UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

THOMAS E. PEREZ, Secretary of Labor, United States Department of Labor, Complainant, v. U.S. UTILITY CONTRACTOR COMPANY, Respondent.	OSHRC DOCKET No. **14-0744** **EAJA**

DECISION AND ORDER

COUNSEL: David W. Zoll, Esquire, Zoll, Kranz & Borgess, LLC, for Petitioner.

Paul Spanos, Trial Attorney, U.S. Department of Labor, for Respondent.

JUDGE: John B. Gatto.

I. INTRODUCTION

The above-styled action is before the Court pursuant to an application filed by U.S. Utility Contractor Company (U.S. Utility) seeking fees and other expenses in the sum of $32,147.34 pursuant to section 504 of the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, and the Commission's Rules Implementing the EAJA, 29 C.F.R. §§ 2204.101-.311. In its application, U.S. Utility argues that the position of Thomas E. Perez, Secretary of Labor, United States Department of Labor (the Secretary) in the prior litigation was not substantially justified. (Applic., p. 2.) In his answer to the EAJA application, the Secretary does not dispute that U.S. Utility 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 exist such that an award would be unjust.[1]

[1] Commission EAJA Rule 105(c) provides that "[f]or the purpose of eligibility, the net worth and number of employees of an applicant shall be determined as of *the date the notice of contest was filed*[.]" (Emphasis added.) 29 C.F.R. § 2204.105(c). Therefore, in this case, the net worth is determined from May 8, 2014, the date U.S. Utility's notice of contest was received by OSAH. Since "there was and has been no material change in the net worth or number of employees since this matter arose," the Court concludes that U.S. Utility had a net worth of $2,247,848 and 100 employees when the notice of contest was filed. (Applic., p. 3; *see also* Ex. A.)

Rather, the Secretary argues that his position was substantially justified, and even if it was not, U.S. Utility's application for fees improperly requested reimbursement at a rate exceeding $125 per hour and unreasonably requested fees for 34 hours devoted to preparing the EAJA application. (Answer, pp. 7-8.)

On April 15, 2014, a Citation and Notification of Penalty (citation) was issued to U.S. Utility pursuant to sections 9(a) and 10(a) of the Occupational Safety and Health Act of 1970 (the Act),[2] by the Secretary, through the Department's Occupational Safety and Health Administration (OSHA),[3] which alleged one serious violation of 29 C.F.R. § 1926.416(a)(1) and proposed a penalty of $5,390.00. According to the Secretary, this violation was based upon U.S. Utility's alleged failure to protect its employees working in proximity to an electric power circuit. The action went to trial on October 21, 2014, and the Court subsequently issued a Decision and Order on December 5, 2014, vacating the Secretary's citation and proposed penalty. *See U.S. Util. Contractor Co.*, 2014 WL 7644310 (No. 14-0744, 2014).[4]

Pursuant to Fed. R. Civ. P. 52(a), 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, U.S. Utility's EAJA application is **GRANTED**, but for

[2] *See* 29 U.S.C. §§ 658(a), 659(a); 651–678.

[3] Section 9(a) provides that the Secretary "or his authorized representative" has the authority to issue a citation. 29 U.S.C. § 658(a). The Secretary has authorized OSHA's Area Directors to issue citations and proposed penalties. *See* 29 C.F.R. §§ 1903.14(a) and .15(a).

[4] Commission Rule 90(d) provides that "[i]f no Commissioner directs review of a report on or before the thirtieth day following the date of docketing of the Judge's report, the decision of the Judge shall become a final order of the Commission." 29 C.F.R. §2200.90(d). Since none of the Commissioners directed review of the Court's Decision and Order, it became a final order of the Commission on January 9, 2015.

the reasons indicated in Section III(B) *infra*, the total attorney fees and expenses are limited to $7,357.29.

II. BACKGROUND

Ronnie Lopez, a former U.S. Utility employee, was injured at the worksite on October 17, 2013, and filed a complaint with OSHA several months later. The crux of the dispute in this application stemmed from Lopez's claim that he received an electrical shock while stripping an electrical wire and the Secretary's admitted primary reliance on Lopez's written statement as the basis in support of the issuance of the citation. The citation resulted from an investigation conducted on January 23, 2014, by Darin Von Lehmden, an OSHA Compliance Safety and Health Officer. During the investigation, Lehmden interviewed and obtained multiple written statements from company employees, including Lopez.

Prior to issuing the citation, the Secretary knew from Lopez's written statement that on October 17, 2013, at approximately 6:50 a.m., Lopez and his foreman, Ben Hester Jr.

