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United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
1120 20th Street, N.W. — 9th Floor  
Washington, DC 20036-3419

SECRETARY OF LABOR,  
Complainant,  
v.  
TIMOTHY VICTORY,  
Respondent.

OSHRC Docket No. 93-3359

***DECISION***

Before: WEISBERG, Chairman, and GUTTMAN, Commissioner.

BY THE COMMISSION:

At issue is whether Commission Judge Richard DeBenedetto erred in awarding Timothy Victory attorneys' fees and expenses under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, and the Commission's EAJA Rules, 29 C.F.R. Part 2204. The judge made the award because he found that the Secretary's position on the dispositive issue in the underlying case was not substantially justified. That issue was whether Mr. Victory, a boat owner who harvested sea urchins with the help of divers, was an employer, and thus subject to the requirements of the Occupational Safety and Health Act ("the Act"), 29 U.S.C. §§ 651-678. We uphold the judge's award.

**FACTS**

Victory took scuba divers in his boat to harvest sea urchins off the coast of Maine. On October 16, 1993, a newly-certified diver with no experience diving in the ocean drowned on his first dive from Victory's boat.

That fatality was one of four in sea urchin diving operations in Maine in 1993. The Coast Guard and the State of Maine contacted OSHA's area office about the fatalities. OSHA's area director ("AD") for Maine, C. William Freeman, testified that he felt an obligation to see whether or not OSHA had jurisdiction over those diving operations. Freeman issued citations in this case and one other.<sup>1</sup> He was aware in advance that "we would be confronted . . . with claims by all parties" in the sea urchin industry that there was no employer/employee relationship involved.

Victory had been a commercial fisherman since January 1992 as a deckhand and dive tender operating out of Jonesport, Maine, a small port about 40 miles from Canada. After obtaining a scuba diving certificate in May 1993, Victory also had been a sea urchin diver. He used the boat he owned, the *Last Chance*. Judge DeBenedetto summarized Victory's relationship with the divers in his January 1996 decision in the underlying case.

Before he himself began diving, Victory usually set out on the Last Chance with three divers, each of whom was responsible for providing and maintaining his own equipment and supplies; each diver's catch was segregated, the proceeds upon sale of the catch being apportioned according to the amounts harvested by each diver . . . . According to the testimony of both Victory and the Secretary's own witness, James Smith, the divers were free to sell their harvest to anyone they chose, and it was the practice that each diver received a share (in this case a 60% share) of his own catch and paid the remaining share (40%) to "the boat" . . . .

Victory testified that when the divers chose to operate from his boat, they, in effect, "hired" his boat for a share of the catch inasmuch as it was the divers who determined when the boat left the dock, where to dive for the urchins, and when to return to the dock . . . .

The Secretary's case focuses on the two divers Victory took with him on October 16, 1993 -- James Smith and Matthew Rice. Mr. Smith was an experienced U. S. Navy diver but,

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<sup>1</sup>The other case was *Glenn Chadbourne*, Docket No. 94-164. There, Judge DeBenedetto vacated the citation on the same grounds as here (Decision and Order of November 9, 1995) and awarded the Respondent \$3,268.50 in fees and expenses, covering the entire proceeding (November 21, 1996). The Secretary did not file a petition for review in *Glenn Chadbourne*.

like Rice, had not dived with Victory before that day. His regular job was as a welder for General Electric Corp., where he had worked for six years. Mr. Rice, who died, was a college student who received scuba training in the spring of 1993 after hearing about the opportunity to earn money harvesting urchins.

Also aboard the *Last Chance* with Victory that day was Clyde Peabody, a relative of Victory's by marriage, who served as the dive tender. Peabody had no previous experience as a dive tender, although he had been a professional fisherman since at least 1972. He tended for Victory four times. The Secretary does not assert on review that Peabody was Victory's employee, and we do not pass on that issue here. She relies only on the alleged employee status of Smith and Rice.

Both divers learned about Victory's enterprise through a "Help Wanted" advertisement placed in the Bangor Daily News and Portland Press Herald, seeking "Experienced Divers for Sea Egging" and giving Victory's telephone number "evenings." Maine marine patrol officer Gordon Faulkingham testified that such ads are a common way of recruiting divers in Maine's sea urchin industry.

Victory testified that his wife actually had placed the ads to get divers for her nephew, Bradley Peabody, who operated another vessel, the *Nancy Ann*. Victory testified that his wife gave his number because Bradley was rarely home, even in the evenings. Three days after the accident, Victory had signed a statement for OSHA, prepared and read back to him by OSHA compliance officer Richard Steifken based on their conversation, indicating that Victory had placed the ads personally.

