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

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

Secretary of Labor,
Complainant,

v.

VALLEY CONSTRUCTION CO.,
Respondent.

Docket No. 92-3644
(EAJA)

NOTICE OF DOCKETING

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on June 20, 1995. The decision of the Judge will become a final order of the Commission on July 20, 1995 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 July 10, 1995** 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) 634-7950.

FOR THE COMMISSION

June 20, 1995
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 92-3644

NOTICE IS GIVEN TO THE FOLLOWING:

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

Benjamin T. Chinni, Esq.
Associate Regional Solicitor
Office of the Solicitor, U.S. DOL
Federal Office Building, Room 881
1240 East Ninth Street
Cleveland, OH 44199

John T. Billick, Esq.
Buckingham, Doolittle & Burroughs
1375 E. Ninth Street
Cleveland, OH 44114

Ken S. Welsch
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:
COM (404) 347-4197
FTS (404) 347-4197

FAX:
COM (404) 347-0113
FTS (404) 347-0113

SECRETARY OF LABOR, Complainant, v. VALLEY CONSTRUCTION COMPANY, Respondent.	OSHRC Docket No. 92-3644 (EAJA)

DECISION AND ORDER

Valley Construction Company (Valley) seeks attorney and agent fees and other expenses in accordance with the Equal Access to Justice Act, 5 U.S.C. § 504, 29 C.F.R. § 2204.101, *et seq.*, for costs incurred in its defense against citations and proposed penalties issued by the Secretary on October 22, 1992.

Background

Valley, an electrical contractor, was engaged in electrical work at 150 Claremont, N.W., Canton, Ohio, in July 1992, when an employee was fatally electrocuted. After an OSHA inspection on October 22, 1992, Valley received a serious citation alleging violations of 29 C.F.R. §§ 1926.59(e)(1), 1926.59(g)(8), 1926.59(h)(2), 1926.152(a)(1), and 1926.556(b)(2)(v) with total proposed penalties of $4,000; and a willful citation alleging violations of 29 C.F.R. §§ 1926.21(b)(2) and 1926.416(a)(1) with a proposed grouped penalty of $17,500. On November 16, 1992, Valley filed its notice of contest.

The hearing scheduled for May 26, 1993, was postponed and on July 12, 1993, the parties filed a joint stipulation and settlement agreement. By settlement agreement, the Secretary amended the serious violations of §§ 1926.59(e)(1) and 1926.59(h)(2) to "other

than serious" with no penalty proposed; reduced the $750 penalty to $375 for the serious violation of § 1926.152(a)(1); reduced the $1,000 penalty to $500 for the serious violation of § 1926.556(b)(2)(v); vacated the serious violation of § 1926.59(e)(1); and vacated the willful citation alleging violations of §§ 1926.21(b)(2) and 1926.416(a)(1). Judge Edwin G. Salyers, since retired, approved the settlement agreement which became a final order of the Commission on September 7, 1993.

On October 5, 1993, Valley filed an Application for Award of Fees and Other Expenses in the amount of $17,750.50. The Secretary filed objections.

Equal Access to Justice Act (EAJA)

The EAJA applies to proceedings before the Commission in section 10(c) of the Occupational Safety and Health Act of 1970 (Act), 29 U.S.C. § 651, *et seq.* It ensures that an eligible applicant is not deterred from seeking review of, or defending against, unjustified Government actions. *Ewing v. Rodgers,* 826 F.2d 967 (10th Cir. 1987). An award is made to an eligible applicant who is the prevailing party, and only if the Government's action is found to be without substantial justification and there are no special circumstances which make the award unjust. *Asbestos Abatement Consultation & Engineering,* 15 BNA OSHC 1252, 1991 CCH OSHD ¶ 28,628 (No 87-1522, 1991). The EAJA does not routinely award attorneys' fees and expenses to a prevailing party. While the applicant has the burden of proving eligibility, the Government has the burden of demonstrating that its action was substantially justified. *Dole v. Phoenix Roofing, Inc.* 922 F.2d 1202, 1209 (5th Cir. 1991), 29 C.F.R. § 2204.106(a). The burden of showing substantial justification is not insurmountable. "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. Nor, in fact does the standard require the Government to establish that its decision to litigate was based on a substantial probability to prevailing." H.R. Rep. 1418, 96 2d. Sess. at 11, 18, 1980 U.S. Code Cong. & Admin. News, 4989 & 4997. See also *S & H Riggers & Erectors, Inc. v. OSHRC,* 672 F.2d 426, 430 (5th Cir. 1982).

