court of Appeals for the Fourth Circuit "broke ranks with its sister courts" and held a plaintiff was not a prevailing party "without 'an enforceable judgment, consent decree, or settlement.' *S-1 and S-2 v. State Bd. of Ed. of N. C.*, 21 F.3d 49, 51 (1994)." 532 U.S. at 627. Applying the 1994 Fourth Circuit precedent, the District Court denied Buckhannon's request for an award. The Fourth Circuit affirmed and the Supreme Court granted certiorari "[t]o resolve the disagreement amongst the Courts of Appeals." *Id.* at 602.

The Court found the term *prevailing party* is a legal term of art used by Congress in various fee-shifting statutes where it has authorized an award of fees and expenses. The Court reviewed past decisions where it had recognized a prevailing party as one who has been awarded some relief by a court, in the form of a judgment on the merits or a court-ordered consent decree. In contrast, the catalyst theory "allows an award where there is no judicially sanctioned change in the legal relationship of the parties. . . . A defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary *imprimatur* on the change. Our precedents thus counsel against holding that the term 'prevailing party' authorizes an award of attorney's fees *without* a corresponding alteration in the legal relationship of the parties." *Id.* at 605. The Court held the catalyst theory "is not a permissible basis for the award of attorney's fees under" the FHAA and the ADA. *Id.* at 610.

Opinions by the Court of Appeals for the D.C. Circuit

Of the appellate courts, the Court of Appeals for the D.C. Circuit has developed the most extensive body of law descended from *Buckhannon.*

Thomas v. National Science Foundation

In *Thomas v. Nat'l Sci. Found.*, 330 F.3d 486 (D.C. Cir. 2003), the district court granted an award to the plaintiffs after the court had issued a preliminary injunction, dismissed all but one count of the of the complaint, granted partial summary judgment for plaintiffs, and, after action by Congress rendered the plaintiffs' claim moot, vacated the preliminary injunction and dismissed the case. The defendant, the National Science Foundation (NSF), appealed the award. The Court of Appeals for the D.C. Circuit found the "judgment and reasoning in *Buckhannon* make it clear that appellees are not 'prevailing parties' under EAJA" and reversed the judgment of the district court and dismissed the case. *Thomas,* 330 F.3d at 488-489. The Court noted *Buckhannon* rejected the catalyst theory, but the Court also found the principles set out in that case "establish a framework for construing and applying the 'prevailing party' requirement more broadly. In applying these principles to the instant case, it is clear that appellees are not 'prevailing parties' under EAJA, for neither the preliminary injunction nor the partial summary judgment changed the legal relationship between appellees and NSF in a way that afforded appellees the relief that they sought." *Thomas*, 330 F.3d at 493.

The D.C. Circuit articulated a three-part test for determining prevailing party status for plaintiffs:

1. There must be a court-ordered change in the legal relationship of the parties;

2. The judgment must be in favor of the party seeking fees; and

3. The judicial pronouncement must be accompanied by judicial relief.

Id. at 492-93.

Analyzing the proceeding under this framework, the Court found:

> [T]he preliminary injunction did not change the legal relationship between the parties in a way that afforded appellees the relief they sought in their lawsuit. . . .

> Appellees filed a lawsuit in order to obtain a refund from NSF, but the preliminary injunction did nothing to vindicate that claim.
>
> Appellees' claim fares no better with respect to the partial summary judgment. . . . The partial summary judgment did not afford appellees any concrete relief, beyond this mere legal declaration. As noted above, *Buckhannon* and *Hewitt* make it clear that a mere "judicial pronouncement that the defendant has violated the Constitution," unaccompanied by "*judicial* relief," is not sufficient to make a claimant a "prevailing party." *Buckhannon,* 532 U.S. at 606, 121 S.Ct. at 1841; *Hewitt,* 482 U.S. [755, 761, 107 S.Ct. 2672, 2676 (1987)]. This type of "judicial decree" is not enough to warrant a fee award, because it represents "not the end but the means" of the litigation. *Hewitt,* 482 U.S. at 761, 107 S.Ct. at 2676. A declaration must require "some action (or cessation of action) by the defendant that the judgment produces – the payment of damages, or specific performance or the termination of some conduct." *Id.* The partial summary judgment in this case did not achieve any such results.

Id at 493–94.

