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SECRETARY OF LABOR,  
Complainant,

v.

JOHNSON MASONRY, INC.,

Respondent.

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OSHRC DOCKET  
NO. 96-0289

ORDER

In a Final Order dated October 22, 1997, I denied the Respondent's Application under the Equal Access to Justice Act for fees and expenses incurred in connection with a citation issued to it by the Occupational Safety and Health Administration.

Disagreeing with this ruling, the Respondent filed a Petition to Reopen the Record for Further Hearing and for Discretionary Review of my decision. In this document the Respondent requested that the record be reopened to allow the presentation of testimony of its expert consultant or, in the alternative, to allow costs and fees claimed from August 12, 1996 because there was no substantial justification for processing and prosecuting the case after August 12, 1996, the Federal Register publication date deleting the incorporation by reference of the Electrical Rules in the construction standards.

The Secretary of Labor opposed the Respondent's motion on the ground that the citation and the complaint were proper because the regulation was in effect at the times those documents were issued and served. Also, the Secretary urged that the fact the Secretary's counsel was unaware of the withdrawal of the regulation constituted a "special circumstance" which rendered any EAJA award unjust.

Now the Respondent has filed a Motion to Allow Reply Brief to be submitted by December 15, 1997, stating that it needed the extension to enable its attorney to consult with the company's safety consultant, to review the case file, and to articulate clearly the reasons why the standard cited never applied.

Counsel for the Secretary not only objected to this motion but also objected to any filing of a response to his reply on the ground that there is nothing in the Commission Rules which allows a Movant to file a reply to a response.

After a detailed review of the Respondent's motion to reopen the hearing and for Discretionary Review and the Secretary's Response, I believe that the previous ORDER should be revised in part. Although the Secretary's counsel promptly withdrew the citation and complaint as soon as he learned of the change in the regulation in issue, it was still necessary for the Respondent to prepare for trial, entailing legal fees and costs. It now appears to me that the Respondent incurred attorney fees and costs after the August 12, 1996 amendment because the Secretary did not inform the Administration or its counsel of the change. The Respondent should not be penalized for this failure.

I conclude that it would be unfair to require the Respondent to absorb trial preparation expense after the regulation change was noticed in the Federal Register.

The original ORDER in this case is amended to allow attorney fees and costs beginning August 12, 1996.

This conclusion renders moot the Respondent's request to allow a Reply Brief, and there will be no decision on this motion.

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Sidney J. Goldstein  
Judge, OSHRC

Dated: December 5, 1997