United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
100 Alabama Street, S.W., Room 2R90
Atlanta, Georgia 30303

SECRETARY OF LABOR, Complainant v. E.C. Concrete, Inc., Respondent.	OSHRC Docket No. 12-2082 (EAJA)

Appearances:

Amy Walker, Esquire
U. S. Department of Labor, Office of the Solicitor, Atlanta, Georgia
For Complainant

Michael Fox Orr, Esquire & Jeremy M. Paul, Esquire
Dawson/Orr, Jacksonville, Florida
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER DENYING RESPONDENT'S EAJA APPLICATION

E.C. Concrete Inc. (ECC) seeks to recover attorney's fees and expenses pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, 29 C.F.R. § 2204.101, *et seq*. that were incurred in defending against five serious violations issued by the Occupational Safety and Health Administration (OSHA) on September 19, 2012. For the reasons discussed in the court's Decision and Order dated September 3, 2013, the violations were vacated or withdrawn by the Secretary prior to the hearing. The court's Decision became a final order of the Commission on October 9, 2013.

ECC's EAJA application, dated October 11, 2013, requests attorneys' fees and expenses in the total amount of $47,146.47. ECC claims that it is an eligible applicant and the prevailing party under the EAJA. ECC argues that the Secretary's case was not substantially justified because of the inadequate inspection by OSHA's safety engineer's (SE).

The Secretary's response to ECC's application dated November 29, 2013, does not dispute that ECC was the prevailing party. The Secretary argues that ECC failed to establish eligibility as to its net worth and maintains that he was substantially justified in pursuing each citation item vacated by the court or withdrawn. The Secretary also claims the attorney fees sought by ECC are excessive and not all properly attributable to the OSHA case.

ECC's reply filed December 6, 2013, addresses primarily the eligibility and attorney fee concerns raised by the Secretary's response. ECC again argues that the Secretary's case lacked substantial justification because "the reasonableness of [the SE] and OSHA's actions by way of not conducting even the most basic investigation before issuing five 'serious' citation items to ECC" (ECC's Reply, p. 5).

For the reasons discussed, ECC's application for relief under the EAJA is DENIED.

BACKGROUND

ECC is a concrete formwork contractor in Jacksonville, Florida for commercial projects. In January 2012, ECC began an expansion project to the Omni Amelia Island Plantation Resort, Fernandina Beach, Florida. Manhattan Construction "Florida" Inc. (MCF), the construction manager, contracted ECC to, in part, "provide the concrete forming, concrete pumping and placing, concrete finishing for the Hotel Buildings A, B, C, D, and F" (Exh. C-13).

On August 1, 2012, an ECC crew was on the 7th floor of Building B installing the shoring system to support the concrete pour for the roof (Tr. 381). At approximately 9:00 a.m., the crew had placed by hoist a bundle of six shoring beams on top of a shoring scaffold when the hoist chains became entangled in the cross brace of the scaffold. The scaffold lifted up and tipped over onto the floor's perimeter (Tr. 315, 508, 514). The aluminum beams on top of the scaffold fell off the floor; striking and injuring two ECC employees entering the building at the 1st floor entrance (Exhs. C-1, C-3; Tr. 44).

As a result of an OSHA inspection, ECC received a citation alleging serious violations of 29 C.F.R. § 1926.501(b)(1) (Item 1) for failing to protect employees exposed to a fall hazard by a fall protection system; 29 C.F.R. § 1926.501(b)(4)(ii) (Item 2) for failing to cover a floor hole to prevent a tripping hazard; 29 C.F.R. § 1926.501(c)(3) (Item 3) for failing to protect employees from falling objects during overhead concrete work by the use of barricades at the 1st floor entrance; 29 C.F.R. § 1926.502(d)(11) (Item 4) for allowing an employee to use a lifeline

wrapped around a concrete column that was not protected from cuts or abrasions; and 29 C.F.R. § 1926.701(b) (Item 5) for allowing employees to work near uncapped rebar. The citation proposed total penalties of $14,280.00.

