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OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR, Complainant, v. KIT CARSON APARTMENTS, LLC; HELTEN ENTERPRISES, LLC; AND RONALD HELTEN, and their successors, Respondent.	OSHRC DOCKET NO. 02-0929

DECISION AND ORDER

Respondent Kit Carson Apartments, LLC seeks attorney fees and expenses in accordance with the Equal Access to Justice Act, 54 U.S.C. § 504 ("EAJA") and implementing regulations set forth at 29 C.F.R. §2204.101, *et seq.*, for costs incurred in its defense against the Occupational Safety and Health Administration (OSHA).

BACKGROUND

During January 2002, the El Paso County, Colorado Health Department received a complaint regarding possible asbestos exposure at the Kit Carson Apartments complex. The complex consists of two apartment buildings located at Security, Colorado, and at the time of the OSHA inspection, was owned by Kit Carson Apartments, LLC, a limited liability Colorado corporation (hereinafter known as KCA). The county health inspector telephoned the apartment and spoke with the manager who stated that Ronald Helten, owner, would return his telephone call. Thereafter, pursuant to a telephone conversation with Mr. Helten, the inspector visited the apartment complex. The inspector's written report was subsequently referred to the Occupational Safety and Health Administration (OSHA) for further action. The report indicated that Mr. Helten was the owner of the apartment buildings. On February 11, 2002, an OSHA compliance officer conducted an inspection of the worksite. Mr. Helten was out of town; however, the compliance officer interviewed the apartment manager, Ms. Ruth Hatch, who, at the request of the compliance officer, completed an "employee questionnaire." Ms. Hatch identified Mr. Helten as the president/owner of the complex and revealed that three employees worked at the site. As a result of the

inspection, OSHA issued one serious citation listing five alleged violations and one willful citation alleging one violation. The citations were issued to Kit Carson Apartments, LLC and dated April 29, 2002.

On May 13, 2002, Mr. Ronald Helten for the first time contacted Respondent's counsel by telephone regarding the citations. A notice contesting the citation was filed with OSHA by Respondent's counsel on May 17, 2002 and a complaint was filed with the Commission on July 9, 2002. Respondent's petition herein indicates that counsel conferred with Mr. Helten by telephone or in person on five separate occasions prior to filing an answer to the complaint on July 24, 2002. The answer, *inter alia,* denies the allegation that KCA is an employer within the meaning of the OSH Act. As reflected by Respondent's counsel's petition, not only was Respondent's employer status denied in the answer, counsel actively researched non-employer defenses as of August 12, 2002.

According to the affidavit of Russell P. Kramer, certified public accountant, Respondent KCA was created during December 1998 and Ronald Helten and his wife, Mary Helten, are shareholders of the corporation, as well as "statutory members." Helten Enterprises, a Colorado limited liability corporation, has as its shareholders Ronald Helten and Mary Helten (10% ownership) with Ronald Helten and Kristine Villens (Ronald Helten's children) holding the remaining 90% of the stock. All four individuals are "statutory members" of Helten Enterprises LLC. Helten Enterprises provides managerial and other services to Kit Carson Apartments which, as previously stated, is owned by Respondent Kit Carson Apartments, LLC. The corporate offices for Kit Carson Apartments, LLC and Helten Enterprises, LLC are located at the same business address. According to Complainant, the apartment complex, having an approximate value of 2.7 million dollars, was owned by Ronald Helten. Mr. Helten sold the property to Kit Carson Apartments, LLC for the nominal sum of $1,000 a few months prior to the OSHA inspection. This allegation has not been denied by any of the Respondents in this case.

On September 27, 2002, counsel for Respondent KCA deposed the OSHA compliance officer who conducted the worksite inspection. Counsel for Respondent questioned the compliance officer closely regarding the employer status of Respondent KCA. From excerpts of the deposition submitted by Complainant's counsel, it is clear that the Secretary, through its counsel, believed that Kit Carson Apartments, LLC was the employer of exposed employees. However, counsel for Complainant repeatedly requested Respondent's counsel to clarify the employer issue. In its memorandum of law in opposition to Respondent's petition herein, Complainant stated the following:

> "During Mr. Villanueva's deposition, Complainant asked counsel for Respondent, KCAL, if it was his position that KCAL did not employ the employees working at KCA.

