UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR	:	
	:	
Complainant	:	
	:	OSHRC DOCKET NO. **94-3484**
v.	:	
	:	
GEO & TED ELECTRIC CORP.,	:	
	:	
Respondent	:	

Appearances:

Alan Kammerman, Esq.
Office of the Solicitor
U.S. Department of Labor
For Complainant

John J. P. Krol, Esq.
Rockville, New York
For Respondent

Before Administrative Law Judge Richard DeBenedetto

DECISION AND ORDER

Geo & Ted Electric Corp. (G&T), was cited on November 9, 1994, for serious (citation number 1) and repeat (citation number 2) violations of various safety standards and a regulation for maintaining a log of occupational injuries and illnesses. Citation number 1 contained four items, including one item involving a safety inspection program and three items relating to electrical safety standards. Citation 2 contained three items, including one item concerning a log of recordable injuries and two items dealing with electrical safety standards.

The Secretary filed a complaint on April 11, 1995, whereby one item and part of a second item were withdrawn from each of the two citations, namely: item 2 and part (a) of item 4 in citation 1; part (a) of item 2 and item 3 of citation 2. After a hearing was held on the remaining items of the citations, the Secretary withdrew two issues in the posthearing brief, namely; item 3 of citation 1 and part (c) of item 2 in citation 2.

G&T now seeks an ward of attorney fees and other expenses under the Equal Access to Justice Act (EAJA), 5 U.S.C. §504. Where an employer meets the eligibility requirements set out in 29 C.F.R. §2204.105 and prevails in a proceeding with the Secretary, the employer may receive an award for fees and expenses unless the position of the Secretary was substantially justified or special circumstances make an award unjust. The Secretary's main objection to the EAJA application is grounded upon the issue of substantial justification. The Secretary also argues that G&T's application is deficient because it does not separate the parts of the proceeding in which it prevailed from those in which it did not prevail.

The application for legal costs may not rest simply on the fact that the Secretary lost the case. The test is whether the government's case (or a discrete substantive portion thereof) had a reasonable basis both in law and fact. *Hocking Valley Steel Erectors, Inc.*, 11 BNA OSHC 1492, 1983 CCH OSHD ¶ 26, 549 (No 80-1463, 1983).

G&T, an electrical contractor, was one of several contractors engaged by the City of New York to renovate its medical examiner's building. In February 1994 all work on the building was stopped by the City of New York because of a contract dispute with the plumbing contractor. The construction contractors were subsequently notified that work would resume on Wednesday, June 22, 1994. On that day, G&T's owner, George Kokakis, went to the job site to survey the current conditions and to draw up a list of things to be done. He found that much of the electrical system had been damaged and disarranged. The following day, on June 23, two G&T employees started their work on the temporary electrical system and the electricals "damaged under the counters."

On Friday, June 24, an employee of the general contractor was fatally injured at the job site. This event triggered the OSHA inspection. Upon arriving at the site that day at about 4:00p.m., some six hours after the accident, the OSHA compliance officer was informed by the City's resident engineer that the work had been shut down for the day and all construction workers had left the building. He returned the following Monday, June 27, and conducted this inspection. G&T had two employees working that Monday, Scott Adelle and Theodore (Teddy) Papadatos, the same two employees who worked at the site on Thursday and Friday, the previous week. They were currently in the process of changing the temporary lighting to a permanent system and installing conduit for computer wiring.

In the first item of citation 1, G&T was charged with failing to inspect for hazardous conditions at the job site when work was resumed in June 1994, in accordance with 29 C.F.R. § 1926.20(b)(2) which requires the employer to initiate and maintain a safety program that provides for frequent and regular inspections of the job site, materials, and equipment to be made by competent persons designated by the employer.

This item of the citation was vacated following a hearing on the merits because the Secretary's case was based solely upon the testimony of the compliance officer whose investigation into the matter was severely inadequate. It was obvious that the compliance officer came to a conclusion on the issue drawn from his limited interviews with the two G&T employees encountered at the job site who explained the nature of their work activities. There was no evidence to suggest that the compliance officer made any significant inquiry into G&T's safety program. The Secretary's position on this issue was not substantially justified.

The next item that was in issue at the hearing stage but withdrawn by the Secretary in her posthearing brief is item 3 of citation 1 relating to the electrical standard at 29 C.F.R. §1926.405(b)(1), which states in part that conductors entering boxes, cabinets, or fittings shall be protected from abrasion, and openings through which conductors enter shall be effectively closed.

