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

SECRETARY OF LABOR, Complainant, v. C.J. HUGHES CONSTRUCTION, INC., Respondent.	OSHRC Docket No. 93-3177

DECISION

Before: ROGERS, Chairman; EISENBREY, Commissioner.

BY THE COMMISSION:

In this case we review a decision of Chief Administrative Law Judge Irving Sommer awarding attorneys' fees and expenses to Respondent, C.J. Hughes Construction, Inc. ("Hughes"), under the Equal Access to Justice Act ("EAJA"), 5 U.S.C. § 504. EAJA allows an employer that prevails in a contest of an Occupational Safety and Health Administration ("OSHA") citation and meets certain eligibility requirements to receive reimbursement unless the Secretary shows that her position was "substantially justified" or that other circumstances make an award unjust. *William B. Hopke Co.*, 12 BNA OSHC 2158, 2159, 1986-87 CCH OSHD ¶ 27,729, p. 36,255 (No. 81-206, 1986).

Hughes, an underground utility contractor, had a contract to repair gas lines for Columbia Gas of Ohio. These proceedings concern a worksite on Harmon Avenue in Columbus, Ohio, where Hughes had dug a trench to expose a leaking gas line. Hughes was cited for six violations of the Occupational Safety and Health Act of 1970, 29 U.S.C.

§§ 651-78 ("the Act"), for allegedly failing to comply with the Secretary's trenching and excavation standards. The Secretary withdrew one citation item in her complaint, and the remainder were assigned to Administrative Law Judge John H. Frye III for disposition. Judge Frye vacated two and affirmed three of these items. The Commission, acting on Hughes' petition for review, then directed review of Judge Frye's decision to affirm the three items. After the Secretary withdrew one of the affirmed items, the Commission reversed Judge Frye and vacated the remaining two items. The issue before us is whether Judge Sommer erred in concluding that the Secretary's position was not substantially justified with respect to the two items which Judge Frye had affirmed. That portion of Judge Sommer's decision finding that the Secretary's position was not substantially justified with respect to the remaining four citation items is not on review. For the reasons that follow, we affirm Judge Sommer's decision in part and reverse in part.

The Commission members are divided in their views as to whether the Secretary established that she was substantially justified as to item 1 of citation no. 1, which alleged that employees did not have a safe means of egress from the trench, contrary to 29 C.F.R. § 1926.651(c)(2). Under section 12(f) of the Act, 29 U.S.C. § 661(f), official action can be taken only with the affirmative vote of at least two members. Considering the length of time this matter has been pending[1] and in the interest of finality, to resolve their impasse over this issue, Chairman Rogers and Commissioner Eisenbrey agree to affirm the judge's holding awarding fees and expenses with respect to item 1 of citation no. 1, but to accord this portion of the judge's decision the precedential value of an unreviewed judge's decision. *Westar Mechanical, Inc.*, 19 BNA OSHC 1568, 1584, 2001 CCH OSHD ¶ 32,483, p. 50,290 (No. 97-0226, 2001) (consolidated).

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[1]Hughes filed its EAJA application on December 5, 1996. A considerable portion of the intervening time was taken up with proceedings on a threshold issue of Hughes' eligibility for an EAJA award, an issue which is no longer before us. *C.J. Hughes Constr., Inc.*, 18 BNA OSHC 1998, 1999 CCH OSHD ¶ 31,954 (No. 93-3177, 1999).

The Commission members do agree, however, that the Secretary was substantially justified in her position with respect to item 1 of citation no. 2, in which the Secretary alleged that Hughes had failed to protect its employees from the hazard of a cave-in under section 1926.651(a)(1), which specifies that "each employee in an excavation shall be protected from cave-ins by an adequate protective system . . . ." The issue litigated by the parties is whether Hughes came within an exception which exempts an employer from this requirement if "excavations are less than 5 feet (1.52 m) in depth and an examination of the ground by a competent person provides no indication of a potential cave-in." Section 1926.652(a)(1)(ii). The relevant facts are as follows.

