OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street., N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant,	:	
v.	:	OSHRC Docket No. 09-0178
PARAMOUNT ADVANCED WIRELESS, LLC, Respondent	:	EAJA

APPEARANCES:

For the Complainant:
Margaret A. Temple,, Esq.
Office of the Solicitor
201 Varick Street
New York, NY 10014

For the Respondent:
Mark A. Lies, Esq.
Daniel Flynn, Esq.
Seyfarth Shaw, LLP
131 South Dearborn Street
Chicago, IL 60603-5777

Before: Covette Rooney
Administrative Law Judge

DECISION AND ORDER

On June 21, 2010, I issued a decision vacating a citation for a serious violation of the Occupational Safety and Health Act of 1970 ("Act"), 29 U.S.C. § 651-678 issued to Paramount Advanced Wireless ("Paramount") that alleged a violation of 29 C.F.R. §1926.105(a) or, in the alternative, 29 C.F.R. §1926.501(b)(1). The decision was not directed for review by the Commission and has become a final order of the Commission. Subsequently, Paramount has timely filed this application for fees and expenses pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504.

I. Background

Under the EAJA, a private party that prevails against the Federal Government in an administrative adjudication (including a contest of an OSHA citation) and meets certain limits on net worth and number of employees, is entitled to an award of attorneys' fees and other expenses, unless the position of the government as a party to the proceeding was "substantially justified," or special circumstances make an award unjust. 5 U.S.C. §§ 504(a)(1) & 504(b)(1)(B); *K.D.K. Upset Forging, Inc.*, 12 BNA OSHC 1856, 1857 (No. 81-1932, 1986); 29 C.F.R. §2204.101.

There is no dispute that Paramount was the "prevailing party" in this matter and meets the other criteria that make it eligible for an award. However, the Secretary opposes the application on the grounds that her decision to issue and pursue the citation was "substantially justified." Moreover, the Secretary argues that if Paramount is entitled to fees and expenses, it is not entitled to a recovery in an amount in excess of the statutory $125 an hour, 5. U.S.C. §504(b)(1)(a)(ii), and raises other issues regarding the award.

This case was initiated as the result of a fatal accident, where an employee of Paramount fell from a communication tower. The citation alleged a violation of 29 C.F.R. §1926.105(a) which requires the use of safety nets when other methods of fall protection are not practical. In the alternative, the citation also alleged that Paramount violated 29 C.F.R. §1926.501(b)(1) which requires that employees working six feet or more above the ground be protected by the use of a guardrail system, safety net system, or personal fall arrest system. The citation alleged that Paramount violated the cited standards on the grounds that "[e]mployees were working on a communication tower 60 feet above the ground without any fall protection."

At the hearing the Secretary argued that the employees were not provided with adequate fall protection on the grounds that they were using a Fisk Descender to perform a controlled descent without being provided with back-up protection consisting of a hooked up second line with a rope grab. After weighing the evidence, it was the conclusion of this Judge that the preponderance of the evidence demonstrated that, at the time of the accident, the employee was positioning himself and was not engaged in a controlled descent. Moreover, the evidence established that, while being used as a positioning device, a Fisk Descender need not be accompanied by a second line, but with a shock absorbing lanyard which the employee was using. Also, at the conclusion of the hearing I vacated the alleged violation of 29 C.F.R. §1926.105(a), which requires the use of safety nets where other methods of fall protection is