The hearing was consolidated with the citation issued to MCF and held in Jacksonville, Florida, on March 26-28, 2013. At the start of the hearing, the Secretary announced the withdrawal of Item 1, an alleged violation of § 1926.501(b)(1) (Tr. 22). The court's Decision and Order, entered on September 3, 2013, vacated the remaining violations issued to ECC. [1]

EQUAL ACCESS TO JUSTICE ACT

The EAJA applies to proceedings before the Commission through § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651, *et seq*. The purpose of the EAJA is to ensure that an eligible employer is not deterred from seeking review of an unjustified action by OSHA.

For an employer to receive an award under the EAJA, the record must establish that (1) the employer was an eligible applicant; (2) the employer was the prevailing party; (3) the Secretary's action was not substantially justified; and (4) there was no special circumstance which makes the award unjust. While the employer has the burden of persuasion to show it meets the eligibility requirements, the Secretary has the burden to show his position in the matter was substantially justified. 29 C.F.R. § 2204.105 and § 2204.106.

In this case, the Secretary does not dispute that ECC's EAJA application is timely filed.[2] The court's Decision became a Final Order of the Commission on October 9, 2013. ECC's EAJA application was filed on October 11, 2013, within thirty days.

1. ECC's ELIGIBILITY

An eligible employer includes a "corporation . . . that has a net worth of not more than $7 million and employs not more than 500 employees." 29 C.F.R. § 2204.105.[3]

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[1] The citation issued to MCF which alleged a similar serious violation of §1926.501(c)(3) as issued to ECC (item 3) was vacated by the court's Decision and Order also issued September 3, 2013,. MCF has not filed an EAJA application.

[2] An EAJA application must be submitted no later than thirty days after the period for seeking appellate review expires. 29 C.F.R. § 2204.302(a).

ECC asserts, through an affidavit of its vice president, that "[A]t all times relevant to this proceeding, ECC's net worth did not exceed $7,000,000.00 and ECC did not employ more than 500 employees" (ECC's Application, Exh. A).

As argued by the Secretary, the vice president's affidavit is not sufficient by itself to establish ECC's net worth. 29 C.F.R. 2204.202(a) requires that the employer "provide with its application a detailed exhibit showing the net worth of the applicant" as of the date of the notice of contest and a "full disclosure of the applicant's assets and liabilities" to determine whether it qualifies under the EAJA.

In its reply, ECC supplemented the vice-president's affidavit by providing balance sheets for October – December 2012, showing the company's net worth as of the date of ECC's notice of contest. The balance sheet which shows a net worth of less than $1.5 million establishes ECC's eligibility under the EAJA.

2. PREVAILING PARTY

ECC, without dispute, was the prevailing party in this case. The alleged serious violations were either vacated by the court in its Decision dated September 3, 2013 or withdrawn by the Secretary prior to the commencement of the hearing.

3. SUBSTANTIAL JUSTIFICATION

After deciding ECC's eligibility and that it was the prevailing party, the court must next determine whether the Secretary's position in issuing and pursuing each alleged violation was substantially justified. In making this determination, there is no presumption that the Secretary's position was not substantially justified simply because he lost the case or he withdrew the alleged violation. *Hocking Valley Steel Erection, Inc.,* 11 BNA OSHC 1492, 1497 (No. 80-1463, 1983). Also, it is noted that the Secretary's decision to litigate does not have to be based upon a substantial probability of prevailing.

For EAJA purposes, "[T]he 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, 1009 (No. 89-1366, 1993). The Secretary must show (1) a reasonable basis for the facts alleged;

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[3] There is no dispute that ECC employed less than 500 employees. During the hearing, it was established that ECC employed approximately 30-40 employees and has been in business since 1972 (Tr. 412, 422-423).

(2) the existence of a reasonable basis in law for the theory propounded; and (3) the facts alleged will reasonably support the legal theory advanced.

In order to establish a violation of an OSHA standard, the Secretary must show: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) the employee(s) access to the violative condition, and (d) the employer either knew or with the exercise of reasonable diligence, could have known of the violative condition). *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994). Of these elements, ECC did not dispute the application of the cited fall protection standards and concrete construction standards to its concrete work on August 1, 2012.

