



United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
1924 Building - Room 2R90, 100 Alabama Street, S.W.  
Atlanta, Georgia 30303-3104

Secretary of Labor,

Complainant

v.

George Cairns & Sons, Inc.,

Respondent.

OSHRC Docket No. **03-2005**

### **Decision on Fee and Expense Application**

George Cairns & Sons, Inc. (Cairns), seeks an award for attorneys' fees and expenses in accordance with the Equal Access to Justice Act, 5 U.S.C. § 504, 29 C.F.R. § 2204.101, *et seq.* (EAJA), for costs incurred in defending against a one-item citation. The Secretary issued the citation, alleging a willful violation of 29 C.F.R. § 1926.652(a)(1), on October 10, 2003. The court heard the case on December 6, 7, and 8, 2004, and affirmed the cited item, reclassifying it as serious, in a decision issued on June 23, 2005. The decision became a final order on July 28, 2005.

On August 11, 2005, Cairns filed an application for legal fees in the amount of \$34,778.24, and for expenses in the amount of \$2,538.65. The Secretary filed an answer to Cairns's application on September 12, 2005. Cairns filed a response to the Secretary's answer on September 26, 2005. In its response, Cairns increased the amount it seeks in attorneys' fees and expenses to \$39,143.72 to cover the costs incurred in drafting and filing its reply to the Secretary's answer.

For the reasons discussed below, the court denies Cairns's application.

### **Issue**

The Secretary does not dispute Cairn's eligibility under the EAJA. The issues are:

- (1) Was Cairns the prevailing party on the classification of the violation?
- (2) Was the Secretary substantially justified in bringing the willful charge against Cairns?

### **Findings of Fact**

The parties submitted stipulated facts in their joint pretrial statement. The court relied on these facts in the underlying decision and reiterates those stipulated facts here:

1. George Cairns & Sons, Inc. (Cairns) is a corporation with a place of business at 8 Ledge Road, Windham, New Hampshire, operating a company engaged in excavation, utility installation, road construction and related activities.

2. Cairns is engaged in interstate commerce within the meaning of the Occupational Safety and Health (OSH) Act.

3. The Secretary of Labor conducted an inspection of the Amethyst Road / Route 16 intersection in North Conway, New Hampshire worksite (“worksite”) on September 11, 2003. As a result of that inspection, on October 10, 2003, the Secretary issued a Citation and Notification of Proposed Penalty (the “Citation”) which alleged a willful violation of 29 C.F.R. §1926.652(a)(1) and proposed a penalty of \$44,000.

4. Cairns timely filed a Notice of Contest regarding the Citation.

5. The Secretary timely filed a complaint before the Commission.

6. Cairns timely filed an Answer to the Complaint.

7. Cairns had been cited with a willful violation of 29 C.F.R. §1926.652(a)(1) as a result of three prior investigations:

a) Inspection Number 302535232, Willful Citation 1, Item 1, Issued on or about August 9, 1999; Original penalty \$42,000; amended penalty \$22,000.

b) Inspection Number 112884291, Willful Citation 1, Item 1, Issued on or about December 1, 1995; Original Penalty \$42,000; amended penalty \$20,000; and

c) Inspection Number 109621292, Willful Citation 2, Item 1, Issued on or about January 4, 1994. Original Penalty, \$10,500; amended penalty \$5,650.

8. Each of the three prior willful citations of 29 C.F.R. §1926.652(a)(1) issued to Cairns was resolved by an informal settlement with OSHA retaining the willful characterizations and reducing the proposed penalties.

9. Mr. Jeff Jacobs was the foreman and competent person at the worksite on the day of the inspection and directed the work on site.

10. On the day of the inspection, Cairns was excavating at the worksite in order to make a connection between the new main water line on Route 16 in North Conway, N.H., and the existing branch line for Amethyst Road.

