United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
100 Alabama St. S.W
Building 1924 Room 2R90
Atlanta, GA 30303-314

SECRETARY OF LABOR, Complainant, v. CENTRAL SITE DEVELOPMENT, LLC, Respondent.	OSHRC Docket No. **16-0642**

DECISION AND ORDER

COUNSEL: Dane L. Steffenson, Trial Attorney, Office of Solicitor, U.S. Department of Labor, Atlanta, GA, for Petitioner.

Paul J. Waters, Esq., Waters Law Group, LLC, Clearwater, FL, for Respondent.

JUDGE: John B. Gatto.

I. INTRODUCTION

Central Site Development, LLC, (Central Site) 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 two items cited by the Secretary in a Citation and Notification of Penalty, issued April 4, 2016. Central Site 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 contends he was substantially justified in issuing the Citation and at all other phases of the proceeding.

Pursuant to Commission Rules 90 and 308, 29 CFR §§ 2200.90 and 2204.308, after carefully considering all the evidence and the arguments of counsel, the Court issues this Decision and Order as its findings of fact and conclusions of law. If any finding is in truth a conclusion of law, or if any conclusion stated is in truth a finding of fact, it shall be deemed so. The Court holds that the Secretary's position was not substantially justified. Therefore, Central Site's EAJA application is **GRANTED** and it is awarded $17,571.00 in attorney fees and expenses.

II. BACKGROUND

The Secretary's Citation arose from a fatality investigation conducted by Compliance Safety and Health Officer Elvin Santiago. Central Site was engaged in site development work at an apartment complex construction project (the "Worksite"), in Saint Petersburg, Florida. Central Site had been at the Worksite for four months at the time of the fatality on October 7, 2015 (Tr. 26). The site covered 10 acres; at the time of the fatality, the site consisted mostly of "[c]leared dirt and a construction trailer." (Tr. 27.) It was bounded on two sides by two-lane paved roads, an office building was on a third side, and an apartment building was on the fourth. There was only one entrance for vehicular traffic to the site (Tr. 27-29, 51).

On the day of the accident, Central Site had onsite Albert Kimball, its supervisor, and one other employee, Michael Montroy, an equipment operator supplied by Construct Corps, LLC, a temporary construction staffing agency (Tr. 24-25, 29, 31, 33, 42, 63, 64-65). Central Site subcontracted the underground pipe work to RAB Foundation Repair, LLC d/b/a API Services ("API"), whose foreman, Doug Miller, and four other workers were also on site that day (Tr. 164). Tri-City, the electrical subcontractor, was also on the site with two employees (Tr. 102). Central Site began work at 7:00 a.m. on the day of the accident (Tr. 52).

The equipment on site that day included a bulldozer and a roller owned by Central Site, a track hoe and a loader owned by API, and at least two dump trucks bringing in dirt (Tr. 43). The bulldozer was equipped with a rearview mirror and a working backup alarm (Tr. 130, 182). The task for the day was setting up a building pad near the construction trailer, approximately 300 feet from the single-entry point to the Worksite (Tr. 51-52). Kimball instructed Montroy to operate the bulldozer to place the dirt for the building pad (Tr. 52-53).

Meanwhile, API was laying pipe for the project. API foreman Miller estimated API averaged "a couple hundred feet" of pipe a day on the project (Tr. 194). At some point, Kimball

took over operation of the bulldozer and assigned a new task to Montroy (Tr. 53). Kimball operated the bulldozer in forward and reverse over an area of the Worksite to compact the soil. Kimball and API's crew were working "[p]robably within 50 to 100 feet, facing each other" when they started out (Tr. 156).

After Kimball had been operating the bulldozer for 30 to 45 minutes, Miller instructed his employee, Justin Smith, to retrieve a water pump from Miller's truck parked near the silt fence that enclosed the Worksite. As Smith returned with the pump, he crossed behind the bulldozer as Kimball operated it in reverse and was struck and killed (Tr. 55, 182). Santiago conducted the fatality investigation following a referral from the police department (Tr. 226). He arrived at the site approximately three hours after the accident, interviewed employees, and took measurements and photographs (Tr. 226-227).