The citation describes the cited condition as a wall-mounted circuit breaker box. The photograph taken by the compliance officer upon his arrival at the site late Friday on June 24, depicts an open electric panel box with numerous wires hanging loosely and outside the confines of the box (Exh. C-1). The wiring was a temporary installation to supply power and lighting for the construction crews (Tr. 25).

The compliance officer's testimony on both direct and cross-examination was focused mainly on the nature of the hazard and the exposure of the workers to such hazard. The compliance officer testified that the wires were unprotected from damage or abrasions, and that if the wires became faulty from abrasions, G&T employees were exposed to electric shock should they place one hand on the metal box while the other hand touched the defective wires (Tr. 75). This testimony was not effectively rebutted.

The compliance officer also testified that a potential hazard also existed for employees of another contractor at the site who passed near the panel box with debris carts filled with waste metal.[1] Although the compliance officer's testimony on this point was rather vague and uncertain and focused on the exposed wires, G&T's own witness, George Kokakis, viewing photo Exhibit C-1, acknowledged that, at least with respect to the panel's bus bars, a hazard existed despite the fact that the panel was grounded (Tr. 138):

> **A** The panel is grounded. You can see the bus to ground right on top. The panel is also grounded down at the main source in the switch board. This was an existing panel which was inspected and accepted prior to us getting there. This was not a new panel that we just installed.
>
> **Q** So, one of these dumpsters being pushed into it could only cause – could only cause it to be shorted out?
>
> **A** It would – it would have caused a short. You would have seen sparks flying around. But it would blow the main down below, and man will not –
>
> **JUDGE DeBENEDETTO**: Finish your sentence.
>
> **THE WITNESS**: And the man will not really get electrocuted unless he physically touches it or he holds the dumpster while the dumpster's touching one side of the leg.
>
> **JUDGE DeBENEDETTO**: One side of the what?
>
> **THE WITNESS**: One side of the switch – the live leg. This one over here, you see it's called live leg of phase. One side of the phase, I would say. Those are the three phases. If somebody goes and pushes the thing in there and only touches one, then you could get electrocuted, yes.

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[1]Where, as here, an employer on a multi-employer construction site creates or controls a noncomplying condition, that employer is held responsible if employees of other employers are exposed or have access to the condition. *Grossman Steel & Aluminum Corp.*, 4 BNA OSHC 1185, 1975-76 CCH OSHD¶ 20,691 (No. 12775, 1976); *Anning-Johnson Company*, 4 BNA OSHC 1193, 1975-76 CCH OSHD ¶ 20,690 (Nos. 3694 & 4409, 1976).

The compliance officer testified that the uncovered panel box, which he observed late Friday, remained in that same condition when he returned the following Monday at 10:00 a.m. The compliance officer also testified that when he discussed the matter with G&T's employee, Theodore (Teddy) Papadatos, during the inspection, he was informed that the panel box had been left uncovered since the end of the work day on Thursday June 23, 1994 (Tr.. 95-96).[2] This testimony was not refuted by G&T witnesses, including Scott Adelle who worked at the job site with Papadatos during the time in question. The Secretary's position on this issue was substantially justified.

The next item that is subject to G&T's application for legal fees and expenses is item 2(b) of citation 2 which was vacated following a hearing on the merits. This item is described in the citation as: "Live wire tips were exposed on the temporary power and light cables where light fixtures had been removed." The cited standard at §1926.403 (i)(2)(i) requires that live parts of electrical equipment must be guarded against accidental contact by cabinets or other forms of enclosures or by other means, including by elevation of 8 feet or more above the floor.

This item was vacated because of the Secretary's failure to present any evidence that G&T's employees had knowledge that the condition existed or were exposed to the hazard. The record shows that when the compliance officer made his initial visit to the site late Friday, on June 24, he notice exposed live wires located a few inches above a 5-foot-high file cabinet in one of the fifth floor offices. When returned to the job site the following morning, Saturday, when no work crews were on the job, the compliance officer corrected the condition by wrapping tape around the exposed wires (Tr. 63-64).

During the entire time the condition was observed by the compliance officer, no employees were working at the site, he had no knowledge as to when the condition first came into existence, and he did not know who or what contractor was responsible for creating the condition (Tr. 48). The Secretary's case rested entirely upon the compliance officer's testimony regarding an alleged statement made by Theodore Papadatos during the inspection. The compliance officer's testimony

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[2] Employee statements fall outside the hearsay concept and qualify as admissions under Rule 801(d)(2)(D) of the Federal Rules of Evidence because they relate to matters within the scope of their employment and were made while they were on the job.

on this point was seriously impaired by uncertainty and vagueness (Tr. 45). The Secretary's position on this issue was not substantially justified.

