United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

Office of
Executive Secretary

Phone: (202) 606-5400
Fax: (202) 606-5050

SECRETARY OF LABOR, Complainant, v. RALPH TAYNTON d/b/a SERVICE SPECIALTY COMPANY, Respondent.	OSHRC Docket No. 92-0498 (EAJA)

NOTICE OF DOCKETING
OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on September 12, 1996. The decision of the Judge will become a final order of the Commission on October 15, 1996 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before October 2, 1996. In order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1120 20th St., N.W., Suite 980
Washington, D. C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D. C. 20210

If a Direction for Review is issued by the Commission then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: September 12, 1996

Ray H. Darling, Jr.
Executive Secretary

92-0498

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Ave., N.W.
Washington, D.C. 20210

Jaylynn Fortney
Regional Solicitor
Office of the Solicitor, U.S. DOL
Suite 339
1371 Peachtree Street, N. E.
Atlanta, GA 30367

Ralph Taynton
Ralph Tanyton, d/b/a Service
Specialty Co.
19084 Saint George Drive
Dunnellon, FL 34432

Nancy J. Spies
Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 240
1365 Peachtree Street, N.E.
Atlanta, GA 30309-3119

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 Peachtree Street, N.E., Suite 240
Atlanta, Georgia 30309-3119

Phone: (404) 347-4197 Fax: (404) 347-0113

SECRETARY OF LABOR, Complaint-Respondent, v. RALPH TAYNTON d/b/a SERVICE SPECIALTY COMPANY, Respondent-Petitioner.	OSHRC Docket No. 92-498 (EAJA)

DECISION ON FEE AND EXPENSE APPLICATION

Ralph Taynton d/b/a Service Specialty Co., seeks attorney and agent fees, as well as expenses it incurred during its successful defense against a willful citation issued by the Secretary of Labor on January 8, 1992. Pursuant to The Equal Access to Justice Act [5 U.S.C. 504] (EAJA) and implementing regulations at 29 C.F.R. § 2204.101, Service petitioned for a total of $34,512.95 in fees and expenses.

The underlying case arose from the second of two Occupational Safety and Health Administration (OSHA) investigations relating to Service, Taynton's wholly-owned, ~~unincorporated~~ dredging company in Southern Florida. The citation asserted six willful multiple-item violations, containing 17 separate items or subitems. In his post-hearing brief, the Secretary withdrew five of the asserted violations. The July 8, 1993, administrative law judge (ALJ) decision affirmed nine of the remaining violations and vacated three. Three of the items were affirmed as willful, four as serious, and two were characterized as nonserious with no penalty. The Secretary proposed a penalty of $75,000; the ALJ decision assessed $12,200.

Taynton and Service appealed. The Review Commission directed review. On April 27, 1995, the Review Commission reversed the ALJ and vacated the citation in its entirety on jurisdictional grounds. The decision did not reach the ALJ's factual findings. The Secretary initially

appealed to the United States Court of Appeals for the Eleventh Circuit. When he unilaterally withdrew his appeal, the April 27, 1995, decision became final. Taynton timely filed his fee petition.

Criteria for Eligibility

The EAJA was designed to encourage persons of limited means to seek review of, or defend against, unjustified governmental actions. *Nitro Electric Co.,* 16 OSHC 1596 (No. 91-3090, 1994). The EAJA does not routinely provide for awards to the prevailing party, even if that party meets the financial eligibility criteria. Payment is to be ordered only if the Secretary has acted without substantial justification or other circumstances make an award unjust.

The applicant has the burden of proving eligibility. A sole owner of an unincorporated business, such as Taynton, cannot have a net worth of more than $7 million or employ more than 500 employees. Taynton and Service have submitted financial and other data, affied to be correct, which are sufficient to establish eligibility under the Act.

Prevailing Party

An eligible applicant must establish that he was the prevailing party. Without dispute, Taynton was the prevailing party based on the Review Commission decision of April 27, 1995.

It may also be argued that Taynton was the prevailing party as to discrete portions of the administrative law judge's (ALJ's) decision below. A party seeking fees "need not have prevailed as to the central issue in the case 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). To qualify, the portion of the case must be significant and must result in some of the benefit the party sought in initiating litigation. *Id.* Thus, even if the ALJ decision discounted some, but not all, of the variously asserted instances of a single violation, if the violation was affirmed the respondent could not be said to have prevailed on a significant portion of the case. The contrary may be true where the ALJ decision substantially reduced the proposed penalty or the classification of the violation.

Substantial Justification

Was the Secretary substantially justified in proceeding as if he had subject matter jurisdiction, even though Taynton had ceased operating as Service by the time the citation was issued? Secondarily, was the Secretary substantially justified in proceeding with those portions of the underlying case which he withdrew or lost before the ALJ?

The Secretary has the burden of demonstrating that an award should not be made in a given case. *Dole v. Phoenix Roofing, Inc.*, 922 F.2d 1202, 1209 (5th Cir. 1991). The action must remain substantially justified from the time of citation through the time of hearing. *Consolidated Constr., Inc.*, 16 BNA OSHC 1001 (No. 89-2839, 1993). Legal precedents and the facts known to the Secretary when he proceeded with the case are weighed.

