United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, SW
Atlanta, Georgia 30303-3104

Secretary of Labor, Complainant, v. AAA Delivery Services, Inc., Respondent.	OSHRC Docket No. **02-0923**

Appearances:

Ann G. Paschall, Esq., U. S. Department of Labor, Office of the Solicitor, Atlanta, Georgia
For Complainant

Brent I. Clark, Esq., Seyfarth Shaw, Chicago, Illinois
For Respondent

Before: Administrative Law Judge Stephen J. Simko, Jr.

DECISION ON FEE AND EXPENSE APPLICATION

AAA Delivery Services, Inc. (AAA), seeks an award for fees and expenses in accordance with the Equal Access to Justice Act, 5 U. S. C. § 504 (EAJA), for costs incurred in its defense against a citation and proposed penalty issued by the Secretary of Labor on May 10, 2002, following the death of Patrick McDonough, a newspaper vendor.

The court heard the case on January 23, 2003, and vacated the citation in a decision issued on May 30, 2003. The court concluded the cited standard did not apply to the cited conditions. The Secretary filed a motion for reconsideration of the decision, which the court denied on June 23, 2003. The Secretary petitioned the Review Commission for review, which the Commission granted. On September 1, 2003, the Commission vacated the citation, but on a different basis than the one used by this court. The Commission held that Patrick McDonough was an independent contractor, and not an employee of AAA.

On November 30, 2005, AAA filed an application for fees and expenses in the amount of $50,812.54. The Secretary filed a response opposing AAA's application on December 30, 2005. AAA replied to the Secretary's response on January 23, 2006.

For the reasons discussed more fully below, AAA's application is denied.

Issues

The Secretary does not dispute AAA's eligibility under the EAJA. The issues are:

1. Was the Secretary substantially justified in bringing this case against AAA?; and
2. If not, is AAA entitled to the entire amount of $ 50, 812.54 it claims as eligible fees and expenses?

Facts

AAA is a Florida corporation engaged in the business of purchasing, distributing, and selling newspapers in the Fort Lauderdale area. On November 23, 2001, an automobile struck and killed McDonough as he was selling newspapers, distributed by AAA, at a busy intersection in Boca Raton, Florida. Following an inspection by Occupational Safety and Health Administration (OSHA) compliance officer Natasha Sanborn, the Secretary issued a citation to AAA alleging a serious violation of 29 C.F.R. § 1910.132(a) for failing to provide reflective clothing to its vendors. The Secretary proposed a penalty of $4,900.00.

Principles of Law

EAJA

Commission Rule 2204.101 provides:

> The Equal Access to Justice Act, 5 U.S.C. 504, provides for an award of attorney or agent fees and other expenses to eligible individuals and entities who are parties to certain administrative proceedings (called "adversary adjudications") before the Occupational Safety and Health Review Commission. An eligible party may receive an award when it prevails over the Secretary of Labor, unless the Secretary's position in the proceeding was substantially justified or that special circumstances make an award unjust.

Commission Rule 2204.106(a) provides in pertinent part:

> The position of the Secretary includes, in addition to the position taken by the Secretary in the adversary adjudication, the action or failure to act by the Secretary upon which the adversary adjudication is based. The burden of persuasion that an award should not be made to an eligible prevailing applicant because the Secretary's position was substantially justified is on the Secretary.

Commission Rule 2204.201(a) provides in pertinent part:

> The application shall show that the applicant has prevailed and identify the position of the Secretary that the applicant alleges was not substantially justified.

Eligibility

The party seeking an award for fees and expenses must submit an application within 30 days of the final disposition in an adversary adjudication. 5 U.S.C. § 504(a)(2). The prevailing party must meet the established eligibility requirements before it can be awarded attorneys' fees and expenses. Commission Rule 2204.105(b)(4) requires that an eligible employer be a "corporation . . . that has a net worth of not more than $7 million and employs not more than 500 employees." Commission Rule 2204.105(c) provides, "For the purpose of eligibility, the net worth and number of employees shall be determined as of the date the notice of contest was filed." Commission Rule 2204.202 (a) requires the applicant to "provide with its application a detailed exhibit showing the net worth of the applicant as of the date of the notice of contest "that provides full disclosure of the applicant's assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards in this part."

