UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR, Complainant, v. CONSOLIDATED CONSTRUCTION, INC., Respondent.	OSHRC Docket No. 89-2839

DECISION

BEFORE: FOULKE, Chairman; WISEMAN and MONTOYA, Commissioners.
BY THE COMMISSION:

I. Introduction

Consolidated Construction, Inc. ("Consolidated") contracted with the United States Air Force to repair an underground fuel tank at a Launch Control Facility in Colorado. By early July 1989, the 75 by 150 foot excavation was 35 feet deep. On July 6, 1989, the Air Force suspended work under the contract, claiming that the slopes of the excavation were too steep and not properly sloped or shored. In response to a complaint from the Air Force, a compliance officer of the Department of Labor's Occupational Safety and Health Administration ("OSHA") conducted an inspection of Consolidated's excavation site on July 12, 1989. A number of citations were issued; items 3 and 4 of Serious Citation No. 1, both involving excavation standards, were ultimately tried before an administrative law judge. The judge, discounting the compliance officer's testimony in favor of Consolidated's expert witnesses, found that the Secretary failed to show a danger to employees from moving earth as required by the standards. His January 8, 1991 decision vacated both citation items.

Having prevailed on the merits,[1] Consolidated sought reimbursement for over $55,000 in attorneys' and other fees and costs under the Equal Access to Justice Act ("EAJA"), 5 U.S.C. § 504.[2] In a decision issued June 18, 1991, the judge denied Consolidated's EAJA application, finding that even though the Secretary had lost on the merits, his position had been "substantially justified." Pursuant to 29 U.S.C. § 661(j) and 29 C.F.R. § 2204.309, Consolidated petitioned for review of the judge's EAJA decision and the case was directed for review on July 26, 1991. For the reasons set forth below, we affirm in part and reverse in part.

I. Standard of Review and Burden of Proof

Judges' awards under the EAJA are reviewed by the Commission *de novo*. *Central Brass Mfg. Co.*, 14 BNA OSHC 1904, 1905, 1987-90 CCH OSHD ¶ 29,144, p. 38,955 (No. 86-978, 1990) (consolidated). The standard of review in such cases is not whether the judge abused his discretion in finding that the Secretary's position was substantially justified, but whether the Secretary's position *was* substantially justified. Under Commission Rule 2204.309, Commission review of a judge's EAJA award is to be in accordance with rules governing substantive petitions for review. The standard of proof in Commission proceedings is the preponderance of the evidence. *Trumid Constr. Co.*, 14 BNA OSHC 1784, 1786 n.5, 1987-90 CCH OSHD ¶ 29,078, p. 38,856 n.5 (No. 86-1139, 1990), citing *Astra Pharmaceutical Prods.*, 9 BNA OSHC 2126, 2131, 1981 CCH OSHD ¶ 25,578, p. 31,899-900 (No. 78-6247, 1981), *aff'd on other grounds*, 681 F.2d 69 (1st Cir.1982). Accordingly, to determine *de novo* whether the Secretary proved by a preponderance of the evidence that his position was substantially justified, the Commission must reexamine the underlying merits of the case.

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[1] The Secretary had proposed penalties of $810 and $640 for the vacated citations.

[2] The EAJA provides, in relevant part:

> (a)(1) An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, 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 was *substantially justified* or that special circumstances make an award unjust.

(Emphasis added.)

The Government's success or failure in litigation is not determinative of whether its position was substantially justified. *Hadden v. Bowen*, 851 F.2d 1266, 1267 (10th Cir. 1988). "Conceivably, the Government could take a position that is not substantially justified, yet win; even more likely, it could take a position that is substantially justified, yet lose." *Pierce v. Underwood*, 487 U.S. 552, 569 (1988). Therefore, the Secretary's having lost this case on the merits does not automatically mean that his position was not substantially justified within the meaning of the EAJA.

At the same time, the burden of demonstrating substantial justification rests with the government. *Dole v. Phoenix Roofing, Inc.*, 922 F.2d 1202, 1209 (5th Cir. 1991), citing *S & H Riggers & Erectors, Inc. v. OSHRC*, 672 F.2d 426, 430 (5th Cir. Unit B 1982). *See also* Commission Rule 2204.106(a). The test of whether government action is substantially justified is essentially one of reasonableness in law and fact. *Hocking Valley Steel Erectors, Inc.*, 11 BNA OSHC 1492, 1983 CCH OSHD ¶ 26,549 (No. 80-1463, 1983). The government's position must be "'justified in substance or in the main'--that is, justified to a degree that could satisfy a reasonable person." *Gatson v. Bowen*, 854 F.2d 379, 380 (10th Cir. 1988) (citation omitted).