Hughes had dug a trench to expose a 12-inch gas main where a leak was suspected. After it was determined that the leak originated in a 1-inch unused service line which ran perpendicular to the main line, Hughes exposed the service line, resulting in an L-shaped trench. It is undisputed that this trench was less than 5 feet deep. Hughes' crew leader, Thomas Febes, took a soil sample from the spoil pile, which he examined and found to consist of dirt, sand, and gravel; in feeling or squeezing the sample he determined that it appeared dry and granular and "held together" "a little." As he entered the trench, Febes also performed a soil test known as the "thumb in the bank test" in which he pressed his thumb into the wall of the trench to detect whether any moisture was present and to feel whether the soil was firm or solid. Febes considered the soil, which appeared consistent throughout the trench, to be "Type C," primarily because Columbia Gas has a policy that all soils are to be classified as "Type C."[2]

The Secretary presented testimony from compliance officer Richard Burns, who had been trained by the Secretary's representatives to the committees which had drafted the

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[2]Appendix A of the standard classifies soil as types "A," "B," or "C" depending on their "unconfined compressive strength," that is, "the load per unit area at which a soil will fail in compression," as well as other criteria. "Type C" soil is the weakest. See section (b), *Definitions.*

trenching and excavation standards. Burns did not perform what he called the "thumb penetration test" because that test is performed on a "clod" of soil, and he was unable to "get the soil to go into a clod." He accordingly regarded the soil as noncohesive. Burns also stated that the thumb test is normally conducted of soil from the spoil pile and that he had "never seen" a thumb test conducted at the trench wall.[3] He took two samples from the spoil pile that the OSHA laboratory in Salt Lake City classified as "Type B" soil and found to be fissured but cohesive "gravelly sandy clay."[4]

Febes did not recall any debris rolling into the excavation and felt no vibration but said that there were some "pockets" in the trench walls where some gravel "may" have fallen out of the wall, and some material came off the spoil pile as it was being formed. Burns observed fissures where material had fallen out of the wall of the excavation, and soil was falling in

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[3]Appendix A of the standard describes various tests for performing a soil analysis, including the thumb penetration test. In describing the thumb test, the Appendix provides as follows:

> Type A soils with an undefined compressive strength of 1.5 tsf [ton per square foot] can be readily indented by the thumb; however, they can be penetrated by the thumb only with very great effort. Type C soils with an unconfined compressive strength of 0.5 tsf can be easily penetrated several inches by the thumb, and can be molded by light finger pressure. This test should be conducted on an undisturbed soil sample, such as a large clump of spoil . . . .

APPENDIX A(d)(2)(iii).

Further, the appendix describes a "dry strength" test:

> If the soil is dry and crumbles on its own or with moderate pressure into individual grains or fine powder, it is granular (any combination of gravel, sand, or silt). If the soil is dry and falls into clumps which break up into smaller clumps, but the smaller clumps can only be broken up with difficulty, it may be clay in any combination with gravel, sand, or silt.

Id. at (d)(2)(ii).

[4]Judge Frye declined to give significant weight to the OSHA lab classification of the soil as "Type B." He concluded that the policy of Columbia Gas to regard all soils as "Type C" was the more prudent course.

from the wall and from the spoil pile during the inspection. Burns also noted that Harmon Avenue where the trench was dug carries heavy truck traffic. Burns also testified that Febes told him that he had detected vibration from truck traffic but had taken this vibration into consideration in determining that the trench walls were nevertheless stable. In addition, Burns believed that the weight of the spoil pile, which was not set back from the edge of the trench, contributed to the possibility of a cave-in. In reaching this conclusion, Burns relied on the fact that the trench was dug in previously disturbed soil. Hughes' consultant, Richard Hayes, who was admitted as an expert witness, testified that most of the soil evident in the spoil pile consisted of sand and small gravel, which in his opinion was not sufficient to create a serious hazard. He also stated that this opinion was supported by the results of the soil analyses, which showed a larger percentage of sand and gravel than of silt and clay. Similarly, Richard C. Phillips, Febes' supervisor, saw no potential for any cave-in. He said that the soil was a mix of gravel and clay that would "hold" unless it got wet.

Burns found Febes to be knowledgeable in soil analysis, use of protective systems, and the requirements of the standard and to have authority to take corrective measures and stop work.[5] While Burns concluded that Febes had "examined the ground for indication of cave-in potential," he felt that Febes had not conducted an adequate examination of the excavation, as contemplated by the standard. Burns explained that Febes should have "go[ne] through the whole area to check for possible signs of cave-in or check for things that could possibly have an effect on the trench." Furthermore, in Burns' opinion, an additional soil test should have

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[5]The standard defines a "competent person" as "one who is capable of identifying existing and predicable hazards in the surroundings, or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them." The record reflects that Febes, as well as Phillips, had completed a "Competent Person Seminar" conducted by the "Contractors Association of West Virginia" and had received training in soil analysis and trench protection. In her trial brief, the Secretary argued that Febes was not a competent person but did not make this argument to the Commission.

been conducted when Hughes enlarged the excavation to expose the service line for the reason that "inspections need to be done prior to any work," and the additional excavation was a "change" in the conditions of the trench. He also testified that he did not consider Febes' visual inspection to be "an adequate examination of the soil by a competent person" because Febes' "visual test and just picking up the soil" were not sufficient to determine the soil stability.[6] Therefore, in Burns' view, Febes could not have made the determination necessary to exempt Hughes from the requirement for providing protection against a cave-in. Hayes, on the other hand, gave his opinion that Febes had performed the tests required by the standard.