Prevailing Party

Section 504(a)(2) of 5 U.S.C. provides:

> A party seeking an award of fees and other expenses shall within thirty days of the final disposition in the adverse adjudication submit to the agency an application which shows that the party was the prevailing party.

Substantially Justified

The Secretary must prove that her position in bringing this case was substantially justified. "The 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). The reasonableness test comprises three parts. The Secretary must show: (1) that there is a reasonable basis for the facts alleged, (2) that there exists a reasonable basis in law for the theory it propounds, and (3) that the facts alleged will reasonably support the legal theory advanced. *Gaston v. Bowen*, 854 F.2d 379, 380 (10th Cir. 1988).

Analysis

The Secretary does not dispute AAA's assertion that it employed fewer than 500 employees and had a net worth of less than $7 million on the date of its notice of contest (see Attachment A to AAA's EAJA Application). The Secretary concedes AAA meets the eligibility requirements under the EAJA. The Secretary also concedes AAA prevailed in her proceeding against it. The Secretary disputes AAA's claim she was not substantially justified in citing it, as McDonough's employer, for violating 29 C.F.R. § 1910.132(a) by failing to provide him with reflective clothing.

Applicability of the Standard

This judge vacated item 1, alleging a serious violation of 29 C.F.R. § 1910.132(a), on the grounds the standard did not apply to the cited conditions.

The standard at 29 C.F.R. § 1910.132(a) provides:

> Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

The citation alleges: "On or about 11/23/01, workers were not provided with the proper protective equipment such as a reflective vest while selling newspapers on a street corner under limited visibility conditions."

Under the reasonableness test, the record establishes the Secretary had a reasonable basis for alleging the facts she did: it is undisputed that McDonough was not wearing a reflective vest at the time of his death. The Secretary must also establish there exists a reasonable basis in law for the theory she propounds, *i. e.*, that under 29 C.F.R. § 1910.132(a), "protective equipment" includes reflective vests. AAA argues this theory is not reasonable (AAA's application, p. 4):

> Throughout this litigation, the Secretary knew no court had previously found that warning garments such as reflective vests constituted personal protective equipment under the PPE standard. The Secretary also knew it had specifically defined reflective vests to be warning garments, not personal protective equipment, in its marine terminal and construction standards. . . . Nevertheless, the Secretary pursued the case through hearing.

Despite AAA's argument, the Secretary did have a reasonable basis in law for her theory that reflective vests qualify as PPE. At the time of the litigation, the Commission had not (and as of this writing, has not) definitively held 29 C.F.R. § 1910.132(a) does not apply to reflective vests. Cases where this issue has arisen have either been decided on other grounds, or have been decided by administrative law judges, whose unreviewed decisions have no precedential value.

While this court analyzed the standard's language and concluded 29 C.F.R. § 1910.132(a) was intended to include only equipment that acts as a physical barrier to potential hazards, this conclusion is not immediately evident on the standard's face. At least one administrative law judge has found 29 C.F.R. § 1910.132(a) applies to reflective vests where employees working at night are exposed to traffic. Judge Barkley, in an order issued August 6, 2004, denied respondent's motion to dismiss a citation for 29 C.F.R. § 1910.132(a), finding the standard applied to reflective vests because traffic poses a "hazard of environment" to employees working in darkness. *U. S. Postal Service,* (No. 04-0655, 1994).[1] This is an issue over which reasonable minds can disagree.

The Secretary must also show AAA's failure to require McDonough to wear a reflective vests supports her theory that this failure constituted a violation of 29 C.F.R. § 1910.132(a). She has done this. Citing AAA's failure to provide McDonough with a reflective vest is consistent with her interpretation of the standard.

The Secretary was reasonably justified in bringing this case against AAA.

