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SECRETARY OF LABOR
Complainant,
v.
JAXON INDUSTRIAL SERVICES, INC.
Respondent.

OSHRC DOCKET
NO. 92-0884

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 January 12, 1995. The decision of the Judge will become a final order of the Commission on February 13, 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 February 1, 1995 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
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Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
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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. 1/12/95

Date: January 12, 1995

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 92-0884

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR, Complainant, v. JAXON INDUSTRIAL SERVICES, INC., Respondent.	OSHRC Docket No. 92-884 (EAJA)

APPEARANCES:

John A. Black, Esquire
Office of the Solicitor
U. S. Department of Labor
Atlanta, Georgia
For Complainant

Robert E. Rader, Jr., Esquire
Rader, Smith, Campbell & Fisher
Dallas, Texas
For Respondent

DECISION AND ORDER

Jaxon Industrial Services, Inc. (Jaxon), seeks attorney's fees and other expenses, in accordance with the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, 29 C.F.R. § 2204.101, *et seq.*, for the costs incurred in its defense against a citation issued by the Secretary on February 11, 1992.

Background

Jaxon is an industrial cleaning company that performs high-pressure water blasting and industrial vacuuming at papermills, coal-fired, and chemical plants. In November 1991, Jaxon was engaged in cleaning up a spill at the Jefferson-Smurfit Jacksonville papermill in Jacksonville, Florida. Its five-man crew was cleaning up a "black liquor," a non-hazardous substance used in the papermaking process.

The two-million gallon spill of black liquor prompted an inspection by OSHA Compliance Officer Anthony Wilk. The spill was caused by a rupture in a storage tank. Wilk believed that the black liquor was a hazardous substance and that Jaxon was engaged in an "emergency response action."

The original citation alleged a violation of § 1910.120(q)(1), for failure to implement and maintain an emergency response plan. The Secretary amended the citation to allege, in the alternative, a violation of § 1910.38(a). During the hearing, the allegation that respondent violated § 1910.120(q)(1) was dismissed because the Secretary indicated that no evidence would be presented on that allegation.

The matter was heard before Judge James D. Burroughs in Jacksonville, Florida, on November 6, 1992. In his decision, Judge Burroughs vacated the citation.

The Equal Access to Justice Act

> Under the EAJA, a private party that prevails against the Federal Government in an administrative adjudication (including a contest of an OSHA citation) and that meets certain limits on net worth and number of employees, is entitled to an award of attorneys' fees and other expenses, unless the position of the government as a party to the proceeding was "substantially justified" or special circumstances make an award unjust.

Asbestos Abatement Consultation & Engineering, 15 BNA OSHC 1252, 1991 CCH OSHD ¶ 28,628 (No. 87-1522, 1991).

The Secretary has the burden of demonstrating that his position 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, 1991-1993 CCH OSHD ¶ 29,986, p. 41,066 (No. 89-1366, 1993). The Tenth Circuit has addressed the standard of reasonableness by which the Secretary is to be judged:

> [T]he reasonableness test breaks down into three parts: the government must show "that there is a reasonable basis . . . for the facts alleged . . . that there exists a reasonable basis in law for the theory it propounds and that the facts alleged will reasonably support the legal theory advanced."

Id., 1991-1993 CCH at p. 41,066, quoting *Gatson v. Bowen*, 854 F.2d 379, 380 (10th Cir. 1988) (citation omitted).

Relief Sought

Jaxon seeks attorney's fees and expenses in the amount of $6,325.14. Jaxon attached to its application documentation and an itemized statement showing number of hours spent in connection with the proceeding, a description of the specific services performed, the hourly rate, and expenses.

Criteria for Eligibility

The prevailing party in an EAJA case must meet the established eligibility requirements before it can be awarded attorney's 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 seven million dollars and employs not more than five hundred employees . . . ." According to Jaxon's application for award of fees and expenses, at the time it filed its notice of contest, Jaxon employed a total of thirteen employees and had a net worth of less than 7 million dollars. The Secretary does not dispute this. Jaxon has satisfied the eligibility requirements.

Prevailing Party

Section 504(a)(2) of 5 U.S.C. provides, in pertinent part:

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

Judge Burroughs vacated the single item set forth in the citation. Jaxon was the prevailing party.

The Alleged Violation

The Secretary charged Jaxon with a serious violation of § 1910.38(a), which provides, in pertinent part:

(a) *Emergency action plan. (1) Scope and application.* This paragraph (a) applies to all emergency action plans required by a particular standard. The emergency action plan shall be in writing (except as provided in the last sentence of paragraph (a)(5)(iii) of this section) and shall cover those designated actions employers and employees must take to ensure employee safety from fire and other emergencies.

(2) *Elements.* The following elements, at a minimum, shall be included in the plan:

(i) Emergency escape procedures and emergency escape route assignments.

Section 1910.38(a)(5)(iii) provides:

The employer shall review with each employee upon initial assignment those parts of the plan which the employee must know to protect the employee in the event of an emergency. The written plan shall be kept at the workplace and made available for employee review. For those employers with 10 or fewer employees the plan may be communicated orally to employees and the employer need not maintain a written plan.