Smith testified that when he called the number listed in the ad he spoke with Victory.

We discussed -- I wanted to know how much it paid. I thought maybe it was a job where I'd be an employee. And he said that I would get sixty percent of my catch and forty percent of my catch would go to the boat.

Smith accepted that arrangement and Victory said to meet him at the Jonesport pier at 8 a.m. on the 16th. Smith did not consider Victory to be his employer and told OSHA so during its

investigation. Nor did he consider the urchin diving to be a “job,” but rather something to do on weekends.

Smith relied on Victory to assess the quality of the eggs, and Victory sold Smith’s entire catch on October 16 to a buyer Victory already had lined up. However, Victory testified that on previous occasions when he worked with other divers, they sometimes sold their portion of the catch to a different buyer than his. Neither Smith nor Rice had a license, which is legally required to sell urchins. Victory did not have a license either (he testified that he lacked the \$89 required for one).

Smith brought all his own diving equipment. Victory supplied the line and buoy, and Smith and Rice used Victory’s urchin bags. Smith testified that those bags were better than his own. Victory, an experienced ocean diver himself, determined where to look for urchins and dove by himself at several locations before finding urchins he thought were marketable. He showed the divers the urchins he found at each location and explained why they were or were not marketable, and the divers accepted his experienced judgment. His statement for OSHA related that when he dove he “told Clyde not to let anybody get in the water until I was back on board.” Clyde Peabody testified, however, that Victory never “instructed” him not to allow other divers in the water at any time.

As to Rice, Victory’s statement for OSHA related that when Rice called, he asked how Victory’s operation worked, and Victory explained. According to Victory, Rice said he “was going to dive part time for me.” Victory told him a diving spot was available on Bradley Peabody’s boat and Rice joined that crew on October 9, 1993. Rice did not dive that day, however, because he did not bring all the necessary diving gear.

Rice next went out on October 15, aboard the *Last Chance*, but again did not dive. This time, Rice did not have the inflation hose for his buoyancy compensator (“B.C.”). Victory’s statement for OSHA related that Rice “wanted to dive without this hose and I wouldn’t let him dive.” Notes taken by U. S. Coast Guard safety specialist Jeffrey R. Ciampa of his interview with Victory on the day of the accident reflect that Victory said he told Rice

“he couldn’t go in water with wet suit without B.C.” Victory testified, however, that he had merely “recommended” to Rice that he not dive.

The next day -- October 16 -- Rice brought all the necessary diving gear. After Victory found acceptable urchins, he told Smith and Rice he would appreciate their staying close -- he asked that they “dive together” -- due to Rice’s inexperience. Smith dove in first. Victory stayed on the boat with Clyde Peabody to monitor Rice’s diving.

Rice had trouble submerging in the salt water, and thus he borrowed another weight belt that Smith had brought on board. Victory watched Rice resubmerge and then, after perhaps five minutes, he rechecked. He saw that Rice’s bubbles had stopped. Victory signaled Smith and then dove in to find Rice. Smith followed after surfacing and learning of the situation. They were unable to locate Rice for about 15 minutes in the murky water. When they reached him, the regulator was out of his mouth and his face mask was off. Their attempts to resuscitate him were unsuccessful.

After an investigation, the Occupational Safety and Health Administration (“OSHA”) issued a citation to Victory alleging serious violations of standards covering commercial diving operations. 29 C.F.R. § 1910.401 *et. seq.* Judge DeBenedetto vacated the citation after a full hearing on the merits. Victory then timely applied for an EAJA award, which the judge granted in the total amount of \$12,287.07.

## DISCUSSION

When an employer with a small net worth (as provided in 29 C.F.R. §§ 2204.105 and .202) prevails in a proceeding with the Secretary, as Victory did, the employer may recover its reasonable attorneys’ fees and expenses (within EAJA limits) upon timely application. To avoid such an award, the Secretary must establish that her position was “substantially justified” or that special circumstances exist that would make an award unjust. *E.g.*, *Pentecost Contrac. Corp.*, 17 BNA OSHC 2133, 2135, 1997 CCH OSHD ¶ 31,382, p. 44,324 (No. 92-3789, 1997). To establish substantial justification, the Secretary must show that her position was reasonable in law and fact. *Id.*

The Secretary's only objection to the judge's EAJA award is his finding on substantial justification. She does not dispute that Victory is financially eligible for an award and that the amount the judge awarded is reasonable, given the amount of work Victory's attorneys did. Victory's affidavit shows that he had a small net worth, well within the eligibility limits for an EAJA award.