District of Columbia v. Jeppsen

In *District of Columbia v. Jeppsen*, 514 F.3d 1287 (D.C. Cir. 2008), the Court of Appeals for the D.C. Circuit addressed the issue of whether a defendant is entitled to an award when the district court dismissed the underlying case for want of jurisdiction. The Court found under *Buckhannon, "*it is clear that a plaintiff 'prevails' only upon obtaining a judicial remedy that vindicates its claim of right." *Jeppsen,* 514 F.3d at 1290. The Court continued,

> On the other hand, a defendant might be as much rewarded by a dispositive order that forever forecloses the suit on a procedural or remedial ground as by a favorable judgment on the merits. *See Dozier v. Ford Motor Co.,* 702 F.2d 1189, 1191 (D.C.Cir.1983) (*res judicata* precludes relitigating issue whether amount in controversy exceeds minimum required for jurisdiction under 28 U.S.C. § 1332). A ruling on a jurisdictional ground, that the action fails either in law or in fact, might give the defendant all it could receive from a judgment on the merits. Be that as it may, this court has not addressed whether, in light of *Buckhannon,* a defendant "prevails" when the case against it is dismissed for want of jurisdiction.

Id.

The Court surveyed appellate court cases addressing this issue both before and after *Buckhannon.* The Court found cases post-*Buckhannon* in which two courts of appeals held that a defendant prevails only if it succeeds on the merits and cases in which two other courts of

appeals held a defendant prevails if it "obtained a judicial order resulting in a 'material alteration of the legal relationship of the parties.'" *Jeppsen,* 514 F.3d at 1290-1291. The Court concluded it "need not enter the lists in this apparent conflict among the circuits" because it determined the district court's dismissal of the plaintiff's case, "properly understood, was a decision on the merits" which "raises no doubt about the district court's jurisdiction to award attorneys' fees." *Id.* at 1291.

District of Columbia v. Straus

In *District of Columbia v. Straus,* 590 F.3d 898 (D.C. Cir. 2010), an attorney initiated administrative proceedings on behalf of a student with special needs. The hearing officer in the case found the issue was moot and dismissed the case with prejudice upon the defendant's motion. The defendant (District of Columbia) sued the plaintiff (Straus) for an award "to cover the attorney's fees it claim[ed] to have expended in the administrative hearing," arguing it had prevailed in the administrative proceedings. *Id.* at 900. In an order on summary judgment, the district court denied the award, finding the defendant was not a prevailing party because it secured a dismissal for mootness by its voluntary conduct.

On appeal, the defendant argued it was a prevailing party because "a dismissal with prejudice is deemed an adjudication on the merits for the purposes of *res judicata*." *Id.* at 902. The Court of Appeals cited the three-part test it set out in *Thomas* for determining prevailing status and noted, "Although we developed this test in connection with requests for fees by plaintiffs, we have applied its latter two requirements to requests by defendants as well." *Id. at 901.* The Court affirmed the district court's summary judgment order. The Court found the defendant's "favorable judicial pronouncement was 'unaccompanied by judicial relief.' *Thomas,* 330 F.3d at 493." *Id.*

Turner v. National Transportation Safety Board

Turner v. National Transportation Safety Board, 608 F.3d 12 (D.C. Cr. 2010), has significant parallels to the facts in the case at hand. In *Turner*, the Court dealt once again with defendants who sought an EAJA award following an administrative proceeding. In *Turner,* the FAA suspended two pilots, alleging they operated an aircraft that was not airworthy. The pilots

each appealed his suspension to an administrative law judge (ALJ). Before the case went to hearing, the FAA withdrew the suspensions against the pilots. The ALJ dismissed the proceedings against the pilots, not specifying whether the dismissal was with or without prejudice.

The pilots sought an EAJA award, arguing they were prevailing parties. The ALJ agreed the pilots had prevailed over the FAA and granted their application. The ALJ determined, due to the FAA's withdrawal, the agency's position was not substantially justified and the pilots prevailed upon the withdrawal of the suspensions. The FAA appealed to the National Transportation Safety Board (NTSB), arguing the ALJ had erred in finding the pilots were prevailing parties. The NTSB determined the issue "was governed by" *Buckhannon,* "notwithstanding that *Buckhannon* arose from a civil action and not from an agency adjudication." *Id.* at 14. The NTSB held the pilots were not prevailing parties because the FAA "withdrew the charges before the [ALJ] could hold a hearing"; and the ALJ did not 'issue an order akin to a court-supervised consent decree" because he "merely accepted the [FAA's] withdrawal of the charges." *Id.* The pilots appealed.

The Court of Appeals reiterated the standard defendants must meet to be qualified as prevailing parties. "[U]nder the test laid out in *Straus* a party need receive only some form of judicial relief, not necessarily a court-ordered consent decree or a judgment on the merits." *Id.* at 15. The pilots argued they met the *Straus* criteria because the ALJ dismissed their cases with prejudice and thereby changed the legal relationship between the parties.