> The 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.'

Id. (citation omitted).

Consolidated argues that the Secretary was not justified in either issuing the citation or enforcing it through litigation. Under Commission Rule 2204.106(a), the position of the Secretary includes his litigation position as well as his action or failure to act prior to the litigation. We therefore turn to the question of 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.

II. Substantial Justification of the Secretary's Position

The Secretary sought to prove violations of two excavation standards, 29 C.F.R. § 1926.651(c) and (q).[3] While the nature of the hazard, the danger from moving ground, is essentially the same under both standards, section 1926.651(c) addresses the danger of a wall shifting or collapsing under its own weight, while section 1926.651(q) addresses soil movement caused by loads superimposed near the edge of an excavation wall, *e.g.*, here, the additional weight of two tanker trucks temporarily stationed at the edge of the excavation. For the reasons below, we find that with respect to the section 1926.651(q) citation item, the Secretary's position was substantially justified throughout the proceeding. With respect to the section 1926.651(c) item, however, we find that the Secretary's position was substantially justified only until the date of the hearing. As of the date the hearing commenced, the Secretary's position on the danger of moving ground in the absence of superimposed loads was no longer substantially justified.

(a) Prior to Issuance of the Citation

We first consider whether the Secretary was substantially justified in issuing these citation items. The evidence he had at that time consisted of the following. An Air Force construction inspector had observed "sloughing" of the excavation wall surface, and an Air Force ground safety manager had taken a videotape of the site, showing the excavation, employees at work, and the presence of the tanker trucks. Both the Air Force personnel and the compliance officer thought that the slopes, which were angled between 0.5 to 1 and .75 to 1, were too steep for average soil that was largely sand and gravel. Relying to some

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[3] At the time of the inspection, the former excavation standards still applied, since the revised excavation standards did not become effective until March 5, 1990. The pertinent standard provided:

> **§ 1926.651 Specific excavation requirements.**
>
> . . . .
>
> (c) The walls and faces of all excavations in which employees are exposed to danger from moving ground shall be guarded by a shoring system, sloping of the ground, or some other equivalent means.
>
> . . . .
>
> (q) If it is necessary to place or operate power shovels, derricks, trucks, materials, or other heavy objects on a level above and near an excavation, the side of the excavation shall be sheet-piled, shored, and braced as necessary to resist the extra pressure due to such superimposed loads.

extent on Table P-1 (former trench standard, 29 C.F.R. § 1926.652), the compliance officer thought the side walls should be sloped 1 to 1 (at a 45° angle). Table P-1 depicts the angle of repose for a variety of soil types. According to the table, "average" soils are to be sloped 1 to 1; other soils require different slopes to be safe. Most sands, for instance, must be sloped closer to 2 to 1, while slopes for certain compacted gravels, solid rock and cemented sands may be much steeper, 0.5 to 1 to 0 to 1 (vertical). The north, east, and west walls of the excavation in this case were sloped more steeply than 1 to 1, with the steepest wall sloped approximately 0.5 to 1.[4]

The compliance officer later testified at the hearing that aside from his own observations, he based his citation recommendation primarily on an OSHA laboratory report that the soil was "unstable." The compliance officer had taken soil samples from the wall of the south side of the excavation, near what is referred to as "the access ramp" by which employees and machinery entered and exited the excavation. The soil samples, scraped from the surface of the wall, were sent to an OSHA soil laboratory for analysis. The compliance officer was unable to use his penetrometer because the soil was too hard. While at the site, however, the compliance officer performed what he called a "jar test," in which the soil is dissolved in water and then allowed to settle, to determine approximate proportions of sand, gravel, and clay. The compliance officer never collected soil from the other three, much steeper walls, nor from the deepest 20 feet of the excavation. He knew that the soil had been previously disturbed, *i.e.*, "pre-excavated . . . and tamped down in 1967" and he testified that he thought it would be dangerous for him to go any further or deeper into the excavation. The compliance officer believed that with or without superimposed loads, flatter slopes were required, and that employees were in imminent danger from moving soil.

