United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR,

Complainant,

v.

STAZ-ON ROOFING, INC., and its successors,

Respondent.

OSHRC DOCKET NO. 02-2229

DECISION AND ORDER

Respondent, Staz-On Roofing, Inc., 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. §2204.1, *et seq.*, for costs incurred in its defense against the Occupational Safety and Health Administration (OSHA).

BACKGROUND

During the period November 12-14, 2002, a compliance officer employed by OSHA initiated an investigation of Respondent's worksite located at Haltom City, Texas. Respondent's employees were engaged in laying roofing felt on the roof of a three-story building. The compliance officer observed certain employees on the roof who were not wearing personal fall protection equipment. After interviewing employees, the compliance officer recommended to her supervisor that a citation listing two alleged violations be issued to Respondent. The first item in the citation alleged a failure to train employees in the recognition and avoidance of unsafe conditions (29 C.F.R. 1926.21(1)(a) and the second item alleged a failure to protect employees by way of personal fall arrest systems, safety nets or guardrails (29 C.F.R. 1926.501(b)(13).

At the commencement of the hearing on April 9, 2003, the Secretary's counsel withdrew item 1 of the citation (training) and the proposed penalty for that item. The hearing was conducted for the remaining issue and a decision affirming item 2 of the citation became a final order of the Commission on September 5, 2003. Respondent filed its petition for attorney fees in the amount of $8,200.00 and expenses in the amount of $213.42 pursuant to the Equal Access to Justice Act for costs incurred in

defending against withdrawn item 1. Respondent's application has been filed in a timely manner (29 C.F.R. §2200.302(a)).

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

To be eligible for costs pursuant to EAJA, an applicant must establish that on the date that it filed its notice of contest, it was 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 its net worth as $368,935.35 as well as the assertion that "the company employed 10 employees" at the time that the notice of contest was filed. Complainant does not dispute Respondent's eligibility under the Act. 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 is 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 the prevailing party with respect to item 1 of the citation (training) because the Secretary withdrew that item from the matters to be tried at the hearing. Thus, according to Respondent, it has prevailed on a "discrete substantive portion of the proceeding" by achieving that which it sought in pursuing litigation; that is, the dismissal of item 1 of the citation. Complainant does not dispute that Respondent constitutes a prevailing party as to that item. Accordingly, Respondent is a prevailing party within the meaning of the EAJ Act with respect to item 1 of the citation.

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 pursuing 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 a 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).

It has been established that the Secretary withdrew the training citation from litigation at the commencement of the hearing (Tr. 6). Complainant asserts, however, that she had substantial justification for pursuing that allegation up to the time that the citation was withdrawn.

According to Complainant, compliance officer Ruth Rodriguez interviewed five employees at the job site on November 14, 2004. When asked by the compliance officer whether they had received any

training in fall protection, four of the five employees stated that they had been trained. The fifth employee, Mr. Morales, told the compliance officer that he had received no training from the Respondent. Based upon this statement, the compliance officer recommended that the so-called failure to train citation be issued to Respondent.

During her deposition taken on March 25, 2003, the compliance officer acknowledged that there would be "no basis" for the citation if Mr. Morales had received "some training" to recognize fall hazards. (Deposition of CO Rodriguez, p. 16, attached to Complainant's memorandum of law.) Moreover, the Secretary, at page 3 of her memorandum, states "[t]here was no doubt that the Secretary was only alleging that Mr. Morales had not been trained." Although the OSHA form 1-B provided to Respondent on January 23, 2003 (Exhibit B to Complainant's memorandum) states that multiple employees were exposed to a fall hazard, it only lists Mr. Morales specifically as an exposed employee.

On March 7, 2003, Respondent mailed responses to Complainant's interrogatories to the Solicitor's office. The Secretary had served the following interrogatory dealing specifically with training:

> **INTERROGATORY NO. 8.** For the period of September 1, 2001 through November 15, 2002, please identify any and all safety meetings or training programs held at the job site or held off-site for Respondent's employees relating to fall protection. In identifying each training program or safety meeting, please identify the date, time, substance or topic covered, and individuals present at the meeting.