The Court first determined the ALJ's dismissal was *without* prejudice. "[A]lthough his order is silent on the subject, the ALJ dismissed the complaints without prejudice. That is consistent with the rule in civil proceedings; when a court dismisses a complaint at the request of the plaintiff, the dismissal is presumed to be without prejudice. *See* Fed.R.Civ.P. 41(a)(2)." *Id.* The pilots argued that, even if a court's dismissal of a complaint at the request of the plaintiff is generally considered without prejudice, the ALJ's dismissal in their cases "should be considered a dismissal with prejudice because it came after the statute of limitations had run on the charges brought by the FAA." *Id.* at 16.

The Court then determined:

> Because the ALJ dismissed the cases without prejudice, there was nothing in this case analogous to judicial relief. *See Straus,* 590 F.3d at 901. Once the FAA withdrew its complaints, the pilots were no longer the subject of proceedings to suspend their licenses. For all practical purposes, the FAA had unilaterally ended the adversarial relationship between the parties, leaving them where they were before the complaint was filed. The order of the ALJ dismissing the cases was just an administrative housekeeping measure, not a form of relief, because the FAA did not need the ALJ's permission to withdraw a complaint. *See* 49 C.F.R. § 821.12(b) ("Except in the case of … a complaint … pleadings may be withdrawn only upon approval of the [ALJ] or the [NTSB]"). Had the ALJ done nothing, the pilots would have been in essentially the same position as they were after the ALJ dismissed this case. These circumstances do not make them prevailing parties according to the criteria of *Buckhannon* as interpreted in *Straus.*

Id. at16.

Green Aviation Management Co., LLC v. FAA

The Court of Appeals once again addressed the status of a defendant as a prevailing party in an administrative proceeding where the agency withdraws its complaint in *Green Aviation Management Co., LLC v. FAA*, 676 F. 3d 200 (D.C. Cir. 2012). The FAA filed a complaint against the defendant, Green Aviation, alleging the chartered flight operator carried an unapproved passenger on a flight. Before the case went to hearing, the FAA withdrew the complaint. Green Aviation then moved for dismissal of the proceedings *with prejudice*, which the ALJ granted. Green Aviation filed an EAJA application. The ALJ found the defendant was the prevailing party, "which was uncontested, but denied the request for fees, finding the FAA was substantially justified in bringing the complaint." *Id.* at 201. On appeal, the FAA Administrator found, under *Buckhannon,* Green Aviation was not the prevailing party because the applicable regulation did not require the ALJ's consent for the FAA's withdrawal of the complaint; thus "there was no exercise of judicial discretion or any judicial imprimatur to the dismissal order." *Id.* at 202.

The Court of Appeals agreed with Green Aviation that it was the prevailing party, based on the dismissal of the case by the ALJ with prejudice. "Although the two-year statute of limitations had not lapsed at the time the complaint was withdrawn, . . . the FAA could not re-file a complaint based on the same set of facts because the dismissal with prejudice has *res judicata* effect. . . . Even though the ALJ's permission was not needed for the complaint to be

withdrawn, the resulting dismissal was a clear form of judicial relief, not simply a 'housekeeping measure.'" *Id.* at 205.

Cactus Canyon Quarries, Inc. v. Federal Mine Safety and Health Review Commission

Most recently, the Court of Appeals for the D.C. Circuit has discussed the status of a defendant as a prevailing party in the context of a Federal Mine and Safety Health Review Commission (FMSHRC) case. FMSHRC and the Occupational Safety and Health Review Commission share a similar framework and relationship with the Secretary of Labor. As with *Turner,* the facts and procedural posture in this case closely resemble those in the case before me. In *Cactus Canyon Quarries, Inc. v. Federal Mine Safety and Health Review Commission*, 820 F.3d 12 (D.C. Cir. 2016), the Mine Safety and Health Administration (MSHA) issued seven citations to Cactus Canyon, the operator of a surface non-coal mine under the jurisdiction of MSHA. Cactus Canyon contested the citations. Before the case went to hearing, the Secretary of Labor vacated the citations and moved to have the ALJ dismiss the proceedings. "Over the objection of Cactus Canyon, the ALJ dismissed the case without indicating whether the dismissal was with or without prejudice." *Id.* at 13-14. Cactus Canyon applied for an EAJA award. "The ALJ denied the application for fees, concluding that Cactus Canyon was not a 'prevailing party.'" *Id.* at 14. The ALJ based this denial on two principal findings: "[F]irst, the dismissal of the underlying proceedings did not involve any judicial consideration of the case; and, second, the dismissal did not provide Cactus Canyon with any court-ordered relief." *Id.* at 15. After FMSHRC declined to review the ALJ's decision, the Court of Appeals granted the defendant's petition for review.