On March 10, 2016, Santiago sent an email to Central Site's counsel, which stated, "[p]lease provide a copy of the 2015 OSHA 300A (4 hours response required), I have a copy that is not completed and let's set up a closing conference, it could be by phone. Thank you." (Ex. R-19 at 4.) Santiago received an automated email response back stating: "[d]elivery to these recipients or groups is complete *but no delivery notification was sent by the destination server.*" (Ex. R-19 at 6) (emphasis added). Santiago called Central Site's counsel "a few days later" and left a voice message indicating he was going to recommend the two disputed violations (Tr. 306). In response to Santiago's voice message, Central Site's counsel sent an email to Santiago on March 16, 2016, indicating he had not received the email Santiago sent on March 10, 2016 (Ex. R-19 at 7).

The Secretary subsequently issued the Citation and Notification of Penalty based on Santiago's recommendation. Item 1 of Citation No. 1 alleged a serious violation of § 5(a)(1) of the Act, 29 U.S.C. § 654(a)(1), commonly known as the "general duty clause," with a proposed penalty of $6,300.00, for allegedly exposing employees to struck-by hazards. Item 1 of Citation No. 2 alleged an "other-than-serious" recordkeeping violation of 29 C.F.R. § 1904.40(a), with a proposed penalty of $400.00. Following a trial in Clearwater, Florida, the Court issued a Decision and Order in this proceeding on July 7, 2017, vacating both items. See *Cent. Site Dev., LLC,* 26 BNA OSHC 1985 (No. 16-0642, 2017). The Decision and Order became a final order

of the Commission on August 10, 2017. On September 5, 2017, Central Site timely filed its *Application* for attorney fees and expenses.[1]

III. ANALYSIS

The EAJA contains provisions authorizing the award of fees and other expenses in specified civil judicial actions, 28 U.S.C. § 2412, and in adversary administrative proceedings, 5 U.S.C. § 504. Significantly, the Supreme Court has explicitly held that "[s]ection 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." (Emphases added.) *Melkonyan v. Sullivan*, 501 U.S. 89, 94 (1991). Under section 504, a private party prevailing in an adversarial agency adjudication may be awarded[2] fees and other expenses incurred by that party relating to that proceeding, "unless the adjudicative officer of the agency finds that the position of the agency[3] was substantially justified or that special circumstances make an award unjust."[4] 5 U.S.C. § 504(a)(1). In Commission proceedings, "[t]he burden of persuasion that an award should not be made . . . is on the Secretary." 29 C.F.R. § 2204.106.

The EAJA limits an award to a prevailing party who is an "owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the adversary adjudication was initiated, and which had not more than 500 employees at the time the adversary adjudication was initiated[.]" 5 U.S.C. § 504(b)(1)(B)(ii); *see also*, 29 C.F.R. §§ 2204.105(b) and (c). As indicated *supra*, the Secretary does not dispute that Central Site was the "prevailing party" in the prior litigation, that it met the other criteria that make it eligible for an award, or that special circumstances exit such that an award would be unjust. There is no question that Central Site

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[1] 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.

[2] The Supreme Court also held that EAJA fees belong to the client, not the attorney, absent a representation agreement to the contrary. *Astrue v. Ratliff*, 560 U.S. 586, 596-97 (2010).

[3] The "position of the agency" means, in addition to the position taken by the agency in the adversary adjudication, the action or failure to act by the agency upon which the adversary adjudication is based . . . ." 5 U.S.C. § 504(b)(1)(E). *See also* 29 C.F.R. § 2204.106(a) ("position of the Secretary includes . . . the action or failure to act by the Secretary upon which the adversary adjudication is based").

[4] Likewise, Commission EAJA Rule 106(a) provides that "[a] prevailing applicant may receive an award for fees and expenses in connection with a proceeding . . . unless the position of the Secretary was substantially justified." 29 C.F.R. § 2204.106(a).

was the prevailing party[5] or that it met the other criteria that make it eligible for an award.[6] The Court also finds there are no special circumstances that would make an award unjust under section 504(a)(1). Central Site is eligible for attorney fees and expenses under EAJA. Accordingly, the Court turns to the actual merits of the Government's litigation position.

