



UNITED STATES OF AMERICA  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
 One Lafayette Centre  
 1120 20th Street, N.W. — 9th Floor  
 Washington, DC 20036-3419

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SECRETARY OF LABOR,

Complainant,

v.

HARRIS MASONRY, INC.,

Respondent.

Docket No. 91-2537

**ORDER**

This matter is before the Commission on a direction for review entered by **Stuart E. Weisberg**, Chairman, on June 14, 1994. The parties have now filed a stipulation and settlement agreement.

Having reviewed the record, and based upon the representations appearing in the stipulation and settlement agreement, we conclude that this case raises no matters warranting further review by the Commission. The terms of the stipulation and settlement agreement do not appear to be contrary to the purposes of the Equal Access to Justice Act, 5 U.S.C. § 504, and are in compliance with the Commission's Rules of Procedure.

Accordingly, we incorporate the terms of the stipulation and settlement agreement into this order, and we set aside the Administrative Law Judge's decision and order to the extent that it is inconsistent with the stipulation and settlement agreement. This is the final order of the Commission in this case.

BY DIRECTION OF THE COMMISSION

Dated July 26, 1994

*Ray H. Darling, Jr.*  
 Ray H. Darling, Jr.  
 Executive Secretary

**NOTICE OF ORDER**

The attached Order by the Occupational Safety and Health Review Commission was issued and served on the following on July 26, 1994.

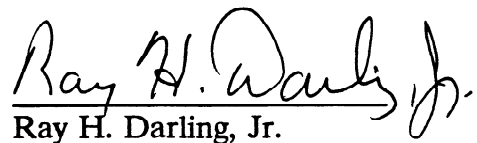
Daniel J. Mick, Esq.  
Counsel for Regional Trial Litigation  
Office of the Solicitor, USDOL  
200 Constitution Ave., N.W. Room S4004  
Washington, D.C. 20210

Catherine Oliver Murphy  
Deputy Regional Solicitor  
Office of the Solicitor, U.S. DOL  
14480 Gateway Building  
3535 Market Street  
Philadelphia, PA 19104

Henry G. Beamer, Esq.  
1330 Grant Building  
Pittsburgh, PA 19104

Michael H. Schoenfeld  
Administrative Law Judge  
Occupational Safety and Health  
Review Commission  
One Lafayette Centre  
1120 20th Street, Suite 990  
Washington, D.C. 20036-3419

FOR THE COMMISSION

  
Ray H. Darling, Jr.  
Executive Secretary

UNITED STATES OF AMERICA  
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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RECORDED

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ROBERT B. REICH, SECRETARY OF LABOR,

Complainant,

v.

HARRIS MASONRY, INC.

Respondent.

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OSHRC Docket No.  
91-2537

**STIPULATION AND SETTLEMENT AGREEMENT**

The parties have reached agreement on a full and complete settlement and disposition of the issues in this proceeding which are currently pending before the Commission. It is hereby stipulated and agreed between the Complainant, Secretary of Labor, and the Respondent, Harris Masonry, Inc., that:

1. The Secretary hereby withdraws the Petition for Discretionary Review regarding the judge's award of attorney fees above the statutory limit under the Equal Access to Justice Act (EAJA), 5 U.S.C. §504.

2. In recognition of the statutory limit of \$75.00 per hour, respondent agrees to a reduction in the amount awarded by

Judge Schoenfeld, from \$7,185.00 to \$5,388.75 (71.85 hours @ \$75.00 per hour) in attorney fees, plus costs.

3. Respondent certifies that a copy of this Stipulation and Settlement Agreement was posted at the workplace on July 15, 1994 1994, in accordance with Rules 7 and 100 of the Commission's Rules of Procedures, and will remain posted for a period of ten days.