Cactus Canyon contended it was a prevailing party under *Buckhannon.* The Court of Appeals ruled, however, this contention is foreclosed by the Court's precedent in *Turner v. National Transportation Safety Board.* "The material facts in the present case are nearly identical to those at issue in *Turner." Id.* at 17-18.

> The Secretary unilaterally ended its relationship with Cactus Canyon, leaving the parties where they were before the citations were issued. And the order of dismissal was not with prejudice. Therefore, we are bound by our previous determination in *Turner* that, given these circumstances, Cactus Canyon is not a "prevailing party."

> Cactus Canyon attempts, unsuccessfully, to distinguish *Turner.* Cactus Canyon notes that in this case the MSHA sought civil penalties, whereas in *Turner* the FAA sought injunctive-type relief. This is true, but irrelevant. Nothing in *Turner* suggests that the type of remedy was germane to the court's "prevailing party" analysis, nor has Cactus Canyon identified a basis for according this factual difference any significance. Cactus Canyon also claims that more time elapsed in this case between the initiation of the administrative proceedings and the termination of the case than in *Turner.* Again, nothing in *Turner* suggests that the amount of time elapsed is relevant to determining whether the EAJA applicant is a "prevailing party," nor has Cactus Canyon provided a reason why it is relevant.

Id. at 18.

Cactus Canyon also asserted it was the prevailing party because the dismissal of the citations following the Secretary's decision to vacate them has *res judicata* effect and the Secretary was prohibited from reissuing the citations. The Court disagreed, stating,

> "Dismissal without prejudice is a dismissal that does not operate as an adjudication upon the merits, and thus does not have a *res judicata* effect." *Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384, 396, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990) (alterations, ellipsis, and citation omitted). The Commission can, as it has done in the past, dismiss proceedings with prejudice when the Secretary vacates a citation. *See, e.g., Sec'y of Labor v. N. Am. Drillers, LLC,* 34 FMSHRC 352, 355 (2012). But it did not do so here.

Id. at 19.

Opinions by the Court of Appeals for the Eleventh Circuit

In its *Reply,* Benton-Georgia claims, "The Secretary relied almost entirely on decisions of the D.C. Circuit, ignoring its conflict with decisions of at least three other Courts of Appeals, including the 11th Circuit which controls this matter." (*Reply,* n. 1) Benton-Georgia then directs the Court's attention to "*EEOC v. Asplundh Tree Expert Co.,* 340 F.3d 1256, 1261 (C.A.11 2003); *EEOC v. Propak Logistics, Inc.,* 746 F.3d 145, 152–154 (C.A.4 2014); and EEOC *v. Pierce Packing Co.,* 669 F.2d 605, 608–609 (C.A.9 1982)." *Id.* Benton-Georgia cites these cases with no discussion regarding their purported conflicts with the D.C. Circuit or their relation to *Buckhannon's* analysis of prevailing party status. Benton-Georgia appears to have borrowed its argument from the Supreme Court's opinion in *CRST*:

> By precluding the defendant from recovering attorney's fees when the claims in question have been dismissed because the Commission failed to satisfy its presuit

> obligations, the decision of the Court of Appeals conflicts with the decisions of three other Courts of Appeals. See *EEOC v. Propak Logistics, Inc.,* 746 F.3d 145, 152–154 (C.A.4 2014); *EEOC v. Asplundh Tree Expert Co.,* 340 F.3d 1256, 1261 (C.A.11 2003); *EEOC v. Pierce Packing Co.,* 669 F.2d 605, 608–609 (C.A.9 1982).

CRST, 136 S.Ct. at 1651.

The Eleventh Circuit case cited by Benton-Georgia, *EEOC v. Asplundh Tree Expert Co.,* 340 F.3d 1256 (11th Cir. 2003), provides little analysis of the issue of prevailing party status. In *Asplundh,* plaintiff EEOC brought a Title VII racial harassment and retaliation action on behalf of an employee of defendant Asplundh. The district court dismissed the action as a sanction of the EEOC's failure to engage in good faith conciliation. "The district court dismissed the lawsuit and awarded costs and fees to Asplundh, holding that the EEOC had failed to meet its statutory duty to engage in good faith conciliation" as required by Title VII. *Id.* at 1259. The Court affirmed the district court's judgments with little analysis of prevailing party status and with no mention of *Buckhannon*.[8]