The last item that is subject to G&T's application for legal fees is item 2(c) of citation 2 which was withdrawn by the Secretary in the posthearing brief. This item also involves the electrical guarding standard at § 1926.403(i)(2)(i) and the same wall-mounted circuit breaker panel discussed above in item 3 of the citation 1. Although both items in citations 1 and 2 involve the issue of guarding live electrical parts that compose the same circuit breaker panel, the subject in citation 1 relates to wires wheras citation 2's item concerns a vertical assembly of copper bus bars that forms an integral part of the circuit breaker panel (Tr. 46; Exh. C-1).

The compliance officer testified that G&T's employees were exposed to electric shock under the same potential circumstances described by the compliance in connection with item 3 of citation 1 (Tr. 47). When George Kokakis, one of the owners of G&T, was questioned by defense counsel on the question of the hazard posed by the circuit breaker panel, the following relevant testimony was elicited (Tr. 136-37):

> **Q** **BY MR. KROL**: The last hardware-typed citation I'd like you to consider is citation 2, item 2, portion C, open and exposed live wiring and circuit buses in the wall-mounted existing circuit breaker panel.
>
> And I think that we've had testimony from [the compliance officer] that concerns that photograph C-1.
>
> **A** Yes, it is true, it's exposed. Anybody that would go and put his had in there will get a shock, possible electrocution. Anybody that is stupid enough to do it. . . .

The Secretary's position on this issue was substantially justified.

The two citiations, issued on November 9, 1994, initially included a total of seven items, several of which are divided in parts. When the compliant was filed in April 1995, the Secretary withdrew the following charges: item 2 and part (a) of item 4 from citation 1; and part (a) of item 2, and item 3 from citation 2. That the Secretary, in her posthearing brief, withdrew one item and part of another item from the citations, has no bearing on the allowable fees and expenses inasmuch as G&T had already addressed those issues in its posthearing brief.

G&T requests total fees of $6, 210 representing attorney fees of $6,075 (81 attorney hours at the then-statutory rate of $75 per hour) and costs of $135.[3] The Secretary makes a valid objection as to G&T's failure to relate the fees and expenses to the specific parts of the proceeding in which it prevailed. G&T's response, which is quoted here in full, is insufficient:

> Finally the Secretary argues that the EAJA Application is deficient in that it does not itemize those portions of time related to instances in which the respondent was not the prevailing party. What the Secretary chooses to ignore is that these contemporaneous invoices dated December 1, 1994 through January 2, 1997 reflect billable hours from November 10, 1994 through December 24, 1996. Throughout that period it was impossible to know on which of the instances either of the parties would have prevailed. Therefore, the invoices do not reflect, and could not reflect, such as breakdown.

This case did not involve particularly difficult issues, and the various items and parts that were included in the Secretary's complaint were essentially evenly balanced in their norrow-complexity. Consequently, the case is susceptible to a reasonable remedy for the Secretary's valid objection by adjusting the legal costs of the items where OSHA's position was not substantially justified, in proper proportion to those items found to have substantial justification.

When the complaint was filed, the two citations contained a total of six items and parts: items 1, 3 and 4 in citation 1; items1, 2(b) and 2(c) in citation 2.[4] Of those six items, only two (item 1 of citation 1 and item 2(b) of citation 2 which were vacated on the merits) did not have substantial justification. Although the Secretary withdrew two items in the posthearing brief (item 3 of citation 1 and item 2(c) of citation 2), substantial justification for those two items has been demonstrated. The remaining two items (item 4(b) of citation1 and item 1 of citation 2) were affirmed on the merits.

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[3]The $75 per hour limitation was raised to $125 per hour by Pub. L. 104-121, § 231(b)(1), which is applicable to adversary adjudications in administrative proceedings commenced on or after March 29, 1996.

[4]For computation purposes, parts (b) and (c) of item 2 in the second citation are treated as two separate items.

According, G&T is allowed the prorated sum of $2,070, representing one third of the requested total fees and expenses of $6,210.

Based upon the foregoing findings and conclusions, it is

ORDERED that G&T's application for an award of fees and expenses is granted to the extent indicated.

/S/ _____
RICHARD DeBENEDETTO
Judge, OSHRC

Dated: _____
Boston, MA