Valley's Application

Despite settling the underlying case, Valley is seeking fees and expenses incurred by attorneys and agents used in defending against the alleged violations and proposed penalties. Valley argues that the evidence shows that the OSHA inspection was wholly inadequate and that none of the violations were justified.

Valley's application seeks fees and expenses incurred for the period of September 18, 1992, through May 26, 1993, in the total amount of $17,750.50. Attorneys' fees are claimed to be $6,608.50. The balance is for consulting services paid to Hayes Environmental Services, Inc. Valley's application is supported by an itemized statement showing the number of hours spent, a description of the specific services performed, the hourly rate, and expenses.

Valley Qualifies as Eligible

The party seeking an award for fees and expenses must submit an application within thirty days of final disposition in an adversary adjudication. 5 U.S.C. § 504(a)(2). The record shows that Valley's EAJA application was timely filed within thirty days after the settlement agreement became a final order of the Commission.

Additionally, the applicant in an EAJA case must meet certain eligibility requirements before it can be awarded attorneys' fees and expenses. Commission Rule 2204.105(b)(4) requires, among other criteria, that an eligible applicant be "a . . . corporation . . . that has a net worth of not more than seven million dollars and employs not more than five hundred employees . . . ." Eligibility is determined as of the date of the notice of contest. Commission Rule 2204.105(c).

In its application, Valley's president, by affidavit, states that the company was a corporation with a net worth less than 7 million dollars and employed less than 500 employees at the time of its notice of contest. In support, Valley attaches a copy of an accounting report reflecting assets in excess of 2 million dollars and 43 employees in 1992 and 1993. Despite questioning Valley's eligibility, the Secretary has not submitted any

evidence to the contrary. Therefore, Valley has satisfied the eligibility requirements of the EAJA.

Valley is the Prevailing Party As To Portion of Case

Once it is shown that the applicant meets the eligibility requirements of the EAJA, it must next be determined whether the applicant for the EAJA is the prevailing party. As stated by the Review Commission in *K.D.K. Upset Forging, Inc.*, 12 BNA OSHC 1856, 1857, 1986 CCH OSHD ¶ 27,612 (No 81-1932, 1986):

> Although the term is not defined in the EAJA, an applicant is considered to be the 'prevailing party' for the purpose 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.

A party need not have prevailed on all issues. It is sufficient that ". . . the 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, 1983-84 CCH OSHD ¶ 26,830, p. 34,358 (No. 80-3699, 1984). Also, a party may be deemed prevailing if it obtains a favorable settlement of the case. H.R. Rep. No. 1418, 96th Cong., 2d. Sess. 11 (1980), reprinted in 1980 U.S. Code Cong. & Admin. News at 4990.

Thus, the issue of whether Valley was the prevailing party involves reviewing each of the violations cited by the Secretary and determining by the settlement agreement whether Valley succeeded on any significant issue raised by the alleged violation and whether Valley achieved some of the benefit it sought in initiating litigation. *See H. P. Fowler Contracting Corp., supra*, at p. 34,358. Thus, each aspect of the cited violation in which Valley achieved some benefit must be reviewed.

There is no dispute that Valley was the prevailing party within the meaning of the EAJA as to the Secretary's withdrawal of the alleged serious violation of § 1926.59(g)(8) and the willful violations of §§ 1926.21(b)(2) and 1926.416(a)(1). The Secretary concedes that Valley was the prevailing party as to these violations (Secretary's Answer, pg. 4).

The more difficult question is whether Valley should also be considered the prevailing party as to those violations in which the Secretary reduced the penalty by fifty percent or reclassified to "other than serious" violations. "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 Corp.*, 11 BNA OSHC at 1846. Although arguably deriving some benefit from the reduction in penalty and reclassification, the record in this case shows that these modifications were not a discrete substantive portion of the case or what Valley sought from litigation.