The Eleventh Circuit applied *Buckhannon* in a number of other cases over the years, but the fact patterns and procedural postures in those cases have little in common with the case at hand. *See Utililty Automation 2000, Inc. v. Choctawhatchee Elec. Cooperative, Inc.,* 298 F.3d 1238 (11th Cir.2002) (judicial approval of Fed. R. Civ. P. Rule 68 offer of judgment is an enforceable one, and thus has the judicial *imprimatur* required by *Buckhannon*); *Smalbein v. City of Daytona Beach*, 353 F.3d 901 (11th Cir. 2003) (retention of jurisdiction over enforcement of a settlement is sufficient to establish prevailing party status); *Morillo-Cedron v. District Director for the U.S. Citizenship & Immigration Services*, 452 F.3d 1254 (11th Cir. 2006) (plaintiff applicants for lawful permanent residency not prevailing party when defendant voluntarily granted lawful permanent resident status and moved to dismiss complaint as moot); *Dionne v. Floormasters Enterprises, Inc.*, 667 F.3d 1199 (11th Cir. 2012) (plaintiff employee not prevailing

[8] The other two cases cited by the Supreme Court in *CRST* are similarly inapposite to the prevailing party issue in this case. The context of the quotation is a discussion of EEOC cases dealing with the issue of presuit obligations, a statutory requirement specific to the EEOC which mandates the agency can bring suit only after an investigation, a determination of reasonable cause, and an attempt to resolve the matter by informal methods of conference, conciliation, and persuasion. 42 U.S.C. § 2000e(5)(b).

party when court granted defendant's motion to dismiss action with prejudice after defendant tendered disputed overtime wages).

Opinions by the Courts of Appeals for Other Circuits

In a case before the Court of Appeals for the Seventh Circuit, the Court affirmed FMSHRC's denial of the defendant's application for an EAJA award after MSHA vacated its "withdrawal order" before the case went to hearing. In *Jeroski v. Federal Mine Safety and Health Review Commission,* 697 F.3d 651 (7th Cir. 2012), FMSHRC dismissed the case without prejudice following MSHA's vacatur of its order. The Secretary objected to the defendant's application for an EAJA award because, he argued, MSHA "merely withdrew its withdrawal order," an action that did not render the defendant a prevailing party. *Id.* at 653.

In his lead opinion, Judge Posner provided a helpful survey of the appellate courts that had considered the prevailing party issue under *Buckhannon*.

> All eight courts of appeals to have considered the meaning of "prevailing party" in the Equal Access to Justice Act would have denied that status to [defendant] USA Cleaning. See, e.g., *Green Aviation Management Co. v. FAA,* 676 F.3d 200, 202–03 (D.C.Cir.2012); *Turner v. National Transportation Safety Board,* 608 F.3d 12, 16 (D.C.Cir.2010); *United States v. Milner,* 583 F.3d 1174, 1196–97 (9th Cir.2009); *Aronov v. Napolitano*, 562 F.3d 84, 89 (1st Cir.2009) (en banc); *Ma v. Chertoff*, 547 F.3d 342 (2d Cir.2008) (per curiam); *Morillo–Cedron v. District Director for U.S. Citizenship & Immigration Services*, 452 F.3d 1254, 1257–58 (11th Cir.2006); *Goldstein v. Moatz*, 445 F.3d 747, 751 (4th Cir.2006); *Marshall v. Commissioner of Social Security*, 444 F.3d 837, 840 (6th Cir.2006); T*homas v. National Science Foundation,* 330 F.3d 486, 492 n. 1 (D.C.Cir.2003); *Brickwood Contractors v. United States*, 288 F.3d 1371, 1379 (Fed.Cir.2002).

Id.

The Court questions the Supreme Court's reasoning in *Buckhannon*, but concludes the Supreme Court's approach in that case "supports the position that eight circuits have taken with respect to the meaning of 'prevailing party,' and we bow to this heavy weight of authority." *Id*. at 655.

