UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. D.C. PAGERS, INC., d/b/a SUPERIOR SERVICE, Respondent.	: : : : : : : : : :	OSHRC DOCKET NO. 01-0162

DECISION AND ORDER

Background and Procedural History

This matter is before the Occupational Safety and Health Review Commission ("the Commission"), pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("the Act"), to determine whether the above-named Respondent is entitled to legal fees and expenses pursuant to the Equal Access to Justice Act ("EAJA"), 5 U.S.C. § 504.

The Occupational Safety and Health Administration ("OSHA") inspected Respondent's construction work site, located in Clairsville, Ohio, on December 19, 2000. As a result of the inspection, Respondent was issued a serious citation alleging violations of 29 C.F.R. §§ 1926.21(b)(2), 1926.102(a)(1) and 1926.417(d). Respondent contested the citation, and a hearing was held on June 5, 2001, in Pittsburgh, Pennsylvania. At the hearing, Respondent's motion to dismiss Item 3 of the citation was granted, based on the Secretary's failure to file a motion prior to the hearing to amend the item to allege a violation of the appropriate standard. In addition, Items 1 and 2 were vacated in my decision and order issued on August 2, 2001, based on the Secretary's failure to establish the alleged violations. The Secretary did not petition for review of my decision, which became a final order on September 14, 2001. Respondent filed its EAJA application on September 26, 2001, and the Secretary filed her answer to the application on October 29, 2001. For the reasons set out below, Respondent's application is GRANTED.

The Standard for an Award

The EAJA provides for the award of attorney or agent fees and other expenses to an eligible applicant prevailing over the Secretary of Labor ("the Secretary"), in an adversary adjudication before the Commission, unless the Secretary's position in the proceeding was substantially justified or special circumstances make an award unjust. *See* Commission Rule 101, 29 C.F.R. 2200.101.[1] There is no dispute, and Respondent's application establishes, that D.C. Pagers, Inc., is an "eligible applicant" as set out in Commission Rule 105, 29 C.F.R. 2200.105.[2] There is likewise no dispute that Respondent is a "prevailing applicant" under Commission Rule 106, 29 C.F.R. 2200.106(a). The Secretary contends, however, that Respondent is not entitled to an award because her position in this matter was substantially justified. In this regard, Rule 106(a) states in pertinent part as follows:

> 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.

In support of their respective positions, both parties cite to *Mautz & Oren, Inc.*, 16 BNA OSHC 1006, 1009 (No. 89-1366, 1993). In that case, the Commission set out the test for "substantial justification" as follows:

> The test of whether the Secretary's action is substantially justified is essentially one of reasonableness in law and fact. *Hocking Valley Steel Erectors, Inc.*, 11 BNA OSHC 1492 (No. 80-1463, 1983). The Secretary's position must be "'justified in substance or in the main'--that is, justified to a degree that could satisfy a reasonable person." *Gatson v. Bowen*, 854 F.2d 379, 380 (10th Cir. 1988) (citation omitted).

The Commission has reiterated this test in more recent cases. *See, e.g., Contour Erection and Siding Sys.,Inc.*, 18 BNA OSHC 1714, 1716 (No. 96-0063, 1999); *Pentecost Contracting Corp.*, 17 BNA OSHC 2133, 2135 (Nos. 92-3789 & 92-3790, 1997).

Citation 1, Item 3

---

[1]The Commission's EAJA rules appear at 29 C.F.R. 2204.101 *et seq.* and essentially mirror those of 5 U.S.C. 504.

[2]Respondent falls within Commission Rule 105(b)(4), which is "[a]ny other partnership, corporation, association, or public or private organization that has a net worth of not more than $7 million and employs not more than 500 employees."

Using the foregoing test, I find that the Secretary's position in regard to Item 3 was not substantially justified. This item alleged a violation of 29 C.F.R. 1926.417(d), which, as Respondent points out, is a nonexistent standard.[3] As set out in my decision and order, the record in this case shows that Respondent raised the issue of having been cited under a nonexistent standard during the informal settlement conference held with the OSHA area director. (Tr. 8). The record also shows that, in a letter dated January 23, 2001, Respondent again advised the area director that it had been incorrectly cited.[4] In its answer to the Secretary's complaint, Respondent once more pointed out that it had been cited incorrectly and moved for Item 3 to be dismissed. Finally, in its pretrial statement dated May 11, 2001, Respondent noted that it had previously moved to dismiss Item 3 and that, to its belief, the motion was still pending.

