United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

SECRETARY OF LABOR, Complainant, v. TERENCE FROMAN, INC., Respondent.	OSHRC DOCKET No. 18-1301

Appearances:

Michael P. Doyle, Esq., Office of Regional Solicitor, U.S. Department of Labor, Philadelphia, PA.
For the Complainant.

Travis Vance, Esq., Fisher & Phillips, Charlotte, NC
For the Respondent.

Before: Administrative Law Judge Keith E. Bell

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (the Commission) because Terence Froman, Inc. (Respondent) filed an Equal Access to Justice Act Petition for Attorney's Fees and Costs, 5 U.S.C. § 504 (EAJA) which was filed with the Commission on July 5, 2019. The Secretary of Labor (Secretary) filed his Answer on July 31, 2019.[1] Both the Complaint and Answer in this matter were timely filed. Respondent seeks attorney fees in the amount of $4,912.50 plus expenses in the amount of $86.60 for a total of $4,999.10. (Resp't Pet'n 1). For the reasons that follow, Respondent's Equal Access to Justice Act Petition for Attorney's Fees and Costs is hereby DENIED.

[1] Respondent filed its Reply to Complainant's EAJA Answer on August 21, 2019. All filings related to this matter were considered by the undersigned in reaching this decision.

Background

On or about February 6, 2018, the Occupational Safety and Health Administration (OSHA) conducted an inspection of Respondent's worksite located at 1619 Moyamensing Ave., Philadelphia, PA 19148. As a result of the inspection, a Citation and Notification of Penalty (Citation) package that included one "serious" citation was issued for an alleged violation of section 5(a)(1) of the Occupational Safety and Health Act, 29 U.S.C. § 654 (a)(1). The Citation alleged that Respondent failed to ensure spring clips were properly installed into the couplings with lever closure of the boom of a Putzmeister concrete pump on February 6, 2018. On August 6, 2018, Respondent timely filed its Notice of Contest. This case was docketed by the Commission on August 15, 2018. On or about May 13, 2019, the Secretary notified the undersigned of his intent to withdraw the Citation in this case. Thereafter, on June 5, 2019, the undersigned issued Notice and Order of Report dismissing the case based on Secretary's withdrawal with acknowledgment that withdrawals by the Secretary are unreviewable.

Equal Access to Justice Act

The EAJA applies to proceedings before the Commission in section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659(c). It ensures that an eligible applicant is not deterred from seeking review of, or defending against, unjustified Government actions. *Ewing v. Rodgers*, 826 F.2d 967 (10th Cir. 1987). Under EAJA, an award is made to an eligible applicant who is the prevailing party only if the government's action is found to be without substantial justification and there are no special circumstances that make the award unjust. *Asbestos Abatement Consultation & Eng'g*, 15 BNA OSHC 1252 (No 87–1522, 1991). Under the applicable EAJA provision, Respondent, Terence Froman, is an eligible applicant if it had a net worth of not more than $7 million and employed not more than 500 employees as of the date the contest was filed. 29 C.F.R. § 2204.105(b)(4) and (c). According to its petition, Respondent meets the EAJA eligibility requirements. (Resp't Pet'n 2).

The EAJA does not routinely award attorneys' fees and expenses to a prevailing party. While the applicant has the burden of proving eligibility, the government has the burden of demonstrating that its action was substantially justified. *Dole v. Phoenix Roofing*, Inc. 922 F.2d 1202, 1209 (5th Cir. 1991), 29 C.F.R. § 2204.106(a).

Timeliness

An EAJA application must be filed within thirty days after the period for seeking appellate review expires. 29 C.F.R. § 2204.302(a). The undersigned's Notice of Order and Report acknowledging the Secretary's withdrawal and dismissing this case was docketed on June 6, 2019. Thereafter, Respondent had sixty days from June 6, 2019, to file any appeal. Fed. R. App. P. Rule 4(a)(B). Respondent's EAJA application in this case was received by the Commission on July 5, 2019, and its timeliness is undisputed. Accordingly, the undersigned finds that the application was timely filed.[2]

Prevailing Party

> A prevailing applicant may receive an award for fees and expenses in connection with a proceeding, or in a discrete substantive portion of the proceedings, unless the position of the Secretary was substantially justified. 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.

29 C.F.R. § 2204.106(a). A party need not have prevailed on all issues. It is sufficient 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." *H.P. Fowler Contracting Corp*., 11 BNA OSHC 1841, 1845 (No. 80–3699, 1984). Also, a party may be deemed prevailing if it obtains a favorable settlement of the case; a concept that was grounded in an early committee report of EAJA. H.R. Rep. No. 96-1418 at 11 (1980) *reprinted in* 1980 U.S.C.C.A.N. 4984, 4990 ("A party may be deemed prevailing if he obtains a favorable settlement of his case"). In the instant case, a resolution was reached based on the Secretary's withdrawal of his Citation involving one "serious" item with a proposed penalty in the amount of $3,049.00. The Commission has held that a withdrawal by the Secretary is considered a favorable outcome for Respondent thereby making it the "prevailing party." *See Valley Constr. Co.*, No. 92-3644, 1995 WL 455809, at *1 (O.S.H.R.C.A.L.J., July 20, 1995) (finding that Respondent was the "prevailing party" with respect to citations withdrawn by the Secretary as part of a settlement agreement). However, this issue has since been addressed by the Supreme Court of the United States and various appellate courts.