A. Substantially Justified

Since the first stage of this enforcement proceeding was the issuance of the citation, the Court must first consider whether the Secretary was substantially justified in issuing the citation. *Consol. Constr., Inc.*, 1993 O.S.H. Dec. (CCH) ¶ 29992, at *3), 1993 WL 69989 at *3 (No. 89-2839, 1993) ("We first consider whether the Secretary was substantially justified in issuing these citation items"). The Court must be mindful, however, that the substantial justification standard was adopted as a "caution to agencies to carefully evaluate their case and not to pursue those which are weak or tenuous." *William B. Hopke Co.*, 12 BNA OSHC 2158, 2160 (No. 81-206, 1986) (*citing* H.R.Rep. No. 1418, 96th Cong., 2d Sess. at 14, reprinted in 1980 U.S. Code Cong. & Ad. News at 4993).

To meet the substantial justification test, the Secretary's position must be "justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood,* 487 U.S. 552, 565 (1988). As the Supreme Court explained, "a position can be justified even though it is not correct, and we believe it can be substantially (*i.e.,* for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact." *Pierce*, 487 U.S. at 565 n. 2. The Commission has held that "[t]he reasonableness test breaks down into three parts: the government must show 'that there is a reasonable basis ... for the facts alleged ... that there exists a reasonable basis in law for the theory it propounds; and that the facts alleged will reasonably

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[5] The Review Commission has held, "[a]lthough the term is not defined in the EAJA, an applicant is considered to be the 'prevailing party'" ... if it has succeeded on any of the significant issues involved in the litigation, and if, as a result of that success, the applicant has achieved some of the benefit it sought in the litigation." *K.D.K. Upset Forging, Inc.*, 12 BNA OSHC 1856, 1857 (No. 81-1932, 1986). Here, the Court vacated both cited items and accordingly assessed no penalties. Central Site achieved the benefit it sought in the litigation in its entirety. Therefore, Central Site was the prevailing party in the action below.

[6] Central Site filed its notice of contest on April 13, 2016. According to Kati Trammel, Central Site's Chief Financial Officer, Central Site employed a total of 90 employees, including full time and proportional part time employees based on a 40-hour work week on that date (Ex. 1 of Central Site's *Application*: Trammel Decl. ¶ 3). Trammel also avers Central Site's total assets on April 30, 2016, amounted to $23,266,510.31, while its total liabilities amounted to $20,084,534.82. See also Ex. A to Central Site's *Application*: balance sheet for April 30, 2016; Ex. 2: Appleby Decl. ¶¶3, 4. Thus, the company's net worth that day was $3,181,975.49 (Ex. 1 of Central Site's *Application*: Trammel Decl. ¶¶ 4, 6).

support the legal theory advanced." *Consol. Constr., Inc.*, 1993 O.S.H. Dec. (CCH) ¶ 29992 at *3) (citation omitted). The test of whether the Secretary's action is substantially justified is essentially one of reasonableness. *William B. Hopke Co.*, 12 BNA OSHC 2158, 2160 (No. 81-206, 1986). Where the Secretary can show that a case had a reasonable basis both in law and fact, no attorney fees will be awarded. *See C.J. Hughes Construction, Inc.*, 19 BNA OSHC 1737, 1741 (No 93-3177, 2001); *Mautz & Oren, Inc.*, 16 BNA OSHC 1006, 1009 (No. 89-1366, 1993); *Hocking Valley Erectors, Inc.*, 11 BNA OSHC 1492, 1498 (No. 80-1463, 1983). *See also U.S. v. One 1985 Chevrolet Corvette*, 914 F.2d 804, 809 (6th Cir. 1990) ("substantially justified" is a standard "which require[s] reasonableness"). "While the position need not prove correct, it must be 'more than merely undeserving of sanctions for frivolousness.'" *Hartmann v. Stone*, 156 F.3d 1229, 1232 (6th Cir. 1998) (citing *Pierce,* 487 U.S. at 566).

