UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.
E.C.C.O. III ENTERPRISES, INC.
Respondent.

OSHRC DOCKET
NO. 92-0638

NOTICE OF DOCKETING
OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on December 6, 1994. The decision of the Judge will become a final order of the Commission on January 5, 1995 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before December 27, 1994 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr./jw

Date: December 6, 1994

Ray H. Darling, Jr.
Executive Secretary

Docket No. 92-0638

NOTICE IS GIVEN TO THE FOLLOWING:

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Administrative Law Judge
Occupational Safety and Health
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SECRETARY OF LABOR	:	
Complainant	:	
V.	:	OSHRC Docket No. 92-0638
E.C.C.O. III ENTERPRISES, INC.,	:	
Respondent	:	

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1970) ("the Act"). It relates to a Decision and Order issued by Judge Richard Gordon which became a Final Order of the Occupational Safety and Health Review Commission ("Commission") on September 2, 1993 in this matter resolving the merits of the case.

Respondent E.C.C.O. III Enterprises, Inc. ("ECCO") has submitted an Application for award of attorney fees and other expenses under the Equal Access to Justice Act ("EAJA"), 5 U.S.C. § 504, made applicable to Commission proceedings by 29 C.F.R. Part 2204.

ECCO is a corporation claiming it was the "prevailing party" as defined by EAJA and has met the requirements as an "eligible party". Under EAJA, an eligible party who is the prevailing party is entitled to an award of attorney fees and other expenses unless the Secretary of Labor ("Secretary") meets his burden that his position was "substantially justified".

On April 7, 1992, the Secretary filed the instant complaint against the respondent in Docket No. 92-0638. The complaint amended the citations and alleged three of the items to be repeat violations; thus, there were five violations in two citations: citation 1, item 1 alleged a serious-repeat violation; citation 1, item 2 alleged a serious violation; citation 2, item 1 alleged a serious-repeat-willful violation; citation 2, item 2 alleged a serious-willful violation; and citation 2, item 3 alleged a serious-repeat-willful violation.

According to the Affidavit filed in the matter pending herein by Barnett Silverstein, attorney for the complainant, there were three settlement offers made by the respondent. The first one was on April 21, 1992, when respondent's counsel suggested settling this matter by reducing serious-repeat citation 1, item 1 and its proposed $4,000.00 penalty to non-serious with a zero penalty; deleting serious citation 1, item 2 and its proposed $4,000.00 penalty; deleting serious-repeat-willful citation 2, item 1 and its proposed $35,000.00 penalty; deleting serious-willful citation 2, item 2 and its proposed $35,000.00 penalty; and reducing serious-repeat-willful citation 2, item 3 and its proposed $35,000.00 penalty to a serious violation with a penalty of 50% of what a serious violation would have been.

On September 8, 1992, respondent's counsel offered to settle this case for $4,000.00 if three of the five cited violations would be withdrawn and the remaining two items would be reclassified as per respondent counsel's suggestion of April 21, 1992. On September 9, 1993, respondent's counsel raised its final settlement offer to $10,000.00 provided three of the five items were withdrawn and the remaining two items would be reclassified as serious.

No settlement was reached and the hearing on this case was held before Judge Gordon on September 22 and 23, 1992, and continued on January 26, 27, and 28, 1993. He affirmed all items including the items amended to "repeat" in both citations of the Secretary's complaint, except he changed the "serious-willful" characterization of the three items on citation 2 to "serious". Thus, citation 1, item 1 was affirmed as a serious-repeat violation; citation 1, item 2 was affirmed as a serious violation; citation 2, item 1 was affirmed as a serious-repeat violation; citation 2, item 2 was affirmed as a serious violation; and citation 2, item 3 was affirmed as a serious-repeat violation. Judge Gordon also adopted the Secretary's proposed penalties for citation 1 and assessed $4,000.00 for each item of citation 1 for a total of $8000.00. For citation 2, he assessed $5,000.00 for each item for a total of $15,000.00 in penalties, thereby reducing the original proposed penalties for the "willful" classifications of that citation. Thus, for both citations, the total of the monetary penalties assessed was $23,000.00.

