



United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
1120 20th Street, N.W., Ninth Floor  
Washington, DC 20036-3457

SECRETARY OF LABOR,

Complainant,

v.

JOSEPH WATSON,

D/B/A JOSEPH WATSON MASONRY,

Respondent.

OSHRC Docket No. 00-1726

(EAJA)

**APPEARANCES:**

Howard M. Radzely, Esq., Joseph M. Woodward, Esq., Alexander Fernández, Esq.,  
Daniel J. Mick, Esq., Peter J. Vassalo, Esq., Department of Labor, Washington, DC  
For the Complainant

Mark A. Waschak, Esq., J. Larry Stine, Esq., Elizabeth K. Dorminey, Wimblery &  
Lawson, P.C., Atlanta, GA  
For the Respondent

**DECISION**

Before: RAILTON, Chairman, ROGERS and THOMPSON, Commissioners.

BY ROGERS and THOMPSON, Commissioners:

Before the Commission is a decision of Administrative Law Judge Ken S. Welsch denying the application of Joseph Watson, d/b/a Joseph Watson Masonry (JWM) for fees and expenses under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504. JWM incurred these fees and expenses while defending against three citations alleging serious, willful, and repeat violations of various construction safety standards promulgated under the Occupational Safety and Health Act of 1970 (OSH Act), 29 U.S.C. § 651-678. For the reasons given below, we reverse the judge's decision in part and remand the case.

## I. Background

JWM was under contract with Metric Constructors, Inc. to perform masonry and brickwork on a barracks complex at Hunter Army Air Field in Savannah, Georgia, pursuant to a contract with the U.S. Army Corps of Engineers (Army Corps). On February 29, 2000, an OSHA compliance officer (CO) began a planned inspection of the worksite. As a result of the inspection, OSHA issued JWM three citations alleging a total of seven serious, willful and repeat violations with a total proposed penalty of \$82,000.

After a hearing in the case, Judge Welsch vacated three alleged violations, affirmed four violations, recharacterized one of the affirmed violations from willful to serious, and assessed reduced penalties for all but one of the affirmed items for a total penalty of \$13,000. Upon the judge's decision becoming a final order of the Commission, JWM filed for EAJA fees and expenses incurred in its defense of all but the one item affirmed by the judge, together with the proposed penalty, as alleged. As a threshold matter, the judge found that JWM was not a prevailing party for the three items that he affirmed with a reduced characterization and/or lower assessed penalty. He further found that the Secretary was substantially justified in her position as to those items that he vacated.

## II. Discussion

Under the EAJA, an eligible party that prevails against the federal government in an adversarial adjudication is entitled to an award of attorney fees and expenses, unless the government as a party to the proceeding was substantially justified in its position or special circumstances make an award unjust.<sup>1</sup> 5 U.S.C. § 504(a)(1). At issue here is whether JWM

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<sup>1</sup> In evaluating JWM's EAJA application, we note that the judge did not specifically find that JWM was an eligible party. *See* 29 C.F.R. § 2204.105(b) (eligible applicant includes corporation with net worth of \$7 million or less and 500 or less employees). Specifically, the judge noted that while JWM's owner had submitted an affidavit of the company's net worth, no supporting documentation was provided. The judge, however, did not require JWM to submit supporting documentation because he ultimately found that JWM was not entitled to any fees and expenses. As we find below that JWM is entitled to fees and expenses as to two items for which the Secretary lacked substantial justification, the judge should determine on

was a prevailing party with respect to the three violations that were affirmed but recharacterized and/or assessed lower penalties than proposed, and whether the Secretary was substantially justified as to those violations for which JWM was the prevailing party.

### **A. Prevailing Party**

Neither the EAJA nor the Commission’s EAJA Rules define the term “prevailing party.” However, under Commission EAJA Rule 106(a), 29 C.F.R. § 2204.106(a), “[a] prevailing applicant may receive an award for fees and expenses in connection with a proceeding, or in a discrete substantive portion of the proceedings. . . .” Here, it is undisputed that JWM is a prevailing party as to those items vacated by the judge. On review, JWM claims that the judge erred in rejecting the company’s claim that it was also a prevailing party for the affirmed items that were recharacterized and/or assessed a lower penalty than proposed. We agree.

There is nothing in the language of the EAJA or the Commission’s EAJA Rules to support the judge’s conclusion that an applicant cannot be a prevailing party if it prevails only as to penalty or characterization. A party prevails “if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.” *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (quoted case omitted). The Commission has held that because “[s]ection 10(a) of the OSH Act . . . specifically allows a party to contest either the underlying citation, the penalty, or both[,]” a party that succeeds in its challenge to the proposed penalty has in fact prevailed in a discrete portion of the case. *Pentecost Contracting Corp.*, 17 BNA OSHC 2133, 2134-35, 1995-97 CCH OSHD ¶ 31,382, pp. 44,323-34 (No. 92-3789, 1997) (EAJA) (consolidated cases) (citing *Hensley, supra*, and *H.P. Fowler Contracting Corp.*, 11 BNA OSHC 1841, 1845, 1983-84 CCH OSHD ¶ 26,830, p. 34,358 (No. 80-3699, 1984) (EAJA)). Under this analysis, a party who succeeds in challenging the proposed characterization of a citation has also prevailed in a discrete portion

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remand whether JWM must submit additional information pursuant to Commission EAJA Rule 202(a), 29 C.F.R. § 2204.202(a), in order to prove its eligibility for an EAJA award.

of the case. Accordingly, we reverse the judge and find that JWM was a prevailing party as to the three affirmed violations in question.