The Commission noted that under established Commission precedent, the burden of proof was on Hughes to establish that a competent person inspected the trench and found no indication of a potential for cave-in. *C.J. Hughes Constr. Inc.*, 17 BNA OSHC 1753, 1756, 1995-97 CCH OSHD ¶ 31,129, p. 43,476 (No. 93-3177, 1996) (citing *Armstrong Steel Erectors, Inc.*, 17 BNA OSHC 1385, 1389, 1995-97 CCH OSHD ¶ 30,909, p. 43,031 (No. 92-262, 1995)). The Commission found that Febes' opinion as to the stability of the trench was supported by other witnesses who were competent persons themselves. The Commission interpreted the standard not to require that the competent person correctly ascertain the stability of the trench to a degree of scientific accuracy but only that the competent person's determination be *reasonable*. In finding Febes to have acted reasonably in this case, the

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[6]As to "visual tests" the Appendix provides as follows:

> (d) *Acceptable visual and manual tests*.—(1) *Visual tests*. Visual analysis is conducted to determine qualitative information regarding the excavation site in general, the soil adjacent to the excavation, the soil forming the sides of the open excavation, and the soil taken as samples from excavated material.
>
> (i) Observe samples of soil that are excavated and soil in the sides of the excavation. Estimate the range of particle sizes and the relative amounts of particle sizes. Soil that is primarily composed of fine-grained material is cohesive material. Soil composed of coarse-grained sand or gravel is granular material.

Commission concluded that Febes had conducted the type of inspection required under the standard and that the Secretary had not shown that Febes' determination as to the safety of the trench was unreasonable. The Commission observed, as did Judge Frye, that the standard offers no guidance for determining what constitutes an "indication of potential cave-in" and that compliance officer Burns conceded that such determinations represent "a judgment call." *Id.* at 1756-57, 1995-97 CCH OSHD at pp. 43,476-77.

In determining whether the Secretary's position is "substantially justified" so as to preclude an award to the employer under EAJA, the Commission applies the following general rule:

> The test of whether the Secretary's action is substantially justified is essentially one of reasonableness in law and fact. *Hocking Valley Steel Erectors, Inc.*, 11 BNA OSHC 1492, 1983-84 CCH OSHD ¶ 26,549 (No. 80-1463, 1983). The Secretary'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) . . . .

Consolidated Constr., Inc., 16 BNA OSHC 1001, 1002, 1991-93 CCH OSHD ¶ 29,992, p. 41,072 (No. 89-2839, 1993). While the Secretary does not dispute that Febes was a "competent person" under the exception clause in issue, Hughes was nevertheless obligated to prove not only that its competent person had conducted a sufficient "examination of the ground" but also that, based on such examination, *no* indication of even a potential for a cave-in was evident. Thus, the Secretary's position is substantially justified if the Secretary could reasonably have believed that Hughes had not adequately examined the ground in which the trench was dug or that any indication of a potential for a cave-in was apparent from that examination.

As we have discussed, the standard's Appendix A can reasonably be interpreted to support Burns' opinion that Febes had not performed his thumb penetration test from the proper location. Similarly, there is no evidence to show that Febes attempted to "estimate the range of particle sizes and the relative amounts of particle sizes" or that he conducted a visual

inspection of "the excavation site in general" and "the soil adjacent to the excavation" as suggested by section (d)(1) of Appendix A. Accordingly, Burns' opinion that Febes did not conduct a proper inspection because he failed to inspect the entire area of the trench is consistent with the language of the Appendix as well. Considering that Burns was an adequately trained compliance officer clearly competent to testify as to the meaning and application of the standard, the Secretary was justified in relying on Burns' opinion that Febes had not performed sufficient soil testing or conducted a complete "visual analysis" in conformity with the standard and Appendix A.

