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. SALCO CONSTRUCTION, INC., Respondent.	OSHRC Docket No. 05-1145 (EAJA)

APPEARANCES:

Ronald Gottlieb, Attorney; Daniel J. Mick, Counsel for Regional Trial Litigation; Charles F. James, Counsel for Appellate Litigation; Joseph M. Woodward, Associate Solicitor; Jonathan L. Snare, Acting Solicitor; U.S. Department of Labor, Washington, DC
For the Complainant

Robert N. Aguiluz, Esq.; The Barnes Law Firm, P.C., Dallas, TX
For the Respondent

DECISION

Before: THOMPSON, Chairman; and ROGERS, Commissioner.

BY THE COMMISSION:

Before the Commission is a decision of Administrative Law Judge Ken S. Welsch denying the application of Salco Construction, Inc. ("Salco") for fees and expenses under the Equal Access to Justice Act ("EAJA"), 5 U.S.C. § 504, and the Commission's implementing regulations, 29 C.F.R. part 2204.[1] Salco seeks fees and expenses incurred while defending

[1] The EAJA, 5 U.S.C. § 504(a)(1), provides in relevant part:

> 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.

against a citation alleging a repeat violation of the construction safety standards promulgated under the Occupational Safety and Health Act of 1970 ("OSH Act"), 29 U.S.C. §§ 651-78. In deciding whether Salco is entitled to fees, the only issue before us is whether the Secretary was substantially justified in citing and prosecuting the alleged violation.[2] For the reasons given below, we affirm the judge's decision.

Background

The events giving rise to Salco's filing of an EAJA fee petition began on April 19, 2005, when the Occupational Safety and Health Administration ("OSHA") inspected a worksite in Baton Rouge, Louisiana, where Salco was erecting the steel for a new Verizon Wireless retail store. As a result of the inspection, OSHA issued Salco two citations—one serious and one repeat—alleging a total of three violations of the construction standards. Under one of the repeat citation items, the Secretary alleged a violation of 29 C.F.R. § 1926.451(g)(1) based on the failure of Salco's employees to use fall protection while "installing bolts into wall braces 12 feet above the ground [and] using a scaffold platform being supported by an industrial forklift."[3] Following a hearing, the judge vacated this citation item and affirmed the two remaining items.

In her case on the merits, the Secretary relied on the testimony of OSHA compliance officer ("CO") Raymond Loupe who observed two Salco employees working on a scaffold platform supported by a telescoping forklift known as a "Gradall Telehandler." One of the employees on the platform had a harness draped over his shoulder unattached to anything, and the other employee was wearing no personal fall protection whatsoever. The platform itself had fall protection on just three sides, but when the platform abutted the building, the eaves of the building constituted fall protection on the fourth "open" side.[4] CO Loupe testified that he saw

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[2] It is undisputed that Salco is a prevailing party and meets the eligibility criteria for an award.

[3] Section 1926.451(g)(1) states:

> Each employee on a scaffold more than 10 feet (3.1 m) above a lower level shall be protected from falling to that lower level. Paragraphs (g)(1)(i) through (vii) of this section establish the types of fall protection to be provided to the employees on each type of scaffold. Paragraph (g)(2) of this section addresses fall protection for scaffold erectors and dismantlers.

[4] Section 1926.450(b) defines open sides and ends as:

> [T]he edges of a platform that are more than 14 inches (36 cm) away horizontally from a sturdy, continuous, vertical surface (such as a building wall) or a sturdy, continuous horizontal surface (such as a floor), or a point of access. Exception:

the forklift back away from the building, moving the platform away from the eaves and into another position along the wall, while the employees were still standing on the platform. According to CO Loupe, when the forklift moved the platform in this manner, the employees were exposed to a twelve-foot fall from the platform's open, unprotected side. Salco's sole witness, the forklift operator, disputed CO Loupe's claim, testifying that the forklift was not moved with the employees on the platform that day.