The Supreme Court's *CRST* Opinion

As Benton-Georgia notes in its *Reply*, *Buckhannon* addressed cases in which *plaintiffs* claimed the status of the prevailing party (although the D.C. Circuit and the Seventh Circuit considered cases in which defendants sought prevailing party status). In *CRST*, decided May 19, 2016, the Supreme Court for the first time addressed "whether a defendant has prevailed." 136 S.Ct. at 1646. In that case, the EEOC filed suit against CRST under Title VII of the Civil Rights Act of 1964, for hostile work environment sexual harassment against a class of female employees. A district court (in the Eighth Circuit) granted CRST's motion for summary judgment as to certain claims and granted CRST's motion for attorney fees and costs. After various appeals, reversals, and remands,[9] the Court of Appeals for the Eighth Circuit "held that a Title VII defendant prevails only by obtaining a 'ruling on the merits.'" *Id.* at 1646. The Supreme Court granted certiorari, disagreed with the Eighth Circuit, and held, "[A] favorable ruling on the merits is not a necessary predicate to find that a defendant has prevailed." *Id.*

The Court first observed,

> Congress has included the term "prevailing party" in various fee-shifting statutes, and it has been the Court's approach to interpret the term in a consistent manner. See *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources,* 532 U.S. 598, 602–603, and n. 4, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001). The Court has said that the "touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties." *Texas State Teachers Assn.[v.Garland Independent School Dist.,* 489 U.S. 782,] 792–793, 109 S.Ct. 1486. This change must be marked by "judicial *imprimatur*." *Buckhannon,* 532 U.S., at 605, 121 S.Ct. 1835. The Court has explained that, when a plaintiff secures an "enforceable judgmen[t] on the merits" or a "court-ordered consent decre[e]," that plaintiff is the prevailing party because he has received a "judicially sanctioned change in the legal relationship of the parties." *Id.,* at 604–605, 121 S.Ct. 1835. The Court, however, has not set forth in detail how courts should determine whether a defendant has prevailed.

Id.

The Court then found plaintiffs and defendants seek different objectives in a legal proceeding and a defendant prevails "whenever the plaintiff's challenge is rebuffed":

[9] This summary greatly simplifies and abridges the procedural history of *CRST.* Justice Kennedy devoted more than half of the lead opinion to "a discussion of the facts and complex procedural history" of the case. *Id.* at 1647.

> A plaintiff seeks a material alteration in the legal relationship between the parties. A defendant seeks to prevent this alteration to the extent it is in the plaintiff's favor. The defendant, of course, might prefer a judgment vindicating its position regarding the substantive merits of the plaintiff's allegations. The defendant has, however, fulfilled its primary objective whenever the plaintiff's challenge is rebuffed, irrespective of the precise reason for **the court's decision**. The defendant may prevail even if **the court's final judgment** rejects the plaintiff's claim for a nonmerits reason. There is no indication that Congress intended that defendants should be eligible to recover attorney's fees only when **courts dispose of claims on the merits**. The congressional policy regarding the exercise of district court discretion in the ultimate decision whether to award fees does not distinguish between **merits-based and non-merits-based judgments**.

Id. at 1651-52 (emphasis added).

Based on *CRST,* Benton-Georgia contends it "successfully rebuffed the Secretary's attempt to enforce a Citation, and is therefore a prevailing party." (*Reply*, p. 2) The emphasized phrases in the above-quoted passage indicate, however, that some form of judgment by the court is still required for a defendant to be a prevailing party in a proceeding. In this case, Benton-Georgia did not "rebuff" the Secretary's challenge, as the term is used in *CRST*. The Secretary unilaterally withdrew the Citation. The Commission has not rendered a decision, disposed of the claims, or entered a judgment in this proceeding. Indeed, as will be discussed below, the Commission has no authority to do so. I find Benton-Georgia has not prevailed under the standard set out in *CRST.*

Withdrawal of the Citation Was Without Prejudice

The Secretary contends the *Order* dismissing the Citation in this proceeding was without prejudice. As noted in *Turner,* "[W]hen a court dismisses a complaint at the request of the plaintiff, the dismissal is presumed to be without prejudice. *See* Fed.R.Civ.P. 41(a)(2)." 608 F.3d at 15. The Court of Appeals for the D.C. Circuit concluded if a dismissal of a case is without prejudice, there is "nothing . . . analogous to judicial relief" and the defendant, therefore, is not a prevailing party. 608 F.3d at 16. The Commission also has held when an order dismissing a citation does not indicate whether it is with or without prejudice, it will be deemed without prejudice. *Safeway Store No. 914*, 16 BNA OSHC 1504 n. 6 (No. 91-373, 1993) ("Under Commission Rule 102, governing withdrawal of citation items, withdrawal is without prejudice

unless otherwise specified.") In the *Order* issued February 29, 2016, I granted the Secretary's motion to withdraw the Citation without indicating whether it was with or without prejudice. The parties were "unable to stipulate to the language in the settlement agreement" so they were unable to reach an accord on this issue. Benton-Georgia did not file a response to the Secretary's motion to withdraw.