## **B. Substantial Justification**

Once an eligible applicant establishes that it is a prevailing party, the Secretary bears the burden of establishing that her position was substantially justified. *See Consol. Constr. Inc.*, 16 BNA OSHC 1001, 1002, 1991-93 CCH OSHD ¶ 29,992, p. 41,072 (No. 89-2839, 1993) (EAJA). The fact that the Secretary lost her case does not automatically mean that her position lacked substantial justification within the meaning of the EAJA. *Id.* Rather, a position is substantially justified if it has a “reasonable basis in both law and fact” or is “‘justified in substance or in the main’ – that is, justified to a degree that could satisfy a reasonable person.” *Pierce v. Underwood*, 487 U.S. 552, 563-66 (1988); *C.J. Hughes Constr. Inc.*, 19 BNA OSHC 1737, 1740, 2001 CCH OSHD ¶ 32,501, p. 50,389 (No. 93-3177, 2001) (EAJA). The Secretary must show that (1) there exists a reasonable basis for the facts alleged, (2) there exists a reasonable basis in law for the theory that she propounds, and (3) the facts alleged reasonably support the legal theory. *Contour Erection & Siding Sys. Inc. (Contour Erection)*, 18 BNA OSHC 1714, 1716, 1999 CCH OSHD ¶ 31,822, p. 46,788 (No. 96-0063, 1999); *Mautz & Oren, Inc.*, 16 BNA OSHC 1006, 1009, 1991-93 CCH OSHD ¶ 29,986, p. 41,066 (No. 89-1366, 1993); *Consol. Constr. Inc.*, 16 BNA OSHC at 1002, 1991-93 CCH OSHD at p. 41,072. Here, JWM claims that the judge erred in finding that the Secretary was substantially justified as to the violations for which it was a prevailing party. As set forth below, we find that the Secretary was substantially justified as to all but two items.

### **1. Citation 1, Item 1**

Under this item, the Secretary alleged a violation of 29 C.F.R. § 1926.20(b)(1),<sup>2</sup> based on JWM’s failure to develop and implement a safety and health program for this worksite.

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<sup>2</sup> This provision states that “[i]t shall be the responsibility of the employer to initiate and maintain such programs as may be necessary to comply with this part.”

The judge vacated the violation, finding that the Secretary failed to present sufficient evidence to establish a violation in light of conflicting testimony at the hearing regarding whether JWM had a written safety program. The CO testified that he had asked during the inspection to see a copy of JWM's safety program, but was told that JWM did not have one. Several witnesses for JWM testified, however, that the CO had never asked to see a copy of the safety program during the inspection. The CO admitted that before the citations were issued, JWM's owner told OSHA that the company did have a written safety program, but JWM did not provide OSHA with a copy of the program until discovery. In evaluating JWM's EAJA claim as to this item, the judge concluded that the Secretary's position was substantially justified because the violation turned on his resolution of the credibility of the witnesses whose testimony conflicted on this issue.

Although the judge did make a credibility determination in his decision on the merits of the violation, we find that the Secretary was substantially justified as to this item for other reasons. Section 1926.20(b)(1) requires that an employer "initiate and maintain" a safety program, but does not require the safety program to be in writing. Under Commission precedent, compliance with this standard requires that an employer adequately implement its program by, for instance, training employees and enforcing safety work rules. *See Northwood Stone & Asphalt, Inc.*, 16 BNA OSHC 2097, 2099, 1993-95 CCH OSHD ¶ 30,583, p. 42,348 (No. 91-3409, 1994), *aff'd*, 82 F.3d 418 (6th Cir. 1996) (unpublished table decision); *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2206, 1991-93 CCH OSHD ¶ 29,964, p. 41,025 (No. 87-2059, 1993). In her citation, the Secretary expressly alleged that JWM had failed to "develop and implement" a safety program at the subject worksite. The CO testified that at the time of the inspection, he not only believed that JWM lacked a written safety program, but also that any program the company did have was not effectively implemented based on his observation of numerous safety violations and training violations at the worksite. Indeed, JWM confirmed to the CO that some of its employees had not been given training. According to the CO, these deficiencies served as the basis in part for his recommendation of this citation. Thus, even though JWM eventually provided OSHA with

evidence that it had a written safety program, the Secretary's case was still reasonably based on the evidence that JWM's program was not adequately implemented. Accordingly, we find that the Secretary was substantially justified in her position as to this item.<sup>3</sup>

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<sup>3</sup> Several premises relied upon by the dissent are not accurate reflections of the record. First, the decision in *Martin C. Heck Brick Contracting Co. (Heck)*, No. 04-0781 (Aug. 2, 2006), is readily distinguishable. Respondent's claim in *Heck* that the scaffold was being raised completely undercut the Secretary's case under the cited standard, 29 C.F.R. § 1926.451(g)(1). The Secretary never tried to litigate that case under 29 C.F.R. § 1926.451(g)(2), the applicable provision for erecting scaffolds. In contrast, the cited standard here, 29 C.F.R. § 1926.20(b)(1), and the language of the citation, encompass the adequacy of Watson's safety program, notwithstanding the claimed existence of a written safety program.

Furthermore, the Secretary litigated the program adequacy issue. The dissent asserts that the "Secretary's post-hearing brief reflects that her legal theory from the start was focused solely on JWM's failure to have developed such a [safety] program. . . . the Secretary simply did not litigate this issue . . ." In fact, the compliance officer's testimony made clear that, in his view, Watson did not have "an effectively-implemented program," repeating "implemented" for emphasis, based partly on the conditions at the worksite. In turn, the Secretary's post-hearing brief argued that the numerous scaffolding violations indicated the lack of a safety program, citing both this testimony and an apt ALJ decision, *Caribco International Corp.*, 16 BNA OSHC 1715 (No. 92-2758, 1994) (digest). In *Caribco*, the judge found a violation of the same standard at issue here. The judge noted the presence of numerous fall hazards and pointed out that "[w]hile there was a printed safety program it is seriously questioned whether it was used at all or merely window dressing." *Id.* at p. 4 (slip opinion, available at [http://www.oshrc.gov/decisions/pdf\\_1994/92-2758.pdf](http://www.oshrc.gov/decisions/pdf_1994/92-2758.pdf)). Thus, the Secretary's litigation position encompassed the adequacy of Watson's safety program.

Finally, while there may arguably have been some evidence to support an alternative theory of liability with respect to the ladder item, Citation 2, Item 1a, the Secretary – in contrast to the safety program item – failed to try a coherent theory that was supported by the language of the citation.

## 2. Citation 2, Item 1a

Under this item, the Secretary alleged a violation of 29 C.F.R. § 1926.451(e)(1)<sup>4</sup> based on JWM's failure to provide ladders or a safe means of access or egress for its scaffolds. The judge vacated this item, finding that JWM had in fact provided ladders for its scaffolds on the date of the inspection. In evaluating JWM's EAJA application as to this item, the judge found that the Secretary was substantially justified because there was evidence that JWM employees did not always use the provided ladders to access the scaffolds and also that scaffolds were not always provided with ladders.