The Review Commission Decision

After the first investigation resulted in a citation with fines, OSHA advised Taynton to expect a further substantial assessment if he employed a helper and continued to operate without repairing the barge-mounted crane characterized as a "piece of junk." On August 27, 1991, OSHA conducted its second investigation of Service in four months. By December 12, 1991, Taynton had "scrapped out" that crane and barge, dismissed Service's one employee, and ceased his business operation. As a result of the August 27, 1991, inspection, OSHA issued Service a second citation, classified as willful, on January 8, 1992, less than a month after Service had gone out of business.

The Review Commission saw the case as raising a "novel question" of jurisdiction. *Taynton*, 17 BNA OSHC 1205 (No. 92-498, 1995). Reading §§ 9(a), 3(5), and 3(6) of the Act together, the Commission's majority for the first time held that the terms "*has* employees" and "*is* employing" in the Act's definitional section defeated jurisdiction for an entity which was not in business when a citation was issued.[1] It rejected the Secretary's argument that the "jurisdictional snapshot" should be taken at the time the violation occurred. *Id.*

Taynton argues that since the Commission unequivocally ruled that the Secretary was without jurisdiction, "the government should not have created the case at all," and there could be "*no* justification for issuing the citation and pursuing this action" (Pet. brief pp. 3, 4). The Secretary's burden to prove substantial justification is not insurmountable, even if the Secretary lost the case on jurisdictional grounds. "The standard . . . should not be read to raise a presumption that the Government's position was not substantially justified, simply because it lost the case." 1980 U.S. Code Cong. & Admin. News at 4989 & 4997. "Conceivably, the Government could take a position

---

[1] The Commission did not decide whether jurisdiction existed if an entity remained in business but no longer had employees. *Taynton*, 17 OSHC 1207, fn 6.

that is not substantially justified, yet win; even more likely, it could take a position that is substantially justified, yet lose." *Pierce v. Underwood,* 487 U.S. 552, 569 (1988).

If the Secretary had a reasonable basis in fact and in law to proceed with the case, he was substantially justified. *Id.* at 565. A reasonable legal position must be based on more than supposition or conjecture. It should be of a kind a reasonable mind might accept as adequate to support the proposed legal conclusion. A party which appears before a court or administrative tribunal is responsible for knowing the precedent and procedures applicable to the adjudicative body. This is not a case where the Secretary took a legal position contrary to settled law.

Because the Commission enunciated its jurisdictional rationale for the first time in this case, the Secretary cannot be charged with knowledge based on the case itself. Nor had the Commission reached an analogous conclusion in a previous case.[2] Prior to *Taynton* and *Jacksonville Shipyard,* the Secretary pursued the infrequent but routinely occurring cases in which a business entity ceased its operations. Those cases were usually resolved prior to hearing. *See Jacksonville Shipyards,* 16 OSHC 2053, 2055 (Weisberg, dissenting). Neither the courts, the Commission, nor the Secretary distinguished between whether the entity, which was an employer at the time of the violative conduct, abandoned its business before or after OSHA issued the citation. Following precedent and the then-accepted view of the jurisdictional issue, the Secretary proceeded in *Taynton* as if he had subject matter jurisdiction. His position that there was jurisdiction was reasonable and, thus, was substantially justified. Taynton's application for fees is denied to the extent that it is based on the April 27, 1995, Review Commission decision.

The Underlying ALJ Decision

Interpreting *INS v. Jean,* 496 U.S. 154 (1990), the Fourth Circuit observed that the EAJA does not favor, as *Jean* termed it, an "atomized line-item" analysis. *Roanoke River Basin Association v. Hudson,* 991 F.2d 132, 137 (4th Cir. 1993). Rather, courts are to look beyond the issue on which the fee-petitioner prevailed to determine, from the totality of the circumstances, whether the government acted reasonably *in the litigation. Id.* at 139. Viewing the case as a whole, it is

---

[2] The Commission's most similar ruling, *Jacksonville Shipyards, Inc.*, 16 BNA OSHC 2053 (No. 92-888, 1994), appeal pending, was not decided until September 30, 1994, a year after the ALJ decision and 3 years after OSHA's citation to Service.

concluded that the Secretary acted reasonably based on the facts he knew and the assumptions he made. Indeed, the Secretary was encouraged to proceed by the conclusion reached after the hearing on the first citation. Although he vacated that citation based on his finding that the purported employee may have been a visitor, Judge James D. Burroughs observed:

> The dismissal of the citations [is not]. . . a vindication of [Service's] approach, or non-approach, to safety. Had the Secretary established the existence of one employee, the evidence was more than sufficient to justify the finding of violations for each of the nineteen items cited . . . Compliance with the Act for employers is mandatory, whether or not an employer considers certain standards to be "ridiculous."

Taynton d/b/a Service Specialty Co., *slip op.* (No. 91-1709, 1992).