4. There is no authorized employee representative, and no affected employee elected party status in this case.

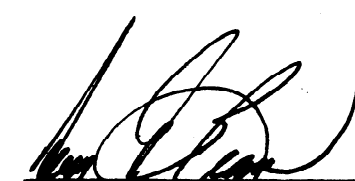
Respectfully submitted,

THOMAS S. WILLIAMSON, Jr.  
Solicitor of Labor

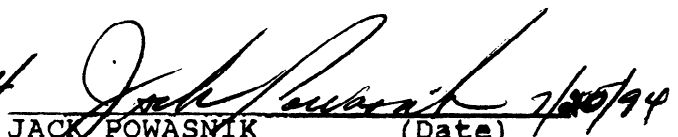
JOSEPH M. WOODWARD  
Associate Solicitor for  
Occupational Safety and Health

DONALD G. SHALHOUB  
Deputy Associate Solicitor for  
Occupational Safety and Health

DANIEL J. MICK  
Counsel for Regional  
Trial Litigation

  
HENRY G. BEAMER  
Attorney for the  
Respondent

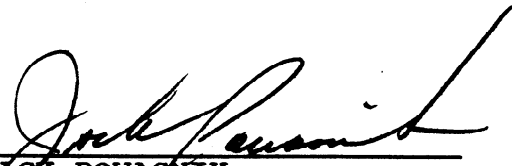
July 14, 94  
(Date)

  
JACK POWASNIK  
Attorney for the  
Secretary of Labor

**CERTIFICATE OF SERVICE**

I certify that a copy of the fully executed Stipulation and Settlement agreement was mailed postage prepaid on July 20, 1994:

Henry G. Beamer, Esq.  
1330 Grant Building  
Pittsburgh, PA 19104

  
\_\_\_\_\_  
JACK POWASNIK  
Attorney for the  
Secretary of Labor



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**SECRETARY OF LABOR**  
Complainant,  
v.  
**HARRIS MASONRY, INC.**  
Respondent.

**OSHRC DOCKET  
NO. 91-2537**

**NOTICE OF DOCKETING  
OF ADMINISTRATIVE LAW JUDGE'S DECISION**

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on May 20, 1994. The decision of the Judge will become a final order of the Commission on June 20, 1994 unless a Commission member directs review of the decision on or before that date. **ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW.** Any such petition should be received by the Executive Secretary on or before June 9, 1994 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

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

Executive Secretary  
Occupational Safety and Health  
Review Commission  
1120 20th St. N.W., Suite 980  
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.  
Counsel for Regional Trial Litigation  
Office of the Solicitor, U.S. DOL  
Room S4004  
200 Constitution Avenue, N.W.  
Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.  
Executive Secretary

Date: May 20, 1994

DOCKET NO. 91-2537

NOTICE IS GIVEN TO THE FOLLOWING:

**Daniel J. Mick, Esq.**  
Counsel for Regional Trial Litigation  
Office of the Solicitor, U.S. DOL  
Room S4004  
200 Constitution Ave., N.W.  
Washington, D.C. 20210

**Catherine Oliver Murphy**  
Deputy Regional Solicitor  
Office of the Solicitor, U.S. DOL  
14480 Gateway Building  
3535 Market Street  
Philadelphia, PA 19104

**Henry G. Beamer, Esquire**  
1330 Grant Building  
Pittsburgh, PA 15219

**Michael H. Schoenfeld**  
Administrative Law Judge  
Occupational Safety and Health  
Review Commission  
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SECRETARY OF LABOR,

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HARRIS MASONRY, INC.,

Respondent.

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OSHRC Docket No. 91-2537

**DECISION AND ORDER  
REGARDING APPLICATION FOR AWARD OF ATTORNEY FEES AND OTHER  
EXPENSES**

This proceeding arises under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651 - 678 (1970) ("the Act"). It relates to a Decision and Order issued on November 5, 1992 ("Decision") in this matter resolving the merits of the case.

Respondent, Harris Masonry, Inc., ("Harris"), submits an Application For Award Of Attorney Fees and Other Expenses under the Equal Access to Justice Act, 5 U. S.C. § 504, made applicable to Commission proceedings by 29 C.F.R. Part 2204.

Harris is a corporation with a net worth of under \$7 million dollars, and was the prevailing party in Docket No. 91-2537, which became a final order of the Commission on December 28, 1992. The Secretary has filed an opposition to Respondent's application for an award.



The test of whether an award under EAJA is warranted in Commission matters is whether the Secretary's position was substantially justified. The burden is upon the Secretary, in opposing such award requests, to show by a preponderance of the evidence that his position in the litigation was substantially justified. "Substantial justification" in turn rests upon a showing that the government action was reasonable in fact and law. The "reasonableness" test must be met by the government by showing that it had a reasonable basis 1) for the facts alleged; 2) for the theory it propounded; and, 3) that the facts alleged reasonably support the legal theory advanced. *Consolidated Construction, Inc.*, 16 BNA OSHC 1001 (No. 89-2839, 1993) citing, *Gatson v. Bowen*, 854 F.2d 379, 380 (10th Cir. 1988).