We disagree with the judge. In her citation, the Secretary alleged that scaffolds were “not *provided* with ladders or any other means of safe access/egress.” (Emphasis added.) However, the evidence presented by the Secretary at the hearing showed that JWM had, in fact, provided ladders, albeit ones that the Secretary claimed were inadequate. Indeed, when describing the violation, the CO testified that job-made ladders leaning against the cited scaffolds were structurally defective. When questioned by the judge regarding her allegation and the inconsistent testimonial evidence, the Secretary expressly declined to amend her citation to allege a violation of the more specific standard governing ladder specifications. Although the Secretary did ask the judge to “amend the Complaint to conform to the evidence,” the judge left the matter open and the Secretary never pursued her request either at the hearing or in her post-hearing brief. Under these circumstances, we find that it was unreasonable for the Secretary to cite a standard that requires the *use* of ladders, allege the violation as a failure to *provide* ladders, and then proceed to present evidence that focuses on the *adequacy* of ladders that were in fact provided. *See Contour Erection*, 18 BNA OSHC at

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<sup>4</sup> This provision states:

When scaffold platforms are more than 2 feet (0.6 m) above or below a point of access, portable ladders, hook-on ladders, attachable ladders, stair towers (scaffold stairways/towers), stairway-type ladders (such as ladder stands), ramps, walkways, integral prefabricated scaffold access, or direct access from another scaffold, structure, personnel hoist, or similar surface shall be used. Crossbraces shall not be used as a means of access.

1716, 1999 CCH OSHD at p. 46,788 (in order to establish that her position was substantially justified, the Secretary must show that the facts alleged reasonably supported her legal theory). Accordingly, we find that the Secretary was not substantially justified in her position as to this item.

### **3. Citation 2, Item 1b**

Under this item, the Secretary alleged a willful violation of 29 C.F.R. § 1926.451(g)(4)(i)<sup>5</sup> based on JWM's failure to provide guardrails or other means of fall protection on scaffolds. The judge found that the Secretary established a violation of the cited standard, but affirmed the violation as serious rather than willful. The judge found that the violation was not willful largely because the Secretary's willful characterization was based in part on the ladder violation, which was grouped with this item and vacated by the judge. The judge also found that numerous warnings from the Army Corps to JWM regarding a recurring problem with guardrail protection were not sufficient to establish willfulness because some of those conditions may have violated the Army Corps' standards but not necessarily OSHA's standards. In evaluating JWM's EAJA claims for this item, the judge found that his recharacterization of the violation did "not render JWM the prevailing party." Nonetheless, the judge noted that the Army Corps' warnings to JWM provided the Secretary with substantial justification for the willful charge.

For the reasons discussed above, we find that JWM was a prevailing party as to this item. In addition, we agree with the judge that the Secretary was substantially justified as to the willful characterization of this item. A violation is willful if it is committed "with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety." *Williams Enterp. Inc.*, 13 BNA OSHC 1249, 1256, 1986-87 CCH OSHD ¶ 27,893, p. 36,589 (No. 85-355, 1987). *See also Reich v. Trinity Indus. Inc.*, 16 F.3d 1149, 1152 (11th Cir. 1994). Here, JWM knew the requirements of the cited

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<sup>5</sup> This provision states that "[g]uardrail systems shall be installed along all open sides and ends of platforms. Guardrail systems shall be installed before the scaffold is released for use by employees other than erection/dismantling crews."

standard because it had been cited for violating the same standard a year before the subject inspection. The record further establishes that JWM knew that the cited scaffold lacked guardrails at least a day before the start of the inspection, but did not abate the condition. Finally, as noted by the judge, the record establishes that the Army Corps had repeatedly notified JWM about ongoing problems with deficient scaffold guardrails at the worksite. Contrary to JWM's claims on review, the record establishes that these reported problems were not immediately corrected by JWM. Although in the end, the judge found that the evidence did not support a willful characterization, we find that the evidence above was sufficient to substantially justify the Secretary's prosecution of the willful characterization of this item. *See Contour Erection*, 18 BNA OSHC at 1716, 1999 CCH OSHD at p. 46,788 ("that the government's case lacked 'substantial evidence' does not mandate a conclusion that its case was not 'substantially justified'").

We find, however, that the Secretary was not substantially justified in proposing a \$56,000 penalty for this citation item and the vacated ladder item. Having affirmed the guardrail violation as serious, the judge assessed a penalty of \$3,000 for this item. In evaluating JWM's EAJA application, the judge – having found that JWM was not a prevailing party as to this item – did not address whether the Secretary was substantially justified in proposing a penalty of \$56,000. On review, JWM claims that it was unreasonable for the Secretary to have proposed such a high penalty amount because she failed to give full credit for JWM's small size.

We agree. Though the burden of proving substantial justification clearly rests with the Secretary, she failed to address JWM's claim in her brief to the Commission.<sup>6</sup> We further

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<sup>6</sup> The Secretary did refer in a footnote in her brief to "the reclassification from willful to serious, and the concomitant reduction of the penalty" for Item 1b. In so doing, she seemed to suggest that the penalty reduction flowed solely from the reclassification and thus the proposed penalty was substantially justified to the same extent as the willful characterization. However, the Secretary never addressed JWM's claim regarding its small size, first raised in its PDR, and, as discussed *infra*, she has not met her burden of proving substantial justification for the proposed \$56,000 penalty even assuming a willful characterization.

find from our review of the record that the Secretary's basis for proposing a \$56,000 penalty was flawed. At the hearing, OSHA Area Director Luis Santiago explained that a \$56,000 penalty was proposed in accordance with OSHA's Field Inspection Reference Manual (FIRM), the manual that provides guidelines regarding OSHA's internal operations. Santiago testified that even though JWM only had 25 employees, the FIRM directed cutting the usual 60% size reduction in half to 30% because of the willful characterization. According to Santiago, the FIRM permitted him to cut the size reduction by an additional 10% in order to ensure the "proper deterrent effect" for an employer like JWM.