Furthermore, the Secretary could reasonably conclude that there were factors tending to show the potential for a cave-in. Judge Frye, in affirming this citation item, found a number of such indications in the record, including material from the spoil pile entering the trench, the uncertain effect of the added weight placed on the trench walls by the spoil pile, the fissures in the soil as confirmed by the results of OSHA's lab tests, the presence of heavy traffic on the nearby street which could result in vibration, and some evidence of lack of cohesiveness in the soil. The fact that the Commission, in reversing Judge Frye and vacating, may have weighed the evidence differently than Judge Frye and reached a different conclusion as to the persuasiveness of the testimony regarding these circumstances does not demonstrate that the Secretary's position was not substantially justified. *See Mautz & Oren, Inc.*, 16 BNA OSHC 1006, 1009, 1991-93 CCH OSHD ¶ 29,986, p. 41,066 (No. 89-1366, 1993) (outcome of the case on the merits is not dispositive as to whether the government's position was substantially justified). Considering the acknowledgment in the Commission's decision that the standard embodies a certain degree of discretionary judgment in evaluating whether a potential for a cave-in is apparent, we cannot find that the Secretary's position lacked a reasonable factual and legal basis. Accordingly, we conclude that she was substantially justified. *See EEOC v. Clay Printing Co.*, 13 F.3d 813, 815 (4th Cir. 1994) (in resolving the

issue of substantial justification, the *rationale* of the ultimate decision on the merits must be taken into consideration).[7]

Judge Sommer awarded Hughes a total of $23,331.84 for fees and expenses incurred in litigating all six citation items. The parties do not dispute the methodology applied by the judge in determining the fees and expenses. Since we find the Secretary's position to have been substantially justified with respect to one citation item, we conclude that the judge's award should be reduced by one-sixth. *See Central Brass Mfg. Co.*, 14 BNA OSHC 1904, 1907-08, 1987-90 CCH OSHD ¶ 29,144, p. 38,957 (No. 86-978, 1990) (consolidated) (allocating fees and expenses according to the proportion of items compensable).

For the reasons set forth, that portion of the judge's decision finding that the Secretary was not substantially justified in her position with respect to item 1 of citation no. 2 is reversed. That part of the judge's decision addressing item 1 of citation no. 1 is affirmed without precedential value. The justification of the Secretary's position with respect to the

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[7]Our conclusion that the Secretary had a reasonable basis for proceeding on this citation item is further supported by a decision of Administrative Law Judge Michael H. Schoenfeld in a companion case in which Columbia Gas was cited for the same alleged violation. In a decision which became a final order of the Commission without review, Judge Schoenfeld affirmed this item on a basis similar to that of Judge Frye. Judge Schoenfeld held as follows:

> Looking at the evidence in a light most favorable to Respondent I find that Respondent has failed to show that there was no indication of a potential cave-in. Fissured, type C soil, which was possibly subject to some vibrations from passing truck traffic and to the uncertain effects of the nearby spoil piles were indications of possible cave-in.

Columbia Gas of Ohio, Inc., No. 93-3232, 1995 OSAHRC LEXIS 112, at *23 (Aug. 11, 1995) (footnote omitted).

Judge Schoenfeld's decision was issued shortly before the Secretary filed her brief before the Commission on its review of Judge Frye's decision in *Hughes*. The similar reasoning and conclusions set forth in Judge Schoenfeld's decision further justified the Secretary in pursuing her litigation position before the Commission. *Mautz & Oren*, 16 BNA OSHC at 1009, 1991-93 CCH OSHD at p. 41,066.

remaining four citation items is not on review. Accordingly, Hughes is awarded attorneys' fees and expenses in the amount of $19,443.20.

So ORDERED.

/s/
Thomasina V. Rogers
Chairman

/s/
Ross Eisenbrey
Commissioner

Dated: December 20, 2001

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

SECRETARY OF LABOR,	:	
	:	
Complainant,	:	
	:	
v.	:	OSHRC DOCKET NO. 93-3177
	:	
C.J. HUGHES CONSTRUCTION, INC.,	:	
	:	
Respondent.	:	

DECISION AND ORDER ON REMAND

This matter is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. ("the Act"). In particular, this case is before the undersigned pursuant to the Commission's October 22, 1999 remand order to determine whether Respondent should be awarded attorney fees and expenses under the Equal Access to Justice Act ("EAJA"), 5 U.S.C. § 504.

