UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Secretary of Labor, Complainant v. Ben Hur Construction Company, Respondent.	OSHRC Docket No. **09-1366** **EAJA**

Appearances:

Evert Van Wijk, Esquire, Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri
For Complainant

Julie O'Keefe, Esquire, Armstrong Teasdale, LLP, St. Louis, Missouri
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER GRANTING IN PART RESPONDENT'S EAJA APPLICATION

Ben Hur Construction Company (Ben Hur) seeks an award for attorney's fees and expenses pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, 29 C.F.R. §2204.101, *et seq*. The attorney's fees and expenses were incurred by Ben Hur in defending against serious and willful citations issued by the Occupational Safety and Health Administration (OSHA) on July 24, 2009. The court's Decision and Order, entered on November 3, 2010, vacated the citations.

Ben Hur's EAJA application, dated January 12, 2011, claims attorneys' fees in the amount of $34,762.50 (278.1 hours @ $125.00 per hour)[1] and other fees and expenses of $20,167.22 (law firm, trial transcript, Lawgical Choice, GorePerry, Bi-State, Smith Consulting, Hugh Murphy, Steve Rank) for the period from July 29, 2009 to August 19, 2010. Ben Hur also seeks $3,987.50 (31.9 hours @ $125 per hour) for the preparation and filing of the EAJA application.

[1] According to the application, the attorneys' fees paid totaled $110,449 based upon an hourly rate of approximately $400 per hour.

For the reasons discussed, Ben Hur's application under the EAJA is approved, in part. The Secretary was without substantial justification for the issuance of Citation no. 1, item 2 and Citation no. 2, item 1, prior to its amendment. Total attorneys' fees of $6,437.50 (51.5 hours @ $125 per hour from July 29, 2009 to April 6, 2010) are deemed reasonable for Ben Hur's defense against §1926.550(a)(8) or §1926.503(a)(2)(iii) and its preparation of the EAJA application. No other fees and expenses are appropriate.

Background

Ben Hur is a privately held construction company engaged primarily in steel erection and precast concrete installation throughout the Midwest. Ben Hur is headquartered in St. Louis, Missouri and employs approximately 160 employees.

In 2009, Ben Hur contracted to set the steel for various phases of a construction project for the new "Edward Jones" corporate and brokers' offices in Maryland Heights, Missouri. On February 3, 2009, a Ben Hur crew had completed setting the steel for Building 1 at Edward Jones North and prepared to move its crane to another site (Tr. 18). In order to move the crane, a 100-ton lattice boom Linkbelt 218 crawler crane, the crew had to disassemble it (Tr. 17). The crane operator was Virgil (Pete) Bell and his apprentice was Steven Lillicrap who died when he attached his safety lanyard to the live line from the crane's drum.

After an inspection, OSHA issued to Ben Hur serious and willful citations on July 24, 2009. The serious citation no. 1, alleged violations of 29 C.F.R. §1926.550(a)(1) (item 1) for not using a signalman during crane disassembly, and 29 C.F.R. §1926.550(a)(8) (item 2) for failing to adequately guard the crane boom hoist drum. The willful citation no. 2, alleged a violation of 29 C.F.R. §1926.503(a)(2)(iii) for failing to train the apprentice on the use and location of personal fall arrest systems. The citations proposed total penalties of $84,000.00. Ben Hur timely contested the citations.

On April 9, 2010, the Secretary moved to amend willful citation no. 2, to allege a serious violation of 29 C.F.R. §1926.21(b)(2) for failing to instruct employees in the recognition and avoidance of unsafe conditions. The Secretary withdrew the willful violation of 29 C.F.R. §1926.503(a)(2)(iii) and reduced the proposed penalty from $70,000.00 to $7,000.00. The motion was granted.

The hearing was held on May 11-12, 2010 in St. Louis, Missouri. The parties stipulated jurisdiction and coverage. At the hearing, the Secretary withdrew serious citation no. 1, item 2, alleged violation of 29 C.F.R. §1926.550(a)(8).

The court's Decision and Order, issued November 3, 2010, vacated citation no. 1, item 1, alleged violation of §1926.550(a)(1), and citation no. 2, as amended, alleged violation of §1926.21(b)(2).

Equal Access to Justice Act

The EAJA applies to proceedings before the Review Commission through §10(c) of the Occupational Safety and Health Act of 1970 (Act), 29 U.S.C. §651, *et seq*. To receive an award under the EAJA, it must be shown that the applicant is eligible; the applicant is the prevailing party; and, the Secretary's action is without substantial justification and there is no special circumstance which makes the award unjust. While the applicant has the burden of persuasion to show it meets the eligibility requirements to receive an award, the Secretary has the burden to show her position in the matter was substantially justified. 29 C.F.R. §§2204.105 and 2204.106.