Although the Commission is not bound by the FIRM, Santiago relied upon it to determine the Secretary's proposed penalty amount. *See, e.g., Orion Constr. Inc.*, 18 BNA OSHC 1867, 1868 n.3, 1999 CCH OSHD ¶ 31,896, p. 47,222 n.3 (No. 98-2014, 1999) (penalty formulas in OSHA's FIRM not binding on the Commission). Based upon our review of the current FIRM, we find that Santiago apparently relied on an outdated version of the manual in calculating the proposed \$56,000 penalty.<sup>7</sup> Contrary to his testimony, the FIRM in effect at the time of the subject inspection does not direct OSHA to cut the size reduction for a willful violation in half. That guideline appears in a prior version of the FIRM, which OSHA changed on March 23, 1995. JAMES W. STANLEY, DEPUTY ASSISTANT SECRETARY, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, MEMORANDUM: FIRM CHANGE: MINIMUM SERIOUS WILLFUL PENALTY (March 23, 1995).<sup>8</sup> Thus, there is nothing in the record to establish that the Secretary had a reasonable basis for her proposed

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<sup>7</sup> Because OSHA's current FIRM and the out-of-date FIRM are not a part of the record in this case, we take official notice of these materials, which we found at [http://www.osha.gov/Firm\\_oseha\\_toc/Firm\\_toc\\_by\\_sect.html](http://www.osha.gov/Firm_oseha_toc/Firm_toc_by_sect.html). *See* section 7(d) of the Administrative Procedure Act, 5 U.S.C. § 556(e).

<sup>8</sup> In the 1995 memorandum announcing this FIRM change, OSHA advises that a 50% reduction in penalty for a willful violation should be given to an employer the size of JWM.

\$56,000 penalty. Accordingly, we find that the Secretary failed to carry her burden of proving substantial justification as to the proposed penalty for this item.<sup>9</sup>

#### **4. Citation 3, Item 2**

Under this item, the Secretary alleged a violation of 29 C.F.R. § 1926.451(f)(7)<sup>10</sup> for JWM's failure to have a competent person supervise and/or direct the erection, use and alteration of scaffolding. The judge vacated this item based on his finding that JWM had designated its foreman, who had 45 years of experience, as the competent person on this project. In evaluating JWM's EAJA application as to this item, the judge found that the Secretary was substantially justified because the evidence showed that the foreman lacked formal training and there were numerous scaffolding violations at the worksite for which the foreman, as JWM's designated competent person, would have been responsible.

We agree with the judge that the Secretary was substantially justified as to this item. A competent person is defined under 29 C.F.R. § 1926.450(b) as "one who is capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has the authorization to take prompt corrective measures to eliminate them." Here, the CO observed numerous

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<sup>9</sup> Contrary to the suggestion by the Chairman in his dissent, we are not binding either the Secretary or the Commission to the FIRM, just noting that the Secretary relied on the FIRM as her justification in proposing a penalty. But, it turns out, the Secretary relied on an *outdated* version of the FIRM and then never addressed the FIRM, the section 17(j) factors, or Watson's argument regarding size with respect to this item on review. Thus, she did not meet her burden of proof regarding substantial justification as she had no reasonable justification in this record. The Chairman is correct that a penalty not in compliance with the FIRM is not necessarily out of compliance with the factors in section 17(j), and that a proposed penalty of \$56,000 could be consistent with a willful characterization. However, the Secretary has simply not addressed Respondent's arguments on review and thus cannot be said to have met her burden of proof on this item.

<sup>10</sup> This provision states that "[s]caffolds shall be erected, moved, dismantled, or altered only under the supervision and direction of a competent person qualified in scaffold erection, moving, dismantling or alteration. Such activities shall be performed only by experienced and trained employees selected for such work by the competent person."

scaffolding violations, including repeat violations, throughout the worksite. Further, the CO asked the foreman several questions during the inspection about basic scaffold safety and the foreman failed to answer the CO's questions. Under these circumstances, we find that it was reasonable for the Secretary to infer that the violative scaffolds had not been erected under the supervision of a competent person and that the foreman, despite the length of his experience, was incapable of identifying hazards and taking prompt corrective action. *See Superior Masonry Builders, Inc.*, 20 BNA OSHC 1182, 1188, 2002-04 CCH OSHD ¶ 32,667, pp. 51,421-22 (No. 96-1043, 2003) (person is competent where "he makes an inspection in a competent manner and makes a reasonable determination that the condition is safe"; "experience alone does not qualify the designated employee as a 'competent person'"); *C.J. Hughes Constr. Inc.*, 17 BNA OSHC 1753, 1757, 1995-97 CCH OSHD ¶ 31,129, p. 43,473 (No. 93-3177, 1996) (violation established if a competent person's actions or failures to act are not reasonable). Based on this evidence, we find that the Secretary was substantially justified in her position as to this item.

### **5. Citation 3, Items 1 and 3**

Under these items, the Secretary alleged repeat violations of two scaffolding provisions with proposed penalties of \$5,000 and \$8,000, respectively. The judge affirmed both items as repeat, but nominally reduced the penalty for each violation by \$1,000 and \$3,000, respectively. In evaluating JWM's EAJA claims for these items, the judge found that JWM was not a prevailing party and, that even if it was, the slight reductions in penalty were not a reflection on the Secretary's justification as to the proposed amounts.

For the reasons discussed above, we find that JWM was a prevailing party as to these items. We also find, however, that on these facts, including the gravity of the violations and the size of JWM, the Secretary was substantially justified in proposing penalties of \$5,000 and \$8,000.

## **ORDER**

We remand this case to the judge with instructions to determine as a threshold matter whether JWM is eligible for an award of fees and expenses under the EAJA. *See* 29 C.F.R. § 2204.105. If JWM is an eligible party, then we direct the judge to award in accordance with Commission EAJA Rule 107, 29 C.F.R. § 2204.107, the reasonable fees and expenses for work performed in connection with JWM's defense of Citation 2, Item 1a, and the proposed penalty for Citation 2, Item 1b.

SO ORDERED.

/s/ \_\_\_\_\_  
Thomasina V. Rogers  
Commissioner

/s/ \_\_\_\_\_  
Horace A. Thompson, III  
Commissioner

Dated: September 6, 2006

RAILTON, Chairman, concurring and dissenting in part:

As a threshold matter, I concur with my colleagues' analysis and conclusion regarding JWM's status as a prevailing party for the citation items in question. In addition, I concur with my colleagues' determination that the Secretary's prosecution of Citation 2, Item 1a was not substantially justified. I also concur that the Secretary was substantially justified in her position as to Citation 2, Item 1b and Citation 3, Item 2, in characterizing the former citation item as willful, and in proposing penalties of \$5,000 and \$8,000 for Citation 3, Items 1 and 3, respectively. As to the remaining issues, however, I believe that my colleagues' reasoning contradicts Commission precedent and, in some instances, defies common sense.