At the outset, the Secretary raises several procedural objections to Respondent's application. The Secretary argues that the application "was not brought under the proper statute," and that it "fails to conform to the statutory requirements." Both of these arguments are rejected in that the mechanical or technical errors pointed out by the Secretary in no way prejudiced the Secretary in attempting to show that his actions were substantially justified. Moreover, the Secretary's argument that the application requests "attorney's fees in excess of the statutory limit" is rejected. The very regulation cited by the Secretary, 29 C.F.R. § 2204.107(a) specifically provides for fees over \$75 per hour under certain conditions. Respondent has alleged that those conditions exist.

As to each of the above arguments, the Secretary "wishes to reserve the right to challenge" the application and have yet another proceeding as to the procedural issues and as to the reasonableness of the fees and the number of hours claimed. The Secretary maintains that such "bifurcation of the fee proceeding will avoid unnecessary expenditure of time and resources." The Secretary's request to litigate the fee application in such a piecemeal fashion is rejected. The Secretary had a full opportunity to respond to the fee application in any fashion he desired, that is by motion, requests for discovery, Etc. Further protracting this matter is unjustified. The Secretary presents no reason, rationale or evidence to contradict Respondent's claims as to its net worth, size, attorney's hours or fees.

The entire record in this case supports the proposition that the Secretary did not have a reasonable basis either in law or fact for bringing or maintaining this action. Without repeating the language of the Decision, suffice it to say neither the inspecting compliance

officer, Complainant's "expert," nor Complainant's counsel had a cogent factual or legal groundwork for the issuance or prosecution of Citation No. 1, Items 1a and 1b. This is evidenced by the numerous amendments, contradictory testimony of Complainant's witnesses, and failure to articulate, at any time, an even arguably viable legal theory of the alleged violation. The award of fees under EAJA should have a "chilling effect" on unreasonable government enforcement efforts. As to the other alleged violations which were vacated in the Decision and Order, the Secretary claims now that since the opinion was based on rejecting the Compliance Officer's testimony on credibility grounds, the Secretary cannot be held to have been unreasonable in relying on such testimony in preparing and prosecuting his case. The Secretary's claim in this case that the officer's testimony and the documentary evidence was reviewed numerous times and that its expert was consulted beforehand shows that its position was reasonable is rejected. For example, a reasonable examination of the compliance officer's videotape would have lead a reasonable person to at least question his statements of the facts surrounding the alleged scaffold violation.<sup>1</sup> Clearly, the need to amend the alleged violations several times prior to trial was reflective of the inability of the Secretary to formulate a viable legal theory of liability.


The cited items were resolved in Harris' favor based upon the total inability of the Secretary to present a cogent case for any violation. Respondent did not have to produce evidence to weigh against that of Complainant, nor were experts needed. This Judge found that the compliance officer's testimony was not at all reliable. This case was not one in which the weight of the inspector's testimony had to be weighed against that of others. Here, his description of events was found to be inherently unreliable. The defects in the citation and OSHA's position could and should have been apparent to the Secretary early in the case. The Secretary was not substantially justified in pursuing this case. An award of fees is proper.

It is not possible, without a more detailed breakdown than that submitted, to determine the rate of labor which went into various items, some of which were more complex than others. The basis of the request for a fee in excess of \$75 per hour is greatly

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<sup>1</sup> See, Decision and Order, n. 3.

modified by fact that issues as to the lack of guardrails on scaffolds (or other protective equipment on a construction site) are not particularly complex or novel under the Act. Counsel for Respondent has previously litigated closely related issues. A rate above but not double the statutory rate is justified under the facts of this case. Respondent's claimed hours and expenses have not been shown to be unreasonable. Accordingly, I find it reasonable to award a total of \$7185.00 (71.85 hours @ \$100.00 per hour) in attorney's fees plus \$631.20 costs advanced for a total award of \$7816.20.



MICHAEL H. SCHOENFELD  
Judge, OSHRC

Dated:

**MAY 20 1994**

Washington, D.C.