In litigating OSHA's second citation, the Secretary sought to prevent employee exposure resulting from Taynton's contined operation of the deteriorated barge-mounted crane. A primary issue, whether Service employed an employee, was decided in the Secretary's favor. Also of major dispute was the question of whether Taynton unacceptably altered the barge-mounted crane and compromised its safety. The Secretary, likewise, prevailed on this issue. The ALJ decision vacated certain of the alleged violations, reduced the classifications, or reduced the penalties. Failure to accept each aspect of the government's case does not negate the overall success of the action.

In fact, even if an EAJA analysis focused on the individual issues on which the petitioner prevailed, fees would not be awarded. The facts forming the basis for a governmental action need not be uncontradicted to support a "substantially justified" finding. If reasonable persons may fairly disagree whether evidence established a fact in issue, it can be said to be substantial. An important consideration in the ALJ's reduction of the classification and penalty was Taynton's testimony at the hearing. Because Taynton was refloating his barge at the time, the Secretary conducted an abbreviated inspection. The inspector observed that the barge-mounted crane appeared to be in the same bad shape or worse than when he had observed it during the first inspection. The investigator looked for such things as load charts and safety devices and found none there. Taynton did not advise the inspector at that time that, when the barge began sinking, he allegedly carried such items to a tug. Taynton provided no corroborating testimony or physical evidence to support the alleged transfer. The ALJ decision credited Taynton's testimony, although the issue clearly was not without

doubt. The Secretary's position to proceed with certain violations has not been rendered unreasonable because he failed to accept Taynton's possibly self-serving assertions.

With this in mind, the specific items on which Taynton prevailed need be only briefly discussed. Item 2a, § 1926.59(e)(1), asserted that Taynton had no hazard communication program. The ALJ decision accepted a more informal program since the substances were common products and Taynton had discussed the MSDSs with his only employee. The Secretary could reasonably assert, however, that Taynton did not have an adequate written program. Items 2b and 2c , § 1926.59(g)(1) and .59(h), were withdrawn. These items alleged that Taynton had not secured material safety data sheets (MSDS's) for hazardous chemicals or properly trained his employee on their use. Taynton had hazardous chemicals on board. The Secretary initially believed that Taynton had not secured MSDSs for the chemicals since they were not at the worksite at the time of the inspection and Taynton did not assert that he had them when initially asked by OSHA's investigator. In withdrawing the items, the Secretary stated (Sec.'s brief below pp. 30, 31):

> While respondent did not produce the MSDS[s] at the time of the inspection, the Secretary concedes that Mr. Taynton was occupied with a more important task, that of refloating his barge.
> * * *
> The Secretary concedes that respondent's problems at the time of the inspection did not allow an adequate interview of respondent and his employee, Mike Clark, to determine whether or not respondent fully complied with the provision of the cited standard.

The Secretary's original determination that Taynton failed to secure the MSDS's or train his employee on hazardous chemicals was reasonable based on the facts known to him at the time.

Item 3d, § 1926.550(a)(8), alleging exposure to rotating gears, was vacated. The ALJ decision agreed with the Secretary that the gears were not properly guarded. It rejected Taynton's argument that the gears did not need to be guarded. However, Taynton's one employee was not specifically shown to have been exposed to running gears when he performed his tasks. The Secretary relied on the fact that when the crane operated and the employee was on board, sufficient exposure was shown. The position was reasonable although not ultimately persuasive.

Item 4b, § 1926.550(a)(6), failing to make an annual inspection, was vacated. Item 4c, § 1926.550(a)(6), failing to record the results of the annual inspection, was withdrawn. The ALJ

vacated item 4b based on a credibility determination that, as stated, was not without doubt. The Secretary's position that credibility was lacking was reasonable. The Secretary withdrew item 4c because it was his theory that no inspection was made. He considered it to be inconsistent to assert that a nonexistent inspection was not properly documented (Sec.'s brief below p. 39). Had it not been withdrawn, item 4c may have been affirmed. The Secretary's initial position was reasonable.

Item 5a, § 1926.605(b)(2), required access to the barge. Item 5b, § 1926.605(d)(2) required that an employer provide lifesaving equipment, specifically a ladder to allow employees to get out of the water. In withdrawing the item 5a, the Secretary stated (Sec's brief below p. 39):

> While the respondent did not, in fact, comply with the provisions of this standard, his failure to do so is explained in part by the circumstances at the time of the inspection.

Since Taynton did not comply with item 5a, the Secretary was reasonable in pursuing the violation. As to item 5b, the Secretary accepted Taynton's testimony at face value, without additional proof of the assertion, that Taynton had permanently affixed a ladder on the stern of the barge which was underwater at the time of the inspection. The Secretary withdrew the item because the inspector "might not have seen a ladder so attached" (Sec. brief below p. 40). The Secretary was reasonable in concluding that there was no ladder since the investigator did not see a ladder, was not told that one had been added since the first inspection, and other cited deficiencies not been repaired.

In sum, because the Secretary's position both in the case as a whole and for the noted individual items was substantially justified, no award is made. It is unnecessary to determine which of the claimed fees and expenses are properly compensable.

NANCY J. SPIES
Judge

Dated: August 29, 1996