impractical, on the grounds that the evidence made no mention of nets. Implicit in my decision was the fact that the evidence demonstrated that other methods of fall protection were shown to be practical. Accordingly, I found that the evidence established that Paramount provided its employees with adequate fall protection. Nonetheless, I found that because the employee fell from the tower, the evidence demonstrated that at some point and contrary to the requirements of the 29 C.F.R. §1926.501(b)(1), the employee was not "protected from falling" at all times. Therefore, the inquiry turned to whether Paramount established, as an affirmative defense, that it had an adequately communicated and enforced safety program requiring that employees on towers be tied off at all times and, therefore, whether the employer established that the accident was the result of an incident of unpreventable employee misconduct. After weighing the evidence, I determined that Paramount had a workrule requiring that employees be tied off at all times, effectively communicated and enforced its safety rules, had an effective training program, and properly supervised its employees. Moreover, I noted that the Secretary failed to allege any failure in Paramount's training, supervision or enforcement program. Rather, the Secretary argued only that the affirmative defense should fail because Paramount's supervisory personnel did not require the use of a secondary line and rope grab. Having already found that such apparatus was unnecessary, I found that Paramount established the affirmative defense and the citation was vacated.

Substantial Justification

There is no dispute that Paramount was the prevailing party and is otherwise eligible to receive attorney fees and expenses under the EAJA if the Secretary's position in this matter was not "substantially justified." Once an eligible applicant establishes that it is the prevailing party, the Secretary bears the burden of establishing that her position was substantially justified. *Joseph Watson, d/b/a Joseph Watson Masonry,* 21 BNA OSHC 1649, 1651 (No. 00-1726, 2006); *See Consol. Constr. Inc.*, 16 BNA OSHC 1001, 1002 (No. 89-2389, 1993)(EAJA). A position is substantially justified if it has a "reasonable basis in both law and fact" or is "justified in substance or in the main." That is, justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood,* 487 U.S. 552, 563-66 (1988); *C.J. Hughes Constr. Inc.*, 19 BNA OSHC 1737, 1740 (No. 93-3177, 2001)(EAJA). The Secretary bears the burden to show that (1) there exists a reasonable basis for the facts alleged, (2) there exists a reasonable basis in law for the

theory she propounds, and (3) the facts alleged reasonably support the legal theory. *Joseph Watson,* 21 BNA OSHC at 1651; *Contour Erection & Siding Sys. Inc.*, 18 BNA OSHC 1714, 1716 (No. 96-0063, 1999).

The Secretary based her case on the assumption that the sole use of a Fisk Descender was as a device used in a controlled decent. Based on that assumption, she concluded that the accident occurred when the Fisk Descender failed during a controlled descent. Moreover, the Secretary took the position that the Fisk Descender must be used with a secondary line with a rope grab and that, having failed to provide that equipment, Paramount did not provide its employee with appropriate fall protection. At the hearing, it became clear that the Secretary's position was based on a misunderstanding of the uses of a Fisk Descender and the type of back-up equipment that should be used with it. However, had the Secretary consulted the Fisk Descender Manual, she would have learned that one of the uses of a Fisk Descender is as a positioning device. Moreover, had she consulted the ComTrain[1] Training Manual, she would have learned that a secondary line with a rope grab is the most frequently used, but not the only acceptable method of back-up when using a Fisk Descender. Both of these documents were available to the Secretary and, with the exercise of reasonable diligence, she could have learned of the multiple uses of a Fisk Descender and the appropriate use of back-up devices other than a secondary line with rope grab[2]. Much of the Secretary's case was based on the testimony of the Compliance Officer which I found to be tainted by this fundamental misunderstanding of the Fisk Descender; a misunderstanding that had no basis in fact and, as noted, could have been easily cured by doing appropriate pre-hearing preparation.[3.]

1 ComTrain is an international trainer for tower climbing and rescue programs. They are recognized by the large telephone carriers, broadcasters, and large international tower companies as being a company qualified to train people in tower climbing and rescue. All of Paramount's tower climbers are ComTrain certified.

2 If the Secretary, in fact, reviewed these documents, she certainly failed to comprehend the information that was clearly contained therein.

