

was an employer, as that term defined by Commission precedent. (Decision p. 27-31)¹.

Subsequent to issuance of the decision, Polites filed an application for fees and expenses under the EAJA, requesting a total award of \$292,815.77, on the grounds that the Secretary was not substantially justified in citing Polites in his individual capacity. Because the underlying case was directed for review before the full Commission, the Commission stayed Polites application. The Commission issued its decision in the underlying case on January 26, 2005². On April 22, 2005, the Commission lifted the stay on this EAJA application, which was assigned to this judge for disposition.

Discussion

A party that prevails on a discrete portion of an adversary adjudication and otherwise meets the size and financial criteria of the EAJA may be reimbursed for its attorneys' fees and expenses unless the Secretary demonstrates by a preponderance of the evidence that her position in the matter was substantially justified or that particular circumstances would render an award unjust. 5 U.S.C. §504, *Contour Erection and Siding Systems Inc.*, 18 BNA OSHC 1714, 1716 (No. 96-0063, 1999); *William B. Hopke Co.*, 12 BNA OSHC 2158, 2159 (No. 81-206, 1986). The loss of a case is not determinative of whether her position was substantially justified. *Hadden v. Bowen*, 851 F.2d 1266, 1267 (10th Cir. 1988); *Contour Erection and Siding Systems Inc.*, 18 BNA OSHC at 1716.

The government's position can be "substantially justified" even though it is not correct. *Pierce v. Underwood*, 487 U.S. 552 566, n.2. (1988); *Morgan v. Perry*, 142 F.3d 670, 687 (3d Cir. 1998). The test of whether the Secretary's action is substantially justified is essentially one of reasonableness in law and fact. *Hanover Potato Products v. Shalala*, 989 F.2d 123, 128 (3d Cir. 1993); *Hocking Valley Steel Erectors, Inc.*, 11 BNA OSHC 1492, 1497 (No. 80-1463, 1983). The Secretary's position must be substantially justified to a degree that must satisfy a reasonable person. *Contour Erection and Siding Systems Inc.*, 18 BNA OSHC at 1716.

Reviewing this record, I conclude that, although I held that Polites should not have been cited individually, the Secretary was substantially justified in issuing the citation. To justify citing Polites in his individual capacity, it was necessary for the Secretary to establish that the Commission should "pierce the corporate veil." Piercing the corporate veil is a remedy used when a corporation is an alter ego of another person or corporation and the dominant entity is using the subservient corporation to perpetrate fraud, to accomplish injustice, or to circumvent the law. *Bd. of Trs. v. Foodtown, Inc.*, 296 F.3d 164, 171 (3d. Cir. 2002). Factors

¹ The decision went on to affirm most of the citations issued to Major.

² Although it vacated one item and modified the penalty assessment, the Commission generally affirmed his judge's decision.

to be considered in determining whether to pierce the corporate veil include gross undercapitalization, failure to observe corporate formalities, non-payment of dividends, the insolvency of the debtor corporation at the time, siphoning of funds of the corporation by the dominant stockholder, non-functioning of other officers or directors, absence of corporate records, and the fact that the corporation is merely a facade for the operations of the dominant stockholder or stockholders. *Id.* at 172.

At the time of the citation, corporations owned and/or controlled by Polites owed the Secretary thousands of dollars in unpaid penalties³. Polites was president and a 4% shareholder of Major. Moreover, the corporate offices were located on a floor of his house. Given the history of unpaid penalties by companies in which Polites was a principal, the Secretary was concerned that Major was a deliberately undercapitalized corporation, whose identity was indistinguishable from Polites and that, absent citing Polites in his individual capacity, a judgment issued against Major alone would be unenforceable either in obtaining abatement or in collecting any assessed penalty.

In my decision in the underlying case, I determined that the Secretary failed to adduce substantial evidence to establish either that Polites exercised sufficient control over the worksite to be considered an employer or that the corporation was little more than an alter ego of Polites. However, that the government's case lacked "substantial evidence" does not mandate a conclusion that its case was not "substantially justified." *Hadden v. Bowen*, 851 F.2d at 1267; *Contour Erection and Siding Systems Inc.*, 18 BNA OSHC at 1716. Also to be considered is the legal theory behind the Secretary's actions. The government's actions may be justified where it argues for a novel or unsettled, but credible interpretation of the law, even if it was not ultimately accepted by the courts. *SEC v. Fox*, 855 F.2d 247, 252 (5th Cir. 1988); *Washington v. Heckler*, 756 F.2d 959 (3d Cir. 1985). I note that the issue of when it is proper to "pierce the corporate veil" and hold an individual liable for OSHA violations committed by a corporation is currently before the Commission on review in *Altor, Inc. and/or Avcon, Inc., et al*, Docket Nos. 98-0755 and 99-0958.⁴

Given the substantial history of non-payment of penalties by companies run by Polites, and the Secretary's commensurate concern about her ability to enforce any abatement order or collect any penalty assessment, I cannot find unreasonable the Secretary's theory that Polites should be cited in his individual capacity. This is especially true where, as here, the

³ Including citations affirmed both before and after issuance of the instant citation, these companies currently owe the Secretary a total of \$535,500

⁴ I also note that in *Ho*, 20 BNA OSHC 1361, 1365-69 (No. 98-1645)(consolidated); *aff'd*, 401 F.3d 355 (5th Cir. 2005), a case decided by the Commission more than three years *after* the hearing in this case, the Commission found that the facts did not support a "reverse piercing" the corporate veil to hold a corporation liable for violations attributable to its president and primary shareholder.

underlying issue of when an individual may be cited in his/her individual capacity is currently before the Review Commission.

I also note that an EAJA award may also be denied where the particular circumstances of the case would make an award unjust. *Timothy Victory*, 18 BNA OSHC 1023, 1025 (No. 93-3359, 1997). Even though he may not be personally liable, Polites is a principal officer and/or shareholder of corporations with a history of not paying its OSHA penalties. It was this failure that was the primary impetus in the Secretary's decision to seek to hold Polites personally liable. To grant an EAJA award to Polites for defending against a situation largely of his own making would, in this Judge's view, be unjust.

Order

Based on the foregoing, it is ORDERED that the Respondent's application for fees and expenses under the EAJA is DENIED.

_____/s/
G. MARVIN BOBER
ADMINISTRATIVE LAW JUDGE

Dated: August 5, 2005