Procedural History

This case arose in October of 1993, when the Occupational Safety and Health Administration ("OSHA") inspected a work site in Columbus, Ohio, where Respondent, C.J. Hughes Construction, Inc. ("Hughes"), had excavated gas lines so that Columbia Gas of Ohio ("Columbia Gas") could repair a gas leak. OSHA inspected the site pursuant to an imminent danger complaint of employees in a trench, and, as a result of the inspection, Hughes was issued a four-item serious citation and a two-item "repeat" citation. The serious citation alleged violations of 29 C.F.R. §§ 1926.651(c)(2), 1926.651(g)(2)(i), 1926.651(j)(2) and 1926.651(k)(2), and the "repeat" citation alleged violations of 29 C.F.R. §§ 1926.652(a)(1) and 1926.651(k)(1). Hughes contested the citations, and a hearing was held on September 13 and 14, 1994, in Columbus, Ohio.[8] In a decision and order dated March 6,

[8]The Secretary withdrew the alleged violation of section 1926.651(g)(2)(i) in her complaint.

1995, the alleged violations of sections 1926.651(c)(2), 1926.651(k)(2) and 1926.652(a)(1) were affirmed and the other alleged violations were vacated.[9]

Hughes petitioned for review of the affirmed items. While this matter was on review, the Secretary moved to withdraw the alleged section 1926.561(k)(2) violation, and the Commission granted the motion on October 18, 1995. In a decision dated September 6, 1996, the Commission vacated the two remaining items, and on December 5, 1996, Hughes filed its EAJA application. The Secretary filed her answer to the application on February 6, 1997, and Hughes filed a reply on February 20, 1997. In a decision and order dated July 9, 1998, I concluded that Hughes had not showed that it met the financial criterion to qualify for an EAJA award and therefore denied the application. Hughes petitioned for review of my decision, and the Commission, in a remand order dated October 22, 1999, directed that Hughes be given an opportunity to submit additional information to establish its eligibility for an EAJA award. Pursuant to the remand, on March 29, 2000, I directed Hughes to submit a detailed exhibit showing its "net worth information for 1993, or an explanation that relates the data already provided to the company's net worth in 1993." Hughes complied with my order on April 17, 2000, and, based on the information submitted, has demonstrated its eligibility for an EAJA award.[10] Accordingly, the issue requiring resolution at this point in time is whether an EAJA award should be granted under the circumstances of this case.

Whether the Secretary was Substantially Justified

Commission precedent is well settled that a party that has prevailed in a discrete portion of an adversary adjudication and that is otherwise eligible for an EAJA award may be reimbursed for its legal fees and expenses unless the Secretary shows that her position was substantially justified or that an award would be unjust under the circumstances. *William B. Hopke Co.*, 12 BNA OSHC 2158, 2159 (No. 81-206, 1986). Even if the Secretary shows her position was initially justified, she may nevertheless be liable for legal fees incurred after this was no longer the case. *Consolidated Constr., Inc.*, 16 BNA OSHC 1001, 1002 (No. 89-2939, 1993). The test in this regard is essentially

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[9]Administrative Law Judge John H. Frye, III, who has since retired, presided over the hearing and issued the decision on the merits in this matter.

[10]To be eligible for an award, a company must show that, at the time it filed its notice of contest, it had a net worth of not more than $7 million. *See* 29 C.F.R. 2204.105(b) and (c). Respondent's submissions, which the Secretary apparently does not dispute, establish this criterion.

one of reasonableness in law and fact, that is, whether the Secretary's position was substantially justified to a degree that would satisfy a reasonable person. *Hocking Valley Steel Erectors, Inc.*, 11 BNA OSHC 1492, 1497 (No. 80-1463, 1983). The loss of her case or her withdrawal of a citation is not necessarily determinative of whether the Secretary was substantially justified; however, once facts become known during the litigation that could make her proceeding with the case unreasonable, the Secretary must act expeditiously to alter her position in view of such facts. *Id*.

Factual Background

To accomplish its work, Hughes excavated an "L" shaped trench. The first excavation, which was about 9 feet long, exposed the main gas line, and the second excavation, which was between 11 and 12 feet long, exposed the leaking service line.[11] The deepest part of the L-shaped trench was 4.5 feet, the 9-foot section was benched along its entire length, and the trench did not exceed 25 feet in lateral distance. When the OSHA compliance officer ("CO") arrived, Kenneth Cummins, a Columbia Gas welder, was welding in the trench. The CO held an opening conference with Thomas Febes, Hughes' foreman, and about midway through the inspection Hughes' superintendent Richard Phillips arrived at the site. Two other Hughes employees were also at the site, as was Robert Cook, a Columbia Gas inspector. (Tr. 11; 32; 86; 94-95; 115-17; 137; 153-57; 166-69; 185; 207; 212-13).