3 I note that in its response to the Application for Fees, the Secretary submits an affidavit which continues to question whether the Fisk Descender was used as a positioning device and a Letter of Interpretation on "Procedures and precautions for employees using descent control equipment. The Secretary's submissions are inappropriate. A determination of substantial justification is based on the record made on the merits of the case and additional evidence is not allowed. *See e.g.,* Commission Rule 307(a)(1) and (a)(2); 29 C.F.R. §§2204.307(a)(1) and (a)(2) . Accordingly, these documents are stricken and not considered.

The Secretary points out that the Commission has held that cases that truly turn on credibility issues are inappropriate for an EAJA award. *Consolidated Constr., Inc.*, 16 BNA OSHC 1001, 1006 (No. 89-2839, 1993). The Secretary asserts that this case was resolved because I found the testimony of Paramount's witnesses more credible that those of the Secretary and, therefore, that this matter is inappropriate for an EAJA award. However, this matter did not turn merely on credibility findings. Although the credibility of the witnesses was involved in my findings, their credibility was only incidental to those findings. Rather, I was greatly persuaded by the sheer weight of the overall evidence. The determining factor was the Secretary's clear confusion over the nature and use of the Fisk Descender and her failure to adduce any significant evidence, other than the uninformed testimony of the Compliance Officer, to support her position. The testimony of Paramount's witnesses was supported by solid documentary evidence which demonstrated the confused and unsupported nature of the underlying assumptions that formed the basis of the Secretary's position.

Moreover, this case arose in the Third Circuit. The law of that Circuit requires the Secretary to establish that the violative condition was foreseeable. *E.g. Kern Bros. Tree Serv.,* 18 BNA OSHC 2069, 2072 (No. 96-1719, 2000). As I noted in my decision, the Secretary based her allegation of knowledge on the alleged failure of Paramount's supervisory personnel to require the use of a secondary line and rope grab. With that line of reasoning having failed, I turned to the basic allegation in the complaint that employees were working on the tower without fall protection. In this regard, I found that Paramount had an excellent safety program and workrules requiring employees to be tied-off 100% of the time and that these rules were effectively communicated and enforced. All the relevant evidence was available to the Secretary before the hearing. Indeed, not only did I find that the "accident was an unforeseeable event caused by the idiosyncratic actions of the employee who, for some unknown reason, unhooked himself from his fall protection," but the Secretary failed to introduce a scintilla of evidence to call into question the quality of Paramount's safety program.

The Secretary also cited Paramount for a violation of 29 C.F.R. §1926.105(a) which requires the use of safety nets when other methods of fall protection are not practical. Yet, as noted in my ruling from the bench, the Secretary failed to even address this issue, likely because it was clear not only from Paramount's evidence, but also from the Secretary's own position

going into the hearing, that methods of fall protection other than safety nets were practical to protect employees. Yet, Paramount had to spend resources preparing to defend against this standard.

Accordingly, I find that the Secretary's position in this matter was not substantially justified and that, on that basis, Paramount is entitled to recover reasonable attorney fees and expenses.

Recovery

Paramount submits the billing record of its attorneys, with accompanying affidavits. The record reveals that three attorneys worked on the case. Senior partner Mark A. Lies II, is a senior partner at the law firm that defended Paramount and billed at $495 per hour, which he avers is a reduction from his usual fee. Associate attorneys Daniel R. Flynn and Meagan Newman billed at hourly rates of $285 and $330, respectively. These rates, too, are averred to be a reduction from their usual rates. After adding up the total hours worked and multiplying that by the respective hourly rates, Paramount's asserts that it incurred attorney's fees in the amount of $49,503.75 plus an additional $3,763.13 in costs and expenses. Therefore, Paramount seeks a recovery under the EAJA in the total amount of $53,266.88.