The fifty percent penalty reduction involving serious violations of §§ 1926.152(a)(1) and 1926.556(b)(2)(v) saved Valley $875. The nature of the violations, the classification of the violations as serious, and Valley's requirement to abate the violations were not affected by the settlement. Valley's monetary savings of $875 in penalties is small in comparison to the $18,250 saved when the Secretary vacated the two willful violations and the one serious violation. Also, the fifty percent penalty reduction was not the reason Valley contested the violations. At the informal conference with the OSHA area director before initiating action, Valley sought to reclassify the violation of § 1926.152(a)(1) to "other than serious" and the withdrawal of the § 1926.556(b)(2)(v) violation (Valley's Application, Exh. B). Thus, by only achieving a small penalty reduction, Valley did not obtain what it had sought by filing its notice of contest. In fact, the area director at the informal conference offered to settle the matter with the fifty percent penalty reduction for both violations (Secretary's Answer, Exh. C-2). Therefore, for the purposes of its EAJA application, Valley is not considered the prevailing party as to the penalty reductions for violations of §§ 1926.152(a)(1) and 1926.556(b)(2)(v).

Similarly, the reclassification of the violations of §§ 1926.59(e)(1) and 1926.59(h)(2) to "other than serious" does not justify a finding that Valley was the prevailing party. The nature of the violations, the requirement to abate the violations, and the ability of OSHA to enforce future violations, if found, were by the reclassification not affected. Valley did save $1,500 by the elimination of the penalties. However, the reclassification of the § 1926.59(e)(1) violation to "other than serious" was offered by the area director at the

informal conference in November 1992. He also offered to reduce the penalty for violation of § 1926.59(h)(2) to $500 (Secretary's Answer, Exh. C-2; Valley's Application, Exh. B).

Thus, the penalty reductions or the reclassifications in the Secretary's settlement of serious violations of §§ 1926.59(e)(1), 1926.59(h)(2), 1926.152(a)(1), and 1926.556(b)(2)(v) do not establish Valley as the "prevailing party" within the meaning of the EAJA. However, by obtaining the Secretary's withdrawal of the serious violation of § 1926.59(g)(8) and the willful violations of §§ 1926.21(b)(2) and 1926.416(a)(1), Valley did achieve its primary reason for initiating litigation and was the prevailing party.

Substantial Justification

Having established that Valley met the EAJA eligibility criteria and that it was the prevailing party as to the Secretary's withdrawal of the violations of §§ 1926.59(g)(8), 1926.21(b)2) and 1926.416(a)(1), Valley is entitled to an award of fees and expenses under the EAJA unless the Secretary establishes that his position was substantially justified in pursuing litigation as to those violations, or the record shows special circumstances which would make an award unjust. 29 C.F.R. § 2204.101. "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, 1991-1993 CCH OSHD ¶ 29,986, p. 41,066 (No. 89-1366, 1993).

The reasonableness test breaks down into three parts: the Government must show "that there is a reasonable basis . . . for the facts alleged . . . that there exists a reasonable basis in law for the theory it propounds and that the facts alleged will reasonably support the legal theory advanced." *Gaston v. Bowen*, 854 F2d. 379, 380 (10th Cir. 1988).

The fact that the Secretary withdrew the violations does not raise a presumption that the Secretary's position was without substantial justification. *Hocking Valley Steel Erectors, Inc.*, 11 BNA OSHC 1492, 1983 CCH OSHD ¶ 26,549 (No. 80-1463, 1983). Valley argues, in part, that there is such a presumption and cites in support *Dun-Par Engineering Co.*, 11 BNA OSHC 1808, 1983-84 CCH OSHD ¶ 26,797 (No. 82-606, 1984), and *K.D.K. Upset Forge, Inc., supra*. However, a closer reading of these cases indicates that such a presumption may arise

as to the issue of "prevailing party" but should not apply to the issue of "substantially justified" unless the Secretary is unable to prove an essential element of the violation.

Also, substantial justification does not require the Secretary to establish that his decision to litigate was based on a substantial probability of prevailing but that his decision to litigate has a reasonable basis in law and fact. See H.R. Rep. No, 96-1418, 96th Cong., 2d Sess. at 13-14, reprinted in [1980] U.S. Code Cong. & Admin. News, 4992-93. A legal position is not substantially justified when it is based on supposition or conjecture. It must be supported by evidence. Evidence is substantial if it is the kind of evidence a reasonable mind might accept as adequate to support a conclusion. *Capital Tunneling Inc.*, 15 BNA OSHC 1304, 1991-93 CCH OSHD ¶ 29,894 (No. 89-2248, 1991).