ECC's argument that the OSHA inspection was materially deficient does not establish the lack of substantial justification. Instead of addressing each alleged violation, ECC in its EAJA application and reply merely argues in general terms that the OSHA inspection was inadequate. There was no effort by ECC to identify any specific deficiency or how such deficiency prevented the Secretary from showing substantial justification. Although the SE was unable to answer number of questions during the hearing, the Secretary argues and the court agrees that the deficiencies were either not important to the court's Decision or the SE did not take the measurement because he would have been exposed to a fall hazard and he acquired the information from ECC or from the design documents (Tr. 76, 206-207). ECC has not identified a measurement, photograph or other evidence that the SE failed to obtain that had relevance to the Secretary establishing his *prima facia* case. Although it may have been helpful to the Secretary's case in hindsight if additional information was obtained, the lack of such information does not render that the Secretary's case lacked substantial justification.

As discussed, the Secretary's substantial justification for each alleged serious violation cited against ECC is established.

Item 1: Alleged Serious Violation of § 1926.501(b)(1)

Section 1926.501(b)(1) requires an employer to protect employees exposed to a fall hazard by a fall protection system. The citation alleged the employees engaged in placing the shoring scaffolds on the 7th floor were exposed to a fall hazard without a fall protection system. The perimeter guardrail system on the 7th floor had been removed along the front of the building in order for ECC to later remove the tables supporting the 7th floor (Tr. 319-320).

The alleged violation was withdrawn by the Secretary prior to the commencement of the hearing on March 26, 2013. At the time, the Secretary did not state the basis for the withdrawal (Tr. 22). The Secretary's position is not unjustified merely because he unilaterally withdrew the item before a full hearing. *High Voltage Electric Service, Inc.*, 21 BNA OSHC 1566 (No. 04-1687, 2006).

In his response, the Secretary states that the Item was withdrawn because he could not prove the violation. It was withdrawn as part of an "overall litigation strategy" to limit the issues in dispute at the hearing. The decision to withdraw the Item was made after reviewing the SE's deposition which was not received until shortly before the hearing (Secretary's Response p. 9). The Secretary claims the OSHA inspection uncovered sufficient evidence supporting the violation.

To establish substantial justification, the record shows that ECC's safety policy required its employees to wear fall protection when closer to the unguarded perimeter than the yellow warning line the company established at approximately six feet. According to the Secretary and not disputed by ECC, on the day of the OSHA inspection, the superintendent had stepped over the yellow line and was working less than six feet from the perimeter. The perimeter was not protected by a guardrail or safety net system, and the superintendent was not using personal fall protection (Exh. R-1).

The Secretary's decision to cite the alleged violation was substantially justified. The EAJA provides the Secretary with every reason to withdraw a citation once the lack of substantial justification appears and to provide evidence as in this case that until the withdrawal occurred, his position was substantially justified. The superintendent may have been within six feet of the floor's perimeter and there was no guardrail system or other fall protection system in place. Such facts if un-contradicted were sufficient to support the issuance of the citation and pursuit of additional evidence through discovery.

Item 2: Alleged Serious Violation of § 1926.501(b)(4)(ii)

Section 1926.501(b)(4)(ii) requires that "a walking/working surface shall be protected from tripping in or stepping into or through holes (including skylights) by covers." The citation alleged that a hole in the 7th floor exposed employees to a tripping hazard.

The court's Decision found that there was an uncovered hole on the 7th floor in the area where employees were attempting to remove the fallen scaffold from the perimeter. The hole was approximately 12 inches wide, 20 inches long and 8 inches deep and it posed a possible tripping hazard (Exh. C-6; Tr. 374). According to ECC, the hole was there for the eventual placement of mechanical equipment. The superintendent knew or should have known the hole was uncovered. It was in plain view and the photograph shows the superintendent standing within three feet of the uncovered hole (Exh. C-6; Tr. 78).

The issue before the court was employees' exposure. The hole was left uncovered or became uncovered when the scaffold tipped over. The accident occurred at approximately 9:00 a.m. and OSHA did not inspect the 7th floor until after 10:00 a.m. indicating that the hole may have been left uncovered for more than one hour. However, the record failed to establish by a preponderance of evidence the employees' exposure to the tripping hazard during this period. The photograph taken by OSHA, although showing the superintendent standing near the hole, appears to show the uncovered hole inside the warning tape. This was the only hole found uncovered.

