United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR, Complainant, v. SPECIALIZED GRADING ENTERPRISES, INC., Respondent.	OSHRC DOCKET NO. 97-1560

DECISION AND ORDER

Specialized Grading Enterprises, Inc. (Specialized) seeks attorney's fees and expenses incurred in its defense against citations and proposed penalties issued by the Occupational Safety and Health Administration (OSHA) in accordance with the Equal Access to Justice Act (hereinafter, the EAJA), 5 U.S.C. §504, implemented at Commission Rule §2204.101, et seq. For the reasons enunciated below, Specialized's petition is GRANTED in part.

Under the EAJA, a prevailing party meeting the basic requirements for eligibility is entitled to an award of attorney fees and other expenses, unless the Secretary shows that her position was substantially justified or that special circumstances make an award unjust. 5 U.S.C. §§504(a)(1), 504(b)(1)(B); *William B. Hopke Co.*, 12 BNA OSHC 2158 (No. 81-0206, 1986).

Specialized submits that it is eligible for the recovery of fees under the EAJA, in that it has a net worth of not more than $7 million, and employs not more than 500 employees. The Secretary does not dispute Specialized's eligibility.

This judge's decision, which became a final order of the Commission on July 6, 1998 affirmed "serious" citation 1, item 1, alleging violation of §1926.651(b)(3). "Serious" citation 1, item 3, alleging violation of §1926.651(j)(2) was vacated during the hearing. "Serious" citation 1, items 2, 4 and 5, alleging violations of §1926.651(c)(2), (j)(2) and (k)(1) were vacated.

Specialized was the prevailing party with regard to citation 1, items 2 through 5, and seeks costs incurred in its defense of those items. The Secretary maintains that its position was substantially justified in regard to each item.

Alleged Violation of §1926.651(j)(2)

The cited item charged Specialized with failing to maintain a 2 foot clearance between the spoil pile and the trench edge. The citation stated that the violation took place on July 21, 1997. At the hearing the OSHA Compliance Officer (CO) stated that the spoil pile was at the edge on July 23, when his inspection took place. The CO admitted he did not see the spoil pile on July 21, and testified that the citation was based on an employee's statement that the spoil pile had always been in the same area. The CO admitted that the size of the spoil pile grows as a trench is excavated. The CO further admitted that the cited trench, which was only 4 or 5 feet long on July 21, had grown to 9 or 10 feet by July 23 (Tr. 89). Steve Schoenberg, the only Specialized employee who was on the job site July 21, testified that the spoil pile was a good three feet out from the edge of the trench on that date (Tr. 104). This item was vacated from the bench.

Alleged Violation of §1926.651 et seq.

The cited violations were based on Steve Schoenberg's interview with the CO, during which he admitted he had briefly entered the cited trench on July 21, 1997 while working alone at the job site. Schoenberg had been operating a backhoe, but entered the trench to locate the bottom of a footer with a probe. The trench was uninspected and unprotected. There was no means of egress provided.

Specialized denied knowledge of the cited violations. Specialized further maintained that the violations were the result of unpreventable employee misconduct. Complainant argued that the employee's presence in the trench was foreseeable,[1] and argued that a reasonably diligent employer would have provided on site supervision.

The cited violations were vacated pursuant to *Capital Electric Line Builders of Kansas, Inc.*, 678 F.2d 128 (10th Cir., 1982), in which the circuit court held that where employee misconduct is alleged, the Secretary must establish that cited violations were foreseeable. The court found that disproving unpreventable employee conduct is part of the Secretary's *prima facie* burden of showing employer knowledge. The court then pointed out that the Secretary can meet her burden by introducing evidence of inadequacies in the employer's safety precautions, training and/or supervision of employees.

[1] Complainant correctly notes that, under Commission precedent, the Secretary need only prove constructive knowledge of the violative conditions, not knowledge of employee exposure, to establish a violation of §5(a)(2) of the Act. *Ormet*, 14 BNA OSHC 2134, 1991-93 CCH OSHD ¶29,254 (85-531, 1991). The trenching precautions specified under §1926.651 *et seq.*, however, are required only when employee exposure is anticipated. There can be no violative condition unless and/or until employees plan to enter an excavation. Moreover, as noted below, the decision in this case was based on 10th Circuit case law rather than on Commission precedent.