"Conceivably, the Government could take a position that is not substantially justified, yet win; even more likely, it could take a position that is not substantially justified, yet lose." *Pierce*, 487 U.S. at 569, "but at the same time the standard does not 'require the Government to establish that its decision to litigate was based on a substantial probability of prevailing.'" *Taucher v. Brown-Hruska*, 396 F.3d 1168, 1173 (D.C. Cir. 2005) (*citing Spencer v. NLRB,* 712 F.2d 539, 557 (D.C.Cir.1983) (*quoting* H.R.Rep. No. 96–1418, at 10–11 (1980)). Therefore, even though the Secretary has "lost this case on the merits [it] does not automatically mean that his position was not substantially justified within the meaning of the EAJA." *Consol. Constr., Inc.*, 1993 O.S.H. Dec. (CCH) ¶ 29992, at *2). The issue is "whether the preponderance of the evidence supports a finding that the Secretary's position was, on the whole, justified *at each stage* of this enforcement proceeding." (*Emphasis added.*) *Mautz*, 16 BNA at 1009.

Item 1 of Citation No. 1

Central Site contends the Secretary was not substantially justified in citing it for a serious § 5(a)(1) violation because (1) his suggested means of abatement, implementation of an internal traffic control plan (ITCP) as set forth in § 6.4 of ANSI A10.47-2015, was not supported by the language of the ANSI standard, and (2) there was no credible evidence either of Central Site's onsite employees was exposed to the cited struck-by hazard, and Central Site could not be held responsible for exposure of employees of other contractors under the general duty clause.

The Secretary counters (1) he "assumed by proposing implementation of an ITCP as described in ANSI A10.47 that the proposed abatement would be construed broadly as it was

drafted by non-lawyers[,]" (Sec'y's Resp., p. 7), and (2) the record evidence establishes exposure by placing "Central Site's workers on foot walking throughout the worksite as well as vehicles/equipment." (Sec'y's Resp., p. 10.) As discussed below, the Court finds the Secretary's arguments to be unpersuasive.

Feasibility of Implementing an ITCP

The Secretary argues,

> Though ITCPs are typically used in roadside worksites, the Secretary justifiably argued that a similar policy could have been enacted at Central Site's non-roadside worksite as a means of abatement. Contrary to Central Site's own safety manual requiring that workers be kept away from vehicles and machinery by, among other means, designated zones, its project manager testified that it would be infeasible to designate walking paths separating pedestrians from moving vehicles on this worksite. . . In proposing abatement, the Secretary relied on Central Site's own belief—expressed in its safety manual—that a policy of separating workers from vehicles was a feasible means of abating that hazard on all its worksites including the one at issue here.

(Sec'y's Resp., p. 8.)

The Court addressed the Secretary's argument that Central Site's safety manual "laid out a form of ITCP" (*Id.*) in the Decision and Order:

> Section 6.4's requirements for an ITCP include: (1) a "diagram showing travel routes for construction equipment and employees within the activity space, access and egress points and the location of equipment and materials storage and staging areas;" and (2) a "plan for communicating changes in the ITCP to employees, equipment operators and truck drivers." (Ex. R-14, § 6.4.3.) The Secretary has not shown Central Site's safety manual requires either of those elements. Therefore, it does not "constitute a form of an ITCP."

Cent. Site, 26 BNA OSHC at 1992, n. 10.

The Secretary attempts to gloss over the crucial fact that the ANSI standard referred to in his Citation as an acceptable abatement method applies, by its own language, to *Work Zone Safety for Highway Construction.* As the Court noted in the Decision and Order,

> Clearly the Worksite at issue here was not an "area of a highway with construction, maintenance/repair or utility work activities." Therefore, contrary to the citation's assertion, the alleged violation did not occur "inside a construction work zone." Further, the "scope" section states it "covers employees engaged in construction, utility work, maintenance, or repair activities *on any area of a highway.*" (R-14, § 1.1) (emphasis added). The Worksite at issue here was not "on any area of a highway." Likewise, an "activity area" is defined as the "*section of the highway* where the work activity takes place." (Id. § 3.2) (emphasis added).

> The Secretary presented no evidence that the work activity took place on a "section of the highway" or that the activity area of the Worksite involved "any area of a highway. Further, an ITCP is intended "to control the flow of construction employees, work vehicles and equipment *within the work space*." (Ex. R-14, § 3.17) (emphasis added). The "work space" is the "portion of the *roadway closed to traffic* and set aside for workers, equipment and material." (Ex. R-14, § 3.44) (emphasis added). Again, the Secretary presented no evidence the work space involved a portion of the *roadway closed to traffic* and set aside for workers, equipment and material.

Cent. Site, 26 BNA OSHC at 1992-93.