The Secretary introduced sufficient evidence, if un-contradicted, of employees' access to the condition. The uncovered hole was in the area where the ECC's employees were working on August 1, 2012 (Tr. 375). The superintendent was standing within the zone of danger because he was less than three feet from the hole (Exh. C-6). OSHA's photograph shows another employee just a few feet away from the hole. Although the court found the uncovered hole was "located inside the yellow warning tape," the tape, as noted by the Secretary, would not have physically prevented an employee from accidently tripping in the hole. Also, the court's finding that the employees were engaged in removing the fallen scaffold does not negate an employer's responsibility to provide the employees a safe workplace. Although not accepted by the court, the Secretary made a reasonable showing that the immediate threat posed by the scaffold had been abated. The scaffold was already secured to prevent it from falling to the ground (Tr. 164, 182-183, 348-349).

The Secretary's burden of establishing substantial justification is not insurmountable. Substantial justification does not require the Secretary to show that its decision to litigate was based on a substantial probability of prevailing. His decision to litigate need only be reasonable

in law and fact. In cases before the Commission, facts are proven by only a preponderance of the evidence, not by clear and convincing evidence or beyond a reasonable doubt.

In this case, the Secretary's position was substantially justified. The hole was uncovered and presented a tripping hazard, the superintendent knew it was uncovered, and employees were working in the area. Evidence is substantial if it is the kind a reasonable mind might accept as adequate to support a conclusion. *Capital Tunneling Inc.*, 15 BNA OSHC 1304 (No. 89-2248, 1991). The EAJA is not read to deter the Secretary from pursing in good faith, cases which are reasonable in advancing the objective of workplace safety. The facts forming the basis of the Secretary's position need not be un-contradicted.

Item 3: Alleged Serious Violation of § 1926.501(c)(3)

Section 1926.501(c)(3) requires that "[W]hen an employee is exposed to falling objects, the employer shall have each employee wear a hard hat and shall implement one of the following measures:" which includes barricading the area where objects could fall. The citation alleged that "employees on the ground level below the overhead concrete work were not protected from falling objects by use of a barricade."

As noted by the Secretary, it was undisputed that two employees accessing the building on the 1st floor were exposed to falling objects. The employees were struck and injured by the shoring beams that had fallen from the 7th floor deck when the hoist chain caught onto the supporting scaffold (Tr. 88). The court vacated the violation because falling beams were not "normally and reasonably anticipated." The court's Decision relied on the testimony of EEC's expert, a structural engineer. According to the Secretary, ECC informed the Secretary that it would present the testimony of the expert shortly before the hearing and his testimony was expected to be that the scaffold was engineered to remain upright. Other than this representation as to the expert's testimony, the remainder of his testimony was a surprise to the Secretary (Secretary's Response p. 12-13). The case was originally designated for simplified proceedings which prevented discovery by the parties unless permitted by the court.

Although not accepted by the court, the Secretary presented evidence sufficient to establish a *prima facia* showing of foreseeability. First, ECC was placing forming scaffolds and aluminum beams within seven feet of the floor's perimeter and above the 1st floor entranceway. While performing this work, the entrance was not barricaded to prevent employees' access.

ECC's contract with MCF required that a scaffold remain at least one and one-half times the scaffold's height from the floor's perimeter. In this case, the scaffold was 10 feet high and therefore needed to be at least 15 feet from the perimeter according to the contract (Exh. C-13). The scaffold was only seven feet from the perimeter.

Also, the Secretary identified other possible falling objects on the 7th floor. In addition to the beams that actually fell, there were such materials as cross braces, wood, and rebar in close proximity to the perimeter (Exhs. C-6, C-7, C-8. C-10; Tr. 89-94). If accepted by the court, the materials could have posed a falling object hazard to the employees entering the building (Tr. 89). However, the tables supporting the floor extended beyond the concrete deck. Although the court concluded that these objects were not shown to pose a falling object hazard, the Secretary correctly noted that there were 24-inch gaps between tables in front of the columns supporting the floor (Exhs. C-14, C-15; Tr. 349-351). Also, much of the debris along the edge was located above these gaps (Exhs. C-8, C-10).

Although the record failed to show that ECC should have known the scaffold and beams or other objects on the 7th floor posed a falling object hazard, the Secretary was substantially justified in pursuing the violation. The scaffold did tip over and two ECC employees entering the building were struck and injured from the falling beams. There were no barricades to prevent their access. Despite failing to consider the tables supporting the 7th floor which extended approximately 3-4 feet beyond the floor's edge, the facts obtained by the SE tended to support the alleged violation and the Secretary's theory. Also, ECC was performing shoring work on the 7th floor within seven feet of the concrete perimeter without barricades at the 1st floor entrance to prevent employees' access.