Respondent's counsel refused to respond to the question. The following was taken directly from Mr. Villanueva's deposition.

> MR. HAMPTON:Objection. Asked and answered. **He has already said over and over again, quite frankly, that Mr. Ronald Helten is the owner. Now, if you -- and I'm trying my best not to be difficult here, <u>but if you have some evidence that indicates that he is not, it would advance this process very quickly if you would divulge that.</u> And if you don't want to, that is your right. But he has testified over and over again, and I have listened to him, <u>and he said that he believed Mr. Helten is the owner. If that is legally incorrect, then say so.</u> But he had already testified to it, and he is not the correct witness to deal with this issue. (citation omitted).**
>
> MR. HAMPTON:
>
> ...Okay. Look, this is silly. He is – I'm just simply saying, he has already testified that he believes Mr. Helten is the owner. If that is incorrect, we will find that out at trial. **<u>If you have something that indicates otherwise, that is fine.</u>**
>
> MR. HAMPTON: Mr. Gonzales, if you are going to represent – and I don't understand this. **<u>If Mr. Helten is not the owner or a shareholder or a principal agent of the company, it would advance this litigation and save your client money for you just to indicate so.</u>**
>
> The fact that he has made a mistake or not made a mistake about "Mr. Helten's proper title" isn't really relevant. **<u>And I would really say to you that if this is something that you and I can figure out on our own – he has said that Mr. Helten and Ruth Hatch has represented that Mr. Helten is the owner.</u>**
>
> He is not a lawyer. It is not his job to be a lawyer. If we have made a mistake about who the owner is, that is fine. He has answered your question. He doesn't know. He believes that Mr. Helten is the owner, and I don't know how the process is being advanced for us to continue to discuss it. I don't. (Citation omitted) (emphasis in the original).

The matter was set for trial commencing November 13, 2003 by order dated September 5, 2002. On October 28, 2002, Respondent mailed a motion to dismiss the complaint and citations to the undersigned and Complainant's counsel. The grounds alleged in support of the motion were that Respondent Kit Carson Apartments, LLC was not an employer and did not employ anyone at Kit Carson

Apartments. According to Respondent's counsel, he was not aware that KCA was not an employer until he deposed the compliance officer (Tr. 8). Pursuant to Commission Rule 40(c), Complainant had 10 days from the date of service to file a response to the pleading. Computing the time in which Complainant was required to respond pursuant to Commission Rules 4(a) and 4(b), Complainant was required to file a response no later than November 15, 2002; two days after the commencement of the hearing. Moreover, pursuant to Rule 40(b), the mere filing of a motion does not automatically postpone a hearing. Respondent's counsel did not file a motion seeking a continuance of the hearing date. On November 12, 2002, Complainant filed a response to Respondent's motion to dismiss.

On November 13, 2002, the hearing in this matter was convened at Denver, Colorado. At the beginning of the hearing, pending motions including Respondent's motion to dismiss were discussed on the record with counsel. Since Respondent had filed its motion so close to the hearing date that no time was allowed for the undersigned to consider the merits of the motion prior to the trial date, Respondent's motion was denied without prejudice (Hearing transcript Tr. 3-10). Thereafter, the parties were invited to make opening statements.