The Secretary argues that any recovery should be reduced on three grounds. First, she notes that Mr. Lies stated in his affidavit that he is a senior partner with over 30 years of experience litigating OSHA enforcement matters. Therefore, she argues that the hours and expenses incurred by Mr. Flynn and Ms. Newman should be deleted as excessive, redundant, or otherwise unnecessary. Second, the Secretary asserts that the hourly rates charged by the attorneys exceed the statutory maximum of $125 per hour allowable under the EAJA and, therefore, should be reduced to the $125 per hour limit. Finally, the Secretary asserts that computerized research costs, which were included as part of the expenses, are a substitute for attorney time and, as such, are not recoverable.

First, I do not agree that the hours and expenses incurred by Mr. Lies' associates are not recoverable. Implicit in the Secretary's argument is that, when a senior attorney is assigned to a case, only his or her hours are compensable because that attorney should be doing all the work. The position is untenable. Much legal work is well suited for more junior attorneys who bill at a lower hourly rate. To hold that a senior attorney should be doing the work fully suited to a junior

attorney is wasteful and inefficient. As the Third Circuit stated regarding fee recovery under ERISA:

> Nor do we approve the wasteful use of highly skilled and highly priced talent for matters easily delegable to non-professionals or less experienced associates. Routine tasks, if performed by senior partners in large firms, should not be billed at their usual rates. A Michelangelo should not charge Sistine Chapel rates for painting a farmer's barn.

Usric v. Bethelehem Mines, 719 F.2d 670, 677 (3d Cir. 1983).

Accordingly, I find that, where otherwise appropriate, the fees and expenses incurred by Mr. Lies associates are eligible for recovery under the EAJA.

However, the Secretary correctly observes that Paramount is only entitled to recover attorney fees at the rate of $125 per hour. 29 U.S.C. §504(b)(1)(A)(ii); Commission EAJA Rule 107(b), 29. C.F.R. §2200.107(b)[4]. Paramount counters that the Commission's EAJA rule 107(c), 29. C.F.R. §2204.107(c) allow it to assess a higher rate based on several factors including (1) the attorney's customary fee for similar service; (2) the prevailing rate for similar services in the community in which the attorney ordinarily performs services; (3) the actual time spent in representing the applicant; (4) the time reasonably spent in light of the difficulty or complexity of the issues in the proceedings; and (5) such other factors as may bear on the value of the services provided.

The $125 per hour rate set forth in EAJA rule 107(b) is a maximum allowable rate. *Saipan Koreana Hotel*, 21 BNA OSHC 1403, 1406 (No. 02-2129, 2006). The applicable portion of Rule 107(b) states that "[a]n award for the fee of an attorney or agent under these rules shall not exceed $125 per hour, *unless the Commission determines by regulation* that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for Commission proceedings, justifies a higher fee." (emphasis added) Clearly, the rule

4 Commission Rule 107(b) provides:

> An award for the fee of an attorney or agent under these rules shall not exceed $125 per hour, unless the Commission determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for Commission proceedings, justifies a higher fee. An award to compensate an expert witness shall not exceed the highest rate at which the Secretary pays expert witnesses. However, an award may include the reasonable expenses of the attorney, agent or witness as a separate item, if the attorney, agent or witness ordinarily charges clients separately for such expenses

only empowers the Commission to raise the maximum rate "by regulation" if it finds that the listed "special factors" warrant an increase. *Timothy Victory*, 1997 WL 45148, *aff'd* 18 BNA OSHC 1023 (No. 93-3359, 1997). To date, the Commission has not promulgated any such regulation.

On that basis, and contrary to Paramount's reading, EAJA rule 107(c) does not set forth grounds for allowing a rate higher than the $125 per hour maximum. Indeed, nowhere in that rule does it suggest that the criteria therein are a basis for awarding an amount greater than $125 per hour[5]. Rather, it must be read in conjunction with EAJA rule 107(a), 29 C.F.R. §2204.107(a) which states that

> Awards shall be based on rates customarily charged by persons engaged in the business of acting as attorneys, agents, and expert witnesses, even if the services were made available without charge or at a reduced rate to the applicant.