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[4] The judge never rules, nor do we, that Table P-1 does or does not "apply" to the excavation in this case, or that Consolidated's excavation did or did not comply with Table P-1. Both the Commission and the Tenth Circuit, where this case could be appealed, have held that Table P-1 is "illustrative" and that failure to meet the "recommended" slopes does not in itself constitute a violation. *Pipe-Rite Util. Ltd.*, 10 BNA OSHC 1289, 1291, 1982 CCH OSHD ¶ 25,877 (No. 79-234, 1982) and *CTM, Inc. v. OSHRC*, 572 F.2d 262, 263 (10th Cir. 1978). In addition, Table P-1 is specifically referred to in the § 1926.652 *trench* standard but not in the § 1926.651 *excavation* standard, and the parties agree that this case involves an excavation, not a trench. In this case, Table P-1 is still of interest, mostly for purposes of understanding the Secretary's grounds for issuing and later enforcing the citation.

Based on this evidence, the Secretary issued the two citation items. The Air Force personnel who complained to OSHA had little or no experience with excavations, and the Secretary's failure to collect soil samples from the very walls he claims required sloping or shoring also undermines his position. Nevertheless, we find that the Secretary's position at this stage, for both citation items, was substantially justified. The compliance officer assigned to the case had inspected 1500 sites in his 15 years with OSHA, including forty excavations, five of which were over 30 feet deep. The soil analysis from the OSHA laboratory indicated that the soil was "unstable." At this point, all the evidence the Secretary had accumulated supported his belief that 1 to 1 slopes were required. He as yet had no evidence to the contrary.

(b) Discovery

1. Section 1926.651(q): Superimposed Loads Violation

With respect to the section 1926.651(q) citation item, (the "superimposed loads" violation), we find that the Secretary's position remained substantially justified throughout the entire proceeding. Section 1926.651(q) assumes a hazard in a way that section 1926.651(c) does not. *See supra* note 3 for text of standard. The standard presumes that superimposed loads will exert extra pressure and that it will be necessary to take additional measures to protect excavation walls. Prompting the section 1926.651(q) violation here were two tanker trucks parked near the edge of the north wall of the excavation for approximately one hour apiece, draining the fuel from the underground tanks in the excavation. It was later established at the hearing that each truck weighed approximately 75,000 to 80,000 pounds when full and was parked 5 feet from the edge at the top of the excavation. In apparent recognition of the potential hazard, Consolidated's project manager testified at the hearing that certain special precautions were taken during this time. First, the trucks were permitted no closer than 5 feet from the edge of the excavation's north wall, because according to Consolidated's calculations, at that position, the forces exerted by the trucks would be inconsequential to the stability of the slope. In addition, employees were instructed to stay away from the north end of the excavation only when a truck was actually arriving or departing, because Consolidated wanted to avoid not "a massive failure" but any injury from rocks that might roll loose from the vibration of the trucks. The employees

were, however, expected to return to work under the trucks during the time the trucks were stationary, filling up with fuel from the underground tanks.

As the Secretary points out, the Empire report was silent on the additional hazard associated with the tanker trucks. The report mentions that "the east bank analysis included the 'influence' of the existing building located 5 feet back of the edge of the excavation," but nothing about the influence of 40-ton tanker trucks on the steeper north wall. We have no indication that further preparation in advance of the hearing on this particular citation item would have led the Secretary to question the validity of his position. We find that the Secretary's position that the superimposed loads in this case may have either created or compounded the danger of moving ground was substantially justified.

2. Section 1926.651(c): Moving Ground Violation

In contrast to his position on the section 1926.651(q) superimposed loads violation, during the period after the citations were issued, leading up to the hearing date, the Secretary's position on the section 1926.651(c) moving ground citation item became less justifiable. Two days after the citations were issued, the Secretary received a copy of a report from Empire Laboratories, Inc., Consolidated's consultants. The 7-page narrative report, with 22 pages of graphs and computer printouts, was accompanied by a cover letter which states: "Based upon our findings in the subsurface, it is our opinion that the slopes at the site were constructed sufficiently stable to allow for the proposed construction at the time of our investigation." Although the report does not use the term "cemented sand" or refer to Table P-1, it focuses on the qualities of the "select" backfill,[5] described as "hard and well-compacted," in the area of the excavation. Since the report and the citations crossed in the mail, the report does not specifically respond to the two citation items themselves.