During his opening statement, counsel for Complainant argued that Ronald Helten controlled the business activities of Helten Enterprises, LLC; Kit Carson Apartments, LLC and Kit Carson Apartments (Tr. 46, 47). Complainant alleged that Ronald Helten personally owned Kit Carson Apartments during part of the investigative period and possessed the authority to fire employees and "control the employees' environment" (Tr. 47). Counsel for Complainant verbally moved that the complaint be amended to include Helten Enterprises, LLC and Ronald Helten as Respondents pursuant to Rule 15, Federal Rules of Civil Procedure on the ground that Ronald Helten and Helten Enterprises, LLC were the employers of exposed employees.[1] Counsel for Complainant further alleged that Kit Carson Apartments, LLC is an affiliate of Helten Enterprises, LLC (Tr. 74), that both corporations are closely held and "have identity of parties" (Tr. 74).

Counsel for Respondent Kit Carson Apartments, LLC stated that he did not represent Ronald Helten, individually, nor Helten Enterprises, LLC and he was not authorized to respond to the motion on their behalf (Tr. 55, 57, 60, 61, 62). Based upon the fact that the entities which Complainant sought to be included as parties to the action were not represented at the hearing, the trial was continued to allow counsel for Complainant to file a written motion to amend the Complaint.

By written motion dated November 22, 2002, Complainant sought to include Helten Enterprises,

[1]Counsel for Respondent KCA acknowledged that Helten Enterprises was the employer of exposed employees at the worksite (Tr. 59).

LLC and Ronald Helten, an individual, as party Respondents to this action. The ground for the amendment was the allegation that the three Respondents shared "an identity of interests" to the extent that they constituted a single entity having a common work site, interrelated and integrated operations and sharing one management or ownership. (Complainant's brief, pp. 12, 13, citing *Trinity Industries Inc.*, 1981 CCH OSHD ¶ 25,297, p. 31, 322). The motion was submitted pursuant to Rule 15, Federal Rules of Civil Procedure. Moreover, Complainant alleged that the failure to name Helten Enterprises, LLC and Ronald Helten as Respondents at an earlier date was a mistake based upon the subterfuge of Respondent's counsel (Brief, *supra*, pp. 4-9, 14, 17).

Respondent, Kit Carson Apartments, LLC, opposed the Secretary's motion to amend on the ground that the amendment lacked good cause, was "delinquent and untimely, and materially prejudiced Respondent" (KCA brief, p. 4). By separate counsel, Helten Enterprises, LLC and Ronald Helten also filed an opposition dated December 13, 2002, to the motion to amend on the ground that the Commission lacked jurisdiction over those parties, the motion was untimely, and the amendment was barred by the statute of limitations because the amendment did not relate back to the date of the original pleadings. Based upon the allegations contained in Complainant's motion and supporting memorandum, the motion to amend the Complaint was granted by order dated December 18, 2002, and the hearing was rescheduled for April 7, 2003. By motion dated December 23, 2002, Helten Enterprises, LLC and Ronald Helten filed an interlocutory appeal of the December 18, 2002 order with the Review Commission. By motion dated December 24, 2002, Respondent Kit Carson Apartments, LLC also filed an interlocutory appeal of the denial of its motion to dismiss with the Review Commission. Both appeals were denied by the Commission on January 24, 2003. Respondents Helten Enterprises, LLC and Ronald Helten filed an answer to the amended complaint on January 24, 2003.

On April 1, 2003, Complainant and Respondents Helten Enterprises, LLC and Ronald Helten filed a settlement agreement with the Commission for approval. The agreement, *inter alia*, reduced the penalty from $31,500 to $5,500, removed Ronald Helten as a Respondent, acknowledged that Helten Enterprises, LLC was the employer of exposed employees and "for settlement purposes only" stated that Respondent Kit Carson Apartments, LLC was not an employer within the meaning of the OSH Act at all times relevant to this matter.

The settlement agreement was approved by order dated April 14, 2003, and based upon the agreement that Respondent Kit Carson Apartments, LLC was not an employer, as stated in the settlement agreement, the motion to dismiss filed on March 13, 2003, by Respondent KCA was granted. A hearing on the merits of the case was not held nor has any evidence other than the assertions of the respective

attorneys been received as part of the record. Kit Carson Apartments, LLC now seeks attorney fees in the amount of $55,065.00 and expenses in the amount of $1,091.62.