11. The soil at the worksite excavation was substantially Type C soil.

12. Two Cairns employees on site, Foreman Jeff Jacobs and Dennis Reilly, worked in the excavation. The distance from the road surface to the bottom of the recently installed connection pipe was at least 5 ½ to 6 feet.
13. The excavation was not protected by a trench box for the time that the employees worked on the day of the inspection.
14. Foreman Jeff Jacobs was aware of the requirements of 29 C.F.R. §1926.652(a)(1).
15. Superintendent Darren Beck was aware of the requirements of 29 C.F.R. §1926.652(a)(1).
16. Superintendent Darren Beck was the superintendent during the 1999 inspection which resulted in the issuance of a willful citation of 29 C.F.R. §1926.652(a)(1).
17. During the year preceding the investigation, Cairns employed between 35 and 80 employees during relevant times.
18. Cairns was hired to replace two miles of water pipe, with connections, in downtown North Conway, N.H., to replace the road surface and to add new sidewalks along N.H. Route 16.
19. The job began in April 2003, continued through the fall, and shut down for winter. Work resumed in April 2004. It is expected to be completed in the fall of 2004.
20. The main line water pipe was 12-inch CCDI pipe. Tie-ins were expected to be 8-inch pipe. Some branch lines were smaller.
21. At the time of the OSHA inspection, September 11, 2003, Cairns had 4 crews working in North Conway.
22. The job was a union job with workers from the Laborer's and Operating Engineers' unions.
23. Darren Beck was the superintendent in charge of all crews.
24. On September 11, 2003, a crew was connecting the main line to an existing branch line that provided water service to residents on Amethyst Hill Road in North Conway. Amethyst is a dead-end street with approximately 6 houses on it.
25. Jeff Jacobs was the foreman of the crew.
26. During the morning, the crew opened an excavation to expose a recently-installed connecting line, and to find the existing branch line to connect to.

27. At the top, the excavation was approximately 22 feet by 25 feet. It was bordered by Amethyst Hill Road on the north, Route 16 on the west, a retail store and gas station on the south and open land and a portion of Amethyst Road on the east.

28. The excavation extended approximately halfway into Amethyst Hill Road.

29. Superintendent Darren Beck was present at the Amethyst excavation on September 9, 2003, at approximately 9:15 a.m. for approximately 15 (fifteen) minutes. He was not there again until several hours later when he responded to a call that an OSHA inspection was taking place there.

30. There was a second Cairns' excavation open in North Conway, N.H. on September 11, 2003 which was observed by the CSHO, Christopher Bills, who was responsible for the instant citation. It was approximately one mile from the first one. The CSHO determined that there were no violations in connection with the second excavation.

31. After 1999 to date, there have been no citations issued to Cairns which have become final orders of the Commission.

32. In August 2003, Cairns was issued a citation for violation of 29 C.F.R. § 1926.652(a)(1) for work in North Conway. The citation was classified as Serious. The proposed penalty was \$750. At the informal conference on the case the citation was withdrawn by OSHA on September 23, 2003.

33. The CSHO's determinations as to the depth of the excavation and the slope of the walls were all derived from the CSHO's use of a device known as an inclinometer, an engineering rod and a calculator.

### **Principles of Law**

#### **EAJA**

Commission Rule 2204.101 provides:

The Equal Access to Justice Act, 5 U.S.C 504, provides for an award of attorney or agent fees and other expenses to eligible individuals and entities who are parties to certain administrative proceedings (called "adversary adjudications) before the Occupational Safety and Health Review Commission. An eligible party may receive an award when it prevails over the Secretary of Labor, unless the Secretary's position in the proceeding was substantially justified or that special circumstances make an award unjust.

Commission Rule 2204.106(a) provides in pertinent part:

The position of the Secretary includes, in addition to the position taken by the Secretary in the adversary adjudication, the action or failure to act by the Secretary upon which the adversary adjudication is based. The burden of persuasion that an award should not be made to an eligible prevailing applicant because the Secretary's position was substantially justified is on the Secretary.

Commission Rule 2204.201(a) provides in pertinent part:

The application shall show that the applicant has prevailed and identify the position of the Secretary that the applicant alleges was not substantially justified.