As noted in the Decision and Order, the Secretary conceded, four years before he issued the Citation in this case, "OSHA has no information on the effectiveness of" ANSI A10-47. *Reinforced Concrete in Construction, and Preventing Backover Injuries and Fatalities,* 77 FR 18973-01 (March 23, 2012). *Cent. Site*, 26 BNA OSHC at 1997. Despite this unequivocal concession, the Secretary rather remarkably states in his *Response* to Central Site's EAJA *Application*,

> For EAJA purposes, the Secretary asserts that he disagrees that the referenced statement is an admission that OSHA does not know whether ITCPs are effective. Instead, the Secretary continues to assume that the effectiveness of an ITCP that achieves its goals of creating separation so workers on foot will not come in to contact with moving vehicles or equipment is self-evident.

(Sec'y's Resp., p. 9.)

The Secretary's disagreement with his own prior statement and his assumption regarding the effectiveness of ITCPs do not constitute a supportable legal theory. It is the Secretary's burden to establish he was substantially justified in issuing the Citation in this proceeding. He has offered *no* evidence of the effectiveness of his proposed abatement method in eliminating or materially reducing the cited hazard—in fact, as indicated *supra*, the Secretary is on record in *The Federal Register* stating OSHA has no such evidence.

The Secretary's failure to note that both the title and language of ANSI A10-47 are inapplicable to the Worksite at issue demonstrates he was not substantially justified in issuing the Citation. His failure to consider his own prior statement that OSHA has no information on the effectiveness of the cited ANSI standard, when it is the Secretary's burden to show a means of abatement will "eliminate or materially reduce the hazard" is additional evidence the Citation

was not justified. Therefore, the Court concludes the Secretary has failed to establish he was substantially justified in referring to ANSI A10-47 as a feasible means of abatement.

Exposure of Central Site Employees to Struck-by Hazards

As the Commission has explained, an employer should not be cited under the general duty clause for exposing employees of other employers to a hazard: "the statutory authority underlying the Commission's imposition of multi-employer liability derives from § 5(a)(2) of the Act, which imposes duties on an employer that, unlike those imposed under § 5(a)(1), need not benefit its own employees." *Summit Contractors, Inc*., 23 BNA OSHC 1196, 1204-05 (No. 05-0839, 2010). Thus, "§ 5(a)(2), unlike its counterpart § 5(a)(1), 'does not base an employer's liability on the existence of an employer-employee relationship'." (Id.) *(quoting Solis v. Summit Contractors, Inc.*, 558 F.3d 815, 828 (8th Cir. 2009)).

The Secretary is responsible for knowing his own policies. The Secretary acknowledges § 5(a)(1) does not apply to the employees of other employers in its own policy. Section III.B.5.a. of OSHA's Field Operations Manual, CPL-02-00-160, states,

> The Hazard Must Affect the Cited Employer's Employees. a. The employees exposed to the Section 5(a)(1) hazard must be the employees of the cited employer. An employer who may have created, contributed to, and/or controlled the hazard normally shall not be cited for a Section 5(a)(1) violation if his own employees are not exposed to the hazard.

Although the Commission is not bound by OSHA's Field Operations Manual (see, *Hackensack Steel Corp*., 20 BNA OSHC 1387, 1392 (No. 97-0755, 2003) ("Field Operations Manual [is] only a guide for OSHA personnel to promote efficiency and uniformity, [is] not binding on OSHA or the Commission, and do[es] not create any substantive rights for employers.")), the above section is quoted to show the Secretary failed to abide by its own guidelines when citing Central Site for exposing the employees of subcontractors on the site to a struck-by hazard.

As noted in the underlying Decision and Order,

> At trial, the Secretary's exposure focus was on the proximity of the subcontractors' employees, including the decedent, to Kimball's bulldozer. For example, the Secretary's counsel asked API foreman Miller a series of questions regarding the potential exposure of API's employees, something the Secretary now says is not at issue.