The Secretary does not dispute that Ben Hur's EAJA application, filed January 12, 2011, was timely filed.[2]

Eligibility

An eligible employer includes any "corporation . . . that has a net worth of not more than $7 million and employs not more than 500 employees." Commission Rule 2204.105, 29 C.F.R. §2204.105.

With approximately 160 employees and a net worth less than $6 million in July 2009, there is no dispute that Ben Hur is an eligible employer under the EAJA (Secretary's Response, p. 2).

Prevailing Party

Ben Hur, without dispute, was the prevailing party (Secretary's Response, p. 3). The alleged violations were either vacated by the court based after the hearing or the Secretary withdrew the allegations prior to the hearing.

---

[2] An application under the EAJA must be submitted " in no case later than thirty days after the period for seeking appellate review expires." 29 C.F.R. §2204.302(a).

Substantial Justification

Since Ben Hur meets the EAJA eligibility criteria and was the prevailing party, it must be determined whether the Secretary's position was substantially justified in issuing and pursuing the citations. There is no presumption the Secretary's position was not substantially justified simply because she lost the case or she withdrew the allegation prior to the hearing. *Hocking Valley Steel Erection, Inc.,* 11 BNA OSHC 1492, 1497 (No. 80-1463, 1983). The Secretary's decision to litigate does not have to be based upon a substantial probability of prevailing.

For EAJA purposes, "[T]he test of whether the Secretary's action is substantially justified is essentially one of reasonableness in law and fact." *Mautz & Oren, Inc*., 16 BNA OSHC 1006, 1009 (No. 89-1366, 1993). Substantial justification is determined on a case-by-case basis.

With regard to the four elements of the Secretary's burden of proof, Ben Hur did not dispute the employee's exposure and its knowledge of the conditions regarding crane disassembling. Ben Hur did not assert an affirmative defense. Ben Hur denied the alleged conditions violated the cited standards.

Citation No. 1

Item 1: Alleged Serious Violation of § 1926.550(a)(1)

Section 1926.550(a)(1) requires that "[T]he employer shall comply with the manufacturer's specifications and limitations applicable to the operation of any and all cranes and derricks."

The citation alleged that during crane disassembly process, Ben Hur did not position a signalman to observe all areas of motion and to warn the crane operator of any danger, i.e. that Mr. Lillicrap was pulled into the boom hoist drum.

To support her position, the Secretary offered into evidence the Linkbelt 218 Crawler Crane manual, section 5, entitled "Disassembly of the Crane and Attachment." Page 5-23 of the manual, entitled "Folding the Gantry" enumerated the procedures to be followed during disassembly. These procedures included a provision that the disassembly crew "Position a Signalman to Observe All Areas Of Motion and Warn Operator Of Danger."

The court's decision concluded that the manual instructions were "recommendations" and not "specifications" as provided by the standard. Also, even if a specification, the court found no violation because the Secretary's allegation involved booming up or down and not the act of raising

or lowering the gantry which triggers the manual's warning to have a signalman.

Despite vacating the citation, the Secretary's position was substantially justified based upon her fair and credible reading of the manufacturer's manual. As applied to the standard, while the introductory paragraph of section 5 of the operator's manual identifies the procedures as "recommended" safe procedures for disassembly, the Secretary's position was that only the step by step procedures for lowering of the gantry were "recommendations."

However, unlike the steps, the Secretary argued, albeit unsuccessfully, that the "WARNING" provision which mandates the use of a signalman was not a recommendation but a "specification." Immediately proceeding the "WARNING," it states, "This Process Is To Be Followed Exactly Or . . .Personal Injury Could Result." Unlike the step by step recommended procedures for disassembly, the Secretary argued the positioning of a signalman was a required safety procedure.

In the Decision and Order, the court rejected the Secretary's interpretation of the manual and determined the manual's instruction to have a signalman was part of the recommendations and as such not a specification under § 1926.550(a)(1). The court looked to the definition of "specification" and concluded the sense of a specification is that an employer can be penalized if it does not comply. On the other hand, a recommendation does not imply an employer will be penalized if the recommendation is not followed. It is a suggestion, a proposal, an option to be considered.