### Eligibility

The party seeking an award for fees and expenses must submit an application within 30 days of the final disposition in an adversary adjudication. 5 U.S.C. § 504(a)(2). The prevailing party must meet the established eligibility requirements before it can be awarded attorneys' fees and expenses. Commission Rule 2204.105(b)(4) requires that an eligible employer be a "corporation . . . that has a net worth of not more than \$7 million and employs not more than 500 employees." Commission Rule 2204.105(c) provides, "For the purpose of eligibility, the net worth and number of employees shall be determined as of the date the notice of contest was filed." Commission Rule 2204.202 (a) requires the applicant to "provide with its application a detailed exhibit showing the net worth of the applicant as of the date of the notice of contest "that provides full disclosure of the applicant's assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards in this part."

### Prevailing Party

Section 504(a)(2) of 5 U.S.C. provides:

A party seeking an award of fees and other expenses shall within thirty days of the final disposition in the adverse adjudication submit to the agency an application which shows that the party was the prevailing party.

### Substantially Justified

The Secretary must prove that her position in bringing this case was substantially justified. "The test of whether the Secretary's action is substantially justified is essentially one of reasonableness in law and fact." *Mautz & Oren, Inc.*, 16 BNA OSHC 1006, 1009 (No. 89-1366, 1993). The reasonableness test comprises three parts. The Secretary must show: (1) that there is a

reasonable basis for the facts alleged, (2) that there exists a reasonable basis in law for the theory it propounds, and (3) that the facts alleged will reasonably support the legal theory advanced. *Gaston v. Bowen*, 854 F.2d 379, 380 (10<sup>th</sup> Cir. 1988).

### **Analysis**

The Secretary does not dispute Cairns's assertion that it employed fewer than 500 employees and had a net worth of less than \$ 7 million on the date of its notice of contest (see Attachments A, B, and C to Cairns's EAJA Application). The Secretary concedes Cairns meets the eligibility requirements under the EAJA. The Secretary disputes Cairns's claim it was the prevailing party on the classification issue and Cairns's claim the Secretary was not substantially justified in citing 29 C.F.R. § 1926.652(a)(1) as a willful violation.

#### Prevailing Party

Cairns contends it was the prevailing party on item 1 of the citation because the court reclassified it from willful to serious. The Secretary disagrees.

Although the term is not defined in the EAJA, an applicant is considered to be the "prevailing party" for the purposes of attorneys' fees statutes if it has succeeded on any of the significant issues involved in the litigation, and if, as a result of that success, the applicant has achieved some of the benefit it sought in the litigation.

*K. D. K. Upset Forging Inc.*, 12 BNA OSHC 1856, 1857 (No. 81-1932, 1986).

Commission Rule 2204.106(a) provides in pertinent part: "A prevailing applicant may receive an award for fees and expenses in connection with a proceeding, or in a discrete substantive portion of the proceedings[.]" Cairns argues the classification of item 1 was a discrete substantive portion of the proceeding, and Cairns prevailed on that discrete substantive portion when the court reduced the violation from willful to serious.

The Commission does not consider an employer to be the prevailing party in every instance where the classification of the violation is reduced. Rather, the Commission has held: "Whether reduction in penalties and severity of violations constitutes a discrete substantive portion of a case must be determined on the basis of all the relevant facts and circumstances." *H. P. Fowler Contracting Corporation*, 11 BNA OSHC 1841, 1846 (No. 80-3699, 1984).

In the present case, the Secretary charged Cairns with one willful violation of the excavation standard. In his opening statement, counsel for Cairns argued only that the classification of the violation was incorrect. He closed his statement saying, "Any violation that occurred here, Your

Honor, we respectfully submit is not more than serious in nature” (Tr. 25). While Cairns argued at times during the hearing and in its post-hearing brief that it was not in violation of the cited standard, the focus of Cairns’s case was the classification of item 1. The hearing presented two discrete issues: (1) did Cairns violate 29 C.F.R. § 1926.652(a)(1) and, if so, (2) was the violation willful? The classification issue was discrete from the issue of noncompliance.