The facts forming the basis of the Secretary's position do not need to be un-contradicted. Determinations based on disputed facts which are not resolved in favor of the Secretary do not render the Secretary's position as unjustified. If the determinations including reasonable inferences had been resolved in favor of the Secretary as opposed to ECC, the Secretary's claim of violation would have been affirmed. "[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). Determinations made in favor of ECC do not mean the Secretary's position lacked substantial justification. The Secretary is not accountable for the court's adverse resolution of these issues.

Item 4: Alleged Serious Violation of § 1926.502(d)(11)

Section 1926.502(d)(11) requires that "[L]ifelines shall be protected against being cut or abraded." The citation alleged that the lifeline used by an employee on the 7th floor and wrapped around a concrete column was not protected from being cut or abraded.

There is no dispute that while the SE was on the 7th floor, he observed an employee retrieving the fallen scaffold from the unguarded perimeter of the floor. The employee was using a personal fall arrest system that had its lifeline directly wrapped around a concrete column (Exhs. C-11, C-12; Tr. 116, 377). As discussed, the perimeter guardrail system had been removed before ECC started the scaffold formwork for the roof.

In deciding the case, the court's Decision relied on the testimony of ECC's expert. As stated in his response, the Secretary was unaware that ECC intended to use an expert to testify regarding the lifeline and the case was originally designated for simplified proceedings which prevented discovery unless permitted by the court. The case was removed by the court without objection from simplified proceedings on the third day of hearing (Tr. 490). According to the Secretary, the fact the expert testified about the wire rope was a complete surprise (Secretary's Response p. 15).

Also, although the court's Decision noted the SE's failure to inspect or analyze the lifeline and determine how long it had been in use, the standard presumes a hazard and the SE's observations established a *prima facia* case. It was ECC's burden to overcome the presumption of a hazard. Until the hearing the Secretary had the evidence needed to establish a violation and had not received information from ECC arguably rebutting the presumed hazard. Because the lifeline was in use by an employee, there was no showing that the SE was able to inspect the lifeline or was made aware that the lifeline was made of galvanized steel rope.

Despite accepting the expert's testimony as a professional engineer that the lifeline was made of galvanized steel rope, he had not tested the actual lifeline or provided information as to lifeline's use. He described the lifeline as steel rope which was "abrasive resistant." The court concluded that the lifeline did not need to be otherwise protected from cuts and abrasions. OSHA's Appendix C, subsection (h)(5) to Subpart M, 29 C.F.R. § 1926.500 *et. seq*. states that "wire rope tie-off" is an acceptable alternative tie-off rigging method for lifelines.

However, the information OSHA obtained supported the alleged violation and establishes the Secretary's substantial justification to pursue the matter. As an exception to the requirement of § 1926.502(d)(11) which applies to all lifelines, ECC had the burden of showing the lifeline was made of wire rope which the expert was able to establish.

Item 5: Alleged Serious Violation of § 1926.701(b)

Section 1926.701(b) requires that "[A]ll protruding steel, onto and into which employees could fall, needs to be guarded to eliminate the hazard of impalement." The citation alleged that "vertical rebar near where the employees were working were not guarded to prevent impalement."

The record showed without dispute that numerous vertical rebar at the perimeter which were to form the concrete wall lacked caps to prevent impalement. The ECC employees were working in close proximity to the uncovered rebar in order to retrieve the fallen scaffold. The rebar were three feet high. The ECC superintendent oversaw the employees retrieving the scaffold (Exhs. C7, C-9, R-1; Tr. 120-123, 375). It was undisputed that the rebar were not capped or otherwise guarded to protect employees from impalement hazards. These undisputed facts establish a *prima facia* case of a violation.

Also, ECC acknowledged that there were thousands of vertical rebar on the project and that there was a shortage of caps. ECC was required to remove caps from areas where employees were not working and place them in active work areas (Tr. 576-577).