In vacating the alleged violation of § 1926.451(g)(1), the judge concluded that, under both the cited standard and under 29 C.F.R. § 1926.451(b)(3),[5] fall protection must be provided on platforms more than ten feet above a lower level only if the open side of the platform is greater than fourteen inches from a horizontal or vertical surface. The judge determined that Salco's two employees were not exposed to a fall hazard when the scaffold platform was placed next to the eaves. Although the judge credited CO Loupe's testimony that the forklift backed away from the eaves in order to reposition the platform, he concluded that the Secretary failed to introduce sufficient evidence to show the platform was ever moved more than fourteen inches away from the eaves as required to establish an open end under § 1926.451(b)(3).

On June 29, 2006, Salco filed an EAJA application for $29,735.82 in fees and expenses incurred in its defense of the vacated citation item. On October 16, 2006, the judge denied Salco's application. He found the Secretary substantially justified in pursuing the violation because she made a reasonable inference—based on CO Loupe's observations and the specifications of the Gradall Telehandler's operations manual—that the scaffold platform would have been separated from the eaves by more than fourteen inches when it was moved by the forklift to another location.

> For plastering and lathing operations the horizontal threshold distance is 18 inches (46 cm).

[5] Section 1926.451(b)(3) states:

> Except as provided in paragraphs (b)(3)(i) and (ii) of this section, the front edge of all platforms shall not be more than 14 inches (36 cm) from the face of the work, unless guardrail systems are erected along the front edge and/or personal fall arrest systems are used in accordance with paragraph (g) of this section to protect employees from falling.

Discussion

The EAJA entitles a prevailing party meeting eligibility criteria to an award for fees and other expenses incurred in connection with an adversarial proceeding, unless the Secretary was substantially justified or special circumstances make an award unjust. 5 U.S.C. § 504(a)(1), (b)(1); 29 C.F.R. § 2204.106. The Secretary's position is "substantially justified if it has a reasonable basis in both law and fact." *Joseph Watson*, 21 BNA OSHC 1649, 1651 (No. 00-1726, 2006). In other words, the Secretary's position must be "justified to a degree that could satisfy a reasonable person." *Am. Wrecking Corp. v. Sec'y of Labor*, 364 F.3d. 321, 325 (D.C. Cir. 2004). The Secretary contends she was substantially justified here because—as the judge found—she made a reasonable inference, based on the record, that moving the forklift would have separated the scaffold platform from the eaves by more than fourteen inches, resulting in a violation of the cited standard. Salco claims, however, that the judge erred in finding substantial justification because the Secretary neither contemplated the need to show a gap of greater than fourteen-inches nor presented evidence on the width of any such gap.

While the facts here present a very close case on the issue of substantial justification, we conclude that the Secretary established that her position had a reasonable basis in both law and fact. First, we agree with the judge that the Secretary made a reasonable inference regarding the movement of the forklift. Indeed, it was reasonable not only for the Secretary to rely upon the statement of her CO that he witnessed the forklift move, but also to assume Salco would have to move the forklift in order to perform its work. As noted in the citation, the employees alleged to have been exposed to the fall hazard were installing bolts into wall braces along the building. This work was performed not in just one area of the wall but all along the entire wall, thus necessitating the movement of the scaffold platform.

Second, we find the Secretary could reasonably infer that when the forklift did move, it separated the scaffold platform from the eaves by a distance of more than fourteen inches. When the forklift was parked facing the eaves of the building while the employees were working—based on pictures of the worksite, as well as CO Loupe's testimony—the tires of the forklift and its boom were perpendicular to the wall with the platform abutting the eaves. However, the Gradall Telehandler cannot move from side to side. Thus, in order to move the platform along the eaves of the building to complete the work, the forklift operator had to back the forklift up before repositioning it against the wall. Under these circumstances, it was reasonable for the

Secretary to infer from her evidence—i.e., the CO's statement and the pictures of the worksite—that the platform would have separated more than fourteen inches from the eaves when the forklift moved to its new position.