> Both tested the Circuit showing it to be hot. [Hester] then undid the wirenut of the hot circuit and carefully removed the orange wire from the circuit making the orange no longer hot to my box. [Hester] then replaced the wirenut so as to not expose any wires. *We then both tested the orange [line] that he just de-termed, and it read "dead", or no power* . . . Now aprox. [sic] 9:10 am I re-tested the wire at the intended box of my assigned work, *it read dead still*. I then went forth with trained procedure, I did the green ground wires 1st, then then did the grey neutral wires, pushed the finished two into the box, then paused, got off the ladder went back to the hot circuit to re-test my tester to asure [sic] its integrity. The tester read hot, then I immediately went back up the ladder, then [re]tested the . . . orange, *and it absolutely read dead*.

(Emphasis added.) (R-2.)

The Secretary also knew from Hester's email to Matt Dearth, U.S. Utility's General Foreman, that immediately after the accident Hester found no signs of a short on the junction boxes or the wire strippers, and that his tests of the conduit after the accident confirmed it was

still dead. (C-6.) Von Lehmden also admitted in his investigative report that Hester "prior to the incident, had disconnected the hot wire in the junction box going from the Fan Room box to the junction box where the work was being performed in the batch house." (R - 2.)

The Secretary also knew that an independent investigation conducted on the day of the accident concluded that Lopez "should have been using a step ladder in lieu of standing on a wire spool or the handrail" and that the cause of the accident was his failure to use a ladder. (C-3.) The independent report also confirmed Hester's statement, concluding "[t]he wire cutters showed no sign [of] a burn, the circuit was dead when we tested it, and no breakers were tripped in the panel servicing this area." (*Id.*) The Secretary also knew Dearth, a journeyman electrician since 2003, completed an accident report on the day of the accident, which also concluded the accident was caused because Lopez was "standing on [a] handrail or wire spool to reach the task instead of getting a ladder." (C-5.)

The Secretary also had documents from the Ohio Bureau of Workers' Compensation, the Acute Care Surgery Clinic, and the Perrysburg EMT. (C-7.) However, the Workers' Compensation records were not based upon an actual examination of Lopez, but rather, were based on a review of the claim file, which in turn was based on purported October 17, 2013, emergency room records from St. Vincent's Medical Center, which the Secretary either never had, or if he did have, failed to tender at trial. The Acute Clinic records also were also based on a review of "pertinent" history that included a purported "electrical burn" diagnosis allegedly made at St. Vincent's, which, as indicated *supra*, was not in the record. The EMT's record necessarily relied on the self-serving factual information reported by Lopez.

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[5] fees and other expenses incurred by that party in connection with that proceeding, "unless the adjudicative officer of the agency finds that the position of the agency[6] was substantially justified or that special circumstances make an award unjust."[7] 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

[5] 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).

[6] 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").

[7] 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).

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 U.S. Utility 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 U.S. Utility was the prevailing party or that it met the other criteria that make it eligible for an award. The Court also finds there are no special circumstances that would make an award unjust under section 504(a)(1). Accordingly, the Court turns to the actual merits of the Government's litigation position.

A. Substantial Justification

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) ("We first consider whether the Secretary was substantially justified in issuing these citation items"). The Secretary 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 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 & Oren, Inc.*, 16 BNA at 1009.

Here, the Secretary sought to prove a violation of 29 C.F.R. § 1926.416(a)(1), which prohibits an employer from allowing "an employee to work in such proximity to any part of an electric power circuit that the employee could contact the electric power circuit in the course of work," unless the employee "is protected against electric shock by deenergizing the circuit and grounding it or by guarding it effectively by insulation or other means." The Secretary admits he primarily "alleged and relied on the facts and the testimony" and argues he had a reasonable basis for the facts he alleged because Lopez was a trained electrician. (Answer, p. 6.) The Court does not agree.

Despite Lopez's assertion his injury resulted from an electric shock, the Secretary knew Lopez had admitted in his written statement that prior to working on the orange wire both he and Hester tested it and it read "'dead" or "no power," that Lopez then retested it and "it read dead still," that Lopez then tested his tester to assure its integrity, and then retested the orange wire again and confirmed again "it absolutely read dead." Likewise, the Secretary also knew from Hester's email he did not find any signs of a short on the junction boxes or the wire strippers, and his tests of the conduit after the accident confirmed it was still dead. The Secretary also knew an independent investigation conducted on the day of the accident found Lopez's "wire cutters showed no sign [of] a burn, the circuit was dead when [ ] tested [ ], and no breakers were tripped in the panel servicing this area."