The Secretary argues that Jaxon's written plan was inadequate to meet the requirements of the standard because it failed to specify "emergency escape route assignments." Judge Burroughs found that Jaxon came under the exemption in § 1910.38(a)(5)(iii) because it had only five employees at the Jefferson-Smurfit papermill. With fewer than ten employees, Jaxon was permitted to communicate its emergency action plan orally to the employees. Judge Burroughs found that "Jaxon had escape routes established and provided oral instruction to its employees concerning potential escape routes" (Judge Burroughs' decision, p. 9). Judge Burroughs did not address the adequacy of Jaxon's written emergency action plan.

The Secretary's Position Was "Substantially Justified"

The Secretary argues that its position at the hearing was substantially justified because he reasonably interpreted the exception in § 1910.38(a)(5)(iii) to exclude employers who

employed a total workforce of ten or fewer employees. The exception provides: "For those employers with 10 or fewer employees the plan may be communicated orally to employees and the employer need not maintain a written plan." Jaxon employed twenty employees at the time of Wilk's inspection (Tr. 41).

Jaxon argued, and Judge Burroughs agreed, that the exception refers to the number of employees at a specific workplace, not the aggregate number of employees. It is undisputed that Jaxon had fewer than ten employees at the Jefferson-Smurfit papermill.

Under the reasonableness test for substantial justification formulated by the Tenth Circuit, the Secretary must show that (1) there was a reasonable basis for the facts alleged, (2) there exists a reasonable basis in law for the theory he propounds, and (3) the facts alleged will reasonably support the legal theory advanced.

The Secretary has established that there was a reasonable basis for the facts alleged. Jaxon had a total of twenty employees. To the Secretary, its written emergency action plan appeared to lack a crucial element, *i.e.*, the emergency escape route assignments.

The second element the Secretary must establish is that there is a reasonable basis in law for the theory he propounds. The Secretary argues that Jaxon's written plan failed to meet the requirements of the standard. The Secretary also argues that his interpretation of the exception in § 1910.38(a)(5)(iii) (that it refers to an employer's total workforce) is reasonable. As support, the Secretary cites a related standard, § 1910.165(b)(5), which excepts "employers with 10 or fewer employees at a particular workplace." The Secretary contends that when a standard specifies "at a particular workplace," then only employees at that particular workplace are counted. Otherwise, when a standard provides, as does § 1910.38(a)(5)(iii), that "employers with 10 or fewer employees" are excepted, the total number of the employer's employees must be counted.

The Secretary's position is based on a reasonable interpretation of the standard. As worded, the exception provided in § 1910.38(a)(5)(iii) is ambiguous. A reasonable person reading the standard could interpret it either way. The fact that a similar exception in a related standard specifies that it applies to a discrete workplace lends support to the Secretary's case.

Jaxon relies on two sources to counter the Secretary's claim that its interpretation of the standard is reasonable. First, Jaxon quotes from *OSHA Instruction* CPL 2-1.4B, promulgated August 29, 1988, in which the Secretary instructs his compliance officers to include "truck drivers, sales and office personnel, seasonal employees, and part-time employees," in determining the total number of employees "at a given workplace" for the purposes of § 1910.38(a). As the Review Commission has noted on numerous occasions, the *Field Operations Manual* and *OSHA Instructions* are internal documents that provide guidance to OSHA professionals but do not have the force and effect of law. These documents do not confer procedural or substantive rights or duties on individuals. *See Caterpillar, Inc.*, 15 BNA OSHC 2153, 1993 CCH OSHD ¶ 29,962 (No. 87-922, 1993). The *OSHA Instruction* bears no relevance in this case.

Second, Jaxon cites *Peavey Grain Co.*, 15 BNA OSHC 1354, 1991 CCH OSHD ¶ 29,533 (No. 89-3046, 1991), in support of its claim that the Secretary's position was not substantially justified. Jaxon states that in *Peavey*, "the Secretary *judicially* admitted that the 10 employee exemption does not refer to total employment. In *Peavey*, the Secretary even acknowledged that the 10-employee exemption can refer to the number of employees in a specific work area within an overall facility. 15 BNA OSHC at 1358, 1359" (Jaxon's Reply to Complainant's Opposition to Application for Fees and Expenses, p. 7). Judge Burroughs also cited *Peavey* in finding that Jaxon was exempt from having a written plan under § 1910.38(a)(5)(iii).

A closer look at *Peavey*, however, reveals a significant difference between it and the present case. The standard at issue in *Peavey* is § 1910.165(b)(5), which the Secretary has cited in this case as support for its position. As previously noted, § 1910.165(b)(5) creates an exception for "employers with 10 or fewer employees in a particular workplace." In *Peavey*, the Secretary agreed that " 'a particular workplace' can refer to something less than a whole facility." *Peavey*, 15 BNA at 1359. The standard at issue here, § 1910.38(a)(5)(iii), lacks the crucial phrase "in a particular workplace." Therefore, *Peavey* is inapposite to the

issue in the instant case. The Secretary has established that his theory has a reasonable basis in law. His position that the § 1910.38(a)(5)(iii) exemption refers to an employer's total workforce is reasonable.

The Secretary must also show that the facts alleged will reasonably support the legal theory advanced. The Secretary relies on the fact that Jaxon had more than ten employees, which supports his theory Jaxon cannot avail itself of the ten-or-fewer employees exemption.

The Secretary has established that his position at the hearing was substantially justified. Jaxon's application for fees and expenses under the EAJA is denied.

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 the application for attorney's fees and expenses is denied.

/s/ Paul L. Brady
PAUL L. BRADY
Judge

Date: January 3, 1995