For the purpose of eligibility, EAJA requires a corporate applicant to state that it employs no more than 500 employees and to provide a detailed exhibit showing a net worth of not more than $7 million (emphasis added). Both requirements of the number of employees and the net worth must be stated as of the date the notice of contest was filed (emphasis added). 29 C.F.R.§§ 2204.105 and 2204.202. Here, in its Application, ECCO merely stated that it has "at all relevant times" employed fewer than five hundred employees. Respondent's net worth exhibit dated September 23,1993 from Anchin, Block

& Anchin does not comply with the requirements of EAJA as it fails to provide a detailed exhibit showing the net worth of the respondent as of the date of the notice of contest. Because of these deficiencies, there is not the proper evidence upon which a finding can be made as to whether or not the respondent is an "eligible party" to receive an award of attorney fees and other expenses. Even if respondent provided the necessary documentation to make a finding that it is an "eligible party", I find that ECCO would still not be eligible for an award of attorney fees as it is not the "prevailing party".

Respondent claimed to be the "prevailing party" and cited as its authority, H.P. Fowler Contracting Corporation, 11 OSHC 1841, 1845 (1984) wherein the Commission held that "the party seeking fees need not have prevailed as to the central issue in the case but only as to a discrete substantive portion of the proceeding" (emphasis added). Also, the United States Supreme Court has held that the standard for determining whether a party is a prevailing party is that the plaintiffs may be considered "prevailing parties" for attorney's fee purposes if they succeed on any significant issue in the litigation which achieves some of the benefits the parties sought in bringing suit. Hensley v. Eckerhart, 103 S.Ct. 1933, 1939 (1983).

In H.P. Fowler Contracting Corporation, Fowler was found by the Commission to be the prevailing party in a discrete substantive portion of that proceeding. In that case, there was a settlement agreement wherein one willful item was withdrawn, two willful items were reclassified as serious, the total penalty was reduced, and five other items were affirmed. The Commission stated that "Under these circumstances, we conclude that, *taken as a whole*, the withdrawal of one willful item, the downgrading of two others, and the concomitant substantial reduction in total penalties, constitute a discrete substantive portion of the proceeding on which Fowler prevailed" (emphasis added).

The present case is clearly distinguishable from Fowler in several respects. In the instant case, respondent's Answer denied all five items and even in its settlement offers, it wanted items dismissed. In the decision rendered by Judge Gordon, no items were dismissed; thus, the respondent did not prevail on any of these significant issues. Therefore, it cannot be held that *taken as a whole*, that the respondent prevailed on a discrete substantive portion of the proceedings; indeed, the complainant succeeded on the significant issues in the litigation.

Furthermore, there was a hearing and a decision in this case as all efforts to settle failed as distinguished from Fowler where there was a settlement and one willful item was actually withdrawn by the complainant. Finally, in the instant case, the only position taken by the complainant not fully sustained and upheld was the "serious-willful" classification of the second citation items which the judge changed to "serious".

Respondent, however, did not prevail on any single item as no item was dismissed, the assessed penalties were more than double the respondent's final settlement offer, and were of amounts consistent with the findings of serious violations.

The respondent's position herein that it is the "prevailing party" cannot escape comparison to a criminal defendant claiming to be a prevailing party if he is charged with murder in the first degree, and after a trial is found guilty of murder in a lesser degree or of voluntary manslaughter. In the criminal instance, the defendant's intent and state of mind are the key issues determining the outcome, but the charges are all felonies and thus of a serious nature. Here, all the items of the citations were found to be "serious", albeit not also "willful" as alleged in citation 2, and what was at issue for a finding of a "willful" characterization of the violations also involved the respondent's intent and state of mind.

In consideration of the above factors, I find the complainant to be the "prevailing party".

Even if ECCO had been found to be the prevailing party, which it is not, the complainant here was substantially justified in pursuing its complaint. The phrase "substantially justified" means justified in substance or in the main, i.e., justified to a degree that could satisfy a reasonable person. Pierce v. Underwood, 487 U.S.552, 564; 108 S.Ct. 2541, 2550 (1988). The complainant presented witnesses who had attested to the "willful" nature of the citation 2 serious items; however, despite those witnesses, Judge Gordon found "serious" violations. A review of the facts of the record clearly establishes that the complainant's position in issuing the citations, amending three items to "repeat" in the complaint and litigating the issues was substantially justified. Indeed, the decision affirmed the serious nature of *all* the items of citations 1 and 2. Therefore, I find the complainant was substantially justified in bringing its citations and complaint.

ORDER

In conclusion, I find that the complainant was the prevailing party, and additionally, it met its burden of proof that its position was "substantially justified" in bringing the action. Accordingly, ECCO's Application for an award of attorney fees and other expenses under EAJA is denied.

It is so ORDERED.

Barbara L. Hassenfeld-Rutberg

BARBARA L. HASSENFELD-RUTBERG
Judge, OSHRC

Dated: December 1, 1994
Boston, MA