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[5] The written report does not explain this, but testimony at the hearing showed that after the original excavation in the 1960's when the fuel tanks were first installed, a procedure called an "engineered backfill" was chosen to restore the landscape. This procedure involves so-called "select fill"--material that has better bearing strength, shear strength, cohesion and other engineering properties than "common" or "non-select" fill. This material is then poured and tamped down, controlling for moisture and density, where it reaches a high degree of compaction.

During the discovery period between the time the complaint was filed (November 30, 1989) and the time of the hearing (May 14, 1990), the Secretary did not respond to the Empire report. Much later, in his brief, the Secretary notes that he did review it but does not say when. The Secretary claims in his brief that some of Empire's slope measurements later proved to be inaccurate and that Empire did not adequately explain why the vertical slopes at the very bottom 10 feet of the excavation would not pose a danger to employees. This, the Secretary says, was his primary concern. (The report does explain that on the west wall, the deepest layer is bedrock, and that on the north and east walls, at a depth of 25 feet down to the bottom of the approximately 35-foot deep excavation, a layer of coarse sand and fine gravel backfill was found, described as dense, well-graded, hard and compacted.) Furthermore, the Secretary points out that the term "cemented sand" did not appear in the report. (At the hearing, a Consolidated witness characterized the deepest 14 to 15 feet as cemented sand, which, according to Table P-1, may safely be cut at a 90° angle.) Finally, the Secretary complains that the portions of the Empire report based on computer data were not self-explanatory.

However, the record shows that the Secretary did not submit the Empire Labs report to an expert until March 1990, shortly before the hearing, when he forwarded it to Dr. Alan Peck. Dr. Peck, whose soil analysis report had provided the primary basis for the compliance officer's citation in this case, has been a chemist at OSHA's soil laboratory since 1975. Dr. Peck was listed as a potential expert witness for the Secretary and was deposed by Consolidated in April 1990. Although he reviewed the Empire report before his deposition, Dr. Peck testified at that deposition that he did not know he would be asked to critique the Empire report. He did express certain criticisms of Empire's methods--for example, that computerized slope stability analyses were recognized as unreliable and that the "factors of safety" Empire calculated were too low for an excavation in which employees' lives were at risk--but he was unable to provide sources for these opinions. Dr. Peck seemed to have no definite opinion on whether the excavation was safe or not and ultimately agreed that just because soil is classified as unstable does not mean that the slope from which that soil came is also unstable. The Secretary never called Dr. Peck as a witness at the hearing.

We find that, from the time of Dr. Peck's deposition, the Secretary should have

known that additional preparation would be required to overcome Consolidated's evidence. In light of the Secretary's failure to undertake additional preparation, such as deposing the authors of the report or retaining an expert other than Dr. Peck to assess the Empire report, we find that the Secretary was no longer substantially justified in proceeding when he entered the hearing room on May 14, 1990. At that point, what was once a facially valid citation item could not reasonably be expected to withstand scrutiny when examined in the shadow of the Empire report (and the explanatory testimony that could likely be expected to bolster it at the hearing). We express no opinion as to whether the Secretary could successfully have rebuilt a substantially justified position with the aid of other evidence, and find only that he failed to do so here.

While we do not pretend to dictate the Secretary's schedule or strategy during the discovery period between the issuance of the citation and the date of the hearing, the Secretary may reasonably be expected to arrive at the hearing thoroughly prepared to defend a substantially justified position. In this case, the Secretary's efforts show no such preparation. Reasonably anticipating the weight the judge could be expected to give the Empire report, the Secretary not only failed to gather enough evidence to prove a violation but also failed to determine (in this case, through careful, if not expert, evaluation of the Empire report) whether his position that employees were actually exposed to a danger of moving ground, at least in the absence of any superimposed loads, was substantially justified.

III. The Judge's Decision

At the hearing, after the Secretary rested his case-in-chief, Consolidated moved to dismiss. The judge ruled that although it was a "close question," the Secretary had made out a prima facie case, and that the matter should go forward. The judge, of course, had not seen the Empire report, and was, in a way, in the same position as the Secretary when he issued the citations before having seen the Empire report.

