SECRETARY OF LABOR,
Complainant,

v.
WOLKOW BRAKER ROOFING CORP.,

Respondent.

OSHRC DOCKET
NOS. 97-1773 and 98-0245
(CONSOLIDATED)

DECISION AND ORDER

Wolkow Braker Roofing Corp. seeks attorney fees and expenses in this consolidated action in accordance with the Equal Access to Justice Act, 54 U.S.C. §504 ("EAJA") and implementing regulations set forth at 29 CFR §2204.101, *et seq.*, for costs incurred in its defense against citations and proposed penalties issued by the Occupational Safety and Health Administration (OSHA).

Background

As a result of an inspection of Respondent's worksite on June 17, 1997 a Serious citation, (Docket No. 97-1773), was issued on September 30, 1997 alleging two violations. Item 1 listed two subitems (a and b) and item 2 listed four subitems (a through d). The total proposed penalty was $4,200.00. A second inspection was conducted at the same worksite on July 30, 1997. As a result of that inspection, a Serious citation listing one alleged violation and a Willful citation listing one alleged violation with two subparts was issued on January 20, 1998 (Docket No. 98-0245). The total proposed penalty for that citation was $56,900.00. Respondent timely contested both citations and, after consolidation, the cases were tried during September 1998. A decision was issued by the undersigned after the hearing disposing of the items alleged as follows:

(a) Docket No. 97-1773

Serious Citation 1

Item 1(a) Affirmed as a Serious violation and a penalty of $2,000.00 assessed (reduced from $3,000.00).

Item 1(b) Vacated.

Item 2(a)-2(d) Vacated.

(b) Docket No. 98-0245

Serious Citation 1

Item 1 Vacated.

Willful Citation 2

Item 1(a) Vacated.

Item 1(b) Affirmed as a Serious violation. A penalty in the amount of $2,000.00 was assessed (reduced from $56,000.00).

Neither party sought review of the decision before the Review Commission. Accordingly, the decision became a final order of the commission on August 6, 1999. By petition dated September 3, 1999, Respondent seeks reimbursement for attorney fees and expenses pursuant to the Equal Access to Justice Act.

Discussion

The equal Access to Justice Act (hereinafter "the Act") applies to proceedings before the Commission through section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §651, *et seq.* The purpose of the Act 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 pursuant to section 504(a)(1) of the Act 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).

The statute was amended during 1996 (the Small Business Regulatory Enforcement Fairness Act) by adding subsection 504(a)(4) as follows:

> If, in an adversary adjudication arising from an agency action to enforce a party's compliance with a statutory or regulatory requirement, the demand by the agency is substantially in excess of the decision of the adjudicative officer and is unreasonable when compared with such decision, under the facts and circumstances of the case, the adjudicative officer shall award to the party the fees and other expenses related to defending against the excessive demand, unless the party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust.

Respondent observes that the "demand" of the Secretary in these cases (a combined total proposed penalty in the amount of $61,100.00) was reduced to an assessed penalty in the amount of $4.000.00; a 93% reduction. Since the demand of the Secretary was substantially in excess of the penalty finally assessed, argues Respondent, all fees and expenses incurred to defend these allegations should be reimbursed regardless of whether Respondent was the prevailing party[1] pursuant to subsection 504(a)(4).

As a preliminary matter, Respondent asserts, with supporting documentation in its petition, that it meets the eligibility requirements to be awarded fees and expenses under the Act. Complainant does not dispute Respondent's eligibility. Accordingly, it is found that Respondent, during all times relevant to these matters, was a corporation with a net worth of less than seven million dollars and less than 500 employees (see Commission Rule 2206.105) and, therefore, meets the requirements to be an eligible party under the Act. Moreover "[t]he Secretary concedes that where citation items were vacated and attendant penalties were dropped, Respondent is a prevailing party within the meaning of the statute (Complainant's brief pg. 9).

As previously stated Respondent filed its petition for fees and expenses in a timely manner on

[1] Respondent argues, in the alternative, that the requirements for assessing attorneys' fees and expenses pursuant to section 504(a)(1) of the Act have also been met in this case.