Thus, where an attorney provides services without charge or at a reduced rate, Rule 107(c) allows the Commission to determine an appropriate compensation. Moreover, should an attorney practice in a community where the customary attorney fee is less than $125 per hour, or if the case was handled solely by associates that customarily bill at a rate lower than the maximum and the case was simple and routine, Rule 107(c) provides guidelines to enable the Commission to make an award at a rate less than the maximum. Notably, Paramount cites no case, nor have I found any case, where the Commission has granted a rate in excess of $125 per hour.

Accordingly, Paramount's recovery of attorney's fees will be calculated at the maximum rate of $125 per hour.

Finally, the Secretary objects to the inclusion of computerized research costs in any recovery. In support, the Secretary cites to several cases where courts have disallowed such costs, generally on the grounds that such expenses are either overhead costs or part of an attorney's time that is compensable as part of the attorney's fees. *E.g U.S. v. Merritt Meridian Cost. Corp.*, 95 F.3d 153, 173 (2d Cir. 1999); *U.S. Media Corp. v. Edde Entertainment, Inc.*,

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5 The rule begins:

> In determining the reasonableness of the fee sought for an attorney, agent or expert witness, the Commission shall consider the following: [omitted]

1999 W.L. 498216 (S.D.N.Y. 1999); *See also Kimball v. Shalala,* 826 F.Supp. 573, 576-577 (D. Me. 1993). While some courts have not allowed recovery for computerized research, others have found such costs to be recoverable. *E.g. American Wrecking Corp. v. Secretary of Labor,* 364 F.3d 321 (D.C. Cir. 2004). Still other courts have found that the recoverability of such expenses to be discretionary. *E.g. Winter v. Cerro Gordo County Conservation Board,* 925 F.2d 1069 (8th Cir. 1991). Although the Commission has never specifically ruled on the issue, it explicitly affirmed a judge's assessment of expenses which included expenses for computerized research as "reasonable on its face." *Victory,* 1997 WL 45148, *aff'd* 18 BNA OSHC 1023, 1027-1028 (No. 93-3359, 1997). Accordingly, I find that computerized research costs have become a standard method of legal research and are a legitimate expense that should be a compensable part of an award under the EAJA.

Lastly, my review of Paramount's application reveals that 18.75 hours and $236.48 in expenses are for work done after the accident, but before the Secretary issued a citation. (EAJA Ex. 1, Invoices of Sept. 16, 2008, Oct. 28, 2008 and Nov. 17, 2008, Jan. 27, 2009, and Feb. 27, 2009)[6] The Review Commission has made it clear that the adversary adjudication does not begin until issuance of the citation. *Central Brass Mfg. Co.,* 14 BNA OSHC 1904, 1906 (No. 86–978, 1990) (consolidated). Although Paramount may have retained its attorney during the OSHA investigation of the accident, to allow fees for legal services incurred before issuance of the citation would be tantamount to holding that the Secretary was not substantially justified in investigating a workplace fatality.

Award

Paramount claims that its attorneys spent 144.75 hours defending this case. As noted, 18.75 of those hours are noncompensable fees incurred prior to issuance of the citation. Therefore, I find that Paramount is entitled to recover for 126 hours of attorney time at a rate of $125 per hour for a total fee recovery of $15,750. In addition, Paramount submits a claim for costs and expenses in the amount of $3,763.13. Again, $236.48 of those costs was incurred prior to issuance of the citation and, therefore, are not recoverable. Thus, Paramount is entitled to

6 The accident occurred on July 18, 2008 and the citation was issued on January 15, 2009. Although several invoices were composed after issuance of the citation, they contained charges for hours worked before the citation was issued.

recover costs and expenses in the amount of $3,526.65.

ORDER

Accordingly, Complainant is ORDERED to compensate the applicant in the amount of $19,276.65.

/s/
Covette Rooney
Judge, OSHRC

Dated: January 11, 2011
Washington, D.C.