Complainant introduced no evidence regarding the efficacy of Specialized's safety program. One on one supervision is not required by either the 10th Circuit or the Commission.

Substantial Justification

The test of whether government action is substantially justified is essentially one of reasonableness in law and fact. *Hocking Valley Steel Erectors, Inc.*, 11 BNA OSHC 1492, 1983 CCH OSHD ¶26,549 (80-1463, 1983).

As a threshold matter, this judge notes that like items 2, 4 and 5, item 3, alleging violation of §1926.651(j)(2), was predicated on Steve Schoenberg's apparently unauthorized entry into the trench on July 21. Had item 3 not been vacated for lack of evidence during the hearing, it would have been dismissed along with items 2, 4 and 5, based on the Secretary's failure to establish employer knowledge. Items 2 through 5 will, therefore, be considered together.

Complainant argues that there is disagreement among the Federal circuit courts as to the proper allocation of the burden of proof in such cases; the Commission itself places the burden of establishing employee misconduct on the employer. Nonetheless, this case was tried in the 10th Circuit, and the law of that Circuit is binding. Complainant has a duty to familiarize herself with the relevant precedent before proceeding to hearing, and is never justified in proceeding without having done so. If Complainant *was* familiar with 10th Circuit law, she should have realized that her evidence was insufficient to make her case. Complainant's only witness, the OSHA CO, had not examined Specialized's safety program (Tr. 95-96), and was completely unprepared to testify as to its efficacy.[2]

Complainant's litigation of the cited items was not reasonable under the relevant law, and so was not substantially justified. I find that an award of attorney fees is justified.

Amount of Fees

Specialized maintains that it expended approximately 68.4 hours in defending the vacated citation items. Specialized claims an additional 37.8 hours were spent in preparation of this EAJA application. In addition Specialized claims $236.25 in consulting fees and $222.60 in expenses, including long distance calls, postage, and photocopying. In total Specialized requests an award of $13,733.85.

The Commission has held that the hearing judge must determine a reasonable fee based on the complexity of the case and the novelty of the issues involved, utilizing his knowledge, expertise and

[2] Complainant argues that Specialized offered no evidence in support of its employee misconduct defense. Clearly, an employer need not present any evidence, and is entitled to require the Secretary to prove her case.

experience in occupational safety and health law. *William B. Hopke Co.*, 12 BNA OSHC 2158 (No. 81-0206, 1986).

This case involved five straightforward trenching violations. The Secretary proposed a total of $4,500.00 in penalties for the four vacated items. The hearing in the matter lasted approximately 4 hours; only two witnesses, the OSHA CO and Steve Schoenberg, testified; the transcript was just over 100 pages. Discussion of the vacated items took up approximately 3/4 of the transcript and four pages of Specialized's 20 page brief. The case raised a single novel legal issue, involving the split authority on the burden of proof in employee misconduct cases.

I find that the documented expenditures were not justified given the absence of complex issues, the few witnesses involved, and the brevity of the hearing. I find that an attorney reasonably familiar with OSHA law should have expended 40 hours preparing for, appearing at the hearing, and briefing the above captioned case, and 10 hours preparing the EAJA petition. At the statutory rate of $125.00 per hour, a reasonable fee in this case amounts to $6,250.00.

Specialized states that it was not certain that Steve Schoenberg would appear at the hearing, and hired the consultant hired to recreate the July 21, 1997 trench. The reasonable costs of consulting fees may be awarded if the services provided were necessary for preparation of the applicant's case. Consulting fees in the amount of $236.25 will be awarded.

Other expenses in the amount of $222.60 are properly documented and will be awarded.

Order

1. Complainant was not substantially justified in pursuing the cited items. Attorney fees in the amount of $6,708.85 are justified and are awarded.

Stanley M. Schwartz
Judge, OSHRC

Dated: