
SECRETARY OF LABOR,
Complainant,
v. OSHRC Docket No. 97-0960

SCAFAR CONTRACTING, INC. ,
Respondent.

DECISION

Before: ROGERS, Chairman; VISSCHER and WEISBERG, Commissioners.

BY THE COMMISSION:

At issue is a decision of Administrative Law Judge Michael H. Schoenfeld awarding fees and expenses under the Equal Access to Justice Act, 5 U.S.C. § 504(a) and 28 U.S.C. §§ 2412(b) & (d)(1) ("EAJA"), to counsel for and a consultant to Scafar Contracting, Inc. ("Scafar"). These fees and expenses were incurred by Scafar in successfully defending against a citation alleging willful violations of an Occupational Safety and Health Administration ("OSHA") excavation cave-in protection standard. *See* section 10(c) of the Occupational Safety and Health Act of 1970 ("the OSH Act"), 29 U.S.C. § 659(c)(administrative adjudication of contested OSHA citations). While approximately 98% of the fees and expenses applied for under EAJA were incurred by Scafar during the "adversary adjudication," *see* 5 U.S.C. § 504(a), of the OSH Act case before the Commission and its ALJ, Scafar also incurred some fees and expenses after the Secretary of Labor ("the Secretary") initiated a "civil action" in the U.S. Court of Appeals for the Third Circuit, seeking "judicial review of [the] agency action."[1] *See* 28 U.S.C. §

[1]In opposing Scafar's EAJA application before the Third Circuit, the Secretary contended that: "Scafar seeks approximately $1,193.32 in attorney fees and expenses for the proceedings before this Court.... The remainder of the $63,296.77 sought by Scafar is for the trial and associated proceedings before the Commission and the preparation of its fee application...." Judge Schoenfeld's fee award does not distinguish between those fees and expenses that were incurred during the administrative "adversary adjudication" and those (continued...)

2412(d)(1)(A). We conclude herein that Judge Schoenfeld erred in including in his EAJA award fees and expenses that were incurred by Scafar during the "adversary adjudication" of the OSH Act case. We therefore remand this case to him for a determination under 28 U.S.C. § 2412(d)(1)(A) of the amount, if any, Scafar is entitled to for "fees and other expenses ... *incurred ... in* ... [the] civil action" (emphasis added).[2]

Background

On August 5, 1998, Judge Schoenfeld's decision in the underlying OSH Act proceeding was docketed with the Commission. *See* 29 C.F.R. § 2200.90(b)(2). In that decision, the judge vacated Items 1a, 1b and 1c of Citation 2, which alleged willful violations of 29 C.F.R. § 1926.652(a)(1) based on Scafar's failure to provide cave-in protection in three contiguous sections of a trench that extended eastward from a manhole excavation. The judge vacated these allegations on the ground that the Secretary had failed to establish that (a) the trench sections were over five feet in depth and (b) Scafar was therefore required to provide cave-in protection under the terms of the cited standard. On August 25, 1998, the Secretary filed a petition for discretionary review of the judge's decision, disputing the judge's evaluation of the evidence relating to trench depths and arguing that she had sustained her burden of proving that the trenches were more than five feet deep. On September 4, 1998, Judge Schoenfeld's decision became the final order of the Commission by operation of law when no Commissioner directed review of the case. Section 12(j) of the OSH Act, 29 U.S.C. § 661(j); 29 C.F.R. § 2200.90(d).

On October 30, 1998, the Secretary filed a petition for review of Judge Schoenfeld's decision in the U.S. Court of Appeals for the Third Circuit. *See* section 11(b) of the OSH

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[1](...continued)
that were incurred during the judicial "civil action."

[2]The Commission ordinarily lacks jurisdiction to make fee awards under 28 U.S.C. § 2412(d)(1)(A), which governs EAJA awards by the courts. However, we have jurisdiction in this particular case as a result of the Third Circuit's order, discussed *infra*, which remanded Scafar's EAJA application to us.

Act, 29 U.S.C. § 660(b). On December 10, 1998, the Secretary abandoned this appeal by filing a motion to dismiss her petition for review. On January 25, 1999, the Third Circuit entered an order granting the Secretary's motion to dismiss her petition for review, thereby terminating the OSH Act enforcement proceedings.

On February 24, 1999, Scafar filed a "motion for fees and expenses pursuant to the Equal Access to Justice Act as enacted and amended at 5 U.S.C. § 504 and 28 U.S.C. § 2412." It filed its motion in the Third Circuit. It did not file any application for fees and expenses with the Commission, either before or after filing its motion with the court. On March 4, 1999, the Secretary filed an opposition to Scafar's motion, and on March 10, Scafar filed a motion for leave to file a reply to the Secretary's opposition, accompanied by the reply itself. On April 29, 1999, the court issued an order granting Scafar leave to file its reply. In that same order, the court stated that it was not "act[ing] substantively on the application ... for attorney's fees and expenses ... [but i]nstead ... remand[ing] the motion to the Occupational Safety and Health Review Commission."[3] The court directed the Commission to "treat the motion as if filed [with the Commission] on the date it was filed in this court [*i.e.*, February 24, 1999]."

In response to this remand order, Judge Schoenfeld awarded $41,649.68 in fees and expenses to Scafar's attorneys and $24,570.81 to Scafar's consultant. In concluding that the Secretary was required to pay these amounts under EAJA, the judge found that, because of the lack of evidentiary support for her allegations that the trench sections were more than five feet deep, the Secretary had not been "substantially justified" in pursuing her litigation of the alleged willful violations. The judge rejected the Secretary's contention that the EAJA

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[3]The court's brief statement of reasons for issuing its remand order suggests that it essentially agreed with the position the Secretary had taken before it, *i.e.*, that it would be more "appropriate" and consistent with principles of "sound judicial administration" for the court to remand Scafar's EAJA application to the Commission, which was "more familiar with the underlying litigation" and "better situated to evaluate an EAJA petition, at least initially," rather than for the court itself "to consider such a fee application in the first instance" (Secretary's opposition to EAJA "motion" at pp. 2-4).

application should be dismissed as untimely under the Commission's procedural rules implementing that Act. *See* 29 C.F.R. § 2204.302. He concluded that the application was timely under a provision of § 2204.302(c), which we quote *infra*, relating to the reinstatement of an EAJA application following withdrawal of the appellate court petition in the underlying action. The Secretary's exceptions to Judge Schoenfeld's decision on the EAJA application are now before us on review.

Discussion

We agree with the Secretary that the judge erred in holding that Scafar's EAJA application under 5 U.S.C. § 504(a) for fees incurred during the administrative adjudication was timely filed under the Commission's EAJA Rules of Procedure. The rules that govern in this instance are published at 29 C.F.R. §§ 2204.302(a) & (d)(1). They state, in pertinent part:

> (a) 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 Commission's final disposition of the proceeding.
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> * * *
>
> (d) For purposes of this section, the date of final disposition is:
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> (1) The date on which the order of the judge disposing of the case becomes final under section 12(j) of the OSH Act, 29 U.S.C. 666(i) ....

(Emphasis added). As indicated, the date on which Judge Schoenfeld's order "disposing of" Scafar's contest of the willful citation became final under section 12(j) of the OSH Act was September 4, 1998. Scafar was therefore required to file an EAJA application with the Commission no later than October 4, 1998, which was "thirty days after *the Commission's* final disposition of the [OSH Act] proceeding" (emphasis added). Yet, under the terms of the Third Circuit's remand order, we are required to treat Scafar's EAJA application as if it had been filed with the Commission on February 24, 1999, which was more than 4-1/2 months *after* the expiration of the EAJA Rules' deadline.

Judge Schoenfeld's reliance on 29 C.F.R. § 2204.302(c) as the basis of an implied exception to § 2204.302(a)'s filing deadline was misplaced. Aside from the fact that Commission EAJA Rule 302(a) by its terms ("in *no* case" (emphasis added)) leaves no room

for *any* exceptions to its 30-day limitation on filings, we further note that Rule 302(c) by its terms applies to *proceedings* that have *already been initiated* by a timely-filed EAJA application under Rule 302(a). Thus, § 2204.302(c) provides:

> (c) If review of a Commission decision, or any item or items contained in that decision, is sought in the court of appeals under section 11(a) of the OSH Act, 29 U.S.C. 660, *an application* for an award *filed with the Commission* with regard to that decision *shall be dismissed* under 5 U.S.C. 5[0]4(c)(1) as to the item or items of which review is sought. If the petition for review in the court of appeals is thereafter withdrawn, the applicant may *reinstate* its application before the Commission within thirty days of the withdrawal.

(Emphasis added). Here, as indicated, the Secretary filed a petition in the Third Circuit seeking review of the judge's decision that constituted the Commission's final disposition of the underlying OSH Act dispute. Also, the Secretary's petition was "thereafter withdrawn." Nevertheless, Scafar's EAJA application was not filed until *after* both of those events had already occurred. Accordingly, there was *no* EAJA application to be "dismissed" under the first sentence of Rule 302(c) when the Secretary filed her petition for review in the Third Circuit and *no* previously-dismissed EAJA application to be "reinstated" under the second sentence of Rule 302(c) when the Secretary subsequently withdrew that petition for review.

In construing the application of the Commission's EAJA Rules, we also look to the statutory provision that these rules implement in order to determine their meaning. The EAJA requirement codified at 5 U.S.C. § 504(a)(2) states, in pertinent part:

> (2) A party seeking an award of fees and other expenses [by an agency that conducts an adversary adjudication] shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency an application which shows that the party is a prevailing party and is eligible to receive an award under this section .... When the United States appeals the underlying merits of an adversary adjudication, *no decision on the application* for fees and other expenses in connection with that adversary adjudication shall be made under this section until a final and unreviewable decision is rendered by the court on the appeal or until the underlying merits of the case have been finally determined pursuant to the appeal.

(Emphasis added). This provision makes it clear that the effect of an appeal by the U.S. government (*e.g.*, the Secretary of Labor in an OSH Act proceeding) seeking judicial review of an administrative agency adjudication is *not* to extend the thirty-day deadline for filing an EAJA application but rather only to stay the EAJA proceedings, including in particular the issuance of a "decision," that have already been initiated by a timely-filed application until the appellate court litigation of the underlying dispute has been finally resolved. Our construction of 29 C.F.R. §§ 2204.302(a) & (c) is therefore consistent with the language of 5 U.S.C. § 504(a)(2), the statutory provision that these rules effectuate.

The courts have held that the 30-day limitation of 5 U.S.C. § 504(a)(2), and its counterpart in 28 U.S.C. § 2412(d)(1)(B), are restrictions on the authority of agencies and courts to award fees and expenses against the government and that these sections are therefore to be "strictly" applied. As the Supreme Court stated in *Ardestani v. INS*, 502 U.S. 129, 137, 112 S.Ct. 515, 520 (1991), "EAJA renders the United States liable for attorney's fees for which it would not otherwise be liable, and thus amounts to a partial waiver of sovereign immunity. Any such waiver must be strictly construed in favor of the United States." *See also, Action on Smoking & Health v. C.A.B.*, 724 F.2d 211, 225 (D.C. Cir. 1984). We therefore are compelled to strictly apply the 30-day limitation of the statute. In the absence of any basis for extending the period to file in this case, we conclude that Scafar's failure to file an EAJA application with the Commission following the Commission's "final disposition" of the underlying OSH Act adjudication deprived the Commission and its ALJ of any authority to make an award of fees and expenses incurred during that administrative adjudication.

Scafar argues, however, that we have the authority to rule on its EAJA application because the application was timely filed with the Third Circuit court under 28 U.S.C. § 2412(d)(1)(B) and that court conferred its own jurisdiction on the Commission when it issued its remand order. We agree with this argument only in part. Scafar's EAJA application was filed within thirty days of the Third Circuit's "final judgment" in the "civil action" that was initiated by the Secretary's appeal of the Commission's "final disposition"

of the "adversary adjudication" in the OSH Act enforcement proceedings. Thus, the Third Circuit entered its "final judgment" on January 25, 1999, when it issued its order granting the Secretary's motion to dismiss her petition for review. Scafar filed its EAJA application thirty days later, on February 24, 1999, and the application was therefore timely with respect to the civil action.

Nevertheless, we do not agree with Scafar's contention that the filing of this timely EAJA application under 28 U.S.C. § 2412(d)(1)(B) conferred jurisdiction on the Third Circuit to award fees and expenses arising out of the administrative proceedings that occurred before Judge Schoenfeld and the Commission. It conferred jurisdiction on the court only to award fees and expenses arising out of the "civil action" that was initiated before the court following the completion of the administrative proceedings, *i.e.*, "the "proceedings for judicial review of [the Commission's] action." *See* 28 U.S.C. § 2412(d)(1)(A). As the Ninth Circuit recently stated, "The Supreme Court's case law squarely supports the government's argument that 5 U.S.C. § 504 governs proceedings before administrative agencies whereas 28 U.S.C. § 2412 governs only proceedings that come under the jurisdiction of the courts." *Mendenhall v. National Transp. Safety Bd.*, 213 F.3d 464, 467 (9th Cir. 2000), *citing Melkonyan v. Sullivan*, 501 U.S. 89, 111 S.Ct. 2157 (1991), and *Sullivan v. Hudson*, 490 U.S. 877, 109 S.Ct. 2248 (1989); *see also*, *Shalala v. Schaefer*, 509 U.S. 292, 113 S.Ct. 2625 (1993).[4] Since the Third Circuit lacked jurisdiction to award Scafar fees and expenses

[4]The above-cited Supreme Court case law does establish a very limited exception to the above-quoted general rule where administrative proceedings are so closely integrated into a judicial "civil action" that the court is deemed to have the authority under 28 U.S.C. § 2412 to award fees and expenses incurred in the administrative proceedings as well as in the court proceedings. Where, as here, the administrative proceedings are *completed* before the judicial proceedings even begin, the two proceedings are separate and distinct, and the court, therefore, clearly lacks jurisdiction under 28 U.S.C. § 2412 to award fees and expenses incurred in the administrative proceedings. *See Melkonyan*, 501 U.S. at 94, 111 S.Ct. at 2161 ("Section 504 was enacted at the same time as § 2412, and is the *only* part of the EAJA that allows fees and expenses for administrative proceedings conducted *prior to* the filing of a civil action" (emphasis added)).

that were incurred during the administrative proceedings, its remand order could not and did not confer such jurisdiction on the Commission.[5]

Having concluded that Scafar's EAJA application is properly before us only to the extent it seeks an award for fees and expenses covered by 28 U.S.C. §§ 2412 (b) & (d)(1), we must address the Secretary's challenges to (a) the judge's finding that she was not "substantially justified" in pursuing her allegations under the willful cave-in protection citation and (b) the judge's computation of the amounts awarded to Scafar's attorneys and its consultant. The parties have vigorously argued the question raised initially in the Secretary's petition for discretionary review and subsequently in the Commission's briefing notice of whether the Secretary was "substantially justified in pursuing this case *through the hearing before the judge and the petition for review to the Commission*" (emphasis added). That question, however, has been rendered moot as a result of our holding that Scafar is not entitled to an award under 5 U.S.C. § 504(a) for the fees and expenses that it incurred in connection with the OSH Act enforcement proceedings before the Commission and its judge. As a result of that holding, the issue becomes whether the Secretary was "substantially justified" in pursuing this case beyond the Commission to the U.S. Court of Appeals. *That* issue was not decided by the judge and has not been addressed by the parties in their arguments before us. Indeed, it is unclear whether the Secretary even contests Scafar's EAJA request under 28 U.S.C. §§ 2412(b) & (d)(1). Accordingly, we remand in

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[5]We reject Scafar's argument that the Third Circuit's order restricts our role on remand to the entering of a factual finding as to the *amount* of fees and expenses that were incurred by Scafar and precludes us from even considering the issue of timeliness that we have ruled upon above. Instead, we agree with Judge Schoenfeld's interpretation of the court's order: "Although the Third Circuit's order speaks of remanding 'the motion' to the Commission, it is clear from the context of the order that the court was directing that the *entire* EAJA matter be placed before the Commission" (emphasis added). We conclude that the *only* restriction that the Third Circuit placed on us in considering Scafar's EAJA application was that we must treat that application as if it had been filed with the Commission on the date it was in fact filed with the court. This decision complies with that restriction.

part for a substantial justification determination to be specifically made under 28 U.S.C. § 2412(d)(1)(A).

Similarly, it appears likely that the Secretary's exceptions to the judge's computations of the amounts awarded to Scafar's attorneys and its consultant have been rendered largely, if not entirely, moot as a result of our dismissal of Scafar's application for fees and expenses incurred in the "adversary adjudication." To the extent that the parties' arguments have not been rendered moot (with regard to the amount(s), if any, due under 28 U.S.C. §§ 2412(b) & (d)(1)), we instruct the judge to consider (or reconsider) them in his decision on remand.

Finally, we also include within the scope of our remand order Scafar's supplemental requests for fees and expenses incurred in the proceedings before the Commission on remand from the Third Circuit. We agree with the Secretary that no determination can be made on these supplemental requests until the adjudication of the remaining portion of Scafar's underlying application for an EAJA award has been completed.

Order

Scafar's EAJA application is dismissed as untimely to the extent it seeks an award under 5 U.S.C. § 504(a) for fees and expenses incurred during the "adversary adjudication" of the contested OSHA citation before the Commission and its ALJ. Scafar's EAJA application is remanded to the judge to consider Scafar's request for an award under 28 U.S.C. §§ 2412(b) & (d)(1) for fees and expenses incurred during the "civil action" initiated before the Third Circuit. Scafar's supplemental requests for fees and expenses incurred on remand before the Commission are also remanded to the judge.

/s/
Thomasina V. Rogers
Chairman

/s/
Gary L. Visscher
Commissioner

/s/
Stuart E. Weisberg
Commissioner

Date: November 21, 2000

SECRETARY OF LABOR,
Complainant,
v. OSHRC Docket No. 97-0960

SCAFAR CONTRACTING, INC. ,
Respondent.

EQUAL ACCESS TO JUSTICE APPLICATION
DECISION AND ORDER

This matter arises under the Equal Access to Justice Act, 5 U.S.C. § 504.

BACKGROUND AND HISTORY

Respondent, a trenching contractor, was involved in the removal and replacement of a sewer line in the city of Newark, New Jersey, on or about November 13, 1997 when a Compliance Officer (CO) of the Occupational Safety and Health Administration (OSHA) inspected the operation. As a result of that inspection, OSHA issued to Respondent two citations alleging serious and willful violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. § § 651 - 678 (Act) and proposing penalties of $ 99,000 for the alleged willful violations and $ 4,000 for the alleged serious violations. Respondent timely contested the citations and the case was heard in New York City on February 23, 24 and 25 and April 23, 1998.

After amendment of the citation and complaint, it was alleged in Citation 2, Items 1a, 1b and 1c, that Respondent had willfully failed to have adequate cave-in protection at three locations along one trench being dug and refilled section by section. In addition, the Secretary, in Citation 1, Item 1a, alleged that at one location in a manhole excavation there was no cave-in protection. In the alternative, Citation 1, Item 1b alleged that the timber shoring used by Respondent in the manhole excavation was of inadequate design.

On July 24, 1998, a Decision and Order was issued affirming Items 1a and 1b of Citation 1 as serious violations and assessing penalties of $ 1,500 and $ 100, respectively. All three subitems of Citation 2, which alleged three willful violations and sought a penalty of $ 99,000, were vacated. On August 25, 1998, the Secretary filed a Petition for Discretionary Review with the Commission. The Decision and Order became the final order of the Commission by operation of law on September 9, 1998, by virtue of the fact that no member of the Commission directed the case for review. On October 20, 1998, the Secretary filed a Petition for Review with the United States Court of Appeals for the Third Circuit, seeking review of the Commission Decision and Order. On December 10, 1998, the Secretary abandoned her appeal by filing a Motion to Dismiss Petition for Review with the Third Circuit. On January 25, 1999, the Third Circuit entered an order granting the Secretary's Motion to Dismiss. On or about February 23, 1999, Respondent moved the Third Circuit court for an Order awarding it fees and expenses pursuant to the EAJA. The

Secretary moved to dismiss the motion for fees and expenses. On April 29, 1999, the Third Circuit remanded the matter to the Commission.

DISCUSSION

a. General Principles.

EAJA applies to proceedings before the Commission through Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659(c). The purpose of the EAJA is to ensure that an eligible applicant is not deterred from seeking review of, or defending against, unjustified actions by the Secretary. *K.D.K. Upset Forging, Inc.,* 12 BNA OSHC 1857 (No. 81-1932, 1986). An award is made to an eligible applicant who is the prevailing party if the Secretary's action is found to be without substantial justification and there are no special circumstances that would make the award unjust. *Asbestos Abatement Consultation and Engineering,* 15 BNA OSHC 1252 (No. 87-1522, 1991). "Prevailing party" is broadly defined. It includes a party who has prevailed on a "discrete substantive portion of an agency action." *See, Bradley v. School Board of the City of Richmond,* 416 U.S. 696 (1974). While the applicant has the burden of proving eligibility, the Secretary has the burden of demonstrating that her actions were substantially justified. 29 C.F.R. § 2204.106(a). There is no presumption that the Secretary's position lacked substantial justification simply because the Respondent prevailed. Moreover, the Secretary need not show that her decision to litigate was based on a substantial probability of prevailing. *S & H Riggers & Erectors, Inc., v. OSHRC,* 672 F.2d 426, 430 (5th Cir. 1982). The Secretary must, however, show that there was a reasonable basis in law as applied to the facts underlying the charges. *Contour Erection and Siding Systems, Inc.,* 18 BNA OSHC 1714, 1716 (No. 96-0063, 1999)("*Contour*"), *Dougherty v. Lehman,* 711 F.2d 555, 561 (3rd Cir. 1983). To be "substantially justified," the government's position must have had a reasonable basis in fact and in law. *Hanover Potato Products, Inc. v. Halala,* 989 F.2d 123, 128 (3rd Cir. 1993)("*Hanover*").

b. Who Prevailed.

In its application, Scafar maintains that it "clearly prevailed" as to Citation 1, Items 1a and 1b, because, even though the items were affirmed, the proposed penalty was reduced from $ 4,000 to $ 1,600. More importantly, Citation 2, alleging three instances of willful violations, along with $ 99,000 in proposed penalties, was vacated in its entirety.[6]

The Secretary apparently agrees, arguing that;

> [assuming], *arguendo,* that respondent's application is found to have limited merit, any fees and expenses awarded pursuant to

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[6] A Respondent is the "prevailing party" in a case in which the citation items are affirmed but the penalty assessed is less than that proposed by OSHA or where the citation is withdrawn by the Secretary. *H.P. Fowler Contracting Corp.,* 11 BNA OSHC 1841 (No. 80-3699, 1984), but see, *Pentecost Contracting Co.,* 18 BNA OSHC 1464 (No. 92-3788, 1997)(ALJ)(68 percent reduction in penalties is not "prevailing" where willful citation is affirmed.)

> the EAJA should be limited to the issues on which respondent prevailed, namely the violation alleged in citation 2, item 1 and the penalty for citation 1, Item 1a and 1b.

(Sec. Brief, p. 21). Based on the above, I find that Respondent is eligible for fees under EAJA.

c. Standard of "Substantially Justified'

As discussed above, to avoid liability under EAJA, the government must show that its case had a reasonable basis in law and fact.

In this case, the Secretary examines succinct portions of the case, and, by parsing it into small packages, she seeks to establish that her actions were reasonable. For example, the Secretary maintains that going forward with alleged violations that were dependent on a showing that the trench was at least 5 feet in depth "had reasonable bases in fact" because the Compliance Officer (CO) testified that he relied on employees who were present during the work and on an employee of a construction monitoring company who was also present when the trench segments were open. The Secretary would like the Administrative Law Judge to find her position "reasonable" because the CO's testimony was rejected on credibility grounds.

Respondent argues that the Administrative Law Judge's findings and conclusions in the Decision and Order of July 24, 1998, show a lack of reasonable bases for the Secretary's prosecution of the matter through hearing. Respondent points to the holding regarding the items in Citation 2, that is, that the Secretary's case was nothing more than "assumptions and inferences" and that she failed to provide any "evidence that [could] supply a reasonable basis" to support the alleged violations. Respondent argues that, as in *Hanover*, the Secretary here 'stubbornly" litigated a case for which she had no reasonable factual or legal basis.

Respondent lists the following as evidencing the lack of a reasonable basis for the Secretary's litigating this case: 1. Her decision to abandon her appeal and her concession in her statement to the Third Circuit that her "chance of success under the substantial evidence standard of review was slim to none." 2. That her position was rejected by the Administrative Law Judge and was also summarily dismissed by the Commission. (The effect of not granting the Secretary's petition for review amounted to the Commission finding "the decision factually and legally unsound and not worthy of review.") 3. Her failure to present any evidence of the depth of two of the trench segments because the CO never even saw two of the three trenches when they were open. 4. Her decision to pursue the willful charge, even though she knew Knowing from the beginning that she had no evidence whatsoever as to the depth of the two trenches. 5. Her reliance on the architectural plan was flawed from the beginning because it nowhere showed the depth. The Administrative Law Judge observed that the Secretary's reliance on the plan was "sheer speculation." 6. The CO's reliance on adding the thickness of the cement/asphalt covering on the roadway to be included in the depth measurement (so as to attain a trench greater than 5' deep) "was a knowing and patent falsehood."

I find that Respondent is correct in its analysis so far as the Secretary's actions during preparation and trial of the case is concerned. (particulars 3, 4, 5 & 6, above.) I reject,

however, Respondent's assertion that the Commission's action in declining to grant the Secretary's petition for discretionary review or that the her withdrawal of her appeal to the Third Circuit is evidence that her litigation position was not substantially justified.

THE SECRETARY'S OPPOSITION

a. The EAJA Application as a Whole

First, the Secretary maintains that the EAJA application as a whole is deficient and should be denied *en toto*. The Secretary argues that the EA JA application was not timely because it was not filed within thirty days from the date on which the unreviewed Administrative Law Judge's decision became final. In making this argument, however, the Secretary conveniently fails to account for the fact that the Third Circuit specifically ordered that "[the Commission] shall treat the motion as if filed on the date it was filed with this court."[7] The Secretary's argument is rejected for the reasons set forth in my Order of June 3, 1999. The EAJA application was timely filed.