My colleagues find that the Secretary was substantially justified in prosecuting Citation 1, Item 1, which alleged a violation of 29 C.F.R. § 1926.20(b)(1). Even though JWM informed the Secretary that it had a written safety program and provided her with a copy of the program during discovery, my colleagues conclude that the Secretary could still reasonably base her case on evidence that JWM did not adequately implement its program. For the reasons that follow, I disagree with both their reasoning and conclusion.

First, my colleagues' reasoning is at odds with their conclusion in the Commission's most recently decided EAJA case, *Martin C. Heck Brick Contracting Co. (Heck)*, No. 04-0781 (Aug. 2, 2006). In *Heck*, the Secretary cited the company for failing to maintain guardrails on a scaffold in violation of 29 C.F.R. § 1926.451(g)(1).<sup>11</sup> During the informal conference, the company submitted unsworn written statements from two of its employees attesting that they were raising the scaffold at the time of the inspection. If these statements were true, the company's activities would have been covered by 29 C.F.R. § 1926.451(g)(2)<sup>12</sup> rather than (g)(1) of that section. Based on these circumstances, the same

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<sup>11</sup> Section 1926.451(g)(1) states: "Each employee on a scaffold more than 10 feet (3.1 m) above a lower level shall be protected from falling to that lower level."

<sup>12</sup> Section 1926.451(g)(2) states:

[T]he employer shall have a competent person determine the feasibility and safety of providing fall protection for employees erecting or dismantling

majority as in the present case concluded that “the Secretary’s failure to conduct further factual investigation . . . was not reasonable, and therefore her position in litigation was not substantially justified.” *Heck*, No. 04-0781, slip op. at 7.

Here, the record reflects that Mr. Watson told the CO before the citation was issued that JWM did, in fact, have a written safety program. Like the employees in *Heck*, Mr. Watson made an *unsworn* statement contesting the citation’s factual basis. The fact that the statements at issue in *Heck* were written and Mr. Watson’s statement was oral is a distinction without meaning – in both cases the authors of the statements were not under oath. As I explained in my *Heck* dissent, “[t]he key issue . . . is whether or not the secretary was *reasonable*, not omniscient, in continuing with her litigation.” *Id.* at 10 (Chairman Railton’s dissent). See also *Contour Erection & Siding Sys. Inc. (Contour Erection)*, 18 BNA OSHC 1714, 1716, 1999 CCH OSHD ¶ 31,822, p. 46,788 (No. 96-0063, 1999) (the government must show that there exists a reasonable basis for the facts alleged and a reasonable basis in law for the theory that it propounds, and that the facts alleged will reasonably support the legal theory); *Taucher v. Brown-Hruska*, 396 F.3d 1168, 1173 (D.C. Cir. 2005) (in context of EAJA, “as in other areas[,] courts need to guard against being ‘subtly influenced by the familiar shortcomings of hindsight judgment’” (quoted case omitted)). My colleagues in *Heck* nonetheless concluded that the Secretary, if acting reasonably, would have further investigated the factual basis of her citation after receiving the unsworn written employee statements. Given my colleagues’ narrow interpretation of substantial justification in *Heck*, their decision to find here that Mr. Watson’s oral statement does *not* require the Secretary to further investigate whether JWM did, in fact, have a safety program flies in the face of what is now Commission precedent.

Second, the Secretary’s subsequent receipt of JWM’s written safety program during

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supported scaffolds. Employers are required to provide fall protection for employees erecting or dismantling supported scaffolds where the installation and use of such protection is feasible and does not create a greater hazard.

discovery served to corroborate Mr. Watson's unsworn claim and therefore, should have prompted the Secretary at that point to further investigate the factual basis of her allegation that JWM had violated section 1926.20(b)(1). In *Heck*, I stated in my dissent that the Secretary's decision to continue prosecuting her case after receiving the two unsworn written statements was substantially justified because, at that time, "there was no objectively reliable indication that employees were raising the scaffold." *Heck*, No. 04-0781, slip op. at 10 (Chairman Railton's dissent). Likewise, here, before receiving JWM's written safety program, the Secretary had been acting on the reasonable assumption that no such program existed. However, once the written safety program was handed over during discovery, the Secretary had the "objectively reliable" proof she was lacking in *Heck*. Because the existence of a safety program completely undermined the Secretary's legal theory under this citation item, she should have evaluated the strength of her case and modified her arguments, accordingly. Cf. *Contour Erection*, 18 BNA OSHC at 1716-17, 1999 CCH OSHD at p. 46,789 (Secretary "should have known that her case, as then constituted, was no longer substantially justified" where the expert upon whom she purportedly relied provided testimony during a deposition that undermined her legal theory); *Consol. Constr. Inc.*, 16 BNA OSHC 1001, 1005-06, 1991-93 CCH OSHD ¶ 29,992, pp. 41,074-75 (No. 89-2839, 1993) (Secretary's prosecution was no longer justified where respondent submitted lab report to the Secretary and the Secretary's expert, during his deposition, was unable to fully support her position).

Finally, despite my colleagues' arguments to the contrary, the Secretary has never contended that JWM failed to adequately implement a safety program. Although the citation states that "[JWM] did not develop and implement a safety and health program" for the construction project at issue, the Secretary's post-hearing brief reflects that her legal theory from the start was focused solely on JWM's failure to have developed such a program. While the record may in fact support the proposition that JWM did not adequately implement its program, the Secretary simply did not litigate this issue and the judge likewise never considered it in vacating the citation. See *EEOC v. Clay Printing Co.*, 13 F.3d 813, 815 (4th

Cir. 1994) (“[m]erits decisions in a litigation, whether intermediate or final, cannot, standing alone, determine the substantial justification issue”; nonetheless, “they – and more critically their rationales – are the most powerful available indicators of the strength, hence reasonableness, of the ultimately rejected position”); *C.J. Hughes Constr. Inc.*, 19 BNA OSHC 1737, 1741, 2001 CCH OSHD ¶ 32,501, p. 50,390 (No. 93-3177, 2001) (citing favorably to *Clay Printing Co.*).