Hughes had designated Febes as its "competent person" at the site. Febes did not take any measurements of the trench, but he conducted visual and manual inspections of the soil before any employees entered the excavation. Specifically, Febes had taken a handful of soil from one of the two spoil piles to determine how cohesive and pliable it was and how much moisture it contained, and he had noted that the soil, which consisted of dirt, sand and gravel, had held together "a little." He had also done a "thumb test" by sticking his thumb into the trench walls. Febes testified at the hearing that the soil appeared to be consistent throughout the excavation and that he had classified it as "Type C" because it was the procedure of Columbia Gas to classify all soils as Type C.[12] Febes

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[11]Hughes' foreman at the site testified that it was a "pretty good gas leak" with "quite a bit of gas flowing freely into the atmosphere." He said someone driving by could have flipped a cigarette out and hot exhaust could have caused the gas to ignite, resulting in a "real serious situation." (Tr. 121-22). Columbia Gas repaired the leak by installing a 3-inch bull plug. (Tr. 34).

[12]OSHA's Technical Center in Salt Lake City classified the soil from the samples the CO had collected at the site as "Type B" cohesive soil. (C-12).

further testified that he had determined that there was no danger of the trench caving in, based upon his education, experience and training. (Tr. 97-102; 122-23; 185).

Serious Citation 1 - Item 1 - 29 C.F.R. 1926.651(c)(2)

The cited standard requires that a stairway, ladder, ramp or other safe means of egress be located in trench excavations that are 4 feet or more in depth so as to require no more than 25 feet of lateral travel for employees. The basis of this item was a slope, or ramp, at the end of the longer section of the trench that two workers had used to enter the trench. The CO determined the slope was not a safe means of egress because the welder he saw in the trench stepped up on the gas main and then on the side of the trench to get out; the CO also believed the slope was too steep to allow an employee to walk out comfortably, although he had not measured it or used it himself. Judge Frye affirmed this item, finding the ramp was a "questionable means of egress" that was "not entirely free of difficulty." The Commission vacated this item, noting that Judge Frye never found that the ramp did not provide safe egress. The Commission also noted the testimony of Febes, Hughes' foreman, that he had entered and left the trench safely by using the ramp and the testimony of the welder that he had entered the trench without difficulty by means of the ramp.[13] Finally, the Commission noted that all of the witnesses employed by Hughes or Columbia Gas who were asked believed the ramp provided safe egress and that the only testimony to the contrary was that of the CO, who had no first-hand knowledge of the difficulty of walking up the ramp. In vacating this item, the Commission stated that the "testimony of the employees who were actually in the trench establishes that this trench provided the safe means of egress required by the standard." In light of the Commission's decision, I conclude that the Secretary was not substantially justified in issuing this citation item. Accordingly, Hughes may recover its legal fees and expenses in regard to this item.

Serious Citation 1 - Item 2 - 29 C.F.R. 1926.651(g)(2)(i)

The cited standard requires emergency rescue equipment to be readily available where hazardous atmospheric conditions exist during work in an excavation. As noted above, the Secretary withdrew this citation item in her complaint, which persuades me she was not substantially justified in issuing this item. Hughes is entitled to recover any fees and expenses it incurred in this regard.

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[13]The Commission pointed out that Judge Frye had not discredited Febes' statements based upon a credibility determination but, rather, on his conclusion that Febes had an interest in defending what he had done at the work site. The Commission found this conclusion unpersuasive because Febes was working for another company as a laborer at the time of the hearing.

Serious Citation 1 - Item 3 - 29 C.F.R. 1926.651(j)(2)

The cited standard requires employees to be protected from excavated or other materials or equipment that could pose a hazard by falling or rolling into excavations; protection may be provided by keeping such materials or equipment at least 2 feet from the edge and/or by using retaining devices to prevent materials or equipment from falling or rolling into excavations. The CO testified that there were two spoil piles at the site, one to the left and one to the right of the service line excavation; the piles were both within 2 feet of the edge and neither was retained in any way. (Tr. 162; 175). The CO further testified that he saw a small amount of soil from the piles trickling slowly into the trench; the employees, on the other hand, testified they did not observe this occurring. (Tr. 57; 74; 120; 140; 162). The CO's opinion was that the weight of the piles might have caused a cave-in. (Tr. 175-77). However, Judge Frye found that the hazard the standard encompassed was that of materials falling or rolling into excavations and not that of added weight causing a cave-in. Judge Frye also found that the small amount of material trickling into the trench did not "constitute a hazard within the contemplation of the standard" and therefore vacated this item. Based on the record and the judge's decision, as well as the fact that the Secretary did not petition for review of this item, I conclude that there was no substantial justification for OSHA to issue this citation item. Hughes may thus recover its legal fees and expenses with respect to this item.