> Q.: What did Mr. Kimball tell you, if anything, about your ability to enter an area where equipment was operating such as him on the bulldozer or where vehicles were being driven around? Did he give you any specific rules or instructions on that?
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> . . .
>
> Were you ever instructed to stay out of the area where he or his crew were operating the roller or dozer?
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> . . .
>
> Were you ever instructed to have you or your crew stay away from moving vehicles that might be driving through the Worksite?
>
> . . .
>
> Did Mr. Kimball ever tell you to stay—that if you see a vehicle driving around you're not allowed to enter that area where the vehicle is driving around?
>
> . . .
>
> When Mr. Kimball brought the dozer back to begin backfilling between ST-8 and ST-9, did he—did he stop in any way and make eye contact, or something with you and your guys, before he entered this area to begin with?
>
> . . .
>
> Did you receive any instructions from Mr. Kimball or anybody else at Central Site as to how close you and your employees should stay away from moving equipment?

(Tr. 176-177.)

> Further, Kimball testified "there was only me and Michael out there." (Tr. 64.) Therefore, other than Montroy, the Secretary failed to prove by a preponderance of evidence that any other Central Site temporary employee was working on site the day of the accident. Therefore, the Secretary's new claim is not supported by the record considering the detailed examination of witnesses regarding the exposure of non-Central Site employees. (See also e.g. Tr. 48, 72-73, 75, 85-86, 149-150, 155-156, 169, 172, 176-177, 180-181, 214-216, 254-256).

Cent. Site, 26 BNA OSHC at 1989.

In his *Response*, the Secretary argues he was substantially justified in citing Central Site for exposure of its two employees on the Worksite because "OSHA viewed the worksite as the zone of danger." (Sec'y's Resp., p. 10.) The Court rejected the "wide net" the Secretary attempted to cast in arguing the mere presence of Kimball and Montroy at the Worksite while vehicles could be in operation constituted exposure. No witness could testify as to the location of Montroy (Tr. 164, 297-300). Kimball was working on

> a 10-acre Worksite with no more than a dozen workers on-site the day of the accident. Kimball is one of the few workers there who drove his own vehicle onto the site. He testified he drove his truck over to the location of the bulldozer when

> he determined he would use the bulldozer to compact the deficient backfill area (Tr. 100, 149). There is no evidence Kimball was at any time exposed to a significant risk of harm from being struck by a moving vehicle. Likewise, while Kimball was operating the bulldozer, he obviously was not exposed to the cited hazard.

Cent. Site, 26 BNA OSHC at 1990.

The Court finds the Secretary was not substantially justified in citing Central Site for a violation of § 5(a)(1). The Secretary did not have a reasonable basis in law for the theory he propounded—the general duty clause does not apply to exposure of other employers' employees to a hazard. Despite the Secretary's protestations, it is clear his focus at trial was on the exposure of the subcontractors' employees to struck-by hazards, and the exposure of Kimball and Montroy was an afterthought (Tr. 48, 72-73, 75, 85-86, 149-150, 155-156, 169, 172, 176-177, 180-181, 214-216, 254-256).[7] At some level of review, either within OSHA before it issued the Citation, or within the Department of Labor once Central Site sent in its notice of contest, a representative of the Secretary should have realized a violation of § 5(a)(1) could not properly be cited with regard to the employees of other employer.

Even if the Court accepts the Secretary's argument that he proceeded on the theory Central Site's employees were exposed to struck-by hazards, the Secretary has failed to show the facts alleged reasonably support the legal theory advanced. No evidence was adduced showing the locations of Kimball and Montroy in relation to moving vehicles when they were pedestrians on the Worksite. Therefore, the Court concludes the Secretary was not substantially justified in citing Central Site for a violation of § 5(a)(1) in this proceeding.

Item 1 of Citation No. 2

Central Site contends the Secretary was not substantially justified in citing it for an "other-than-serious" recordkeeping violation of § 1904.40(a) because the Secretary cited the company even though Central Site's attorney notified the Secretary by email that he had never received a request for the documents at issue.

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[7] The Secretary cites its summary of facts in the *Pretrial Order* as evidence he had always focused on the exposure of Central Site's employees to struck-by hazards:

> Respondent's employees and employees of other contractors were working on foot and walking near vehicles and equipment that Respondent or others were operating. The presence of these pedestrians near moving vehicles and equipment created a hazard of a pedestrian being struck.

(Sec'y's *Resp.*, p.11, n. 3.) This summary, however, also shows the Secretary was improperly alleging the exposure of employees of other employers as a basis for the alleged § 5(a)(1) violation.