September 3, 1999. Respondent vigorously argues in its petition that it is entitled to fees under the new amendment to the Act (5 U.S.C. §504(a)(4)) based solely upon the fact that the penalty proposed by the Secretary (the "demand") was ultimately reduced by 93%. Respondent takes the position that the demand substantially exceeded the final award. Under these circumstances, according to Respondent, by viewing the cases as a whole, section 504(a)(4) does not require a showing of "prevailing party" by Respondent nor may the Secretary be excused from paying fees even if though it is established that there was substantial justification for going forward with the allegations (Respondent's brief pg. 5). The only element that must be established, according to Respondent, is a showing that the Secretary's demand was substantially in excess of the award (Respondent's brief pg. 5,6).

Upon the motion of the Secretary's counsel, Complainant was granted additional time to file a response to Respondent's petition until November 8, 1999. Thereafter, an additional response dated December 3, 1999 was received from the Secretary. Although Respondent has vigorously asserted the section 504(a)(4) claim, as set forth above, the Secretary's responses are virtually silent regarding this issue. Thus, it is not known what position the Secretary takes, if any, regarding Respondent's substantial claim to fees pursuant to section 504(a)(4) of the Act. Notwithstanding the Secretary's failure to respond to Respondent's claim, it is necessary to analyze the issue as framed by Respondent to determine whether Respondent's interpretation of the aforesaid section of the Act is valid.

The Review Commission has not had the opportunity to analyze the scope of section 504(a)(4) when applied to applications for attorneys' fees in occupational safety and health matters. Accordingly, without Commission guidance, it is necessary to reference the legislative history of the 1996 amendments to determine whether Respondent's claims fall within the intent of Congress. The legislative history for section 504(a)(4) is set forth at 142 Cong.Rec. S 3242 104th Congress 2nd Session (Vol.142 No. 46).[2] Subtitle C, Equal Access to Justice Act, deals specifically with section 504(a)(4) of the Act. That section was added to assist eligible small businesses in recovering attorney fees and expenses "when unreasonable agency demands for fines or civil penalties in enforcement actions are not sustained by the court or by an administrative law judge." *ibid* at S3244. Moreover

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2 The legislative history is set forth in a statement by Senator Bond wherein he stated "[s]ince there will not be a conference report on the Act, this statement and a companion statement in the House should serve as the best legislative history of the legislation as finally enacted."

"the legislation is intended to assist in changing the culture among government regulators to increase the reasonableness and fairness of their enforcement practices" *id.* The reasoning underlying the amendment is as follows:

> Past agency practice too often has been to treat small businesses like suspects. One goal of this bill is to encourage government regulatory agencies to treat small businesses as partners sharing in a common goal of informed regulatory compliance. Government enforcement attorneys often take the position that they must zealously advocate for their client, in this case a regulatory agency, to the maximum extent permitted by law, as if they were representing an individual or other private party. But in the new regulatory climate for small businesses under this legislation, government attorneys with the advantages and resources of the federal government behind them in dealing with small entities must adjust their actions accordingly and not routinely issue original penalties or other demands at the high end of the scale merely as a way of pressuring small entities to agree to quick settlements.

Although the amendment (section 504(a)(4)) is not intended to award attorney fees "as a matter of course," it does create a new avenue for small employers to recover attorney fees in those cases when the government "makes excessive demands"[3] even in those instances when the government is the prevailing party. The test for awarding attorney fees is "whether the agency or government demand that led to the administrative or civil action is substantially in excess of the final outcome of the case so as to be unreasonable when compared to the final outcome (whether a fine, injunctive relief or damage) under the facts and circumstances of the case" *id.*