The classification issue was also substantive. The Secretary proposed a penalty of \$44,000.00 for item 1 when it was classified as willful. After reducing item 1 to a serious violation, the court imposed a penalty of \$7,000.00, a difference of \$37,000.00. Cairns achieved much of the benefit it sought in contesting the citation: it received a significantly lower penalty and was spared a fourth willful violation.

Based upon the circumstances of the proceeding below, the court determines Cairns was the prevailing party on the issue of the classification of item 1.

#### Substantial Justification

Compliance officer Christopher Bills explained why he recommended the violation be classified as willful (Tr. 97-98):

The basis of the willful recommendation was the history of the Employer, the knowledge of the conditions by both the foreman and the superintendent, the knowledge of the Employer as to not meeting the requirements of 652(a)(1), the direction by the foreman [Jeff Jacobs] of the employee working in the excavation, and in addition his choice as to even though he knew—that is, the foreman’s knowledge—that it didn’t meet the requirements of the 652(a)(1).

It didn’t meet the sloping requirements and they supposedly couldn’t put a trench box in it or some sort of shielding system, [Jacobs] still continued to work in there for a significant amount of time, or as he told me on site, for approximately two hours as to the employee being in the excavation.

The facts gathered by Bills during his inspection substantially justified his recommendation to the Secretary to cite Cairns for a willful violation of 29 C.F.R. § 1926.652(a)(1). Bills observed Cairns violating the same standard it had willfully violated three times in the past. Foreman Jacobs told Bills he had been working in the 7 to 10 foot deep excavation along with another employee for approximately two hours. Cairns dug the excavation in Type C soil, yet it did not use a trench box, did not shore the excavation, and made an inadequate attempt to properly slope it. Under these circumstances, the Secretary’s belief she could establish a *prima facie* case that Cairns had willfully violated the cited standard was substantially justified.

The court determined the issue of willfulness primarily by considering foreman Jacob's testimony. The court excerpted a lengthy portion of Jacob's testimony in the underlying Decision to show Jacobs's "evolving state of mind" as he directed the work in the excavation (Decision, p. 9). Because a willfulness determination requires a court to delve into the state of mind of the employer's representative(s), it is among the more difficult decisions a court is called upon to make. The underlying proceeding presented a thorny issue. Jacobs admitted at the hearing that in continuing work in the excavation without taking adequate safety precautions, he "made a bad call" (Tr. 301), made a "poor decision" (Tr. 308), and used "poor judgment" (Tr. 422). Jacobs admitted he knew the excavation was not properly sloped the day of the inspection (Tr. 415-416). This testimony could support a finding of willfulness: Jacobs admitted knowingly committing a violation of the Act. His admission could be taken for a conscious disregard for the safety of Cairns's employees. The court, however, found Jacobs credible in his description of the various stages he went through as he grappled with the unexpected problems he ran into. Rather than showing plain indifference to the safety of Cairns's employees, Jacob's testimony tends to show a supervisor trying his best to protect his employees without stopping work. Jacobs conceded, in retrospect, it would have been better to halt work rather than to continue with inadequate protection. Contrary to Cairns's assertion in its reply, the court's decision was based largely on finding Jacobs a credible witness. The Commission has held, "[A] case which truly turns on credibility issues is particularly ill-suited for the reallocation of litigation fees under the EAJA." *Consolidated Construction, Inc.*, 16 BNA OSHC 1001, 1006 (No. 89-2839, 1993).

The facts alleged by the Secretary reasonably supported a willful classification. Had Jacobs been less credible as a witness, the Secretary could have shown Cairns's foreman supervising work in an excavation he knew was improperly sloped, for a company that had racked up three previous willful violations of the same standard. The Secretary has established she was substantially justified in prosecuting this case against Cairns.



## **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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

### **ORDER**

Based upon the foregoing decision, it is hereby ORDERED that:  
Cairns's application for attorneys' fees and expenses is denied.

SO ORDERED.

**Date:** October 13, 2005

*/s/ Judge Stephen J. Simko, Jr.*  
**Judge Stephen J. Simko, Jr.**