Essentially, my colleagues have raised the issue of inadequate implementation on the Secretary’s behalf in order to demonstrate that her prosecution was substantially justified and in doing so, they move beyond the Secretary’s litigation position to all but find that the judge erroneously vacated the citation item. However, the judge’s underlying decision to vacate the citation is not before us. The law clearly reflects that a decision to grant or deny EAJA fees must be based on the pre-litigation and litigation positions actually taken by the Secretary, and not on positions that she could, or should, have taken. *See* 5 U.S.C. § 504(b)(1)(E);<sup>13</sup> 29 C.F.R. § 2204.106;<sup>14</sup> *see also I.N.S. v. Jean*, 496 U.S. 154, 159 (1990) (position of the United States encompasses “both the agency’s prelitigation conduct and the Department of Justice’s subsequent litigation positions”); *Jacobs v. Schiffer*, 204 F.3d 259, 263 (D.C. Cir. 2000) (“[t]he government’s ‘position’ includes both its pre-litigation and litigation positions”). Indeed, with respect Citation 2, Item 1a, which alleged a violation of the scaffold provision governing ladder access, my colleagues adhere to this statement of law in finding that the Secretary lacked substantial justification even though the record clearly contains evidence that supports an alternative theory of liability. In contrast with their approach to the safety program item, my colleagues make a point of *not* raising additional

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<sup>13</sup> Section 504(b)(1)(E) provides that “‘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.”

<sup>14</sup> Section 2204.106 provides, as relevant, that “[t]he position of the Secretary includes, in addition to the position taken by the Secretary in the adversary adjudication, the action or failure to act by the Secretary upon which the adversary adjudication is based.”

arguments to support the Secretary's position as to the ladder item. Under these circumstances, I would find that upon receiving JWM's written safety program during discovery, the Secretary should have realized that her prosecution of the section 1926.20(b)(1) violation was no longer substantially justified.

Turning to Citation 2, Item 1b, which alleged a violation of 29 C.F.R. § 1926.451(g)(4)(i), my colleagues conclude that, even though the violation was properly characterized as willful, the Secretary's decision to propose a penalty of \$56,000 was not substantially justified. *See* OSH Act § 17(a), 29 U.S.C. § 666(a) (\$5,000-\$70,000 range for willful violations). In support of this conclusion, my colleagues rely on the Secretary's failure to utilize the most recent version of the FIRM. I disagree with my colleagues' reliance on the FIRM, and their ultimate conclusion that the Secretary's proposed penalty was not substantially justified.

The FIRM contains "only guidelines for internal application that do not have the force and effect of law and create no substantive or procedural rights to employers," *see Eric K. Ho*, 20 BNA OSHC 1361, 1377 n.23, 2002-04 CCH OSHD ¶ 32,692, p. 51,586 n.23 (No. 98-1645, 2003) (consolidated cases), *aff'd*, 401 F.3d 355 (5th Cir. 2005), whereas section 17(j) of the OSH Act, 29 U.S.C. § 666(j),<sup>15</sup> requires the Commission to give due consideration to certain factors before imposing a penalty. *See Spirit Homes, Inc.*, 20 BNA OSHC 1629, 1632, 2002-04 CCH OSHD ¶ 32,714, p. 51,822 (No. 00-1807, 2004) (consolidated cases). A penalty that is not in compliance with the FIRM is not necessarily out of compliance with section 17(j), *i.e.*, the Commission could give due consideration to the various statutory penalty factors but then assess a penalty amount that diverges from what is recommended in the FIRM. Indeed, in analyzing the proposed penalties for Citation 3, Items 1 and 3, and agreeing that the Secretary was substantially justified, my colleagues

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<sup>15</sup> Section 17(j) of the OSH Act requires that the Commission give "due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations."

recognize that the Secretary's consideration of the statutory penalty factors controls whether a proposed penalty is substantially justified, not her view of those factors as set forth in the FIRM. Thus, the relevant question here is whether, in proposing a penalty of \$56,000, the Secretary gave due consideration to the factors in section 17(j). I would find that the record, as described by my colleagues, reflects that she did. Indeed, my colleagues do not disagree that the Secretary was substantially justified in characterizing this citation item as willful and her proposed penalty of \$56,000 was certainly consistent with such a characterization.

Based on the foregoing analysis, I respectfully dissent in part from my colleagues' decision.

/s/ \_\_\_\_\_  
W. Scott Railton  
Chairman

Dated: September 6, 2006

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United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
1924 Building - Room 2R90, 100 Alabama Street, SW  
Atlanta, Georgia 30303-3104

Secretary of Labor,

Complainant,

v.

Joseph Watson, d/b/a Joseph Watson Masonry,

Respondent.

OSHRC Docket No. 00-1726

**EAJA**

Before: Administrative Law Judge Ken S. Welsch

**DECISION ON FEE AND EXPENSE APPLICATION**

Joseph Watson, d/b/a Joseph Watson Masonry (JWM), seeks attorney's fees and expenses in accordance with the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, 29 C.F.R. § 2204.101 *et seq.*, for costs incurred in its defense against three citations and proposed penalties issued by the Secretary on August 25, 2000. For the reasons stated below, JWM's application is denied.

**Background**

JWM was hired by Metric Constructors, Inc., to perform masonry and brickwork on a new barracks complex at Hunter Army Air Field in Savannah, Georgia. Metric was under contract with the United States Army Corps of Engineers. After an inspection by Occupational Safety and Health Administration (OSHA) compliance officer Xavier Aponte, the Secretary issued one citation to Metric and three citations to JWM, alleging serious, willful, and repeated violations of the Occupational Safety and Health Act of 1970 (Act).

Item 1 of citation no. 1 alleged a serious violation of 29 C.F.R. § 1926.20(b)(1) for failing to initiate and maintain a safety program at the worksite. Item 2a alleged a serious violation of 29 C.F.R. § 1926.502(b)(1) for failing to maintain the top rails of its guardrail systems at least 39 inches above the working level exposing employees to fall hazards greater than 11 feet. Item 2b alleged a serious violation of 29 C.F.R. § 1926.502(b)(2)(i) for failing to maintain midrails of its guardrail system between 19.5 and 21 inches above the working level. Item 2c alleged a serious violation of

29 C.F.R. § 1926.502(b)(9) for failing to place flags with high visibility materials at no more than 6-foot intervals on wire rope used for top rails.

Item 1a of citation no. 2 alleged a willful violation of 29 C.F.R. § 1926.451(e)(1) for failing to provide ladders or other means of safe access and egress for employees performing masonry work on scaffolding. Item 1b alleged a willful violation of 29 C.F.R. § 1926.451(g)(4)(i) for failing to provide standard guardrails or other means of fall protection for employees performing masonry work on scaffolding.