DISCUSSION

The Equal Access to Justice Act (EAJA) applies to proceedings before the Commission through section 10(c) of the Occupational Safety and Health Act of 1970 (Act), 29 U.S.C. § 651, *et seq.* The purpose of the EAJA is to ensure that an eligible applicant is not deterred from seeking review of, or defending against, unjustified actions by the Secretary. *K.D.K. Upset Forging, Inc.*, 12 BNA OSHC 1857, 1859, 1986 CCH OSHD ¶ 27,612 (No. 81-1932, 1986). An award is made to an eligible applicant who is the prevailing party if the Secretary'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). While the applicant has the burden of proving eligibility, the Secretary has the burden of demonstrating that her action was substantially justified 29 C.F.R. § 2204.106(a). However, EAJA does not allow routine award of attorney's fees and expenses to a prevailing party. There is no presumption that the Secretary's position was not substantially justified, simply because she lost the case. Moreover, the Act does not require that the Secretary's decision to litigate be based on a substantial probability of prevailing. *S & H Riggers & Erectors, Inc. v. OSHRC,* 672 F.2d 426, 430 (5th Cir. 1982).

ELIGIBILITY

Respondent Kit Carson Apartments, LLC filed its application for attorney fees in a timely manner. In addition, an applicant must establish that on the date that it filed its notice of contest, it is a "partnership, corporation, association, or public or private organization that has a net worth of not more than seven million dollars and employs not more than 500 employees. 29 C.F.R. § 2204.105. Respondent's petition provides documentation establishing the net worth of Kit Carson Apartments as $922,056 based upon an asset value of $4,104,823 less a mortgage debt in the amount of $3,182,767. The Secretary agrees that at all times relevant to this case, Respondent KCA did not have any employees. The Secretary in her response to the petition does not dispute Respondent's eligibility. Accordingly, Respondent's petition establishes its eligibility at the time of its notice of contest.

PREVAILING PARTY

To be considered as a "prevailing party" within the meaning of the Act, the record must establish that Respondent succeeded on any significant issue involved in the case and achieved some benefit which it sought in pursuing litigation. *K.O.K. Upset Forging, Inc.*, 12 BNA OSHR 1856, 1857 (1986). It is not necessary for Respondent to have prevailed on all issues but only as to a "discrete substantive portion of

the proceeding." *H.P. Fowler Contracting Corp.*, 11 BNA OSHC 1841, 1845 (1984). Respondent asserts that it is entitled to recoup all of its attorney fees and expenses because the Secretary agreed in the settlement agreement filed in this matter that Respondent Kit Carson Apartments, LLC was not an employer within the meaning of the OSH Act. (Settlement Agreement, p. 4). Based upon that acknowledgment, the complaint against Respondent was dismissed.

Complainant disputes that Respondent is a prevailing party within the meaning of the EAJ Act on the ground that Respondent Kit Carson Apartments, LLC and Respondents Helten Enterprises, LLC and Ronald Helten constitute a single entity because they were engaged in interrelated and integrated business activities having a common ownership, common worksite and common management. However, that issue was never litigated in this case. Although Complainant alleged that the aforesaid entities constituted an integrated enterprise, which was denied by Respondent Kit Carson Apartments, LLC, that issue was never litigated nor has a decision been rendered accepting or denying Complainant's argument. Thus, since Respondent Kit Carson Apartments, LLC has achieved that which it sought in pursuing litigation; that is, the dismissal of the complaint against it, that must be considered as succeeding on a significant discrete issue. Thus, Respondent fulfills the requirements for being a prevailing party within the meaning of the Act.