Second, the Secretary argues that the net worth exhibit does not comply with Rule 202(a), 29 C.F.R. § 2204.202(a), requiring "full disclosure of applicant's assets and liabilities..." The Secretary points out that the Radler affidavit omits notes referenced in the balance sheet and does not describe the accounting principles utilized, without which, she asserts, the validity of assets and liabilities cannot be ascertained. The Secretary's argument is rejected in the absence of a showing of some evidence that would at least suggest that there is something less than full disclosure in the net worth exhibit.

b. Details of the EAJA Application

The Secretary also delves into the materials supporting the application in great detail.

She states that the invoices submitted as Exhibit B to the Rufolo affidavit and Exhibit L to the Paranac affidavit do not comply with Rule 203 in that neither has attached contemporaneous time sheets documenting the time spent that is required under *National Ass'n of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1327 (D.C. Cir. 1982)("*National*"). The Secretary's reliance on *National* is misplaced. By submitting copies of their montly billings, the applications are supported with sufficient "contemporaneous" documentation to meet the D.C. Circuit's test, which held as follows:

> ...the application must be sufficiently detailed to permit the District Court to make an independent determination whether or not the hours claimed are justified. The better practice is to prepare detailed summaries based on contemporaneous time records indicating the work performed by each attorney for whom fees are sought.

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[7] Although the Third Circuit's order speaks of remanding "the motion" to the Commission, it is clear from the context of the order that the court was directing that the entire EAJA matter be placed before the Commission.

National, supra. at 1327. The Secretary claims that the affidavits supporting the claimed billing have been submitted without proper supporting materials in that the submissions; 1) do not identify the individuals who performed services; 2) do not show the hours spent by each individual in connection with this proceeding and the normal billing rate of that individual; 3) do not designate each citation item or issue on which hours were expended; and, 4) do not describe the services performed in each instance. Also, according to the Secretary, the Paranac and Rufolo affidavits and their invoices fail to designate the citation items and issues on which hours were expended.

The Secretary's arguments are rejected. The citation items and issues were so closely related in fact and law to one another that it would be virtually impossible to account for time spent in defense of each one individually. Moreover, contrary to the Secretary's claim, the identity of the individuals providing the services, the hours spent by each, and the usual billing rate for each are included in the billings by matching up the full names under "User Summary" at the end of each months' billings with the initials for each itemized service.

The Secretary alleges that the fees sought are at excessive rates, noting that Rule 107(b), 29 C.F.R. § 2204.107(b), limits fees for agents and attorneys to $75 per hour for services performed before July 3, 1997, and to $125 per hour for services on or after that date.[8] The Commission has held that the $125 per hour rate applies "to actions commenced (by the issuance of the citation) after March 29, 1996. *Contour, supra.* 18 BNA at p. 1717. In this case, the citation was issued on April 30, 1997. The $125 per hour rate limit applies.

The Secretary also argues that travel expenses billed by Consultant Rufolo after February 5, 1998, are "redundant and unnecessary, a consequence of overstaffing and duplicative work" because as of that date Respondent had engaged the Paranac law firm (Sec. Answer p.11). This argument is also rejected. With nothing further than the fact that both a consultant and a law firm were working simultaneously on the same case, the

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[8] The Secretary calculates that if Respondent were to receive the maximum allowable hourly rates under the Commission rules that JW Rufolo would receive $37,341.25 for its total of 261.25 hours of work and the firm of Jasinski and Paranac would receive $42,013.25 for its 336.25 hours expended. (Sec. Brief, Pp 6-7) .

Secretary has not necessarily established that the services being performed for Respondent by either counsel or consultant were "redundant" or "unnecessary."

The Secretary, citing *Cooper v. U.S.R.R. Retirement Bd.,* 24 F. 3d 1414, 1417 (D.C.Cir, 1994), also claims that reimbursement of Paranac and Rufolo for travel time should be at one-half their base hourly rate. The Secretary, however, does not acknowledge the Commission's decision in *Ruhlin Co.,* 17 BNA OSHC 1068 (No. 93-1507, 1995), holding otherwise.

The Secretary goes to significant lengths to point out a number of instances in the listings of itemized services provided by counsel and the consultant that she argues were "excessive, redundant and unnecessary hours, primarily due to overstaffing and duplication of services between JW Rufolo and the Paranac law firm." Each of the items pointed out by the Secretary has been reviewed and is approved. Working in teams is not necessarily duplication, especially as trial nears, and the Secretary's objections are broad and sweeping and lack specificity that the claimed duplicative work was actually redundant or superfluous. Finally, the Secretary maintains that the Paranac billing "fails to document and substantiate the necessity" of a number of itemized expenses which total $2,985.76 for such things as photocopying, faxing and the use of lexis and messengers. Given that such activities are reasonably anticipated and generally engaged in by attorneys, other representatives and all parties to litigation, I find the Secretary's claim unpersuasive.