**1. Whether the Secretary's position was substantially justified**

Judge DeBenedetto resolved the EAJA issue essentially as follows:

The record plainly demonstrates that the harvesting excursion was an informal joint adventure undertaken for the mutual benefit of the participants. The Secretary's position lacked substantial justification.

[I]t is difficult to understand why the Secretary has argued . . . that where Victory was said to have prohibited an inexperienced scuba diver from going into the water because he did not have the proper diving equipment, it demonstrated that Victory exercised the control of an employer. On the contrary, the undisputed facts lead one to believe that anyone having knowledge and experience in the safe practices for diving, as Victory obviously had, would have done the same thing simply out of natural concern for the personal safety of another, and not because of any notion of power to control within the context of an employment relationship.

The Secretary argues that her position was substantially justified under the Commission's precedent in *S & S Diving Co.*, 8 BNA OSHC 2041, 1980 CCH OSHD ¶ 24,742 (No. 77-4234, 1980). There, the Commission held that divers and tenders on boats that harvested giant clams called geoducks (pronounced "goo-ey-ducks") in Puget Sound, Washington, were employees of the boat's lessee.

However, there are important factual differences between *S & S* and this case. Even more importantly, *S & S* was premised on a legal proposition that the Commission has since modified. That proposition was that:

[T]he term "employer" under the Act is not limited to employment relationships as defined under common law principles but rather is to be broadly construed in light of the statutory purpose and the economic realities of the relationship at issue.

8 BNA OSHC at 2042, 1980 CCH OSHD at p. 30,465 (citing *Griffin & Brand of McAllen, Inc.*, 6 BNA OSHC 1702, 1703, 1978 CCH OSHD ¶ 22,829, pp. 27,600-01 (No. 14801, 1978)). Over a year before this case arose, the Commission modified that proposition in *Vergona Crane Co.*, 15 BNA OSHC 1782, 1991-93 CCH OSHD ¶ 29,775 (No. 88-1745, 1992), in order to conform Commission precedent to an intervening Supreme Court decision, *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992). In *Vergona*, the Commission noted *Darden's* holding “that the term ‘employee’ in a federal statute should be interpreted under common law principles, unless the particular statute specifically indicates otherwise.” 15 BNA OSHC at 1784, 1991-93 CCH OSHD at p. 40,496. *Vergona* found no indication in the OSH Act that common law principles should not control the definition of “employee.”<sup>2</sup> Thus, Commission precedent in 1993, the year of the citation here, was that the term “employee” under the Act should be interpreted consistent with common law principles.<sup>3</sup> Under the circumstances, the Secretary was mistaken in relying on *S & S* and other Commission decisions before *Vergona* as to the operative test of an employment relationship.

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<sup>2</sup>We note that the Secretary has not suggested any such indication in the OSH Act here.

<sup>3</sup>Those principles, discussed below, are less inclusive than the previous test, set forth in *S & S*. Even under *S & S*, however, the Secretary’s position that Victory was the divers’ employer was not reasonable -- as the judge found. Aside from the facts discussed in the text which differ from those in *S & S*, there are other significant differences. For example, here Smith and the tender considered themselves to be neither independent contractors nor employees, but rather individuals working with Victory in an informal joint enterprise. Also, the method of compensation here differed substantially and the operation was structured much differently than in *S & S*. Victory was not committed to paying for or fulfilling a lease or other obligations to harvest sea urchins, so the long-term employment of divers and tenders was not shown to be an economic necessity. Also, Victory needed no approval by the State to harvest sea urchins, and the relevant license ran to the individual *seller* of the urchins -- including the divers -- not the boat owner. The divers and tender also could work on different boats of different owners and lessees if they chose.

*Vergona* set forth the basic test of an employer-employee relationship under common law principles, quoting *Darden*:

In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

*Vergona*, 15 BNA OSHC at 1784, 1991-93 CCH OSHD at p. 40,496-97 (quoting 112 S. Ct. at 1348). The Secretary's evidence falls well short under the *Darden* criteria. Victory did not have the "right to control the manner and means" by which the divers harvested sea urchins. Based on this record, the divers were free to pursue their own method and means of harvesting sea urchins, once in the water. The diving skills required of them were substantial, although they relied on Victory to locate marketable sea urchins. What Victory controlled was the use of his boat and his own participation in the venture. But that clearly does not make him an employer by itself.