Serious Citation 1 - Item 4 - 29 C.F.R. 1926.651(k)(2)

and "Repeat" Citation 2 - Item 1 - 29 C.F.R. 1926.652(a)(1)

These two items involve essentially the same facts, those relating to Febes' determination that the trench did not represent a cave-in hazard. The cited standards provide as follows:

> 1926.651(k)(2) - Where the competent person finds evidence of a situation that could result in a possible cave-in, ... exposed employees shall be removed from the hazardous area until the necessary precautions have been taken to ensure their safety.
>
> 1926.652(a)(1) - Each employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) or (c) of this section except when ... (ii) excavations are less than 5 feet (1.52m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

Judge Frye affirmed both of these items based on his finding that the record established indications of a possible cave-in at the site. As noted above, the Secretary withdrew Item 4 of Citation 1 while this matter was on review, and the Commission's decision vacated Item 1 of

Citation 2. For the reasons set out in the Commission's decision, I conclude that the Secretary was not substantially justified in issuing these items. First, the Commission observed that the CO's own notes from the inspection showed that Febes, Hughes' foreman, was qualified as a competent person. Second, the Commission noted that Febes' determination was supported by every witness who testified, except for the CO.[14] In fact, as the Commission pointed out, there were two other individuals at the site who were also trained as competent persons and who also concluded that there were no indications of a potential collapse of the trench.[15] Third, the Commission noted the CO's admission that the determination of a competent person involves making a "judgment call" and then held that the Secretary had failed to show that Febes did not perform his job in a competent manner or that his determination was unreasonable. In view of the Commission's decision, I find that Hughes is entitled to recover its legal fees and expenses with respect to both of these citation items.

"Repeat" Citation 2 - Item 2 - 29 C.F.R. 1926.651(k)(1)

The cited standard requires the competent person to conduct daily inspections of excavations, both prior to the start of work and as needed throughout the shift. The basis of this item was the CO's conclusion that Febes' examination of the trench fell short of what was required and that his determination as to the trench's safety was incorrect. Judge Frye vacated this citation item, and I find that the Secretary was not substantially justified in issuing this item. First, as set out *supra*, the CO's own inspection notes established that Febes was qualified as a competent person. Second, the record demonstrates that Febes conducted visual and manual inspections of the trench before employees entered it, and although he characterized the soil as Type C, due to the policy of Columbia Gas to classify all soils as Type C, he also determined that the trench did not represent a safety hazard. Finally, as noted above, the Commission held that the Secretary had not shown that Febes did not perform his job in a competent manner or that his determination was unreasonable. Hughes may accordingly recover its legal fees and costs with respect to this citation item.

The Award to which Hughes is Entitled

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[14]The Commission specifically found the CO's observations about the trench to be of questionable weight based on the other evidence of record.

[15]These individuals were the Columbia Gas welder who was working in the trench when the CO appeared and the Hughes superintendent who arrived about halfway through the inspection.

As noted *supra*, an eligible party prevailing in an adversary adjudication is entitled to its legal fees and expenses unless the Secretary shows that her position was substantially justified or that an award would be unjust under the circumstances. *William B. Hopke Co.*, 12 BNA OSHC 2158, 2159 (No. 81-206, 1986). Based on the foregoing, the Secretary was not substantially justified in issuing the citations in this matter, and she does not contend that an award would be unjust. However, the Secretary does dispute the amount claimed in the application. Specifically, she asserts that the expenses are not justified and that the number of hours and the hourly rates are excessive.

Hughes' EAJA application contains copies of the itemized statements it received from its counsel that set out the hours expended and a description of the legal services rendered in this case.[16] The statements also set out the expenses claimed, which include charges for copies, faxes, long-distance phone calls and postage; other expenses include charges for FedEx, Lexis, Westlaw and travel costs. The Commission has held that "[a]llowing the recovery of the reasonable and necessary expenses of an attorney in a specific case which are customarily charged to the client is ... consistent with the EAJA's statutory objective of encouraging small employers to defend their rights against unjustified governmental action." *See Ruhlin Co.*, 17 BNA OSHC 1068, 1069 (No. 93-1507, 1995), and cases cited therein. In view of this decision, and upon reviewing the expenses claimed and Hughes' supporting submissions, I conclude that the expenses were reasonable, necessary and not excessive. Hughes may therefore recover its claimed expenses.