For its part, Consolidated presented a strong case in rebuttal, including testimony from three witnesses whom the judge qualified as experts. The trained geologist and engineer from Empire had performed slope stability analyses on hundreds of large, deep excavations and based their opinions on extensive soils testing and computer modeling, as well as on their practical experience in the design of excavations. Elaborating on the written

report, they testified that the slopes were stable and that there was no danger of moving ground. An engineered, select backfill, according to Empire Labs, does not require 1 to 1 sloping to be safe. In other words, despite the otherwise "average" composition of the soil, the degree of compaction allows for special treatment, *i.e.*, steeper slopes. In addition, Consolidated objected to the use of the soil sample the compliance officer had taken, claiming that it was a non-representative sample. The Empire report had confirmed that the soil was mostly "clayey sand and gravel," but unlike the compliance officer's sample, Empire's samples included undisturbed soil bored out of various portions of each excavation wall.

Based on Consolidated's rebuttal testimony which he considered "knowledgeable and convincing," the judge found that Consolidated had rebutted the Secretary's initial showing, and so vacated both items of the citation. Nevertheless, when he ruled on Consolidated's EAJA application, the judge considered the Secretary's actions to be substantially justified under the EAJA. In support of this finding, he mentions that Consolidated did not provide the Secretary with its experts' report until after the inspection was conducted and the citation issued. Since the report arrived just days after the citations were issued, however, we find that this fact only weighs in favor of substantial justification for issuing the citation. The judge also found that it was not unreasonable for the Secretary's counsel to believe he would prevail on the merits, given the "confusing and contradictory" nature of Consolidated's expert testimony regarding actual slopes and the disparity between critical slope calculations depending on the computer program used. While the Secretary was able through adept cross-examination to cast doubt on some of the computer models Empire had used in reaching its ultimate conclusion about the safety of the excavation, we do not want to encourage the Secretary to rely on weakening the employer's case late in the hearing process instead of on strengthening his own in the early stages. Dr. Peck's refusal to take a position on whether the excavation was safe should have alerted the Secretary to the need for further technical assistance. Finally, it should not be overlooked that the soil Consolidated analyzed was actually soil from the walls that had generated the most concern.

In sum, the judge found that the testimony of the Secretary's witnesses was enough to make out an initial prima facie case that moving ground was a danger, but that the

rebuttal testimony offered by Consolidated's witnesses was ultimately enough to deprive the Secretary of the preponderance of the evidence he needed to prove his case, thus leading to the vacation of the citation items. The judge--possibly influenced by his own ruling on the Secretary's prima facie case--found that the Secretary's position had been substantially justified. According to the judge: "This Judge found the expert testimony more credible than that of the Secretary's Compliance Officer. . . . An award of fees based solely on this Judge's resolution of credibility issues would be improper." We agree that a case which truly turns on credibility issues is particularly ill-suited for the reallocation of litigation fees under the EAJA. We do not see this case, however, as centering on a "credibility" issue. Rather, because the Secretary's case-in-chief was so weak,[6] the record simply fails to support not only a finding of a violation, but a finding of substantial justification as well.

IV. Order

We therefore remand this case to the judge with instructions that he consider the reasonableness of Consolidated's fee petition. Further, he shall award only those portions of reasonable fees that are (1) connected with defending against the section 1926.651(c) citation item *and* (2) attributable to work done after the Secretary's position on that item ceased to be substantially justified, that is, incurred on or after the first date of the hearing, May 14, 1990. To the extent that an attorney or expert fee was related to defending against the superimposed load violation under section 1926.651(q), such fees shall not be awarded.

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[6] The judge was correct in finding that the Secretary need not have "expert" testimony to prove a violation of this type. Consolidated had urged a reading of *Seaward Constr. Co.*, 5 BNA OSHC 1422, 1977-78 CCH OSHD ¶ 21,803 (No. 8684, 1977), that would make expert testimony a *sine qua non* for proving a violation of section 1926.651(c). We think Consolidated misconstrues *Seaward*. In that case, the employer's witnesses testified that no danger of a cave-in was posed and the judge found the testimony to be "consistent and reliable." *Id.* at 1422, 1977-78 CCH OSHD at p. 26,242. As it affirmed the judge on review, the Commission concluded that "[d]etermination of whether a danger of moving ground exists is a question of fact. The resolution of this question requires assessment of all conditions that exist at the worksite and evaluation of expert testimony about the dangers that may or may not be present." *Id.* at 1423, 1977-78 CCH OSHD at p. 26,243. Even assuming that the employer's witnesses in the *Seaward* case were qualified as experts, the Commission's statement can hardly be read as requiring the Secretary to produce expert witnesses to prove his case. Of course, when the Secretary chooses not to produce an expert witness, he risks the possibility, as here, of not being able to refute the employer's evidence. Nevertheless, since we can envision scenarios in which the Secretary may prove a violation using non-expert witnesses, we emphasize that expert testimony is not always a prerequisite to a finding of a violation of the standard cited here.