Although determined by the court to be incorrect, the Secretary's interpretation did not lack substantial justification for the purposes of EAJA. This was a case of first impression. The Secretary was advancing a fair reading of the manufacturer's manual which if accepted by the court could have established a violation of § 1926.550(a)(1). The EAJA was not intended to prevent the Secretary from pursuing a credible interpretation. It was a plausible reading of the manufacturer's intent and a credible extension of its purpose even though the Secretary did not prevail. A safety standard is generally construed liberally to allow broad coverage in carrying out the congressional intent to provide safe and healthful working conditions.

With regard to the Secretary's allegation of booming up which the Court found did not trigger the manual's warning, the Secretary argued, albeit unsuccessfully, that the phrase "operation of ....cranes" should not be restricted to only those instances where the crane is engaged in performing lifts. *Austin Bridge Co.,* 1986-87 CCH OSHD 27,604 (No. 85-1061, 1986) (ALJ). Since the raising

of the butt section of the boom involved an "area of motion," the Secretary posits that Ben Hur was required to position a signalman to warn Bell of any danger. It was a reasonable inference that booming up included raising the gantry.

The Secretary had a reasonable basis in fact, no signalman was positioned. At the time of the accident, Mr. Lillicrap was on the crane behind the cab in an area not observable by the crane operator. As discussed, the manufacturer's manual was susceptible to different interpretations. The Secretary offered a credible application of the manual's instructions to the standard's use of "specifications and limitations." Her position was at least arguably correct. Her interpretation of the manual was credible and the undisputed fact of no signalman supported her interpretation.

Substantial justification for the alleged violation of § 1926.550(a)(1) is established.

Item 2: Alleged Serious Violation of § 1926.550(a)(8)

Section 1926.550(a)(8) requires that "[B]elts, gears, shafts, pulleys, sprockets, spindles, drums, fly wheels, chains, or other reciprocating, rotating, or other moving parts or equipment shall be guarded if such parts are exposed to contact by employees, or otherwise create a hazard."

The item was withdrawn by the Secretary at the commencement of the hearing on May 11, 2010 (Tr. 5). She offered no explanation for her withdrawal.

There is no presumption of the lack of justification merely because the citation was withdrawn. *Hocking Valley Steel Erectors, Inc.,* 11 BNA OSHC *supra* at 1498. The EAJA provides the Secretary with every reason to withdraw a citation once the lack of substantial justification appears and to provide evidence that until the withdrawal occurred, her position was substantially justified.

The record, here, fails to show that the Secretary was substantially justified in pursuing the alleged violation until April 6, 2010 when she notified Ben Hur of her intent to withdraw. In response to the EAJA application, the Secretary made no showing of a reasonable basis for alleging the violation. The Secretary has not shown facts to support the legal theory advanced by the issuance of the citation. Although the unexplained withdrawal of a citation does not necessarily alter the substantial justification of the Secretary's position, the Secretary must produce some evidence, such as affidavits, to support a claim of substantial justification. *K.D.K Upset Forging, Inc.*, 12 BNA OSHC 1856 (No 81-1932, 1986).

In response to the EAJA application, the Secretary failed to produce affidavits or other evidence justifying her allegation that the lack of guarding requirement was violated. She offered no basis for citing Ben Hur for violation of § 1926.550(a)(8). Without providing such basis for her issuance of the citation, the court is unable to determine whether the Secretary was substantially justified.

Ben Hur is entitled to reasonable fees and expenses related to its defense against this allegation.

Citation No. 2

Item 1: Alleged Serious Violation of § 1926.21(b)(2), As Amended

Section 1926.21(b)(2) requires that "[T]he employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury."

The Secretary amended the allegation from a willful violation of § 1926.503(a)(2)(iii) to a serious violation of § 1926.21(b)(2) on April 15, 2010. By e-mail, the Secretary notified Ben Hur of her intention to amend the citation on April 6, 2010. The court's decision to vacate the alleged violation of § 1926.21(b)(2) was based upon an analysis of the evidence and not on the applicability of the originally cited standard.

Mr. Lillicrap was an apprentice who had received training from the union. Also, Mr. Bell testified that he instructed him on tying off. The standard requires employers to train all employees whether or not they are out of union halls and no matter how experienced on the recognized hazards in the workplace. Employees especially inexperienced employees are expected to be informed by supervisory personnel of the dangers associated with the specific hazardous activity in which they are engaged. *National Industrial Constructors, Inc*. 583 F.2d 1048 (8th Cir. 1978).