FINAL CALCULATIONS AND THE LODESTAR

The EAJA applications of attorney Paranac and his firm includes 305 hours for work covering trial preparation, trial and post trial proceedings, 31.25 hours for the EAJA application, and 36.25 hours of work regarding post-remand activities including briefs regarding the EAJA issued. The law firm states that it has various billing rates ranging from $ 225 per hour for Mr. Paranac to $170 per hour for others in his firm. Another $ 3,714.27 is shown in trial expenses and 685.41 in appeals and EAJA expenses. Consultant Rufolo submitted an account of 271.75 hours. His usual rate of billing is said to be $ 250 per hour, resulting in a total of $ 67, 937.50, with additional expenses of $ 792.81.

In arriving at an appropriate award, a "lodestar," (the hourly fee times a reasonable number of hours expended) must be determined. To determine the reasonable number of hours expended in setting the "lodestar," the complexity and novelty of the issues involved must be considered, as well as other factors including the prevailing rate for similar services and the value of the services provided. The judge must weigh the petitioner's submitted number of hours expended "against his own knowledge, experience and expertise of the time required to complete similar activities" in order to arrive at a reasonable number of hours. *William B. Hopke Co.*, 12 BNA OSHC 2158, 2160 (No. 81-0206, 1986).

The litigation in this case involved two serious and three willful items with a penalty exceeding $100,000. The willful classification of violations considerably raises the stakes for an employer. The law surrounding the cited standards and the law of the case were neither complex nor particularly novel, although it took a considerable amount of preparation and time to develop and fully appreciate a fairly complex set of facts in regard to the site, its measurements and how the work proceeded. Respondent's engaging an expert engineering witness regarding shoring was of little help while retaining another, a former OSHA official, was of significance. In addition, the final results primarily turned on the Secretary's failure to provide a reasonable factual predicate for a showing of a violation. Indeed, it was this very failure on which the determination of lack of substantial justification primarily rests. Thus, based upon my experience, I find that the resources expended by counsel exceeds by one-fifth what was necessary to adequately defend against the citations. The hours itemized will thus be reduced by 20% in calculating the "lodestar." Similarly, I am of the opinion that the lodestar for the consultant should be a 30% reduction. Accordingly, fees are awarded as listed below.[9]

Respondent's attorneys, Jasinski and Paranac, are entitled to a lodestar award of $125 per hour for 244 hours, for a total of $ 30,500 plus $ 3,174 in expenses, for the primary litigation. In addition, Jasinski and Paranac are awarded $125 per hour for 25 hours for a total of $ 3,125, plus $ 685.41 in expenses, for the preparation of the EAJA application.

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[9] See Appendix A.

Counsel is also awarded $ 3,625 for 29 hours at $ 125 per hour for the preparation of the EAJA brief. The grand total of Counsels award is thus $41,649.68

Consultant Rufolo's award is calculated on a "lodestar" of $ 125 per hour for 190 hours, for a total of $ 23,778. In addition, consultant Rufolo is awarded $ 792.81 for expenses. The grand total award to Rufolo is thus $ 24,570.81.

_____/s/_____
Michael H. Schoenfeld
Judge, OSHRC

Dated: 9/13/99
Washington, DC

SECRETARY OF LABOR v. SCAFAR CONTRACTING, INC.
DOCKET No. 97-0960

APPENDIX A

"LODESTAR" CALCULATIONS - COUNSEL

Activity	Hours Claimed	Lodestar Factor	Lodestar Hours	Rate	Amount	Expenses	Total
EAJA Appl.	31.25	0.80	25	$125	$3,125.00	$685.41	$3,810.41
Prep. & Hearing	305	0.80	244	$125	$30,500.00	$3,714.27	$34,214.27
EAJA Briefs	36.25	0.80	29	$125	$3,625.00	- - -	$3,625.00
					TOTAL		$41,649.68

"LODESTAR" CALCULATIONS - CONSULTANT

Activity	Hours Claimed	Lodestar Factor	Lodestar Hours	Rate	Amount	Expenses	Total
Prep. & Hearing	271.75	0.70	190	$125	$23,778.00	$792.82	$24,570.81
					TOTAL		$24,570.81