According to the legislative history "[t]he comparison called for in the Act is always between a "demand" by government . . . *taken as a whole* and the final outcome of the case . . . *taken as a whole, id* (emphasis added). Congress cautions, however, that the test "should not be a simple mathematical comparison. The committee intends for it to be applied in such a way that it identifies and corrects situations where the agency's demand is so far in excess of the true value of the case, as demonstrated by the final outcome, that it appears that the agency's assessment or enforcement action did not represent a reasonable effort to match the penalty to the actual facts and circumstances of the case." *id*. Moreover, attorney fees should not be awarded in the case of willful violations, bad faith actions

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[3] The term "demand" is defined at section 504(b)(1)(F) as follows:

> (F) "demand" means the express demand of the agency which led to the adversary adjudication, but does not include a recitation by the agency of the maximum statutory penalty (I) in the administrative complaint, or (II) elsewhere when accompanied by an express demand for a lesser amount.

and cases involving special circumstances. Special circumstances include:

> . . . instances where the party seeking fees engaged in a flagrant violation of the law, endangered the lives of others, or engaged in some other type of conduct that would make the award of the fees unjust. The actions covered by "bad faith" include the conduct of the party seeking fees both at the time of the underlying violation, and during the enforcement action. For example, if the party seeking fees attempted to elude government officials, cover up its conduct, or otherwise impede the Government's law enforcement activities, then attorney's fees should not be awarded.

Thus, unlike section 504(a)(1) of the Act wherein attorneys' fees may not be awarded if the original position of the agency, as the non-prevailing party, was "substantially justified," the test for attorney fees under 504(a)(4) requires a showing that the demand by the Agency *taken as a whole* was unreasonable in relation to the final outcome *taken as a whole* without regard as to which litigant was the prevailing party.

This matter was initiated as a result of an inspection of Respondent's worksite on June 17, 1997. The inspecting officer believed that employees were not provided with proper fall protection (Citation 1, item 1(a)). In addition the officer concluded that a ladder at the site did not conform to four safety standards (Citation 1, items 2(a)-2(d)). A closing conference was conducted by the compliance officer wherein the Respondent was informed of the alleged violations. However, Respondent was under no obligation to correct these alleged violations until a citation with proposed abatement dates was issued by an "authorized representative" of the Secretary. That did not occur until September 30, 1997.

A second inspection of Respondent's worksite occurred July 30, 1997 while the first inspection was still being reviewed, presumably, at the area office level. That inspection revealed to the inspecting officer a failure to properly store liquefied gas (Citation 1, item 1) and the same condition which was observed during the first inspection regarding the failure to provide proper fall protection. This item was ultimately classified as willful with a proposed penalty, in combination with item 1(b) of $56,000.00. Item 1(b) involved the failure to provide fall protection in an area unrelated to the first inspection.

There is no explanation in the record as to why the two inspections were treated separately for purposes of issuing citations nor is there any basis to conclude that the inspections should have been combined for purposes of issuing citations. Nevertheless, the conditions

supporting Citation 1, item 1(a) (fall protection) for the first inspection and the conditions supporting the willful citation (item 1(a) for the second inspection were identical. Thus, the second citation for this condition was duplicative since the Respondent was under no legal obligation to correct the conditions until a citation had been issued. The Secretary suggests that issuing two citations for the same alleged violation, under the circumstances of this case, present "special circumstances" and the government should not be deterred from advancing novel extensions and interpretations of the law by awarding attorney fees (Complainant's brief pg. 15)[4] Thus, rather than seeking to compel Respondent to correct the alleged hazardous condition through imminent danger proceedings, (Section 13(a) Occupational Safety and Health Act), the Secretary issued two citations for the same violation with a proposed penalty for the second citation over eighteen times higher than the penalty proposed for the first citation ($3,000.00). Thus, this small employer was issued a substantially increased proposed penalty with a "willful" designation for exercising its right to wait until an authorized representative of the Secretary determined that a violative condition existed (by issuing a citation) rather than complying with the unofficial findings of the compliance officer. The Secretary provides no basis for concluding that those facts rise to the level of "special circumstances" as defined by Congress *supra*.