In deciding the case, the court accepted ECC's concern about retrieving the fallen scaffold and concluded that the potential hazard of impalement from the rebar was not greater than the emergency threat of a 400-pound scaffold hanging off the 7th floor. Although the court considered it an emergency response, the Secretary correctly noted that the injured employees had been removed from the scene and the scaffold had been secured to prevent it from falling off the floor (Tr. 164, 182-183, 348-349). The Secretary reasonably argued that ECC was engaged in an accident recovery operation but it was no longer an emergency and nothing about the worksite conditions justified exposing employees to impalement hazards (Tr. 173). Despite rejecting the Secretary's argument, the Secretary was justified in pursuing the matter.

The EAJA was not intended to deter the Secretary from pursing in good faith, cases which are reasonable in advancing the objective of workplace safety, if such cases are reasonably supportable in fact and law, as in this case.

4. SPECIAL CIRCUMSTANCE

The record does not show special circumstances which prevent an award of fees and expenses.

ECC's CLAIM FOR FEES AND EXPENSES

Based on finding that the Secretary was substantially justified in pursuing the five serious violations, ECC is not entitled to reasonable attorneys' fees and expenses.

However, a cursory review of ECC's claim for attorney fees and expenses appears excessive and not all entries related to the OSHA case. The hourly rate reflected in the invoices for March 7, 2013, through September 13, 2013, is $140.00 per hour. The invoice for February 4, 2013, reflects an hourly rate of $135.00. The hourly rate on the invoices for November 5, 2012, through January 9, 2013, is $125.00. The Commission limits an attorney's hourly rate to $125.00 29 C.F.R. § 2204.107(b). ECC agrees that $125.00 per hour is the maximum "amount recoverable" (ECC Reply, p. 4). However, there is no showing that ECC's claim for fees is based on $125.00. Therefore, ECC's claim, if approved, needs to be adjusted to reflect the allowable hour rate.

Also, as noted by the Secretary, ECC's application seeks fees and expenses which appear unrelated to the case. Although the invoices references "Reuben Sapp, Jr. v. Crane Rental Corporation, E.C. Concrete, Manhattan Construction (Florida) & John Does 1-5" which involves other litigation brought by a victim in the accident, ECC asserts it has redacted entries not involving the OSHA case (ECC Reply, p. 3).

However, the Secretary has identified, which ECC acknowledges in its reply, at least four entries not redacted that "should not be awarded as they are unrelated" to the OSHA case (ECC Reply, p. 3). The unrelated entries are: (1) the April 11-13 entry which reads "correspondence from and correspondence to (2 times) Janice Pia regarding potential recovery and subrogation for payments made on behalf of Sapp and Michael Tubbs," (2) the January 7-13 entry which reads "Analyzed strategy for responding to co-defendant Manhattan's failure to pay all amounts

requested in change order requests and Manhattan's request for estimate of overtime hours to finish project," (3) the April 29-13 entry which reads "correspondence from and correspondence to (5 times) plaintiff's counsel and defense counsel regarding requests to depose corporate representatives of crane rental," and (4) the March 1-13 entry which reads "reviewed and analyzed Occupational Safety and Health Review Commission opinions regarding admissibility of material generated during OSHA proceeding in corresponding civil lawsuit in preparation of drafting objection and/or motion for protective order regarding production of deposition transcript of E.C. Concrete's employees taken during OSHA proceeding." These entries are clearly improper and need to be deducted if any fee claim is awarded.

There are also other questionable entries which may need to be deducted such as the March 18 - 13 entry reflecting disbursement for "transcript excerpt of Cedric Hazelton deposition 11/27/12." Although as ECC claims Mr. Hazelton was the crane operator at the time of the accident, he did not testify at the OSHA hearing and according to the Secretary was not deposed for the OSHA case (Secretary's Response p. 5).

Overall, ECC fails to show the fees requested are reasonable. Although the hearing took three days, the issues were not complex and ECC's attorney was assisted by MCF's attorney who is an experienced attorney in OSHA matters. Also, as stated, the case was initially designated for simplified proceedings and was converted to conventional proceedings by the court. ECC never sought to remove the case.

Although ECC's claim for fees and expenses need to be adjusted to reflect the maximum $125.00 hourly rate and to eliminate all improper entries, ECC's application for EAJA is denied because the Secretary has established substantial justification in pursuing the five serious citation items.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is ORDERED that:

1. ECC's EAJA application for attorney fees and expenses is DENIED.

/s/
KEN S. WELSCH
Administrative Law Judge

Date: January 7, 2014