[2] The Secretary does not dispute the timeliness of Respondent's EAJA application.

In *Benton-Georgia, LLC*, 26 BNA OSHC 1293 (No. 15-1539, 2016) (*Benton-Georgia*) the administrative law judge concluded that although the Secretary filed a Motion to Withdraw, the employer was not a "prevailing party" within the meaning of the Equal Access to Justice Act. In *Benton-Georgia*, the judge principally relied on the Supreme Court's ruling in *Buckhannon Bd. and Care Home, Inc. v. W. Va. Dept. of Health and Human Res.,* 532 U.S. 598 (2001) (*Buckhannon*). In *Buckhannon*, the Court took certiorari to resolve disagreements among Courts of Appeals regarding the proper test to determine whether an applicant for attorney's fees under a fee-shifting provision of a statute qualified as a "prevailing party". *Buckhannon* 532 at 602. Specifically, the Fourth Circuit Court of Appeals rejected the widely used "catalyst theory" and held that "a person may not be a prevailing party except by virtue of having obtained an enforceable judgment, consent decree, or settlement giving some of the legal relief sought."[3] *Id.* Under the "catalyst theory," a plaintiff is a "prevailing party" if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct. *Buckhannon* 532 U.S. at 601. In its analysis, the Supreme Court noted that it had not historically awarded attorney's fees when there was "judicial pronouncement," unaccompanied by "judicial relief," is not sufficient to make a claimant a "prevailing party." *Buckhannon*, 532 U.S. at 606 (citing *Hewitt v. Helms,* 482 U.S. 755, 760 (1987).

In an EAJA case appealed from an adverse ruling by the Federal Mine Safety and Health Review Commission, the D.C. Circuit Court of Appeals, which has appellate jurisdiction over this case, held that the mine operator was not a "prevailing party" because the Secretary unilaterally ended the relationship which left Cactus Canyon in the same position it was in before the citations were issued, and the dismissal was not "with prejudice". *Cactus Canyon Quarries, Inc. v. Fed. Mine Safety and Health Review Comm'n,* 820 F.3d 12, 15 (D.C. Cir. 2016).[4] Here, the Secretary did not file a motion, but rather a Notice of Withdrawal that simply stated, "[t]he Secretary of Labor withdraws the Citation and Notification of Penalty Issued for Inspection 1294419." Subsequently, the undersigned issued final order that stated, among other things, "[t]he

[3] The Fourth Circuit Court of Appeals was specifically addressing the fee-shifting provisions of the Fair Housing Amendments Act and the Americans with Disabilities Act. *Buckhannon* 532 U.S. at 601-602. However, in *Buckhannon*, the Supreme Court was looking more broadly at its prior rulings addressing the issue of "prevailing party".

[4] Following the Supreme Court's analysis in *Buckhannon*, the D.C. Circuit Court of Appeals noted that it previously held that the phrase "prevailing party" in fee-shifting statutes should be treated the same unless there is a good reason to do otherwise. *Cactus Canyon* at 16 (quoting *Green Aviation Mgmt. Co.*, 676 F.3d 200, 202 (D.C. Cir. 2012)).

Commission acknowledges receipt of the Secretary's notice of withdrawal". The Order cites *Cuyahoga Valley Ry. Co. v. United Transp. Union,* 474 U.S. 3 (1985) in which the Supreme Court held that the Secretary's discretion to withdraw is unreviewable. Finally, the Order dismissed the case making no mention of "prejudice".

The undersigned hereby adopts the well-reasoned and detailed analysis of the *Benton-Georgia* decision and finds that Respondent, Terence Froman, is not a "prevailing party" within the meaning of EAJA because the Secretary's withdrawal is not the result of a judicial pronouncement that provides judicial relief, but rather a unilateral exercise of prosecutorial discretion.[5]

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 and Rule 308 of the Commission Rules of Procedure. 29 C.F.R. § 2204.308.

ORDER

Based on the foregoing, Respondent's Application for Award Under the Equal Access to Justice Act is hereby DENIED.

SO ORDERED by:

Dated: December 2, 2019

/s/_____
Keith E. Bell
OSHRC Judge

[5] This result does not disturb the Commission's prior decision in *Valley Construction* because the withdrawal here was not part of a settlement agreement.