Although Victory possessed more expertise regarding urchins than Smith or Rice, all three clearly treated the work as an informal joint enterprise. The divers supplied their own diving and harvesting equipment, although Victory supplied some lines and buoys and lent them his harvesting bags. The duration of the relationship was short, and there was no evidence that Victory and the divers expected to work together long-term or even regularly. Victory had no right to assign additional projects to the divers, and they had discretion over when and how long to work (subject to Victory's right as boat owner to return to port). Further, the divers were not paid a set amount for their labor, but instead "gave" 40% of their catch to "the boat." They were free to sell their share of the catch to whomever they chose. Victory exercised no control in this regard. There were no employee benefits and the divers

were not treated as employees for tax purposes. While none of these factors alone is dispositive, in combination they clearly are inconsistent with employee status under *Vergona*.

The Secretary argues:

The notes showing that Mr. Victory had instructed Mr. Peabody to not let anyone dive until Mr. Victory had checked the site and returned to the boat, and that Mr. Victory had prohibited Mr. Rice from diving without the hose, are substantial evidence that Mr. Victory controlled the divers and the conditions under which the harvesting operation would be conducted.

However, as the judge noted, those factors are just as easily explained by the fact that Victory owned and operated the boat and felt personally concerned for the divers' safety. The Secretary bears the burden of establishing that Victory exercised an *employer's* control over the divers as opposed to a *boat owner's* control over persons aboard his vessel, and that evidence is lacking.

The Secretary further contends that she relied on statements made by Victory during the OSHA investigation that were inconsistent with his testimony at the hearing. However, Judge DeBenedetto did not rely on credibility findings regarding Victory's testimony versus his prior statements, and he did not need to do so. Moreover, even Victory's pretrial statements do not provide substantial justification for the Secretary's position here, given the existing law on employee status.

Admittedly, Victory rather than the divers selected and paid the tender. Also, the work seemingly was part of Victory's regular business at the time. These factors, however, are not inconsistent with our conclusions above. In light of all the facts available to the Secretary even before issuing the citation, it was not reasonable to conclude that Victory was the divers' employer under the common law principles set forth in *Vergona*.<sup>4</sup>

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<sup>4</sup>We note that the Supreme court recently reaffirmed *Darden's* reliance on common law principles in *N.L.R.B. v. Town & Country Electric, Inc.*, 116 S. Ct. 450 (1995).

## 2. Supplemental EAJA request

As mentioned, the Secretary does not dispute the *amount* the judge awarded. Victory's attorneys have submitted requests for supplemental fees for this review. Their affidavits list additional fees and expenses totaling \$503.30, related to the Opposition they submitted to the Secretary's petition, and \$1,037.00, related to preparing their review brief. Victory filed those fee requests after the Secretary filed her review brief, and she asks for an opportunity to address them.

Where an eligible party shows that it is entitled to an EAJA award regarding a citation, it also is entitled to reasonable attorneys' fees and expenses for the fee litigation itself. *Commissioner., I.N.S. v. Jean*, 496 U.S. 154 (1990). The amounts in Victory's supplemental fee requests appear reasonable to us. The \$472.50 in attorneys' fees for 6.3 hours related to preparing the Opposition to the Secretary's Petition for Discretionary Review of Judge DeBenedetto's EAJA decision appears reasonable. So does the \$1,008.75 for 13.45 attorney hours to prepare the review brief with tables and the last supplemental fee request. On their face, those amounts seem to be in line with the fees the judge awarded -- all are at \$75 per hour.

As to the other expenses, the Commission has held that EAJA awards include "the reasonable and necessary expenses of an attorney in a specific case which are customarily charged to the client." *Ruhlin Co.*, 17 BNA OSHC 1068, 1069, 1995 CCH OSHD ¶ 20,678, p. 42,573 (No. 93-1507, 1995). The expenses listed in conjunction to Victory's Opposition are photocopying charges (\$3.60 for outside copying, \$10.20 for inside copying) and a special delivery charge (\$17.00). Those expenses appear reasonable on their face. So do the expenses listed in conjunction with Victory's review brief -- photocopying totaling \$13.00 and a special delivery charge of \$15.25.

We will award the supplemental amounts Victory has requested, since they appear reasonable. If the Secretary finds those amounts objectionable, she may move for reconsideration within 10 days of the issuance of this decision.

**CONCLUSION**

We affirm the judge's EAJA award in the amount of \$12,287.07. We also grant Victory's supplemental requests totaling \$1,540.30, for his participation in this review. The Secretary may move for reconsideration of our disposition of Victory's supplemental EAJA fee requests within 10 days after this decision. It is so ordered.

/s/  
Stuart E. Weisberg  
Chairman

/s/  
Daniel Guttman  
Commissioner

Dated: September 30, 1997