AAA's Employment Relationship with McDonough

The Commission found McDonough was an independent contractor, and thus was not an employee of AAA. In making this determination, the Commission analyzed a number of factors as set out in *Nationwide Mutual Insurance Company v. Darden,* 503 U.S. 318 112 S. Ct. 1344 (1992). The Secretary argued before the Commission that, under *Darden,* the central inquiry is:

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the

[1] In its reply, AAA argues the court cannot consider Judge Barkley's order in determining substantial justification because the Secretary did not refer to it in the proceeding below, so it is not part of the record. The Secretary is not referring to Judge Barkley's order as evidence, but rather in support of her position that there is a reasonable basis in law for the theory she propounds. Reference to the order is appropriate.

> work; the duration of the relationship between parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party. *Nationwide Mutual Insurance Company v. Darden*, 503 U.S. at 323-24 (quoting Community for Creative Non-Violence v. Reid, 490 U.S. 730, 751-752 (1989) (footnotes omitted)).

Complainant stated that the fundamental question under the *Darden* test is whether the alleged employer has the right to control work involved. In support of her position that AAA has the right to control the work of its newspaper vendors, the Secretary argued:

> AAA set the terms of payment and the hours of work. AAA supplied the goods to be vended, and the sole tool of the trade, the money apron. All work sites were determined initially by AAA - the intersections which the vendors came to prefer for themselves - and transportation was provided by AAA from the vendor's home to the site and back again. Even on a daily basis, AAA chose where the vendor would work if there was any dispute with personal preferences. AAA determined the fitness of the vendors to perform their duties on a daily basis, reserving the right to reject their services if they were incapacitated by drunkenness or other impairment. AAA provided personal protective equipment in the form of orange vests, when asked. AAA made safety training available, and provided transportation to and from the safety training if a worker elected to take it.
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> In short, but for AAA, these workers were unemployed. They could not independently hire out their services to another employer; there was no competitive market in which AAA was competing for these vendors' services. The supposed contracts AAA had with McDonough were meaningless pieces of paper; one of them was not signed, and AAA failed to honor its apparently undertaking to get "independent contractor" insurance for him, even though it collected $2 weekly for supposed "premiums." McDonough was AAA's employee; he had a regular relationship with the company, it controlled his rate of pay, it controlled where he worked, and indeed it controlled whether he worked at all, since it reserved the right to reject his services on any given day.
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> Secretary's Opening Brief, pages 14 and 15.

This court found it unnecessary to address the employment issue because it vacated the citation on the grounds the cited standard was inapplicable. The Court in *Darden* cautions there is

"no shorthand formula or magic phrase that can be applied to find the answer" to whether an employment relationship exists. *Id.* at 1349. The totality of the factors must be weighed. Each case must be decided on the facts peculiar to it.

While the Commission found that McDonough was not an employee of respondent, the Secretary had a reasonable basis for the facts alleged. Although the vendors earned money by selling newspapers which were provided by AAA, they had no downside economic risk. They were guaranteed each day to receive all proceeds from the sale of 53 papers. The Secretary had a reasonable basis in law for the theory that newspaper vendors are not independent contractors. Compliance officer Sanborn recommended that no citation be issued to AAA based in her belief that the vendors were independent contractors (attachment H to AAA's EAJA application). AAA cites this in support of its argument the Secretary was not substantially justified in bringing this action. This argument is rejected. The recommendation of a compliance officer is not dispositive of a legal issue.

At least one jurisdiction has found that newspaper vendors are employees, and not independent contractors. *See Kentucky Unemployment Insurance Commission v. Landmark Community Newspapers of Kentucky, Inc.*, 91 S. W. 3d 575 (KY 2002). The facts of the case reasonably support the legal theory advanced by the Secretary. Under these circumstances, the Secretary was substantially justified in bringing this case against AAA.

Settlement Negotiations

AAA argues the Secretary was not substantially justified in pursuing this action after AAA made a reasonable offer of settlement. This argument has no place in an EAJA petition. The Secretary has met her burden in showing her positions in bringing the case were substantially justified. She has no further burden of showing she was substantially justified in rejecting a settlement offer, reasonable or not, from AAA.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is hereby ORDERED that:

AAA's application for attorneys' fees and expenses is denied.

/s/
STEPHEN J. SIMKO, JR.
Judge

Date: March 13, 2006