SUBSTANTIAL JUSTIFICATION

As an eligible prevailing party, Respondent may be entitled to an award of attorney fees and expenses unless the Secretary establishes that her position was substantially justified in pending litigation or the record shows special circumstances which makes an award unjust. "The test of whether the Secretary's action is substantially justified is essentially one of reasonableness in law and fact." *Mautz & Orem, Inc.*, 16 BNA OSHC 1006, 1991-1993 CCH OSHD ¶ 29,986, p. 41,066 (No. 89-1366, 1993). The Secretary must show that there is a reasonable basis for the facts alleged; for the theory she propounds; and that the facts alleged will reasonably support the legal theory advanced. *See Gaston v. Bowen,* 854 F.2d 379, 380 (10th Cir. 1988). The fact that the Secretary may have lost as to these items does not mean that her position in pursing them in litigation was not substantially justified. *S & H Riggers & Erectors, Inc. v. OSHRC, supra,* at 430. In cases before the Commission, facts need to be proved by only a preponderance of the evidence, not by clear and convincing evidence or beyond a reasonable doubt. The EAJA should not be read to deter the Secretary from pursuing in good faith cases which are reasonable in advancing the objective of workplace safety and health, if such cases are reasonably supportable in fact and law. The facts forming the basis of the Secretary's position need not be uncontradicted. If reasonable persons fairly disagree whether the evidence establishes a fact in issue, the Secretary's evidence can be said

to be substantial. The phrase "substantially justified" means "justified in substance or in the main . . ., that is, justified to a degree that could satisfy a reasonable person. This interpretation of the phrase accords with related uses of the term 'substantial' and is equivalent to the 'reasonable basis both in law and fact' formulation adopted by the vast majority of courts of appeals." *Pierce v. Underwood*, 108 S. Ct. 2541, 2543 (1988).

The issue presented by this petition is whether the Secretary of Labor was substantially justified in believing that Respondent Kit Carson Apartments, LLC was the employer of employees exposed to hazardous substances. There is no dispute that the situs of the alleged violations was the Kit Carson Apartment complex owned by Kit Carson Apartments, LLC and that employees working at the complex were potentially exposed to asbestos. The referral from the El Paso County, Colorado Health Department to OSHA listed the name of the establishment as "Kit Carson Apartments LLC" (Exhibit 1 to Complainant's opposition to the petition for attorney fees). Moreover, the notes accompanying the referral indicate that a complaint alleging asbestos exposure at the apartment buildings had been received by that agency and an investigator was told by the apartment manager that Ronald Helten was the owner. The investigator met with Mr Helten at the facility and verified that asbestos was present. Thereafter, an inspection of the facility was conducted by an OSHA inspector who, in the company of the apartment manager, Ruth Hatch, determined that hazardous conditions existed at the worksite. Ms. Hatch also stated that she worked for Ronald Helten, the owner of the apartment buildings (see Exhibit 4 to Complainant's opposition). Moreover, the employer questionnaire form completed by Ms. Hatch at the request of the compliance officer lists Kit Carson Apartments as the name of the company and Ronald Helten as the owner/president (See Exhibit 5, *supra*). There is no evidence in the record of this case establishing that the state inspector or OSHA's inspector were told that the employees working at the apartment complex were employed by Helten Enterprises, LLC. To the contrary, it was reasonable for Complainant to conclude that the exposed employees were employed by Kit Carson Apartments, LLC. Indeed, the corporate status of Kit Carson Apartments, LLC was verified by the Secretary (*supra*, Exhibit 6).

Although the inspection in this matter was conducted on February 11, 2002 and a complaint filed on June 9, 2002, it was not until September 27, 2002, during Respondent's deposition of the compliance officer that Respondent's questioning of the compliance officer led the Secretary's counsel to suspect that Respondent KCA was not the employer.[2] Although Respondent's counsel was not forthcoming in his responses to Complainant's counsel's inquiries regarding employment status of the employees during its

[2]Respondent's Answer to the complaint was a general denial of the allegations and did not alert Complainant that Helten Enterprises was the employer of exposed employees.