With respect to the other vacated items, the Secretary failed to prove most of those violations by credible testimony at the hearing and the Secretary declined to appeal those findings. However, item 1(a) resulting from the first inspection was affirmed with a reduction of the penalty from $3,000.00 to $2,000.00 and item 1(b) of Willful Citation 2 (second inspection) was redesignated as a serious violation and the penalty was reduced from $56,000.00 to $2,000.00. The Secretary also declined to appeal these findings.

As previously stated, the test for recovering attorney fees under section 504(a)(4) of the Act is whether the agency demand was substantially in excess of the final outcome so as to be unreasonable under the facts and circumstances of the case.

Clearly, the attempts to penalize Respondent for exercising its right to be informed by an

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[4] The Secretary initially argued that the factual setting underlying the second citation was different than the first citation.

authorized representative of the Secretary of violative conditions before taking remedial action is unreasonable under any circumstances. Moreover, the Secretary's failure of proof regarding the vacated items indicates poor or incomplete investigations or an inadequate presentation at trial. The substantially increased proposed penalty for alleged violations resulting from the second inspection which was conducted before a citation had been issued for the first inspection indicates an overly zealous enforcement policy, at least in this instance, against small employers.

The most troubling aspect of this case is the arrogant attitude displayed by Complainant's representatives by insisting that this matter be litigated to the fullest extent and rejecting all urgings and offers to settle the matter amicably. That unshakable stance has resulted in increased expenses for Respondent. In its petition, Respondent asserts that the Secretary "summarily" rejected two offers of settlement.[5] The first offer included, *inter alia*, the payment of $13,000.00 in penalties. The offer was rejected. The second offer, according to Respondent, occurred upon completion of the hearing and at the strong urging of the undersigned that the parties should attempt to resolve the matter at that point to avoid additional expense. However, "negotiations were stopped cold," according to Respondent, because the Secretary demanded that 80-85% of the penalty must be paid. These allegations are not refuted by the Secretary in her reply brief. In addition, subsequent to the receipt of respondent's petition and the Secretary's response thereto, the undersigned issued an order directing the parties to submit additional information. The heaviest burden of production was placed upon Respondent. In addition, both parties were directed to submit separate written reports "regarding efforts to settle this matter pursuant to
29 CFR §2204.306." In response to the order, Respondent stated that Complainant had tendered no offer of settlement in response to its offer; however, optimism was expressed that settlement could be achieved via a telephone conference with the undersigned. The Secretary's response, however, foreclosed any possibility of conducting a meaningful settlement conference. By letter dated January 6, 2000, Complainant's counsel responded to the order as follows:

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[5] While a rejected settlement offer is not admissible at a hearing on the merits of a citation, it is admissible in a proceeding to recover attorney fees and costs. *See* Rule 68 FRCP; *March v. Chesney* 473 U.S. 1(1985).

> In response to Paragraph 5 of Your Honor's order dated December 15, 1999, no substantive settlement discussions have occurred in this case. Furthermore, the Secretary hereby objects to respondent's Motion for a Settlement Conference and request for the appointment of a settlement judge. The Secretary does not feel that a Settlement conference is appropriate in this case and requests that the case be decided on the papers filed by both parties.

Thus, the Secretary has obstinately refused to engage in meaningful settlement discussions even after the hearing on the merits when it should have been apparent to Complainant that her case contained serious weaknesses. Furthermore, the admonition from the undersigned immediately after the conclusion of the hearing that settlement of the matter would be in the interest of both parties should have, at the least, persuaded Complainant to engage in meaningful settlement discussions.