In response, Respondent stated:

> Respondent's employees received informal on-the-job training on fall hazards and fall protection on a continuous basis. Respondent's employees also received formal training on fall hazards and fall protection when Staz-On sent them to OSHA's 10 hour course on Construction Safety & Health. The two employees allegedly without fall protection in this case, James Copely and Omar Torres, attended the OSHA course on June 20-21 and July 25-26, 2002, respectively. Employees also attended formal weekly safety meetings and the topic of falls and fall protection was discussed on a rotating basis during those weekly meetings. Copies of safety minutes of these weekly meetings that Respondent has been able to locate at this point are attached. These minutes reflect that in 2002 formal training on fall hazards and fall protection was given on 1/10/02, 7/8/02, 7/29/02, 9/10/02, and 11/11/02, the last training being just one day before the inspection in this case.

Complainant acknowledges that the safety meeting records supplied by Respondent indicate that Mr. Morales attended four safety meetings wherein "fall causes," "fall protection" and "OSHA Top Ten" were discussed. However, Complainant asserts that the scarcity of information provided was insufficient to

determine whether Mr. Morales had received training which complied with the cited standard. Thus, Complainant argues that as of March 7, 2004, there was substantial justification for pursuing the alleged training violation as it applied to Mr. Morales particularly since Respondent had failed to establish that Morales had attended the "OSHA Ten Hour Course." (Complainant's brief, p. 5).

On March 25, 2003, Complainant took the deposition of Daniel Crawford, Respondent's on-site superintendent. During the deposition, Respondent's counsel stated that the training records provided in response to interrogatory 8 (*supra*) were "representative minutes of safety meetings." In addition, Mr. Crawford provided additional information regarding the company's training policies for all employees. Crawford provided no information, however, regarding the specific training provided to Mr. Morales. On March 28, 2003 Respondent provided pretrial information required to be exchanged by the parties pursuant to an order issued by the undersigned on January 23, 2003. In his transmittal letter, Respondent's counsel states:

> We are hereby supplementing Respondent's Answers to Interrogatories to add Mr. Paul Graham as a person with knowledge of relevant facts. His omission was an oversight that I did not catch until I prepared the prehearing exchange. The synopsis of his knowledge is set forth in the prehearing exchange.

In relevant part, Respondent's pretrial exchange stated that Mr. Graham would testify that "all Staz-On workers observed by OSHA had been trained on fall hazards and use of personal fall protection systems, including, specifically, Miguel Morales." Based upon the above information, as well as additional information received by Complainant on April 1, 2003, in Respondent's pretrial exchange, Complainant made the decision to withdraw item 1 of the citation (Complainant's brief, p. 6). Although Complainant states that the decision to withdraw the item was made on that date, Respondent's counsel states that he was unaware of the withdrawal until the hearing when Complainant's counsel withdrew the item on the record.

DISCUSSION

Based upon the foregoing, it is clear that the compliance officer would not have recommended that the training citation be issued to Respondent if Mr. Morales had answered in the affirmative in response to the compliance officer's question as to whether he had received training in the recognition of fall hazards. Indeed, without verifying their responses by viewing training records, the compliance officer accepted the statement of four of the interviewed employees that they had received fall hazard recognition training. Thus, Complainant's representatives accepted a minimal verification that Respondent was in compliance with the training standard. In the absence of that verification for Mr. Morales, Complainant was substantially justified in citing Respondent for failing to train Mr. Morales as required by the cited standard.

The quantum of evidence previously established by Complainant as sufficient verification of compliance with the training standard was met by Respondent with respect to Mr. Morales on March 7, 2002, when answers supplied in response to Complainant's interrogatories established that Mr. Morales had received training in "fall causes, fall protection and the OSHA Top Ten" during four training sessions. Indeed, Complainant acknowledges that Respondent provided "proof of training" for Mr. Morales in response to interrogatories. (Complainant's Sur-reply, p. 1.) Thus, as of March 7, 2002, Complainant was no longer substantially justified in going forward with the alleged training violation. However, Complainant declined to withdraw that citation until the morning of the hearing on April 9, 2003. Accordingly, Respondent is entitled to attorney fees and expenses incurred to defend that allegation for the period March 8, 2002 to April 8, 2003.