Benton Georgia counters,

> That the ALJ did not state magic words in the Order dismissing the matter is irrelevant. The limitations period for OSHA Citations is six months. 29 U.S.C. § 658(c). The accident occurred on March 28, 2015. The Secretary's Motion to Withdraw the Citation was granted on February 29, 2016, almost a year after the accident. At the time of the Motion, the Secretary knew that the matter was forever time barred—an effective dismissal *with prejudice*, regardless of whether Benton-Georgia sought, or the ALJ *sua sponte* uttered any magic words.

(*Reply*, p.3) (emphasis in original)

Benton-Georgia's dismissive characterization of the absence of "any magic words" is not a sound legal theory. "In the hierarchy of law, language is king. Words matter in constitutions, treaties, statutes, rules, cases, and contracts." *Pottinger v. City of Miami*, 805 F.3d 1293 (11th Cir. 2015). According to relevant appellate court and Commission precedent, because I did not indicate whether the dismissal of the Citation was with or without prejudice, the dismissal is deemed to be without prejudice.

Withdrawal of the Citation Is Not Reviewable

Benton-Georgia is correct the Secretary is barred by § 9(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (Act)[10], from issuing another Citation arising from OSHA's investigation of the February 28, 2015, accident. The expiration of the six-month statute of limitations term in this case supports Benton-Georgia's contention the dismissal is effectively with prejudice. The Court of Appeals for the Eleventh Circuit has held, "[W]here the statute of limitations will bar future litigation of an action dismissed without prejudice, we review the dismissal as if it was with prejudice. *Gray v. Fid. Acceptance Corp.*, 634 F.2d 226,

[10] Section 9(c) provides: "No citation may be issued under this section after the expiration of six months following the occurrence of any violation.

227 (5th Cir. Unit B 1981) (per curiam)." *Kalim A. R. Muhammad v. Brenda L. Bethel Muhammad,* No. 15-15440, 2016 WL 3509529, at *1 (11th Cir. June 27, 2016).

The petitioners for EAJA awards also invoked the statute of limitations argument in *Turner, Green Aviation,* and *Cactus Canyon.* The nearest parallel to the situation in this case is *Turner,* where the FAA withdrew the suspensions of the defendant pilots before the case went to hearing. The Court of Appeals for the D.C. Circuit concluded the ALJ's subsequent dismissal of the case was without prejudice, rejecting the pilots' argument it should be considered with prejudice because the statute of limitation had run on the original charges. The Court stated, "The order of the ALJ dismissing the cases was just an administrative housekeeping measure, not a form of relief, because the FAA did not need the ALJ's permission to withdraw a complaint. . . . Had the ALJ done nothing, the pilots would have been in essentially the same position as they were after the ALJ dismissed this case. These circumstances do not make them prevailing parties according to the criteria of *Buckhannon* as interpreted in *Straus." Turner,* 608 F.3d at 16.

I am persuaded by the reasoning of the Court in *Turner.* Commission Rule 102, 29 C.F.R § 2200.102, provides the Secretary may withdraw a citation "at any stage of a proceeding. The notice of withdrawal shall be served in accordance with § 2200.7(c)[.]"[11] The Supreme Court in *Cuyahoga Valley Railway Co. v. United Transportation Union* 474 U.S. 3, 7 (1985), held, "[T]he Secretary's decision to withdraw a citation against an employer under the Act is not reviewable by the Commission." The Secretary has prosecutorial discretion to determine whether to pursue or withdraw a citation. Upon receipt of the Secretary's notice of withdrawal, the ALJ issues an order acknowledging the Secretary's notice and closing the case. This is, however, a ministerial function, not a substantive one. Under *Cuyahoga,* the ALJ does not have the authority to grant or deny the Secretary's withdrawal of a citation. *Heave Ho Crane Co.,* 24 BNA OSHC 2058,

[11] The Commission Rules were revised in 1986. 51 Fed. Reg. 32002-01 (September 8, 1986). Prior to the revision, the Commission did not have a rule regarding notices of withdrawal of citations. In a pre-revision EAJA case, *K.D.K. Upset Forging, Inc.,* 12 BNA OSHC 1856 (No. 81-1932, 1986), the Commission found respondent was a prevailing party after the ALJ granted the Secretary's motion to withdraw the citation based on respondent's representation it had abated the cited condition. In accordance with revised Commission Rule 102 and the Supreme Court's opinions in *Cuyahoga* and *Buckhannon,* I find *K.D.K. Upset Forging, Inc.* is not binding precedent on the issue of prevailing party status.

2061 (No. 14-0250, 2014) ("Indeed, a withdrawal would presumably not require Respondent's signature, nor would it require approval by the judge.").