As to the Secretary's assertion that the number of hours claimed is excessive, I note that Hughes seeks reimbursement for a total of 236.50 hours of legal services in this case. According to the statements, this total includes attorney hours as well as law clerk, paralegal and clerk hours. In her reply, the Secretary states that "there is no explanation as to why [these] hours were necessary to prepare Respondent's case" and suggests that the hours were duplicative or that Hughes' attorneys were not knowledgeable in OSHA law. However, as Hughes indicates, the fees and expenses in this case have been incurred over a several-year period that involved pre-trial preparation, a hearing and a post-hearing brief, and two petitions for review and briefing in that regard. As Hughes further

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[16]Hughes' initial application included a summary of the attorney fees and expenses it incurred through October 28, 1996. After the Secretary filed her answer, Hughes filed a reply that included itemized statements from its counsel through October 28, 1996, and two more statements through January 6, 1997. The Secretary did not respond to Hughes' reply.

indicates, that it has prevailed shows that its counsel was in fact well qualified to represent it in this matter. Finally, as noted above, the Secretary did not respond to Hughes' reply. I conclude that the number of hours Hughes claims in its application were reasonable, necessary and not excessive.

The Secretary's final assertion is that Hughes is claiming hourly attorney rates that are in excess of the allowable amount. Hughes' application shows that it is claiming $150.00 per hour of attorney time. The statutory maximum under the Commission's EAJA rules was $75.00 per attorney or agent hour in 1993, when the adversary adjudication began in this case. The rate was increased to $125.00 per hour, for fees incurred on or after July 3, 1997, when the Commission amended its rules in 1997. *See* 62 Fed. Reg. 35961 (1997). *See also* Commission Rule 107, 29 C.F.R. 2204.107. The 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* Commission Rule 107(b). Moreover, the Commission has specifically held that the $125.00 hourly rate applies only to adversary adjudications begun after July 3, 1997. *Contour Erection and Siding Systems, Inc.*, 18 BNA OSHC 1714, 1717 (No. 96-0063, 1999). Hughes may therefore recover its attorney fees at the rate in effect at the time the citations were issued, that is, $75.00 per hour.

An additional matter requiring resolution is the hourly rate Hughes may claim in this matter for the time expended by its counsel's law clerk, paralegals and clerks and by Hayes Environmental Services ("Hayes").[17] The application shows that the law clerk's hourly rate was initially $55.00 and that this amount was then increased to $60.00; after the law clerk became an associate attorney his rate was $90.00 per hour, and this rate later increased to $110.00 per hour. The application further shows that the paralegals were billed at $60.00 per hour and that the clerks were billed at $45.00 per hour. Finally, the application shows that Hayes billed its services at $125.00 per hour. I conclude that all of these hourly rates are excessive, in light of the $75.00 maximum allowable rate for attorney hours, and that Hughes may recover for these hours as follows: $50.00 per hour for the law clerk, and $75.00 per hour after he became an associate attorney; $40.00 per hour for the paralegals; $25.00 per hour for the clerks; and $75.00 per hour for the services of Hayes.

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[17]Hayes provided consulting services during the pre-trial phase of this case as well as an expert witness who testified at the hearing. Hughes' application contains copies of two statements from Hayes billing a total of 14.50 hours and a total of $9.00 for parking expenses.

Based on the foregoing, and the information contained in its EAJA application, Hughes is entitled to an award for its expenses in this matter totaling $5,165.09; this includes the $9.00 parking expense shown on the Hayes statement dated October 11, 1994, and the expenses totaling $89.35 shown on the two additional statements submitted with Hughes' reply. Hughes is also entitled to an award of its fees, including those set out in the Hayes statements and the two additional statements from its counsel, as follows:

217.25 Attorney Hours	$75.00 Hourly Rate	Total - $16,293.75
10.25 Law Clerk Hours	$50.00 Hourly Rate	Total - $ 512.50
3.20 Paralegal Hours	$40.00 Hourly Rate	Total - $ 128.00
5.80 Clerk Hours	$25.00 Hourly Rate	Total - $ 145.00
14.50 Hayes Hours	$75.00 Hourly Rate	Total - $ 1,087.50

Adding together the above totals, Hughes may recover $18,166.75 in fees. Adding this amount to the expenses set out *supra*, the total award due to Hughes is $23,331.84.

So ORDERED.

/S/

Irving Sommer
Chief Judge

Date: 9/19/00