Notwithstanding the foregoing, the Secretary did not file a motion to amend the citation prior to the hearing, as required by my pretrial order.[5] In fact, the Secretary took no action at all with respect to Item 3 until Respondent renewed its motion to dismiss at the beginning of the hearing. At that point, the Secretary objected to the motion to dismiss. (Tr. 7-8). The motion to dismiss Item 3 was granted, however, for two reasons. First, it was noted that, to the extent there was any prejudice, Respondent was placed in a difficult position in regard to putting on a defense. Second, it was noted that the Secretary had failed to comply with my pretrial order and that the proper sanction was to dismiss Item 3. (Tr. 9). The Secretary then moved to amend the pleadings to conform to the evidence that would be presented. (Tr. 11). That motion was denied for the reasons already given, but the parties were afforded the opportunity to give a narrative statement with respect to what the testimony would have been as to Item 3. (Tr. 9-11; 17-18).

---

[3]29 C.F.R. 1926.217, which addresses lockout and tagging of circuits in construction work, has only subparts (a), (b) and (c). There is no subpart (d).

[4]Respondent even set out the portion the OSHA Field Inspection Reference Manual ("F.I.R.M.") that advises what the area director should do when it is learned that the employer has been cited improperly. *See* F.I.R.M., CPL 2.103, Section 8, Chapter IV, Paragraph B.2.

[5]On March 29, 2001, I issued a "Notice of Hearing, Planning Order and Miscellaneous Orders," which required any motions to amend the pleadings to be filed so as to be received by all parties no later than May 7, 2001.

In her answer to the EAJA application, the Secretary asserts, as she did at the hearing and in her post-hearing brief, that Respondent was informed at the time of the informal conference that the alleged violation of 29 C.F.R. 1926.417(d) was a "typo" and that the standard OSHA had intended to cite was 29 C.F.R. 1926.417(b). The Secretary further asserts that Respondent's counsel was also advised of this fact prior to the hearing, and that, accordingly, Respondent would not have been prejudiced by the amendment of Item 3.[6] The Secretary misses the point. At the hearing, I indicated that the more important reason for granting the motion to dismiss was the fact that the Secretary, despite repeated notice from the time of the informal conference in January 2001, and despite my pre-heating order, had taken no action to amend the citation to allege a violation of the appropriate standard. (Tr. 9). Under these circumstances, the Secretary was not substantially justified in proceeding with Item 3, and Respondent is entitled to an award for this item.

Citation 1, Items 1 and 2

I further find that the Secretary's position in regard to Items 1 and 2 was not substantially justified. These two items were based on essentially the same facts. As set out in my decision and order, the inspecting OSHA compliance officer ("CO") observed an employee, who identified himself as Mr. Dillon, Respondent's foreman at the site, at a secondary electrical panel. Another employee of Respondent, Mr. Thalman, was standing "right behind" Mr. Dillon at the time. Although there was some dispute about what Mr. Dillon was doing, I concluded, based on the testimony as a whole, that he used a tester to check the voltage going to the panel and then proceeded to check the markings on the breakers in the panel. (Tr. 15-21; 38; 66-69). The evidence showed that Mr. Thalman had turned off the voltage at the primary electrical panel, so that no power was going to the secondary panel, and that the breakers in the secondary panel were also off. (Tr. 20; 67-71). The CO determined that the employees, Mr. Dillon in particular, were exposed to the hazard of an "arc blast" if the panel were energized and that they had not had appropriate training in working on electrical equipment. He also determined that they had not had training in the safety equipment they should have been using, in this case eye protection, to protect them from an arc blast. Finally, the CO

[6]Respondent did not obtain counsel in this matter until May 11, 2001.

determined that the employees should have been wearing eye protection to cut the PVC pipe he saw at the site, although that work was not going on when he was there.[7] (Tr. 19-26; 31-32).

Item 1 alleged a violation of 29 C.F.R. 1926.21(b)(2), which provides that:

> The 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.

As noted in my decision, the Commission requires that, "[u]nder 1926.21(b)(2), an employer must instruct its employees in the recognition and avoidance of those hazards of which a reasonably prudent employer would have been aware." *See, e.g., Capform, Inc.*, 19 BNA OSHC 1374, 1376 (No. 99-0322, 2001) (citations omitted). As further noted in my decision, the Secretary did not prove either the presence of hazards or the existence of another regulation applicable to such hazards that would have required a reasonably prudent employer to take the actions Respondent was cited for failing to take. In this regard, the CO testified that Respondent's employees at the site:

> had not had training in safety-related work practices in regard to arc blast zones or working on live electrical in determining what hazards or what personal protective equipment would be suitable for that particular work. (Tr. 24-25).