The conduct displayed by the Secretary's representatives in this case conform in virtually every respect to the reasons cited by Congress as the basis for passage of section 504(a)(4) of the Act. The Secretary attempted to discourage this Respondent from exercising its rights by proposing an excessive penalty for failing to comply with a compliance officer's findings. Moreover, the Secretary steadfastly refused to engage in meaningful settlement discussions unless the Respondent paid no less than the arbitrary figure of 80% of the proposed penalty. Most significantly, the Secretary prolonged this litigation by refusing to discuss settlement even after losing substantially all of the case after hearing. Finally, the final outcome of the case; a reduction of penalty from $61,100.00 to $4,000.00, the dismissal of seven of nine allegations and the reduction of one of the remaining items from willful to serious, taken as a whole in relation to the original demand, clearly forms the basis for concluding that the Secretary's demand was unreasonably in excess of the true value of the case. Accordingly, it is held that the petition for attorney's fees falls within the penumbra of section 504(a)(4) of the Act, and the actions of the Secretary's representatives, as described above, warrant the assessment of attorney fees and expenses to Respondent.

Having determined that Respondent is entitled to attorney fees and expenses pursuant to section 504(a)(4) of 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 reasonable 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 602.35 attorney hours at an hourly rate of $125.00. These hours were expended by lead counsel and assistant counsel. The original assistant counsel was replaced and the hours expended by the new assistant counsel were reduced by 20.00 hours as "start-up time." A non lawyer assistant spent 32.75 hours on the case at an hourly rate of $50.00. Thus, the fees sought by Respondent in its original petition are as follows:

Total attorney hours	602.25	Legal asst. hours	32.75
	- 20.00		x $50.00/hr.
	582.25		$1,637.50
	x $125.00/hr.		
	$72,781.25		

The total fees, $74,418.75, were reduced by Respondent via a "self-imposed reduction" of 10%. Thus, total fees requested by Respondent amount to $66,976.88. In addition, expenses in the amount of $15,922.34 are sought by Respondent. A supplemental claim was filed by Respondent for fees incurred in preparing the petition for fees. Respondent claims that an additional 59 hours were expended in that task and, at $125.00 per hour, claims $7,375.00.

Complainant argues that this case presented "simple fall protection and training" issues

and no complex issues were involved. Moreover, Respondent's lead counsel, as an experienced OSHA lawyer, should have handled the matter by himself and any hours spent by assistant counsel were excessive and redundant. In particular, argues Complainant, Respondent's defense for citation 2, item 1(a) (Docket No. 98-0245) relating to section 10(b) of the OSHA Act consisted of nine pages of Respondent's 60-page posthearing brief (15%) and was rejected by the trial judge.

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 issues raised in this litigation. Respondent now acknowledges that the finding that citation 2 item 1(a) (Docket No. 98-0245) was a duplicative citation "states the obvious." Nevertheless, Respondent engaged in a lengthy, complex and largely irrelevant discussion of the application of sections 10(b) and 17(d) of the OSHA Act for that item. Based upon the record as a whole and the simplicity of the issues presented, it is concluded that the hours expended by Respondent should be reduced by 50%. Accordingly, it is found that 301 hours of attorney time at $125.00 per hour and 16 hours of legal assistant time at $50.00 per hour are recoverable. Thus, $37,625.00 for attorney fees and $800.00 in legal assistant fees are assessed.

With respect to expenses incurred, Respondent seeks reimbursement as follows:

Telephone charges	$ 132.86	
Photocopies	1,423.14	
Facsimiles	490.00	
Travel	6,048.67	
Postage	288.09	
Parking/transportation	423.50	
Computer research	3,796.63	
Depositions	494.05	
Meals		293.60
Administrative support		652.50
Couriers	55.30	
Transcript	1,824.00	
TOTAL EXPENSES:		$15.922.34

These expenses are adequately supported in the record and are assessed against Complainant.

Finally, Respondent claims reimbursement for 59 hours spent in preparing the petition for fees. Since this litigation has been prolonged by the obstinate refusal of Complainant to

engage in meaningful settlement discussions, the total cost for the petition, $7,375.00, (59 hours times $125.00 per hour) is assessed against Complainant. Accordingly, Respondent is awarded $45,000.00 in attorney fees and $15,902.34 in expenses.

The total award is as follows:

Attorney fees	$45,000.00
Legal Asst. Fees	800.00
Expenses	15,922.34
	$61,722.34

/s/

Robert A. Yetman
Judge, OSHRC

Dated: August 11, 2000