As Salco points out, the Secretary introduced no actual measurements or estimates of the distance between the platform and the eaves during the forklift's movement. Yet, the fact that the Secretary had insufficient evidence to prove her case on the merits does not necessarily mean she lacked substantial justification to prosecute the case. *Joseph Watson*, 21 BNA OSHC at 1651. Given the evidence the Secretary had, we believe it was reasonable for her to infer that when the forklift moved there was a fourteen-inch gap between the wall and the platform, and we see no reason to overturn the judge's finding of substantial justification for purposes of denying an award of EAJA fees.[6]

[6] Because we find the Secretary was substantially justified, we do not reach the issue of appropriate fees here. We note, however, that after finding substantial justification, the judge went on to hold that "[e]ven if the Secretary was not substantially justified . . ., Salco's fee application was deficient." According to the judge, the deficiencies were as follows: (1) Salco asked for attorney's fees calculated at a rate higher than $125 per hour; (2) Salco's fee application included time its attorney spent defending other citation items; and (3) Salco's fee application included time its attorney spent on defenses rejected by the judge. We disagree with the judge to the extent he was suggesting the insufficiencies he noted in Salco's EAJA fee petition provided an independent basis for denying Salco's petition. Commission precedent establishes that, even where an EAJA applicant's fee petition is deficient, a complete denial of fees is only "reserved for the most severe situations." *See Cent. Brass Mfg. Co.*, 14 BNA OSHC 1904, 1907, 1987-90 CCH OSHD ¶ 29,144, p. 38,958 (Nos. 86-978 & 86-1610, 1990). There is nothing in the record to suggest that this case presents such a situation. We also note that "time reasonably spent on an unsuccessful argument in support of a successful claim" may well be compensable. *See Jaffee v. Redmond*, 142 F.3d 409, 414 (7th Cir. 1998).

Order

We affirm the judge's decision denying Salco's EAJA application.

SO ORDERED.

/s/
Horace A. Thompson III
Chairman

/s/
Thomasina V. Rogers
Commissioner

Dated: July 18, 2007

Secretary of Labor, Complainant v. Salco Construction, Inc., Respondent.	OSHRC Docket No. **05-1145** **EAJA**

Appearances:

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For Complainant

Robert N. Aguiluz, Esquire
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For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER
DISMISSING EAJA APPLICATION

Salco Construction, Inc. (Salco) seeks an award for fees and expenses under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 *et seq*., which were incurred in its defense against serious and repeat citations issued on June 14, 2005, by the Occupational Safety and Health Administration (OSHA). After the hearing on January 12, 2006, the court by decision and order dated April 24, 2006, vacated Citation No. 2, item 2, alleged violation of §1926.451(g)(1). The decision became a final order of the Review Commission on May 30, 2006. Salco's application for fees and expenses dated June 29, 2006, claims costs totaling $29,753.82.

For the reasons discussed, Salco's application under the EAJA is denied.

Background

Salco, a corporation registered in the State of Louisiana, is engaged in the business of erecting prefabricated steel buildings. On April 29, 2005, three Salco employees were observed by OSHA compliance officer Raymond Loupe installing flashing at the eves and bolting purlins to steel

beams for a new, single story Verizon Wireless store in Baton Rouge, Louisiana. There is no dispute the two employees on an elevated platform supported by a Gradall Telehandler and the one employee standing on a steel beam were working without personal fall protection. As a result of OSHA's inspection, Salco received serious and repeat citations.

Serious Citation No. 1, alleged Salco violated 29 C.F.R. § 1926.760(a)(1) for failing to ensure an employee on the steel beam exposed to a fall hazard in excess of 15 feet was protected by fall protection. The serious citation proposed a penalty of $3,000.00.

Repeat Citation No. 2, alleged Salco violated 29 C.F.R. § 1926.451(c)(2)(v) (item 1) for failing to secure the elevated scaffold platform to the forks on the Gradall Telehandler, and 29 C.F.R. § 1926.451(g)(1) (item 2) for failing to protect two employees on the elevated scaffold platform from a fall hazard in excess of 10 feet by a system of fall protection. The repeat citation proposed a penalty of $1,200.00, for each violation.

The hearing was held on January 12, 2006, in Baton Rouge, Louisiana. The court's decision dated April 24, 2006, affirmed Citation No. 1, violation of §1926.760(a)(1) and Citation No. 2, item 1, violation of § 1926.451(c)(2)(v) and assessed a total penalty of $3,000.00. Citation 2, item 2, alleged violation of § 1926.451(g)(1) was vacated. Salco did not seek review of the court's decision which became a final order of the Review Commission on May 30, 2006.