Having determined that Respondent is entitled to attorney fees and expenses pursuant to the Act, it is necessary to determine the amount of the award. The first step in determining reasonable fee and expense awards is to determine the "lodestar" *Central Brass Manufacturing Co.*, 14 BNA OSHC 1904 (Rev. Comm. 1990). *William B. Hopke Co.*, 12 BNA OSHC 2158 (Rev. Comm. 1986). The lodestar has been defined as a:

> threshold point of reference which is subject to additions or deductions for specific reasons–is determined by multiplying the total number of hours reasonably spent by a reasonable hourly rate. *Hensley*, 103 S.Ct. At 1939; *Furtado*, 635 F.2d at 920. To determine the number of hours reasonably spent, one must first determine the number of hours actually spent and then subtract from that figure hours which were duplicative, unproductive, excessive, or otherwise unnecessary. *Hensley*, 103 S.Ct. At 1939-40, *Wojtkowski v. Cade*, 725 F.2d 127, 130 (1st Cir 1984); *Furtado*, 635 F.2d at 920. In calculating a reasonable hourly rate, one must consider such factors as the type of work performed, who performed it, the expertise that it required, and when it was undertaken.

Furtado, 635 F.2d at 920; *Grendel's Den Inc. v. Larkin*, 749 F.2d 945, 950 (1st Cir. 1989).

Once the lodestar is determined, that figure is either raised or lowered based upon such things as the quality of representation and results obtained. A similar test should be applied to determine which expenses should be awarded. *Grendel's Den*, *supra*, at 951. In addition, when determining the lodestar, the judge should consider the complexity and novelty of the issues based on his experience, knowledge and expertise of the time required to complete similar activities. *Central Brass Manufacturing Co.*, *supra*, at 1907.

In its petition for fees, Respondent lists a total of 45.8 hours of attorney time spent between March 8, 2003 and April 8, 2003 in preparing its defense for the withdrawn citation. Respondent claims an additional 6.2 hours spent in the preparation of the EAJA application at $125 per hour, Respondent's claim is as follows:

45.8	x	$125.00	=	$5,725.00
6.2	x	$125.00	=	775.00
		TOTAL		$6,300.00

In addition, Respondent claims expenses as follows:

1.	Parking for jail visit to James Copley on 3/21/03	$ 12.00
2.	Photocopies (910 @ .20)	182.00
3.	FedEx to Michael Schoen on March 31, 2003	14.42
4.	Courthouse parking for trial on April 9, 2003	5.00
	Total Expenses	$213.42

Based upon the record of this case, it is concluded that the hours claimed by Respondent are excessive in relation to the relatively non-complex issue raised in this case. It is clear that Complainant needed little persuasion based upon company records to verify that Mr. Morales had received fall protection training to Complainant's satisfaction. Since Complainant was tardy in withdrawing the item after receiving training verification, Respondent has been awarded compensation up to the day preceding the hearing. However, in consideration of the record as a whole, as well as the high competence level of counsel, it is concluded that the number of hours expended by Respondent for the withdrawn citation should be reduced by 50%. Accordingly, it is found that 23 hours of attorney time at $125.00 per hour are recoverable. Thus, $2,875.00 is assessed for attorney fees. Moreover, the claimed 6.2 hours at $125.00 per

hour ($775.00) for preparation of the EAJA Application is also assessed. Since Respondent failed to provide any supporting documentation that the claimed expenses were expended as a result of its defense of the alleged training violation, those expenses in the amount of $213.42 are disapproved.

The total award is as follows:

Attorney fees	$2,875.00
EAJA Application	775.00
Total	$3,650.00

FINDINGS OF FACT

Findings of fact relevant and necessary to a determination of all issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact inconsistent with this decision are hereby denied.

ORDER

Complainant is directed to compensate Respondent $3,650.00 pursuant to the EAJA Act for attorney fees.

/s/_____
Robert A. Yetman
Judge, OSHRC

Dated: March 9, 2004