To determine whether the Secretary has established that his position was substantially justified, the court must look to the record. 29 C.F.R. § 22004.307(a). Since this case was settled without a hearing, the record in this case consists of the submissions from the parties, including parts of the OSHA investigation, interview statements, and parts of depositions. The question for determination at this juncture is whether the Secretary was substantially justified in citing Valley for the alleged violations of §§ 1926.59(g)(8), 1926.21(b)(2), and 1926.416(a)(1).

Serious Violation of § 1926.59(g)(8)

The Secretary cited Valley for failing to maintain and make readily accessible to employees copies of material safety data sheets (MSDSs) of each hazardous chemical used at the workplace. Section 1926.59(g)(8) provides, in part, that:

> The employer shall maintain in the workplace copies of the required material safety data sheets for each hazardous chemical, and shall ensure that they are readily accessible during each work shift to employees when they are in their work area(s).

The Secretary argues that Valley failed to maintain MSDSs at each workplace for hazardous chemicals, such as gasoline and oil. The Secretary bases the violation on finding that some employees appeared to have no knowledge of what MSDSs were or where they

were maintained. Therefore, according to the Secretary, the MSDSs were also not "readily accessible" to employees as required by § 1926.58(g)(8).

Valley argues that due to the nature of its business, it was not required to have an MSDS at each workplace since its workplaces were mobile. Another regulation, § 1926.59(g)(9), provides that "[W]here employees must travel between workplaces during the workshift . . ., the [MSDS] may be kept at the primary workplace facility" as long as the employer can ensure that "employees can immediately obtain the required information in an emergency."

Thus, the initial inquiry is whether Valley was correctly cited under § 1926.59(g)(8) as opposed to § 1926.59(g)(9). In this regard, the OSHA inspector stated in his deposition that it was his understanding at the time of the inspection that Valley's employees moved from one work location to another during the work shift (Valley's Application, Exh. H). The inspector's work sheets at page 3 of 7, describes Valley's "job sites (mobile) . . . ." and noted that Valley kept the MSDS at its office (Secretary's Answer, Exh. C-18). Therefore, the evidence at the time of issuing the citation indicated that Valley's employees traveled between workplaces and the required MSDSs were maintained at its main office as required by § 1926.59(g)(9).

There is no evidence presented by the Secretary that employees could not obtain the information from the MSDS in an emergency as required by § 1926.59(g)(9). The Secretary's argument that some employees did not know what an MSDS was or where it was located demonstrates that Valley's hazardous communication training program, as required by § 1926.59(h), may have been deficient. Valley was cited for violation of § 1926.59(h)(2), which the Secretary amended to an "other than serious" violation in the settlement agreement. Such training deficiencies do not establish that MSDSs were not properly maintained and the information obtainable as required by § 1926.59(g)(9). Based on this record, the Secretary cited the incorrect standard and was not substantially justified in pursuing a violation of § 1926.59(g)(8).

Willful Violation of § 1926.21(b)(2)

As part of the willful citation, the Secretary alleged that Valley failed to instruct employees in the recognition and avoidance of unsafe conditions and regulations applicable to their work environment in violation of 29 C.F.R. § 1926.21(b)(2). Specifically, the citation alleges that "adequate training was not provided to employees working near energized electrical lines in a damp or wet location."

An employer complies with § 1926.21(b)(2) when it instructs employees about hazards they may encounter on the job and the regulations applicable to those hazards. *Concrete Construction Co.,* 15 BNA OSHC 1614, 1991-93 CCH OSHD ¶ 29,681 (No. 89-2019, 1992). Because of the potentially subjective nature of the standard, the Review Commission has incorporated a reasonableness requirement. "That is, to establish noncompliance, the Secretary must establish that the cited employer failed to provide the instructions that a reasonably prudent employer would have given in the same circumstances." *El Paso Crane and Rigging Co., Inc.,* 16 BNA OSHC 1419, 1424, 1991-93 CCH OSHD ¶ 30,231 p. 41,620 (No. 90-1160, 1993).