The fact Mr. Lillicrap tied-off to a live drum line which caused the accident does not establish a violation of § 1926.21(b)(2). In *El Paso Crane and Rigging Co., Inc*., 16 BNA OSHC 1419 (No. 90-1106, 1993), the Commission stated that "[t]he issue as to this particular citation item . . . is whether the employer's program of safety instruction provided adequate guidance to the employees, not whether the accident could have been averted."

In her response to the EAJA application, Secretary claims she was substantially justified

because Mr. Bell did not claim that he gave tie-off instructions until his deposition on April 13, 2010. Prior to the issuance of the citation, the Secretary claims CSHO specifically asked Mr. Bell "did you ever give [Mr. Lillicrap] any training about wearing a harness or where to attach or anything like that?" At that time, rather than state as he claimed at his deposition and at the hearing, that such training or instructions were indeed given, Bell answered "that's not my expertise." Secretary claims Mr. Bell's deposition was suspect given that he had previously never stated he provided tie-off instruction to Mr. Lillicrap. If such information had been conveyed, the Secretary maintains the citation may not have been pursued under either the original or subsequent cited standard. During the Secretary's cross examination, when confronted with the transcript of his recorded interview, she characterizes Mr. Bell as evasive (Tr. 238-239). Also, the Secretary claims Mr. Bell did not make any statement to the McCarthy accident investigator regarding instructions given to Lillicrap to not tie-off to the live line (Exh. C-9). Given that Mr. Bell did not tell OSHA that he had provided tie-off instruction and also did not mention this to the general contractor investigator, the Secretary was substantially justified in proceeding.

Also, there was an issue as to Mr. Bell's qualifications to give instruction on attaching lanyards. Mr. Bell never worked above 6 feet. He had not worn fall protection equipment nor did he have reason to know the proper tie off points on the crane. Mr. Bell testified his job duties did not include giving any safety training. He never told Ben Hur management that he was ostensibly giving safety training to Lillicrap (Tr. 235).

The EAJA is not to be read to deter the Secretary from pursing 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, as in this case, do not need to be uncontradicted. Determinations based on disputed facts which are not resolved in favor of the Secretary do not necessarily render the Secretary's position as unjustified. If the credibility determinations in this case had been resolved in favor of the Secretary as opposed to Ben Hur, the Secretary's claim of violation would have been supported. "[A] case which truly turns on credibility issues is particularly ill-suited for the reallocation of litigation fees under the EAJA." *Consolidated Construction, Inc.,* 16 BNA OSHC 1001, 1006 (No. 89-2839, 1993). Credibility determinations made by the court do not mean the Secretary's position lacked substantial justification. The Secretary is not

accountable for the adverse resolution of credibility issues.

The Secretary has established that she was substantially justified in pursuing the alleged violation of § 1926.21(b)(2). She had a reasonable basis; the contradictory and ambiguous statements of crane operator Bell which was supported the lack of training records by Ben Hur, for the facts alleged. The facts alleged supported the legal theory advanced by the Secretary that Ben Hur violated § 1926.21(b)(2).

However, the Secretary failed to provide a substantial justification for initially citing Ben Hur for willful violation of § 1926.503(a)(2)(iii) in July 24, 2009. The Secretary in her motion to amend, stated that "the incorrect standard was cited." The Secretary offered no justification for citing § 1926.503(a)(2)(iii) or alleging a willful classification with a $70,000.00 proposed penalty.

Although both standards require fall protection training and the underlying factual violative description remained the same, the Secretary's withdrawal of the willful classification and high proposed penalty makes Ben Hur the prevailing party to a substantial portion of the case. The Secretary offered no evidence or information identifying her basis for alleging a willful violation or requesting the maximum penalty. There were no affidavits or portions of the OSHA inspection file provided supporting or justifying the allegation of willful. Without such support, the court cannot conclude the Secretary was substantially justified for alleging a willful violation of § 1926.503(a)(2)(iii).

Special Circumstances

The record fails to show special circumstances which prevent an award of fees and expenses.

Ben Hur's Fees and Expenses

Based upon finding a lack of substantial justification for alleging a violation of § 1926.550(a)(8) (Citation no. 1, item 2) and a willful violation of § 1926.503(a)(2)(iii) (Citation no. 2, item 1), Ben Hur is entitled to reasonable attorneys' fees and expenses for defending the alleged violations and preparing the EAJA application.