Commission Rule 102 is analogous to Fed. R. Civ. P. 41(a)(1)(A)(i), which permits a plaintiff to "dismiss an action without a court order by filing . . . a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment." Commission Rule 102 is less restrictive than Rule 41 because the Secretary may withdraw a citation "at any time," while Rule 41 allows for voluntary dismissal only before the defendant files an answer or a motion for summary judgment. The notice of dismissal, like the notice of withdrawal, is not reviewable.

> The notice of dismissal is self-effectuating and terminates the case in and of itself; no order or other action of the district court is required. *Qureshi v. United States,* 600 F.3d 523, 525 (5th Cir.2010); *Am. Cyanamid Co. v. McGhee,* 317 F.2d 295, 297 (5th Cir.1963); 9 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 2363 (3d ed.2014) ("Although Rule 5(a) requires that a notice of voluntary dismissal be served on all other parties, the cases seem to make it clear that the notice is effective at the moment it is filed with the clerk. It is merely a notice and not a motion, although a notice in the form of a motion is sufficient. No order of the court is required and the district judge may not impose conditions." (footnotes omitted)). As this court said of the notice of dismissal in *American Cyanamid Co. v. McGhee:*
>
> > That document itself closes the file. There is nothing the defendant can do to fan the ashes of that action into life and the court has no role to play. This is a matter of right running to the plaintiff and may not be extinguished or circumscribed by adversary or court. There is not even a perfunctory order of court closing the file. Its alpha and omega was the doing of the plaintiff alone.
>
> 317 F.2d at 297. Accordingly, the district court may not attach any conditions to the dismissal. *Williams v. Ezell,* 531 F.2d 1261, 1264 (5th Cir.1976). After the notice of voluntary dismissal is filed, the district court loses jurisdiction over the case. *Qureshi,* 600 F.3d at 525.

In re Amerijet Int'l, Inc., 785 F.3d 967, 973 (5th Cir. 2015).

Notices of withdrawal have been treated with some inconsistency by the Commission. For example, in *Fred C. Kroeger & Sons*, 14 BNA OSHC 1694 (No. 88-0832, 1990), the Secretary properly served a notice of withdrawal. In its order closing the case, the Commission stated, "[T]he Commission construes the Secretary's Notice to Withdraw as a Motion to

Withdraw Item 2 of Citation 1 and grants the motion." The Secretary also served a notice of withdrawal of the citation in *ABF Freight Systems, Inc.,* (No. 00-0737, 2001). In its order, the Commission stated, "The Notice of Withdrawal of Citation Item is construed as a motion to vacate the citation and proposed penalty and is granted pursuant to the delegation of authority to the Executive Secretary." More recently, the Commission's orders upon receipt of the Secretary's notice of withdrawal have refrained from construing the notice as a motion or approving the construed motion. In *Otis Elevator Co,* 23 BNA OSHC 1664 (No. 10-1057, 2011), the Commission acknowledged receipt of the Secretary's notice of withdrawal and set aside the ALJ's decision, without granting or approving the withdrawal:

> This withdrawal resolves all remaining issues in this case. *Cuyahoga Valley Ry. Co. v. United Transp. Union,* 474 U.S. 3 (1985) (holding that Secretary's discretion to withdraw citation is unreviewable). Therefore, the Commission sets aside the judge's Decision and Order to the extent that it is inconsistent with the Secretary's notice of withdrawal and accords the remainder of his decision the status of an unreviewed judge's decision.

In this proceeding, the Secretary more properly should have served a "Notice of Withdrawal," not a "Motion to Withdraw," and the *Order* should not have "granted" the motion. I hereby amend the *Order* to acknowledge receipt of the Secretary's notice of withdrawal of the Citation.

Because the Secretary's notice of withdrawal is "self-effectuating and terminates the case in and of itself," I have afforded Benton-Georgia no judicial relief in this case. *Amerijet,* 785 F.3d at 973. The Secretary's voluntary withdrawal of the Citation "lacks the judicial i*mprimatur*" of change. *Buckhannon,* 532 U.S. at 605. Although the Secretary is foreclosed under § 9(c) from issuing a new citation to Benton-Georgia resulting from OSHA's investigation of the February 28, 2015, accident, it is not because of any authoritative action on my part—it is a *statutory* prohibition, not a judicial one. Accordingly, I determine Benton-Georgia was not the prevailing party in the underlying proceeding.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is hereby ORDERED that: Benton-Georgia's application for attorney fees and expenses is DENIED.

SO ORDERED. /s/

Judge Heather A. Joys
Administrative Law Judge
Atlanta, Georgia

Date: September 6, 2016