The record, however, did not establish that the employees were required to be trained in arc blasts. No arc blast occurred at the site, and the evidence did not show that there was a reasonable expectation one could have occurred. As found in my decision, the CO's statements about arc blasts were not illuminating, even after the Secretary's counsel asked him to elaborate, and I was not persuaded that he even knew what an arc blast was. (Tr. 19-20). Moreover, the CO's testimony did not establish that he had any education, experience or expertise in electrical equipment. (Tr. 12-13). As also found in my decision, the testimony of Roy Dutcher, Respondent's president, was far more probative and reliable, even considering his stake in the proceedings. Mr. Dutcher's testimony clearly demonstrated his knowledge and understanding of arc blasts, and his opinion that an arc blast could not have occurred at the site was far more trustworthy as it was based on his 35 years of experience

[7]According to Mr. Thalman, Respondent was "running the underground conduit" in order to "run it into the panel." (Tr. 63).

and established credentials in the field.[8] (Tr. 41-42; 48-49; 52-60). In addition, I observed the respective demeanors of these two individuals on the stand, and I found Mr. Dutcher to be a forthright and candid witness. The CO, on the other hand, was inclined to give evasive or incomplete answers, and I found his testimony generally undependable and lacking in credibility. The testimony of Mr. Dutcher was credited over that of the CO, and I concluded that Respondent did not violate the standard for not instructing its employees in the hazards of arc blasts.[9]

I also concluded that, even if the CO's testimony were interpreted to mean that Respondent did not have a reasonable safety program or did not provide safety training in general, his testimony was rejected. Mr. Dillon evidently told the CO they had a safety and health program but did not have one at the site. The CO apparently asked Mr. Dillon to send him a copy of the program, but one was not provided until the informal conference. (Tr. 23-24; 27-28). There was no evidence, however, that the CO ever asked a more senior company official for a copy of the program. Moreover, the CO testified the employees told him they had received some electrical training, and his determination that they had not had the appropriate training was premised mainly on the lack of training in arc blasts, which, as noted above, was not a hazard present at the site. (Tr. 24-26; 36-37). Finally, there was credible testimony from Mr. Dutcher and Mr. Thalman that Respondent had provided training about general electrical hazards. (Tr. 64-65). In view of the record, I found that the CO had "little or no basis on which to fairly evaluate the nature, extent or content of Respondent's training when he issued the citation." Item 1 of the citation was accordingly vacated.

In her answer, the Secretary asserts that she was justified in litigating this matter because the vacating of Item 1 was based on credibility determinations. This assertion is rejected. My finding that Respondent did not violate the standard was based primarily on the CO's issuance of this ciation item without a sufficient understanding of the electrical equipment involved or the risk of arc blast

---

[8]Mr. Dutcher is licensed as a master electrician in three states, and he is also licensed to train electrical contractors in their license renewal requirements. He testified that Mr. Dillon and Mr. Thalman are licensed master electricians with many years of experience. (Tr. 41-43).

[9]Mr. Dutcher's testimony was supported by that of Mr. Thalman. Mr. Thalman opined that there was no hazard at the site that required the use of eye protection. He said that besides the power being off at the primary panel, the breakers in the secondary panel were off. He also said that no electrical equipment was being operated. (Tr. 63-71).

on which he later relied, and on his failure to fairly evaluate Respondent's training, both of which could have been discovered well before the hearing with the exercise of reasonable diligence. I find that there was no substantial justification for the litigation of this item and that Respondent is entitled to an award.

Item 2 alleged a violation of 29 C.F.R. 1926.102(a)(1), which provides as follows:

> Employees shall be provided with eye and face protection equipment when machines or operations present potential eye or face injury from physical, chemical, or radiation agents.

As set out in my decision, the CO testified there were two bases for this item.[10] The first was that an employee was testing an electrical panel, which, if energized, could have caused an arc blast that could have resulted in injury to the employee's eyes or face. The second was that in cutting the PVC pipe, employees were exposed to potential eye injury from fragments of the pipe. (Tr. 19-21). In my decision, however, and as explained above, the record did not show that an arc blast hazard existed or that that hazard reasonably could have been anticipated at the site, such that eye protection was required. The CO's theory with respect to this particular instance was therefore rejected.