The Secretary also knew Dearth had completed an accident report, which concluded the accident was caused because Lopez was "standing on [a] handrail or wire spool to reach the task instead of getting a ladder." The Secretary knew the independent investigation also concluded

Lopez "should have been using a step ladder in lieu of standing on a wire spool or the handrail" and the accident was the result of Lopez's failure to use a ladder. Lopez admitted at trial he had been standing on a handrail rather than a ladder at the time of the accident, which could have, and should, have been verified by the Secretary before the issuance of the citation.

Thus, given all of the statements and evidence contradicting Lopez's assertion he was injured by an electrical shock, the Secretary was not substantially justified in relying on this assertion. Further, given all of the evidence to the contrary, the Secretary was not substantially justified in relying on the Ohio Workers' Compensation reports and the Acute Care Surgery Clinic Progress Notes. The Workers' Compensation reports did not indicate they were based upon an actual examination of Lopez, but rather, were based on a review of the claim file. The Acute Care Progress Notes also indicated they were based in part on a purported diagnosis memorialized made in an emergency room note, which was not in the record. The EMT report also was based on self-serving factual information reported by Lopez.

Thus, the numerous statements and evidence contradicting Lopez's assertion he was injured by an electrical shock should have convinced the Secretary that while his reliance on Lopez's assertion may not have been frivolous, his position was too weak and tenuous to be substantially justified. *William B. Hopke Co.*, 12 BNA OSHC at 2160. In light of the Secretary's failure to undertake additional inquiry and investigation after having been confronted with all of that contradictory evidence, the Court concludes, based upon the totality of evidence available to the Secretary at the time of the issuance of the citation, the preponderance of evidence does not support a finding that the Secretary was substantially justified in issuing the citation. *See Consolidated Construction, Inc.*, 1993 O.S.H. Dec. (CCH) P 29992, 1993 WL 69989 (89-2839, 1993) (awarding attorney fees to employer when Secretary failed to undertake additional

preparation needed to overcome employer's evidence). Further, the Court concludes since the evidence was available to the Secretary throughout each stage of the proceeding, his position was, on the whole, not substantially justified at any stage of this enforcement proceeding. *Pierce,* 487 U.S. at 569; *Mautz & Oren, Inc.*, 16 BNA at 1009.

B. The Award

Having concluded the Secretary's position was never substantially justified, the Court must determine the reasonableness of U.S. Utility's fee petition. U.S. Utility asserts in its application, "the EAJA, adopted in March, 1996, states that a higher rate should be awarded if 'a special factor, such as the limited availability of qualified attorneys ... justifies a higher fee.'" (Applic., p. 4.) The Court finds no merit in U.S. Utility's argument. Contrary to U.S. Utility's assertion, section 504 precludes an award for attorney or agent fees in excessive of $125 per hour, "*unless the agency 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 the proceedings involved, justifies a higher fee." (Emphasis added.) 5 U.S.C. § 504(b)(1)(A)(ii). The Commission's EAJA rules similarly preclude an award for attorney or agent fees in excess of $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." (Emphasis added.) 29 C.F.R. § 2204.107(b).

It is clear section 504 does *not* confer on the Commission or its judges discretion to increase attorney's fees at a rate above the statutory $125 maximum *without* a Commission determination made *by regulation*. *See Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571 (2008) (where the Supreme Court again acknowledged that attorney fees may not be awarded in excess of $125 per hour unless the agency determines *by regulation* that it is justified). The

Commission has *not* promulgated a regulation justifying a fee higher than $125 per hour. This in itself precludes an award at a higher rate.

Not surprisingly, the Commission and its judges have consistently held the $125 per hour rate set forth in the EAJA is a maximum allowable rate. *See e.g.*, *Saipan Koreana Hotel*, 21 BNA OSHC 1403, 1406 (No. 02-2129, 2006) ("An award for the fee of an attorney ... under these rules shall not exceed $125 per hour ...."); *C.J. Hughes Constr., Inc.*, 19 BNA OSHC 1737 (No. 93-3177, 2001) (Commission does not allow for recovery of an amount over the statutory rate unless it has determined by regulation that an increase is justified); *see also E.C. Concrete, Inc.*, 24 BNA OSHC 2137, 2146 (No. 12-2082, 2014) (ALJ); *Paramount Advanced Wireless, LLC*, 23 BNA OSHC 1634 (No. 09-0178, 2011) (ALJ). U.S. Utility's requested hourly rates[8] are therefore reduced to the statutory maximum of $125 per hour, and its total fee request is proportionally reduced from $30,717.50 to $11,306.25.