On June 29, 2006, Salco filed an EAJA application for fees and expenses in its defense of Citation No. 2, item 2.

EAJA

The EAJA applies to proceedings before the Review Commission through § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651, *et seq*. An award for fees and expenses under the EAJA is made to an eligible applicant who is the prevailing party, if the Secretary's action in bringing the case is found to be without substantial justification and there are no special circumstances which make an award unjust. 29 C.F.R. § 2204.101 *et seq.*

While the applicant has the burden of persuasion to show it meets the eligibility requirements to receive an award, the Secretary has the burden to show that her position in the matter was 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. 29 C.F.R. § 2204.302. The Secretary does not dispute Salco's application dated June 29, 2006, was timely filed.

The party seeking an award must also meet certain eligibility requirements. An eligible employer includes a "corporation . . . that has a net worth of not more than $7 million and employs not more than 500 employees." 29 C.F.R. § 2204.105(b)(4).

Salco is a corporation registered with the State of Louisiana. The record shows Salco employs approximately 50 employees (Tr. 62, 114). Salco's application includes a financial balance sheet reflecting its assets and liabilities as of February 28, 2005. The net worth is less than $7 million (Salco' Application, Exh. 1). The Secretary does not dispute Salco's eligibility under the EAJA (Secretary's Opposition).

Prevailing Party

"An applicant is considered to be the 'prevailing party' . . . 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). A party does not have to prevail on all issues in contest "....but only as to a discrete substantive portion of the proceeding." *H.P. Fowler Contracting Corp.*, 11 BNA OSHC 1841, 1845 (No. 80-3699, 1984).

In the instant case, vacating Citation No. 2, item 2, alleged violation of § 1926.451(g)(1), was a "discrete substantive portion" of the citations issued by OSHA. The Secretary does not dispute that Salco was the prevailing party as to alleged violation of § 1926.451(g)(1) (Secretary's Opposition).

Substantial Justification

In order for Salco to be awarded costs under the EAJA, the Secretary's position in pursuing the alleged violation of § 1926.451(g)(1) must be shown to not be substantially justified. The test of whether the Secretary's action is substantially justified is essentially one of reasonableness in law and fact. *Contour Erection and Siding Systems Inc.*, 18 BNA OSHC 1714, 1716 (No. 96-0063, 1999). There is no presumption that her position was not justified simply because the citation item

was vacated. Also, the Secretary's decision to litigate the item does not have to be based on a substantial probability of prevailing.

In this case, the Secretary alleged Salco violated § 1926.451(g)(1) (Citation No. 2, item 2) for failing to equip two employees on an elevated scaffold platform supported by a Gradall Telehandler installing flashing at the eave and exposed to a fall of 13 feet with a fall arrest system. Section 1926.451(g)(1) provides, in part:

> Each employee on a scaffold more than 10 feet (3.1 m) above a lower level shall be protected from falling to that lower level. Paragraphs (g)(1)(I) through (vii) of this section establish the types of fall protection to be provided to the employees on each type of scaffold.

The record established and Salco did not dispute the terms of § 1926.451(g)(1) were not complied with and that Salco knew of the violative conditions through its leadman on site. The Secretary's case was based on the observations and photographs made by the OSHA compliance officer during his inspection. Compliance officer Loupe observed the two employees on an elevated platform. One of the employees on the platform was the leadman. The employees were not utilizing any personal fall protection (Exhs. C-1, C-2, C-3; Tr. 30, 113-114). The platform which was supported by a Gradall Telehandler, had suitable guardrails on three sides but was open along the side of the platform facing the eave (Tr. 26, 28). Loupe testified he saw the Gradall's wheels move with the employees still on the platform (Tr. 24-27, 29-30, 60).

Throughout the proceedings, Salco's defenses to alleged violation § 1926.451(g)(1) involved its claim the scaffolding standards at § 1926.451 were preempted by the steel erection standards at Subpart R, § 1926.750 *et seq*., and the platform was less than 10 feet above the ground. Both of these arguments were rejected by the court in its decision dated April 24, 2006, which decided in favor of the Secretary.