Based on the record in this case, Valley considered working on or near energized low voltage lines (120- and 240-voltage) in wet or damp conditions to be an "unsafe condition" as contemplated by § 1926.21(b)(2). Valley's general foreman acknowledged that working around secondary lines or low voltage lines "is as dangerous as primary, and that they [employees] should respect it the same. The potential is there - it is hard to compare the two." Further, he told the inspector that working near low voltage lines in wet or damp conditions "is usually discouraged but we (Valley) has to keep the public in service" (Secretary's Answer, Exh. C-4). Valley's president acknowledged that working on low voltage lines in wet or damp conditions "is normal procedure - everyone considers it dangerous" (Secretary's Answer, Exh. C-5). By recognizing it to be an "unsafe condition," Valley, under § 1926.21(b)(2), was required to instruct its employees in the recognition and avoidance of the hazards which may be encountered.

However, the record indicates that Valley's management and employees have different understandings as to what was required. Valley's foreman stated that it was up to the employee whether to wear rubber gloves while working on low voltage lines, but that leather gloves generally were used. However, in working in the rain, the foreman makes the call (Secretary's Answer, Exh. C-6). Valley's president, on the other hand, stated that no personal protective equipment was required while working on low voltage lines in damp or wet locations. It was at the discretion of the employee (Secretary's Answer, Exh. C-5). An apprentice lineman stated that he had not received any instruction from Valley about working on secondary voltage lines in wet weather. He uses rubber gloves while working on primary lines but leather gloves when working on secondary lines (Secretary's Answer, Exh. C-7). A journeyman lineman stated that he only used leather gloves when working on low voltage lines (Secretary's Answer, Exh. C-8).

Also, in informally surveying six other electric companies in the Ohio area, the OSHA inspector found that two companies required employees to wear rubber gloves while working on any voltage lines regardless of the conditions; another company required its employees to wear rubber gloves while working on any voltage lines if the conditions were wet or damp; a fourth company stated that it did not work in the rain; the fifth company stated that if it worked in the rain, it would require wearing rubber gloves; and the sixth company stated it depends on the method as to what type of gloves are to be worn in wet or damp conditions (Secretary's Answer, Exh. C-9). Based on this survey most, if not all, other electric companies require employees to wear rubber gloves when working on low voltage lines in damp or wet conditions.

Valley argues that it satisfied the training requirements of § 1926.21(b)(2) in that the union provides the apprenticeship training through the American Line Builders Apprenticeship Training (ALBAT) program and that once employed, Valley requires employees to attend safety meetings once or twice a week. First, ". . . the Commission has made clear that while the standard does not limit the employer in the method by which it may impart the necessary training, an employer that places too much trust in the quality of experience and training an employee has already acquired elsewhere runs the risk of violating the standard." *Ford Development Corp.,* 15 BNA OSHC 2064, 1991-93 CCH OSHD

¶ 29,000, p. 40,802 (No. 90-1505, 1992). Secondly, a representative of ALBAT told the OSHA inspector that "rubber gloves should be used (working around low voltage lines in wet or damp conditions) - this is a common sence [*sic*] thing. [N]o real establish cut and dry rules in this area" (Secretary's Answer, Exh. C-11). Thirdly, although Valley submitted records of its safety meetings (Secretary's Answer, Exh. C-14), there is no evidence that the deceased had attended any safety meetings. Also, under subjects discussed at the safety meetings, there is no showing that there was any discussion involving precautions to be taken by employees working on low voltage lines in wet or damp locations. Valley cites for the proposition that an employer satisfies the requirements of § 1926.21(b)(2) by having regular employees' safety meetings; *Archer-Western Contractors, Ltd.,* 15 BNA OSHC 1013, 1991-93 CCH OSHD ¶ 29,317 (No. 87-1067, 1991). However, in fact, the Review Commission found that the minutes of the safety meetings did not establish that employees were adequately trained in all phases of crane operations. It was the testimony of crane operators that revealed that the employees were, in fact, adequately trained. *Id.* at 1020.

In this case, there is no evidence that Valley's employees received training as to what safety precautions were required while working on low voltage lines in wet or damp locations. Therefore, the Secretary was substantially justified within the meaning of the EAJA in citing Valley for violation of § 1926.21(b)(2).