In the Decision and Order, the Court vacated Item 1 of Citation No. 2 at trial, based on the Secretary's failure to establish Central Site (through its counsel) received the March 10, 2016, request that is the basis for the alleged violation.

> The Secretary asserts after emailing the request, Santiago "received an automated response that OSHA believes suggests the email was delivered but that no information as to whether the email was read was provided." (Compl't's' Br. 20) (citing Ex. R-19 at 6). What OSHA "believes" the automated response "suggests" is irrelevant. The Secretary has the burden of proving more than mere "suggestions," he must prove each element of his prima facie case. Since the records request was sent by email to Central Site's counsel, a condition precedent to a violation is proof that Central Site's counsel received the email requesting the records.
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> The automated response stated that "[d]elivery to these recipients or groups is complete but *no delivery notification was sent by the destination server.*" (Emphasis added.) According the Secretary, "worst case scenario," the automated response "does not confirm delivery, but does confirm that the email was sent by OSHA." (Compl't's' Br. 20.) Indeed, the evidence shows the Secretary's "worst case scenario" did occur. Central Site's counsel indicated in an email to Santiago on March 16, 2016, that he did not receive the email sent by Santiago on March 10, 2016. Therefore, a preponderance of evidence shows the Secretary failed to establish Central Site received Santiago's request for a copy of its 2015 OSHA 300-A form.

Cent. Site, 26 BNA OSHC at 1995-96.

The Secretary now contends he was substantially justified in issuing the Citation because he pursued the item at issue "based on his belief that the citation item would be interpreted broadly. Central Site knew by March 16 that OSHA had requested the log, yet failed to produce the log and cure any potential violation."[8] (Sec'y's Resp., p. 12.) This is nonsensical. First, this dispute could have been avoided by a simple telephone call from Santiago or his supervisor to Central Site's counsel to clear up the miscommunication.[9] Second, the Secretary issued the

[8] This is the second instance in which the Secretary claims he was substantially justified in issuing the Citation because he believed the Court would "interpret broadly" a text he either drafted or cited to (*See,* Sec'y's Resp., p. 7 (The Secretary assumed his proposed abatement of an ITCP as described in ANSI A10.47 "would be construed broadly as it was drafted by non-lawyers."). The Secretary should not be so quick to assume the Court will ignore the plain meaning of a text and interpret or construe it "broadly." "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).

[9] The Secretary passed up this opportunity to circumvent the miscommunication when he ignored the email from Central Site's counsel in response to Santiago's voice message left several days after the March 10 request was sent, stating he had not received the requested records. Central Site's counsel responded with an email sent March 16, stating "You mentioned the 2015 300A log having a problem. You never requested a 2015 300A at any time[,]" and

Citation on April 4, 2016, *after* Central Site notified the Secretary it had not received the request sent March 10, 2016. Yet the alleged violation description of the item states "[o]n or about 03/10/2016, at the job site - the employer did not provide OSHA 300 logs after a request." Section 1904.40(a) mandates to the employer that "[w]hen an authorized government representative asks for the records you keep under part 1904, you must provide copies of the records within four (4) business hours." By March 16, the date the Secretary asserts Central Site knew of the March 10 request, the allowed 4-hour time limit had long since expired.

The Secretary's lack of substantial justification for pursuing this item is shown by the confused testimony of Santiago regarding his recordkeeping request. He acknowledges he and his supervisor were aware Central Site was disputing it received the records request. Instead of attempting to clear up the problem, Santiago complied with his supervisor's instruction to turn in the case.

> Q. And what happened after March 10th in terms of your discussion with Mr. Waters or – and your request for the 300-A log?
>
> A. I don't understand the question.
>
> Q. Was there any follow-up to the email, did you have any further communications with him?
>
> A. I called -- I called him back a few days later and, basically, you know, did -- like, left him a message of what recommendations I was doing due to, you know, this case. And I also informed him that because we did not receive a 300-A, I was recommending a citation for that also.
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> . . .
>
> Q. Did Mr. Waters respond to that voice mail?
>
> A. I don't remember, but I think he did. I don't remember exactly, but I think he did.
>
> Q. Would you look at page 7 of R-19? . . . Is that an email that you received from Mr. Waters?
>
> A. Yes, sir.
>
> Q. Is that in some way a response to your voice mail as you understood it?
>
> A. Yes, sir.