Item 1 of citation no. 3 alleged a repeated violation of 29 C.F.R. § 1926.451(c)(2) for failing to erect a scaffold using base plates and mud sills. Item 2 alleged a repeated violation of 29 C.F.R. § 1926.451(f)(7) for failing to erect scaffolds under the supervision of a competent person. Item 3 alleged a repeated violation of 29 C.F.R. § 1926.454(a) for failing to provide safety training in scaffolding.

The court issued a decision and order in this matter on January 24, 2002, which vacated item 1 of citation no. 1, item 1a of citation no. 2, and item 2 of citation no. 3. The other items and subitems were affirmed (Item 1b of citation no. 2 was affirmed as serious rather than willful), with some reduction in the proposed penalties. The decision became a final order of the Review Commission on February 28, 2002.

On March 8, 20002, JWM filed an application for attorney's fees and expenses in the amount of \$32,616.44. The Secretary filed a response objecting to JWM's application on April 4, 2002. JWM filed a reply on April 19, 2002.

### **The Equal Access to Justice Act**

The EAJA allows prevailing parties in an administrative proceeding involving the Federal government to recover attorney's fees and expenses unless the government agency's position was substantially justified or special circumstances make an award unjust. It ensures that an eligible applicant is not deterred from seeking review of, or defending against, unjustified government actions. *Ewing v. Rodgers*, 826 F.2d 967 (10th Cir. 1987). The EAJA does not routinely award attorney's fees and expenses to a prevailing party. While the applicant has the burden of proving eligibility, the government has the burden of demonstrating that its action was substantially justified. *Dole v. Phoenix Roofing, Inc.*, 922 F.2d 1202, 1209 (5th Cir. 1991).

## **Eligibility**

The party seeking an award for fees and expenses must submit an application within 30 days of the final disposition in an adversary adjudication. 5 U.S.C. § 504(a)(2). JWM timely filed its application.

The prevailing party must meet the established eligibility requirements before it can be awarded attorneys' fees and expenses. Commission Rule 2204.105(b)(4) requires that an eligible employer be "a . . . corporation . . . that has a net worth of not more than seven million dollars and employs not more than five hundred employees . . ." Eligibility is determined as of the date of the notice of contest. Rule 2204.105(c).

In its application, JWM owner Joseph Watson, by affidavit, states that the company was a corporation with a net worth of less than 2 million dollars and fewer than 50 employees at the time of the OSHA inspection. JWM attached no documentation (such as tax records, balance sheets, or accounting statements) supporting its statement of net worth.

The Secretary argues that JWM's application should be dismissed because it fails to provide sufficient evidence that meets the eligibility requirements. Commission Rule 2204.202 requires that the applicant "provide with its application a detailed exhibit showing the net worth of the applicant . . . that provides full disclosure of the applicant's assets and liabilities. . ."

The record in this case leaves little doubt that JWM met the eligibility requirements of the EAJA at all times of its existence. Commission Rule 2204.202 provides, "The Commission may require an applicant to file additional information to determine its eligibility for an award." The appropriate course of action in this case would be to allow JWM to supplement its application, not to dismiss it. That step is unnecessary, however, because it is determined below that JWM is not entitled to attorney's fees and expenses.

## **Prevailing Party**

Section 504(a)(2) of 5 U.S.C. provides in pertinent part:

A party seeking an award of fees and other expenses shall within thirty days of the final disposition in the adverse adjudication submit to the agency an application which shows that the party was the prevailing party.

The parties agree that JWM was the prevailing party with regard to the vacated items (item 1 of citation no. 1, item 1a of citation no. 2, and item 2 of citation no. 3). JWM also claims that it is the prevailing party on item 1a of citation no 2. because the court reclassified that item from willful to serious, and on items 1 and 3 of citation no. 3 because the court assessed lower penalties than those proposed by the Secretary.

JWM's argument that it is the prevailing party with regard to the reclassified item and the items with lowered penalties is rejected. In those instances, the court found the violations to exist, affirmed the items, and imposed penalties.

The Commission is the final arbiter of penalties in all contested cases. Receiving a lower penalty than the one proposed does not result in the noncompliant company's "prevailing" over the Secretary. The court slightly reduced the penalties based on the company's small size. The reduction in penalty is no reflection on the Secretary's justification in bringing the charges on these items.

Similarly, the reclassification of item 1b of citation no. 2 from willful to serious does not render JWM the prevailing party. Item 1b was grouped with item 1a and classified as willful by the Secretary. As discussed, *infra*, although item 1a was vacated, the Secretary was substantially justified in her position on that item. Vacating item 1a resulted in much of the Secretary's evidence of willfulness on grouped items 1a and 1b becoming moot. Under item 1b, the Secretary proved that JWM violated § 1926.451(g)(4)(i) by failing to provide guardrails on scaffolds. The Secretary presented evidence that JWM received numerous warnings from the Corps regarding ongoing deficiencies in its scaffolding guardrails. In a close decision, the court declined to classify the violation as willful because "[t]he Corps has more stringent safety standards than does OSHA, so that not all of its warnings to JWM resulted from OSHA violations" (Decision, p. 11). The record of previous warnings did, however, provide the Secretary with substantial justification to charge a willful violation.

The items that will be analyzed for substantial justification will be only those three items vacated in the decision and order.

### **Substantially Justified**

\_\_\_\_\_The Secretary must prove that its position was substantially justified. “The test of whether the Secretary’s action is substantially justified is essentially one of reasonableness in law and fact.” *Mautz & Oren, Inc.*, 16 BNA OSHC 1006 (No. 89-1366, 1993). The reasonableness test comprises three parts: the Secretary must show “that there is a reasonable basis . . . for the facts alleged . . . that there exists a reasonable basis in law for the theory it propounds and that the facts alleged will reasonably support the legal theory advanced.” *Gaston v. Bowen*, 854 F.2d. 379, 380 (10th Cir. 1988). There is no presumption that the Secretary’s position was not substantially justified simply because she lost the case. Also, it does not require that the Secretary’s decision to litigate be based on a substantial probability of prevailing. *See S & H Riggers & Erectors, Inc. v. OSHRC*, 672 F.2d 426, 430 (5th Cir. 1982).