Under the EAJA, the amount of fees awarded to the attorney must be "reasonable." 5 U.S.C. § 504(b)(1)(A) ("fees and other expenses" includes "reasonable attorney or agent fees"). Thus, fee-shifting statutes like the EAJA only compensate for time that is "reasonably expended on the litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). In determining the reasonableness of the fees sought for an attorney, the Commission's EAJA rules require the Commission and its judges consider:

> (1) If the attorney, agent, or witness is in private practice, his or her customary fee for similar services, or, if an employee of the applicant, the fully allocated cost of the services; (2) The prevailing rate for similar services in the community in which the attorney, agent, or witness ordinarily perform services; (3) The time actually spent in the representation of the applicant; (4) The time reasonably spent

[8] At the statutory maximum, Borrillo's request for 4.75 hours is reduced from $1,662.50 to $593.75, Wall's request for 1.30 hours is reduced from $325.00 to $162.50, and Loll's request for 80.80 hours is reduced from $28,280.00 to $10,100.00. There is no change in the rate of Greenlese's request for 7.50 hours totaling $450.00, since it was billed at $60.00 per hour.

> in light of the difficulty or complexity of the issues in the proceeding; and (5) Such other factors as may bear on the value of the services provided.

29 C.F.R. § 2204.107(c). The Court has considered all the enumerated factors but finds *infra*, the last three factors are more significant in its reasonableness analysis.

As to these factors, the Court finds a significant portion of the time U.S. Utility spent was preparing and supporting the application related to its argument it was entitled to fees in excess of the EAJA's statutory maximum, which was excessive, redundant, and unnecessary, especially since this issue had previously been conclusively determined. *Hensley,* 461 U.S. at 434. Further, since it is settled law, it was also not a difficult or complex issue to ascertain; thus, the amount of time was not "reasonably expended." *Id*. The Court therefore concludes U.S. Utility's request for attorney's fees is inappropriate to the extent it related to time spent on asserting an entitlement to fees in excess of the statutory maximum. *See e.g.*, *Mendenhall*, 213 F.3d at 473 (National Transportation Safety Board did not abuse its discretion in refusing to compensate fee applicant, under the EAJA, for time spent on issue that had already been conclusively determined). U.S. Utility's fee request is reduced by $587.50 for hours specifically enumerated in its itemization and amended itemization in support of its fee request in excess of the statutory maximum.[9]

The Secretary also argues, and the Court agrees, that the amount of hours claimed by U.S. Utility for research and drafting the application was excessive and unreasonable. The issue in the prior litigation was neither difficult nor complex. As U.S. Utility acknowledged in its application, the "sole basis for the violation was the fact that Ronnie Lopez claimed to have

[9] The fee petition requested one hour on January 14, 2015, for the review of law on inflation; 2 hours on January 15, 2015, for research on prevailing fee rate and contacts with 4 attorneys seeking support for prevailing fee rate; 1.5 hours on January 21, 2015, for preparation of affidavits of attorneys supporting the fee in excess of statutory maximum, a call to Greg Lodge on the same, and finalization of affidavits and email to attorneys for review and comment; and .20 hour on January 26, 2015, for another call to Greg Lodge.

received an electrical shock." (Applic., p. 7.) Much of the application was a recitation of the EAJA and Commission's EAJA rules, the history of the prior litigation, and U.S. Utility's arguments and affidavits in support of its fee request in excess of the statutory maximum. U.S. Utility's argument that the Secretary's position was not substantially justified, which was not lengthy or complex, is set out in its entirety in footnote 10.[10]

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[10] a. The Secretary failed to consult with or call as a witness a qualified expert who could opine on the likelihood of an electrocution occurring through a neutral wire;

b. The Secretary failed to consult with or call any independent witness who could confirm the claims of Lopez that he suffered an electrical bum;

c. The Secretary ignored the fact that both the injured worker and three other witnesses, two of whom were independent, all stated that there was no energy on the circuit which was alleged to have caused the injury.

d. The Secretary ignored the fact in pursuing this matter that there was no witness or expert who could testify that the Employer knew that the neutral was energized, and instead pursued an serious penalty where even the injured party admitted he had no knowledge or idea that he could be shocked by the neutral wire at the time he was allegedly hurt.

e. The sole basis for the violation was the fact that Ronnie Lopez claimed to have received an electrical shock. There were no allegations in either opening statement, closing argument, or in the notice of violation that any other employee was involved in the alleged violation or was exposed to a hazardous condition as a result of the violation.

f. The Secretary ignored the fact in pursuing this matter that even if the circuit was energized, the Respondent had no knowledge that the circuit was energized, based on the extensive testing of the circuit by both the foreman and the employee before working on the circuit. Therefore under any set of facts there was no basis to charge the Employer with knowledge.