---

ended with, "It is important that you call me on this." (Ex. R-19, p. 7.) No one from OSHA called Central Site's counsel in response to the email.

Q. Was there -- what discussion, if any, did you have with Mr. Waters after he sent you this email that's page 7 of R-19?

A. At that moment I already turned the case in. I didn't have the case any longer. I don't remember if I called him back or not but at that moment I didn't have it anymore.

. . .

Q. So you sent him an email on March 21st. Did that have anything to do with his email to you on March 16th?

A. It is possible.

Q. You don't know?

A. Let me see. It is possible that it was because of that email.

. . .

JUDGE GATTO: [You recommended issuing the item citation] even though you received a response back about that delivery indicating that no delivery notification was sent by the destination server, which was Mr. Waters's server?

THE WITNESS: Yes, sir. I consulted with my supervisor. . . . I told him that I had not received any response from Mr. Waters and he told me to turn in the case because it was getting late and that the case needed to [be] turned in.

JUDGE GATTO: Your supervisor was aware of this, this delivery notification also?

THE WITNESS: Yes, sir.

(Tr. 306-309.)

The Secretary was on notice before he issued the Citation in this proceeding that Central Site did not receive the record request that gave rise to the citation item. He did not take the simple step of conferring with Central Site's counsel prior to issuing the Citation. The Court finds the Secretary was not substantially justified in issuing the Citation for a violation of § 1904.40(a).

Therefore, the Court concludes Central Site is entitled to attorney fees and expenses for Item 1 of Citation No. 1 and Item 1 of Citation No. 2.

B. Award

Commission Rule 2204.107(b) provides:

> An award for the fee of an attorney or agent under these rules shall not exceed $125 per hour, unless the Commission determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for Commission proceedings, justifies a higher fee. An award to compensate an expert witness shall not exceed the highest rate at which the Secretary pays expert witnesses. However, an award may include reasonable expenses of the attorney, agent or witness as a separate item, if the attorney, agent or witness ordinarily charges clients separately for such expenses.

Central Site seeks a total award for attorney fees of $17,571.00 (Resp't's Reply, Attach. D, ¶ 5). In his *Response,* the Secretary does not object to the amount of the award requested, or otherwise address the award issue. Paul Waters represented Central Site in all phases of this proceeding. Attachment A to Exhibit 3 of Central Site's *Application* is an itemized statement showing the hours expended, a description of services performed, the rate at which the fee was computed, the amount of expenses, and the total amount paid by Central Site to Waters. Between the date the Citation was issued, April 4, 2016, and the date the Court issued its Notice of Decision and Report, June 23, 2017, Waters spent 103.3 hours working on the case. Waters charged Central Site $350.00 per hour, but used the statutory amount of $125.00 per hour to calculate the award sought (*Application,* Ex. 3, ¶ 7). The Court finds this amount to be reasonable.

The statement includes an additional 11.2 hours spent researching the EAJA and drafting the *Application.* Hours spent preparing an application for attorney fees under the EAJA are compensable. *Central Brass Manufacturing*, 14 BNA OSHC 1904 (Nos. 86-978 & 86-1610, 1990). Central Site sought an award of $15,525.00 in its *Application.* Central Site seeks and additional $2,046.00 for time spent reviewing the Secretary's *Response* and drafting its *Reply.* The Court also finds this amount to be reasonable.

The Commission has held that a judge, in determining an EAJA award, "should consider the complexity and novelty of the issues based on his own knowledge, experience and expertise of the time required to complete similar activities." *Id.* at 1907. Having examined the itemized statements in comparison with the issues involved and the course of the proceeding, the Court concludes the fees and other expenses in the amount of $17,571.00 sought by Central Site is reasonable. Accordingly,

IV. ORDER

IT IS HEREBY ORDERED THAT Central Site's application seeking attorney fees and expenses pursuant to the EAJA is **GRANTED** and the Court awards $17,571.00 in fees and other expenses to Central Site.

SO ORDERED.

/s/ John B. Gatto
John B. Gatto
Administrative Law Judge

Dated: January 25, 2018
Atlanta, GA