The alleged violation of § 1926.451(g)(1) was vacated because the Secretary failed to show by a preponderance of the evidence that the eave did not act as a guardrail in preventing employees from falling from the open side of the platform or that the platform was more than 14 inches from the eave. Section 1926.451(b)(3) requires a guardrail system or personal fall arrest system to prevent employees from fall falling if the platform is greater than 14 inches from a horizontal or vertical surface.

In its EAJA application, Salco argues the Secretary's position was not substantially justified because the OSHA compliance officer did not take any measurements and was unable to testify that the distance between the platform and the eave was greater than 14 inches. According to Salco, this shows OSHA did not consider the employee exposure requirement in establishing a violation of a standard before issuing the citation.

Establishing employee exposure is an essential element of the Secretary's burden of proof. *Walker Towing Corp.*, 14 BNA OSHC 2072, 2074 (No. 87-1359, 1991). However, the failure of the Secretary to meet its burden of proof on this element does not necessarily entitle Salco to an award under the EAJA. The EAJA is not to be read to deter the Secretary from pursing in good faith, cases which are reasonable in advancing the objective of workplace safety, if such cases are reasonably supportable in fact and law. The facts forming the basis of the Secretary's position do not need to be uncontradicted.

Although the compliance officer did not take measurements and could not testify the platform was more than 14 inches from the eave, the Secretary attempted to establish employee exposure by relying on the compliance officer's observations that the platform was repositioned from another location to the location depicted in the photographs while the employees were on it. Loupe testified he saw the platform move during repositioning (Tr. 24-25, 61). While the platform was repositioning, the two employees remained on the platform (Tr. 26-27). Loupe testified the employees were exposed to a 12-foot fall during the repositioning of the platform (Tr. 60). The Secretary introduced evidence regarding the operation of the Gradall Telehandler which she believed indicated the boom supporting the elevated platform would only telescope forwards or in an outward direction toward the face of the eave (Exh. R-2). The Secretary, therefore, argued the forklift would have to back away from the eave more than 14 inches and then move forward to allow the employees to install the flashing along the length of the eave.

Although this evidence was not accepted by the court based on credibility, the inferences drawn by such evidence establish the Secretary's substantially justification in pursuing the issue. Despite Salco's arguments to the contrary, the inferences were reasonable in attempting to show employee exposure. The observations of the compliance officer, the photographs, and the operation's manual, established a reasonable basis for the facts alleged. Salco did not deny the

employees were on the elevated scaffold platform without fall protection. Other than challenging the height of the platform, Salco did not dispute throughout this proceeding, the employees' exposure to a fall hazard without fall protection. Thus, a reasonable basis in fact and law existed for the case the Secretary presented.

Salco's Fee Application

Even if the Secretary was not substantially justified in pursuing a violation of §1926.451(g)(1), Salco's fee application is deficient. In determining allowable fees and expenses under the EAJA, the regulations provide that such awards should be based on rates customarily charged by persons engaged in the business and that the fee should not exceed $125 per hour, unless the Commission determines that an increase in the cost of living or a special factor justifies a higher fee. 29 C.F.R. § 2204.107(b).

In this case, Salco's application shows a $200 per hour rate. There is no showing to justify the higher rate based on the cost of living in the area or any special circumstances.

Salco's fee application does not separate and segregate, to the extent possible, the attorney's time spent in defending against the alleged violation of §1926.451(g)(1). Its application for $29,753.82 includes the costs of defending against the violations of §1926.760(a)(1) and §1926.451(c)(2)(v), which were affirmed in favor of the Secretary.

Further, as discussed, even though Salco prevailed on the alleged violation of §1926.451(g)(1), Salco's case including its post trail brief does not reflect any time spent on the issue which ultimately resulted in vacating the item. Salco's basis for contesting the item was resolved in favor of the Secretary.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is ORDERED that:

Salco's EAJA application for attorney fees and expenses is **DENIED**.

/s/

KEN S. WELSCH
Judge

Date: **October 16, 2006**