g. Since the entire case of the Secretary rested on a single witness, there was a duty to attempt to reconcile the conflicting testimony. The Secretary gave no weight to the conflicting testimony, even though some of it came from totally disinterested persons, nor did the Secretary make any effort to explain or otherwise resolve the conflict.

h. Since the entire case of the Secretary rested on a single witness, there was a duty on the Secretary to perform some basic analysis of the credibility of the witness. The Secretary's own statements revealed conflicting testimony from the witness, for example, whether or not he was using a ladder at the time of the claimed injury.

i. Finally, the Secretary failed to assign an investigator to the case who had sufficient knowledge or experience in electrical matters to understand basic circuitry. Had he done so it would have been apparent that the accident could not have occurred as alleged by the sole witness. The investigator who was assigned to the matter failed, without explanation, to bring his investigatory file to the hearing. While this may have been simple negligence, it also could be that the file contained investigatory material that would have supported the Respondent's position that the neutral line was not energized and could not have been energized so as to cause the alleged injury. A reasonable investigation should include some effort to determine the practical basis upon which a claim is based. If the investigator lacks sufficient skill or expertise to determine the potential for danger, he or she ought to obtain the services of a person skilled in the trade who can provide an explanation of the issues. Had that been done in this case, especially after independent witnesses questioned the potential for an injury, no reasonable investigator would have pursued these charges.

...

The mere fact of an injury, without more, is insufficient to establish a violation, particularly when both the foreman and the injured employee had complied with the specific regulation requiring that the circuit be tested. Yet the Secretary based its claim on this simple fact, both in opening statement and evidence. And even that evidence lacked professional testimony.

(Applic., pp. 6-9.)

Notwithstanding the issue in the prior litigation was not difficult or complex and the $125 per hour rate issue is settled law, U.S. Utility claimed 33.20 hours related to the research, preparation and filing of the EAJA application. The Court finds this amount excessive and unreasonable. In preparing the fee request, the petitioning party is expected to exercise "billing judgment," *i.e.*, "make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary[.]" *Hensley,* 461 U.S. at 434. Comparatively, U.S. Utility claimed 18.30 hours related to the research, preparation and filing of its post-trial proposed findings of fact and conclusions of law on the merits in the prior litigation. Based upon the Court's knowledge, experience, and expertise of the time required to complete similar activities, the Court finds 9 hours is appropriate for the post-trial portion of the EAJA application, which is approximately half of the amount of time expended on the post-trial proposed findings of fact and conclusions. Therefore, Zoll's billable hours of 33.20 hours related to the research, preparation and filing of the EAJA application is reduced to 9 hours, or from $4,150.00 to $1,125.00 and U.S. Utility's request is therefore further reduced by $3,025.00.

In addition, on October 30, 2014, and on November 10, 2014, Paralegal Greenlese collectively billed 2 hours ($120.00) related to "trying to figure out how to file subpoenas" with the Court. The Court finds that amount excessive since the information was readily obtainable by a telephone call or email to the Court. Based upon the Court's knowledge, experience, and expertise of the time required to complete similar activities, the Court finds 0.15 hours ($9.00) is appropriate. Therefore, U.S. Utility's request is further reduced by $111.00.

On January 22, 2015, Zoll billed 1.5 hours for an email exchange with, and the subsequent preparation of Exhibit G, the Dreux Affidavit, which was not attached to the application and is not part of the record. Therefore, U.S. Utility's request is further reduced by

$187.50. On January 22, 2015, Attorney Zoll billed 2 hours for "Final proof, signature, edits and filing of fee petition." On February 3, 2015, Zoll billed 3 hours to "Finalize Fee Petition and supervise filing of same" and Greenlese also billed 0.40 hour for "filing pleading for" Zoll. The Court finds that Zoll's 3 hours billed on February 3, 2015, were duplicative. U.S. Utility's fee request is therefore further reduced by $375.00.

Based upon the above findings and conclusions, and the Court's own knowledge, experience, and expertise of the time required to complete similar activities, the Court finds the appropriate amount of attorney's fees is $7,020.25 and the appropriate amount for expenses is $337.04. Accordingly,

IV. ORDER

IT IS HEREBY ORDERED THAT U.S. Utility's application seeking attorney fees and expenses pursuant to the EAJA is **GRANTED** but the total fees and expenses awarded are limited to $7,357.29.

SO ORDERED THIS 21st day of **April, 2015**.

/s/
JOHN B. GATTO, Judge
U.S. Occupational Safety and
Health Review Commission