deposition (see background discussion, *supra*), it is clear that the employment status of the employees became a significant issue. On October 28, 2002, fifteen days prior to the hearing in this matter, Respondent's counsel filed a motion to dismiss, which, for the first time affirmatively alleged that Respondent Kit Carson Apartments, LLC was not an employer within the meaning of the Act. The information provided in support of the motion, however, would lead one to conclude that Ronald Helten; Helten Enterprises LLC; Kit Carson Apartments, LLC and Kit Carson Apartments engaged in interrelated and integrated operations such that they constituted a single entity. See *Trinity Industries, Inc.*, 9 BNA OSHC 1515 (1981). Indeed, the undersigned, at the hearing in this matter, expressed the view that the evidence tended to support the conclusion that Mr. Ronald Helten directed the operations of all of the aforesaid operations and each entity had integrated operations with each other (Tr. 57). Based upon that evidence and the arguments made by Complainant's counsel, Complainant was allowed to amend the citation to allege the close business relationship between the parties and present evidence in support of the amendment. In other words, the state of the record at that time led the undersigned to believe that there was sufficient evidence in support of the amendment and it was reasonable for the Secretary to pursue that theory.

Although the issue was never fully litigated prior to the settlement agreement, it was reasonable for the Secretary to believe that the various entities listed above constituted a single entity. See *Trinity Industries, supra; Advanced Specialty Co.*, 3 BNA OSHC 2072 (1976); *Simpson Metal Industries, Inc.*, 1975-76 OSHD (CCH) ¶ 20,293. Accordingly, Complainant was substantially justified in maintaining Kit Carson Apartments, LLC as a Respondent in this matter as a constituent part of a closely held integrated operation owned and controlled by Ronald Helten and his family members. Since it was reasonable for Complainant to believe that Kit Carson Apartments, LLC was an integral part of that integrated operation, there is no basis for awarding attorney fees to Respondent.

The most troubling aspect of this matter is the fact that Respondent has unreasonably protracted this litigation. It is clear that the person most knowledgeable about the business activities of Kit Carson Apartments, LLC and Helten Enterprises, LLC is Ronald Helten. These closely held, family operated, businesses are operated primarily by Mr. Helten. He has actively participated in the defense of this matter from its inception (see Respondent's petition for attorney fees, Ex. B) and provided most of the factual setting to Respondent's counsel.[3] It is reasonable to conclude, based upon the record of this matter, that

[3]The Secretary issued a subpoena to an employee working at the apartment complex requiring her appearance at the trial in this matter. Mr. Helten provided that witness with a motion seeking to quash the subpoena. (Tr. 33-35).

Mr. Helten informed Respondent's counsel of the employment status of the individuals employed at the apartment complex during the initial preparation of the case. Indeed, counsel researched affirmative defenses as early as May 15, 2002 and non-employer defenses as early as August12, 2002. It is disingenuous, at the least, for Respondent's counsel to state that he was not aware of which entity employed the exposed employees at the apartment complex until he deposed Complainant's compliance officer on September 27, 2002. (Tr. 8). Respondent was well positioned to set the record straight regarding the employment issue at the earliest stage of this litigation and consciously failed to do so. *See, Astra Pharmaceutical Products,* (1st Cir. 1982), 10 OSHC BNA 1697 at 1700 citing *Noranda Aluminum Inc.*, 593 F.2d 811, 814 and n. 5 (8th Cir. 1979). *Stephenson Enterprises Inc.*, 578 F.2d 1021, 1026 (5th Cir. 1978). The failure to file an appropriate motion until the eve of trial clearly violates the letter and intent of Commission Rule 40(b) which requires litigants to file motions "as soon as the grounds therefor are known." As a result of that failure, this otherwise routine and non-complex case has resulted in months of needless legal activity and five file folders of written documentation. It is noteworthy that the matter was settled quickly for a substantial reduction in the proposed penalty when additional counsel was obtained by Respondent Ronald Helten.

CONCLUSION

For the foregoing reasons, the petition of Respondent Kit Carson Apartments, LLC seeking an award of attorney fees and expenses is DENIED.

/s/
Robert A. Yetman
Judge, OSHRC

Dated: September 22, 2003