Lastly, the judge may, in his discretion, consider the arguments already set forth in the parties' pleadings as to the reasonableness of the fee application or additional apportionment theories submitted by the parties.

Edwin G. Foulke, Jr.
Chairman

Donald G. Wiseman
Commissioner

Velma Montoya
Commissioner

Dated: March 3, 1993

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Secretary of Labor,	:	
Complainant,	:	
v.	:	Docket No. 89-2839
CONSOLIDATED CONSTRUCTION, INC.,	:	
Respondent.	:	

NOTICE OF COMMISSION DECISION AND REMAND

The attached Decision and Remand by the Occupational Safety and Health Review Commission was issued on March 3, 1993. The case will be referred to the Office of the Chief Administrative Law Judge for further action.

FOR THE COMMISSION

Ray H. Darling, Jr.

March 3, 1993
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 89-2839

NOTICE IS GIVEN TO THE FOLLOWING:

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Secretary of Labor,
Complainant,

v.

Consolidated Construction, Inc.,
Respondent.

Docket No. 89-2839

NOTICE OF DOCKETING

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on June 26, 1991. The decision of the Judge will become a final order of the Commission on July 26, 1991 unless a Commission member directs review of the decision on or before that date. **ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW.** Any such petition should be received by the Executive Secretary **on or before July 16, 1991** in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. § 2200.91.

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

Executive Secretary
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Review Commission
1825 K St., N.W., Room 401
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Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
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If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 634-7950.

FOR THE COMMISSION

June 26, 1991
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 89-2839

NOTICE IS GIVEN TO THE FOLLOWING:

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UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. CONSOLIDATED CONSTRUCTION, INC., Respondent.	OSHRC DOCKET NO. 89-2839

DECISION AND ORDER

Loye, Judge:

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C., Section 651, et. seq, hereafter referred to as the Act).

Respondent, Consolidated Construction, Inc. (Consolidated), submits an application for an award of fees and expenses under the Equal Access to Justice Act (EAJA), pursuant to §2204 et seq. of the Commissions Rules of Procedure. Consolidated is a corporation with a net worth of under $7 million dollars, and was the prevailing party in Commission Docket No. 89-2839, which became a final order of the Commission on March 11, 1991.

A prevailing party meeting the basic requirements for eligibility under the rules is entitled to an award of attorney fees and other expenses, unless the Secretary shows that her position was substantially justified or that special circumstances make an award unjust.

No presumption that the Secretary's case was not substantially justified is raised by the mere fact that she lost her case. The test of whether government action is substantially justified is essentially one of reasonableness in law and fact. Pierce v. Underwood, 108 S.Ct 2541, 2550 (1988). Hocking Valley Steel Erectors, Inc., 11 BNA OSHC 1492 (80-1463, 1983).

The evidence in this case demonstrates that the Secretary did have a reasonable basis for bringing this case to trial. The Secretary's videotape of respondent's excavation depicts crumbling vertical and near vertical walls. Soil analysis revealed a soil content of more than 50% sand and gravel, which, according to guidelines published within the OSHA regulations normally requires sloping to a 1:1 ratio. A superimposed load in the form of a tank truck rested on the edge of the excavation. Such evidence was sufficient to support the issuance of a citation and to make out a prima facie case.

The matter was ultimately resolved in respondent's favor based on rebuttal evidence produced by an engineering firm retained by respondent. This Judge found the expert testimony more credible than that of the Secretary's Compliance Officer.

This Judge notes, however, that respondent's expert was not retained, and did not produce its report until after the citation was issued and contested. It was not unreasonable, moreover, for Secretary's counsel to believe he would prevail in this matter, given the confusing and contradictory nature of expert testimony

regarding actual slopes, and the disparity between critical slope calculations depending on the computer program used.

The Secretary was substantially justified in pursuing this case. An award of fees based solely on this Judge's resolution of credibility issues would be improper. Respondent's application is, therefore, DENIED.

SO ORDERED.

Benjamin R. Loye
Judge, OSHRC

Dated: June 18, 1991