Also rejected was the CO's rationale for asserting that cutting the PVC pipe with a hand-held hacksaw could have caused an injury at the site. The CO testified that dust or fibers from such work could have become airborne and gotten into the employees' eyes. (Tr. 21). The CO did not observe anyone cutting PVC pipe at the site, however, and it is clear from the record that that work was not taking place while he was there. (Tr. 30-32). The CO also admitted that he had never heard of an eye injury from flying debris caused by cutting PVC pipe with a hand-held hacksaw. (Tr. 33). In addition, both Mr. Dutcher and Mr. Thalman testified that they had never heard of such an injury in all their years of experience, and Mr. Dutcher explained why an injury of the type the CO described was unlikely; in particular, he testified that any particles from the cutting operation would be substantially larger than dust and would not become airborne but would fall to the ground. (Tr. 48; 56-57; 66). The testimony of Mr. Dutcher was credited over that of the CO, and Item 2 was vacated.

---

[10]The CO agreed that Respondent provided the employees with safety glasses and that the employees told him they had safety glasses at the site. (Tr. 29-30).

The Secretary again asserts that she was justified in litigating this item because the vacating of Item 2 was based on credibility determinations. This assertion is again rejected. As in Item 1, my vacating of Item 2 was based primarily on the CO's conclusions which were based on mere impression without any other reasonable justification. In the first instance, the CO's conclusion was due to his lack of knowledge regarding electrical hazards. In the second instance, as noted in my decision, the CO's conclusion was found to be speculative at best. With the exercise of reasonable diligence, the Secretary, through her solicitors, could have discovered well before the hearing that the CO's conclusions with respect to these instances were without a sound basis. I find, therefore, that there was no substantial justification for litigating Item 2 and that Respondent is entitled to an award.

The Award to which Respondent is Entitled

Respondent's EAJA application includes statements of the legal services provided in this case, from May 9, 2001, the date on which Respondent retained counsel, through September 16, 2001. The statements show the dates on which legal services were performed, a detailed description of the services provided on that date, and the amount of attorney or paralegal time expended.[11] The statements also show various expenses such as photocopies, postage, UPS delivery services, long distance calls and the cost of obtaining the hearing transcript. The EAJA application includes an affidavit of Respondent's counsel attesting to the validity of the statements and to his belief that the amount of time, effort and expense was fair and warranted in the circumstances of this case. I have reviewed the application, and I find the amounts claimed reasonable and fully justified.

The Secretary's only objection to the amounts claimed relates to services provided on May 10, 2001. According to the statement that includes that date, Respondent's counsel had an extended meeting with Mr. Dutcher and drafted a motion to dismiss and a notice of appearance; Respondent's counsel also performed research and checked code sections, for a total of 1.30 hours of attorney time.

---

[11]The application claims $125.00 per hour, the statutory maximum, for Respondent's counsel, and $40.00 per hour for counsel's paralegal. The application also claims $115.00 per hour for another attorney in counsel's law firm for a one-time conference call on May 31, 2001. The call lasted .05 hour and the attorney time billed was $5.75.

The Secretary notes that the EAJA application states that the motion to dismiss was filed on March 12, 2001, before Respondent had counsel, and she asserts that Respondent's counsel's "attempt to gain compensation for work he did not perform casts serious doubt on Applicant's petition and the fees and expenses claimed therein."

Respondent included its motion to dismiss Item 3 of the citation in its answer to the complaint, which was, in fact, filed on March 12, 2001. This does not, however, provide a reason to deny the amounts claimed in the EAJA application, including those for May 10, 2001. First, as noted above, I have reviewed the entire application and find the amounts claimed to be reasonable. Second, the amount of time counsel expended on May 10, 2001, was for various services, including an extended meeting with the client, and I conclude that the 1.30 hours claimed for the services provided on that date would not be unreasonable even if counsel had not drafted the motion to dismiss. Third, it could well be that counsel drafted the motion to dismiss believing it was necessary to file the motion despite its having been included in the answer, and then, having thought further about it, decided that it was not necessary to file the motion after all. This conclusion is supported by the fact that there is no further claim of time expended on this matter, such as paralegal preparation of the motion.

Based on the foregoing, Respondent's application for legal fees and expenses is GRANTED, for the total amount claimed of $5,224.47. So ORDERED.

/s/

Michael H. Schoenfeld
Judge, OSHRC

Dated: 01/10/02
Washington, D.C.