As Ben Hur recognizes, the Commission limits an attorney's hourly rate to $125. Ben Hur's EAJA application shows attorneys' fees in the amount of $34,762.50 (278.1 hours) and other fees and expenses of $20,167.22 (law firm, trial transcript, Lawgical Choice, GorePerry, Bi-State, Smith Consulting, Hugh Murphy, Steve Rank) for the period from July 29, 2009 to August 19, 2010. Ben

Hur also seeks $3,987.50 (31.9 hours) for the preparation and filing of the EAJA application.

In determining the reasonableness of attorneys' fees for the Secretary's lack of justification for alleged serious violation of § 1926.550(a)(8) and willful violation of § 1926.503(a)(2)(iii), the court considers the difficulty or complexity of the issues and the value of the services provided. In her response, the Secretary does not contend that an award of reasonable fees and expenses are unjust. She disputes the amount claimed as excessive.

The Secretary shows that Ben Hur was on notice of the Secretary's intent to withdraw the alleged violations of § 1926.550(a)(8) and § 1926.503(a)(2)(ii) on April 6, 2010. Although Ben Hur's counsel claims she was informed of the Secretary's withdrawal on April 13, 2010 and did not spend any material time on the items after that date, the Secretary shows an e-mail sent on April 6, 2010 where the Secretary advises counsel of the withdrawal of both items. Such e-mail gave counsel sufficient notice to cease any further work on the two items.

Also, it is noted that Ben Hur's EAJA application does not identify the portion of claimed attorneys' fees and expenses attributable to each citation item. The record fails to show the time spent on a specific alleged citation item. In its application, Ben Hur specifically refers to the dates of 1/4/10, 2/16/10, 4/2/10 and 4/5/10 to show time spent (total of 10.3 hours) in researching and analyzing the alleged violation of § 1926.550(a)(8).

In view of counsel's experience in OSHA proceedings, her familiarity with Ben Hur's operation, the lack of novelty, the rather straightforward factual dispute between the parties, and the Secretary's withdrawal of the two items prior to the hearing, a reasonable amount of time spent by counsel is no more than 36.5 hours (10.3 hours for §1926.550(a)(8) and 26.2 hours for the willful violation of § 1926.503(a)(2)(ii)) or more than two-thirds of attorneys' time spent between July 29, 2009 to April 6, 2010. Counsel's records show a total of 45.5 hours. At $125 per hour, Ben Hur is entitled to $4,562.50 in fees in defending the alleged violations of § 1926.550(a)(8) and § 1926.503(a)(2)(ii) for the period from July 29, 2009, when counsel initiated services, to April 6, 2010 when Ben Hur received notice of the withdrawal.

With regard to other fees and expenses in defending the alleged violations of § 1926.550(a)(8) and § 1926.503(a)(2)(iii), Ben Hur's application is also limited to the period of July 29, 2009 to April 6, 2010. A review of the EAJA application shows no expenses incurred by the law firm prior to April

6, 2010. The lack of other fees and expenses prior to April 6, 2010 are also shown for the services of Norma Carlin, Lawgical Choice, GorePerry, Bi-State, Smith Consulting, and expert Hugh Murphy. The fees incurred by Steve Rank prior to April 6, 2010 (15.75 hours at $150 per hour) are not shown to apply to the alleged violations of § 1926.550(a)(8) or § 1926.503(a)(2)(iii). According to the application, the charges sought by Rank, a consulting expert, have not been paid, although payable. Ben Hur's application fails to show any other fees and expenses prior to April 6, 2009.

With regard to preparing the EAJA application, Ben Hur's application shows fees of $3,987.50 at $125 per hour for 31.9 hours. A reasonable fee for submitting the application on two items which were withdrawn prior to hearing is 15 hours at $125 per hour for $1,875.00.

A total of $6,437.50 in attorneys' fees for 51.5 hours (36.5 hours for the defense and 15 hours of EAJA preparation) is deemed reasonable for the Secretary's lack of substantial justification for alleged violations of § 1926.550(a)(8) and § 1926.503(a)(2)(iii). No other fees and expenses are deemed applicable.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is ORDERED that:

1. Ben Hur's EAJA application for attorney fees and expenses is **DENIED** as to items 1 and 3.

2. Ben Hur's EAJA application for attorney fees and expenses is **GRANTED** as to item 2 and fees in the total amount of $ 6,437.50 (defending the two alleged violations and preparing the EAJA application) is awarded as reasonable.

No expenses were shown incurred prior to April 6, 2010 when Ben Hur was notified of the withdrawal of § 1926.550(a)(8) and § 1926.503(a)(2)(iii).

/s/
KEN S. WELSCH
Judge

Date: March 22, 2011