Willful Violation of § 1926.416(a)(1)

Valley was cited for willful violation of § 1926.416(a)(1), which requires an employer who permits an employee to work in proximity to any part of an electric power circuit to which he could come in contact, to protect the employee "by deenergizing the circuit and grounding it or by guarding it effectively by insulation or other means." The citation, as amended in the Secretary's complaint, describes Valley's alleged violation as follows:

> On or before 7/20/92, at 150 Claremont Avenue, N.W., Canton, Ohio, employees working on or near energized electrical lines that were not effectively guarded were not required to use the proper personal protective equipment which could prevent serious physical harm or death from electrocution.

The Secretary argues that a violation of § 1926.416(a)(1) is established when an employee is exposed to a shock hazard from contact with an electrical power circuit and no protective measures are used. The Secretary interprets "other means" to include personal protective equipment such as rubber gloves and sleeves. Valley argues, on the other hand, that the proper interpretation of "other means" does not include the use of personal protective equipment but rather refers to other means of guarding the electric power circuit itself.

The Secretary's interpretation is reasonable in view of the construction of the standard and its purpose, which is to protect employees who work around any part of an electric power circuit. The standard ensures that an employee working near an energized power circuit is protected from coming in contact by some means. It is reasonable for the Secretary to interpret "other means" to include employee personal protective equipment. Adequate personal protective equipment could prevent an employee from coming into contact with the energized power circuit.

The Secretary's accident investigation found that Valley's deceased employee was instructed to secure a street light brace to the pole after a heavy rain. The secondary line was energized; the line was insulated; the deceased was wearing leather gloves and rubber shoes; and the conditions were wet and damp (Secretary's Answer, Exhs. C-6, C-7). At the time of the accident, the deceased was working within one foot of the energized power line (Secretary's Answer, Exhs. C-6, C-17). Valley's safety rules, in part, require that "no employee shall be permitted to work in such proximity to any part of an electric power circuit that he may contact the same in the course of his work unless the employee is protected against electric shock by de-energizing the circuit and grounding it or by guarding it by effective insulation" (Secretary's Answer, Exh. C-12). These safety rules do not address the use of personal protective equipment such as rubber gloves.

In citing § 1926.416(a)(1), the Secretary's position appears to have been that if the deceased employee had been wearing rubber gloves or the power line had been de-energized, the accident might not have occurred. The Secretary's survey of six other Ohio electric companies found that at least five of the companies required employees to wear rubber gloves when working on any voltage power lines if the conditions were wet or

damp (Secretary's Answer, Exh. C-9). The ALBAT representative also seemed to express the need for wearing rubber gloves (Secretary's Answer, Exh. C-11). However, Valley did not require its employees to wear rubber gloves. It was left to the discretion of the employee.

Although these facts do not establish that the Secretary would have necessarily prevailed in this action, the Secretary has established that his theory has a reasonable basis in law and that the facts alleged would reasonably support the theory advanced. Thus, the Secretary has established that his position was substantially justified under the EAJA in citing Valley for violation of § 1926.416(a)(l).

Willful Classification and Penalty

The Secretary cited the violations of §§ 1926.21(b)(2) and 1926.416(a)(1) as willful violations with a grouped penalty of $17,500. This willful classification and penalty must also be considered in determining whether the Secretary was substantially justified under the EAJA. In this regard, it is noted that the Secretary offered to settle with Valley at the informal conference in November 1992 for reclassification of the violations to serious and a grouped penalty of $2,500. In his complaint, the Secretary pleaded the violations, in the alternative, as serious with a grouped penalty of $2,500. Finally, prior to the OSHA inspector's deposition in April 1993, the Secretary notified Valley that the violations were no longer considered willful but were reclassified as serious violations. Thus, it appears that the Secretary never steadfastly considered the violations as willful.

Under the Act, a violation is willful if it is committed with intentional disregard of, or plain indifference to, the Act's requirements. *Mel Jarvis Construction Co.*, 10 BNA OSHC 1052, 1981 CCH OSHD ¶ 25,713 (No. 77-2100, 1981). In showing plain indifference or intentional disregard, the Secretary points to statements made by Valley's management that the use of any personal protective equipment was within an employee's discretion (Secretary's Answer, pg. 27). This is despite Valley's recognition that work around low voltage lines could be as hazardous as working on primary power lines (Secretary's Answer, Exhs. C-4, C-5). Also, consideration is given to OSHA's informal survey of other Ohio

electric companies which seems to indicate that rubber gloves are necessary under these conditions.