### **The Alleged Violations**

#### **Item 1 of Citation No. 1: § 1926.20(b)(1)**

Section 1926.20(b)(1) provides:

It shall be the responsibility of the employer to initiate and maintain such programs as may be necessary to comply with this part.

Compliance officer Aponte testified that he had asked JWM owner Joseph Watson and JWM foreman Jessie Fowler if JWM “had any kind of work rule or procedures of inspections, training, or any kind of safety program and there was none” (Tr. 673-674). Aponte stated that Fowler “was not aware of the existence of any kind of recent document or recent safety program” (Tr. 674).

Fowler contradicted Aponte at the hearing. He stated that he had a copy of the safety program on site in his truck at the time of Aponte’s inspection (Tr. 395). Aponte stated that Watson had told him that JWM did not have a safety program (Tr. 674). Watson also contradicted Aponte’s statement and testified that JWM did have a safety program on the site (Tr. 35).

The determination of this issue turned upon the credibility of the witnesses. If Aponte’s testimony had been credited, the Secretary would have prevailed on this issue. “[A] case which truly turns on credibility issues is particularly ill-suited for the reallocation of litigation fees under the EAJA.” *Consolidated Construction, Inc.*, 16 BNA OSHC 1001, 1006 (No. 89-2839, 1993).

At the time the Secretary went to hearing, she was relying on information provided by Aponte that JWM did not have a safety program. JWM failed to produce a safety program during the

inspection, even though the owner and the foreman testified that Aponte questioned them on this issue. It was not unreasonable for the Secretary to accept Aponte's statements that JWM's management personnel had told him there was no safety program. It was logical to assume that JWM would have produced the safety program if it existed. Based on this information, the Secretary was substantially justified in her position. No costs are awarded for this item

**Item 1a of Citation No. 2: § 1926.451(e)(1)**

Section 1926.451(e)(1) provides:

When scaffold platforms are more than 2 feet (0.6 m) above or below a point of access, portable ladders, hook-on ladders, attachable ladders, stair towers (scaffold stairways/towers), stairway-type ladders (such as ladder stands), ramps, walkways, integral prefabricated scaffold access, or direct access from another scaffold, structure, personnel hoist, or similar surface shall be used. Cross braces shall not be used as a means of access.

The court dismissed this item because the Secretary focused on the adequacy of the ladders provided by Metric, rather than on whether employees were actually using the ladders as required by the cited standard. As noted in this judge's decision (Decision, p. 8):

The Secretary's basis for citing item 1 appears to have changed between the date the citation was issued and the date of the hearing. Each instance of item 1 in the citation charges JWM with a violation of § 1926.451(e)(1) for permitting employees to work on "a scaffold that was not provided with ladders." At the hearing, compliance officer Aponte conceded that the scaffolds were provided with ladders.

Aponte testified that he observed two job-made ladders leaning against the scaffolds that are the subject of this item. It was Aponte's opinion that the job-made ladders were structurally defective (Exhs. R-27, R-31; Tr. 562-564, 590-591). The Secretary's examination of Aponte led to some confusion regarding wherein the alleged violation occurred, with Aponte contending that the adequacy of the ladders was at issue:

Q.: Was this ladder a part of any of the violations that you had found?

Aponte: There were some problems with the ladder. So one of the job-made ladders that had some structural defects on it [sic]. It did not have any supports or filler blocks between the cleats.

Judge Welsh: The question she asked was: Is that ladder that's depicted at that portion of the video part of any of the alleged violations that you cited in this case?

Aponte: Yes.

Judge Welsch: Do you know which one?

Aponte: That would be the citation for 451(e)(1). . .

Q.: Do you have any knowledge as to whether employees used this ladder?

Aponte: No, ma'am.

(Tr. 591).

Despite this confusion at the hearing, there was evidence that JWM's employees did not always use the ladders to access the scaffolds, and that at times scaffolds were not provided with ladders (Decision , p. 7):

The record establishes both that Metric provided ladders for access to the scaffolds, and that the Corps had ongoing problems with JWM's employees failing to use the ladders. Gotthardt stated (Tr. 86):

I had had numerous discussions with regard to ladders [prior to February 29, 2000]. As scaffolds would be moved from one location to another, the ladders seemed like they wouldn't move with the scaffolds, and about the time that we would get the scaffold or the contractor would get the scaffold set up properly with all the ladders and so forth, they would finish their work in that area, and they would start moving to another location.

Gotthardt's testimony supports the conclusion that JWM's employees were not consistently using ladders to gain access to the scaffolds. Evidence is substantial if it is the kind of evidence a reasonable mind might accept as adequate to support a conclusion. *Capitol Tunneling, Inc.*, 15 BNA OSHC 1304 (No. 89-2248, 1991). The Secretary had a reasonable basis for alleging that JWM failed to provide safe access to the scaffolds used by its employees. No costs are awarded for this item.

**Item 2 of Citation No. 3: § 1926.451(f)(7)**

Section 1926.451(f)(7) provides:

Scaffolds shall be erected, moved, dismantled, or altered only under the supervision and direction of a competent person qualified in scaffold erection, moving, dismantling or alteration. Such activities shall be performed only by experienced and trained employees selected for such work by the competent person.

Section 1926.450(b) defines a competent person as “one who is capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them.”

Foreman Jessie Fowler was JWM’s designated competent person (Tr. 823). Fowler supervised JWM’s employees while they erected scaffolds. Fowler inspected the scaffolds after they were erected (Tr. 387-388).

The Secretary charged that Fowler was not qualified as a competent person based on his lack of formal safety training and the noncompliance of the scaffolds with the safety standards. Fowler conceded that he had never taken a class in scaffold safety training (Tr. 348).

The court vacated this item based on Fowler’s 45 years of experience in erecting scaffolds, and on his testimony in which he demonstrated that he was capable of identifying existing and predictable hazards on scaffolds.

Despite the dismissal of this item, the Secretary was substantially justified in her position that Fowler was not a competent person under the cited standard. Fowler had no formal safety training. The scaffolds erected under his supervision the day of the OSHA inspection violated several safety standards, most notably the guardrail standard at § 1926.451(g)(4)(i). The employees’ exposure to fall hazards were in Fowler’s “direct line of sight” during the OSHA inspection (Tr. 575-578, 682). No costs are awarded for this item.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is hereby ORDERED that:

JWM’s application for attorney’s fees and expenses is denied.

/s/ \_\_\_\_\_  
KEN S. WELSCH  
Judge

Date: October 14, 2002