Based on this record, the Secretary was substantially justified in initially classifying the violations of §§ 1926.21(b)(2) and 1926.416(a)(1) as willful. Also, the record supports the reclassification to serious violations in that the hazard of electrocution was present as evidenced by the fatality, and Valley's knowledge that such conditions were hazardous. 29 U.S.C. § 666(k). Finally, the proposed penalty appears appropriate and reasonable considering the high gravity of the violations and the fact that Valley is a small employer with no history of prior violations.

No Special Circumstances

There is no showing of special circumstances that would render an award of attorneys' fees and expenses unjust. Therefore, Valley is entitled to an award of fees and costs under the EAJA for the Secretary's lack of substantial justification in citing §1926.59(g)(8).

Valley's Application in Part is Allowed

In determining allowable fees and expenses under the EAJA, 29 C.F.R. § 2204.107 provides that such awards should be based on rates customarily charged by persons engaged in the business and that the fee should not exceed $75 per hour, unless the Commission determines that an increase in the cost of living or a special factor justifies a higher fee.

Valley's application for fees shows that its principal attorney claims $5,394 in fees for 37.40 hours of work at $145 per hour. Also, there is an additional claim of $1,214.50 for 34.70 hours of work done apparently by a paralegal at a rate of $35 per hour. Thus, the total amount claimed in attorneys' fees is $6,608.50, for a total of 72.10 hours during the period November 6, 1992, to May 26, 1993, when the settlement agreement was drafted. Additionally, Valley also claims expert or consultant fees in the amount of $10,980 charged by Hayes Environmental Services, Inc. Hayes showed 78.50 hours of work during the period September 18, 1992, to May 13, 1993, at $150 per hour plus $64 in expenses for postage, telephone calls and gasoline (Valley's Application, Exh. I). Thus, Valley's application seeks attorney and consultant fees and expenses in the total amount of $17,750.50 (the total fees

and expenses shown in the application when added together only support a request for $17,652.50).

In reviewing Valley's application, there is no justification shown for fees in excess of the $75 per hour rate, nor does the record or complexity of the case support a higher rate. Therefore, Valley's application is limited to a rate of $75 per hour.

Further, to the extent practicable, fees and expenses are limited to only the allegation in which the Secretary is found not substantially justified. In this case, it is the Secretary's pursuit of § 1926.59(g)(8). However, Valley's application is not segregated based on its costs in defending against this violation. Thus, the precise amount of fees or expenses incurred in defending against the alleged violation of § 1926.59(g)(8) is difficult, if not impossible, to ascertain with any degree of certainity.

In determining an appropriate fee, consideration is given to the complexity of the violation and the experience of the attorney. In this regard, Valley was cited under the incorrect standard, and the Secretary lacked evidence that information from the MSDS was not available in an emergency. Defending against this violation certainly did not require consultants or experts. Also, Valley's application fails to describe the purpose or need for engaging Hayes Environmental Services, Inc. Therefore, any fees and expenses claimed for Hayes Environmental are not allowed in this case.

Further, as described above, the nature of Valley's defense was that it was cited under the incorrect standard. Due to the nature of its work, Valley was only required to maintain the MSDS at a primary workplace facility. The Secretary withdrew the alleged violation by letter dated May 7, 1993 (Secretary's Answer, Exh. C-46). In calculating appropriate attorneys' fees for defending against the violation, it is concluded that Valley is eligible to receive $750, which represents 10 hours of work at a rate of $75 per hour. This is 11 percent of the total amount of attorneys' fees claimed. Also, 10 hours represents approximately one-seventh of the total attorney hours claimed. It is noted that there were only seven violations cited. Attorney time clearly was spent in preparing the answer and the settlement agreement, a small portion of which would have involved the alleged violation of § 1926.59(g)(8). Also, time was spent in discovery specifically on the alleged violation. This is reflected in the deposition of the OSHA inspector (Valley's Application, Exh. H, pgs.

46-47). Further, in considering an appropriate fee, it is noted that Valley's attorney is an experienced OSHA attorney and the issue of applicability of the standard is not viewed as complex or difficult. Thus, an award of $750 is reasonable and appropriate in this case.

FINDINGS OF FACT AND 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: Valley's application for attorney fees and expenses is granted in the amount of $750.

KEN S. WELSCH
Judge

Date: June 8, 1995