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Secretary of Labor,
Complainant,

v.

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C & D European Stucco and Stone, Inc.,
Respondent.

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OSHRC Docket No. **96-929 (EAJA)**

Appearances:

Curtis Gaye, Esquire
Frances B. Schleicher, Esquire
Office of the Solicitor
U. S. Department of Labor
For Complainant

J. Larry Stine, Esquire
Wimberly & Lawson
Atlanta, Georgia
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION ON FEE AND EXPENSE APPLICATION

C&D European Stucco and Stone, Inc. (C &D), seeks attorney's fees and expenses in accordance with the Equal Access to Justice Act, 5 U.S.C. § 504, 29 C.F.R. § 2204.101, *et seq.* (EAJA), for costs incurred in its defense against a citation and proposed penalties issued by the Secretary on June 20, 1996. For the reasons stated below, C&D's application is denied.

Background

C&D was hired as a subcontractor in May 1996 to apply insulation and stucco to the exterior of a six-story motel in Duluth, Georgia. After an inspection by Occupational Safety and Health Administration (OSHA) compliance officer Walter Dierks, the Secretary issued a citation to C&D alleging three serious violations of the Occupational Safety and Health Act of 1970 (Act). Item 1 alleged a violation of § 1926.20(b)(2) for failure to have a competent person make frequent and regular inspections of the job site. Item 2, which the Secretary withdrew at the beginning of the February 28, 1997, hearing in this matter, alleged a violation of § 1926.21(b)(2) for failure to provide

training. Item 3 alleged a violation of § 1926.451(d)(10) for failure to install guardrails on all open sides and ends of scaffolds.

The undersigned issued a decision in this matter on March 16, 1998, vacating items 1 and 3. The decision became a final order of the Review Commission on April 27, 1998.

On May 15, 1998, C&D filed an application for attorney's fees and expenses in the amount of \$10,620.00.¹ The Secretary filed a response objecting to C&D's application on June 10, 1998. C&D filed a reply on June 25, 1998. The Secretary filed a response to C&D's reply on July 2, 1998.

The Equal Access to Justice Act

The EAJA allows prevailing parties in an administrative proceeding involving the federal government to recover attorney's fees and expenses unless the government agency's position was substantially justified or special circumstances make an award unjust. 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). The EAJA does not routinely award attorney's 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).

Eligibility

The party seeking an award for fees and expenses must submit an application within 30 days of the final disposition in an adversary adjudication. 5 U.S.C. § 504(a)(2). C&D timely filed its application.

The prevailing party must meet the established eligibility requirements before it can be awarded attorneys' 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 . . ." Eligibility is determined as of the date of the notice of contest. Rule 2204.105(c).

¹ C&D claims it spent \$9,852.00 between December 17, 1996, and April 28, 1997, on defending itself against the Secretary. C&D claims it incurred costs in the amount of \$768.00 in preparing its application for attorney's fees and expenses. After filing a reply to the Secretary's response to C&D's EAJA application, C&D claimed another \$917.50 for preparation of its reply. The total amount of fees and expenses sought by C&D is \$11,537.50.

In its application, C&D's president, by affidavit, states that the company was a corporation with a net worth of less than 7 million dollars and fewer than 500 employees at the time of its notice of contest.² C&D attaches no documentation (such as tax records, balance sheets, or accounting statements) supporting its statement of net worth.

The Secretary argues that C&D's application should be dismissed because it fails to provide sufficient evidence that C&D meets the eligibility requirements. Commission Rule 2204.202 requires that the applicant "provide with its application a detailed exhibit showing the net worth of the applicant . . . that provides full disclosure of the applicant's assets and liabilities . . ."

C&D counters that, if its statement of net worth is deemed insufficient to prove eligibility, the appropriate course of action is to allow it to supplement its application. Commission Rule 2204.202 provides that, "The Commission may require an applicant to file additional information to determine its eligibility for an award."

The undersigned agrees that supplementation, and not dismissal, would be the appropriate course of action in the present case. That step is unnecessary, however, because it is determined below that C&D is not entitled to attorney's fees and expenses.

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 adverse adjudication submit to the agency an application which shows that the party was the prevailing party.

The Secretary does not dispute that C&D was the prevailing party for each of the three items cited. The Secretary withdrew item 2 at the beginning of the hearing, and the undersigned vacated items 1 and 3 in her decision and order issued on March 16, 1998.

Substantially Justified

The Secretary must prove that its position was substantially justified. "The test of whether the Secretary's action is substantially justified is essentially one of reasonableness in law and fact."

² In his affidavit, C&D's president also states that C&D has ceased doing business and its net worth at the time of the application is zero. In its application, C&D attributes its "financial ruin" to the "burden of defending against the Complainant's unjustified position" (C&D's application, p.2).

Mautz & Oren, Inc., 16 BNA OSHC 1006 (No. 89-1366, 1993). The reasonableness test comprises three parts: the Secretary 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.” *Gaston v. Bowen*, 854 F2d. 379, 380 (10th Cir. 1988).

The Alleged Violations

One of the bases of item 1 (alleged violation of § 1926.20(b)(2)) is that no competent person would have allowed the use of the allegedly defective scaffold that C&D was using. Therefore, item 3, which addresses the condition of the scaffold, will be discussed first.

Item 3: §1926.451(d)(10)

Section 1926.451(d)(10) provides in pertinent part:

Guardrails made of lumber . . . and toeboards shall be installed at open sides and ends on all scaffolds more than 10 feet above the ground or floor.

Compliance officer Dierks testified that he observed two C&D employees standing on two metal boards that were placed across the interior of a scaffold. The scaffold was erected 6 to 8 inches away from the side of the building on which the employees were installing insulation and stucco. At the hearing, Dierks testified that the employees reached through the scaffolding to apply the materials to the exterior of the wall (Tr. 39, 49). Dierks stated that there were no guardrails behind the employees as they stood working on the two metal boards (Tr. 41).

The brothers Constantin and Daniel Moraru, president and vice-president of C&D, both testified that their employees only worked on the area outside the scaffolding structure that was supported by brackets or outriggers (Tr. 58, 134). Neither brother was at the site at the time of Dierks’s inspection.

The determination of this issue turned upon the credibility of the witnesses. If Dierks’s testimony was credited, the Secretary would have prevailed on this issue. The issue was resolved in C&D’s favor, however, based on the testimony of William Woods, the general contractor’s superintendent, who accompanied Dierks during his inspection. Woods, who was called as a witness by the Secretary, testified during cross-examination that C&D’s employees were not working from

the main scaffolding platform. Woods stated that the employees were working from the brackets, with the cross-bracing behind them (Tr. 82-84).

The decision issued by the undersigned in this case held (Decision, p. 5):

The testimony of the Moraru brothers regarding their work practices, along with Woods's eyewitness testimony regarding Dierks's walkaround inspection is deemed more credible than Dierks's observations. Dierks may not have been as familiar with the stucco process as were the other witnesses. Dierks apparently focused on the outside edge, which was without guardrails, not on the area from which the employees actually worked.

The decision expressly predicates the outcome of item 3 on the issue of credibility. “[A] case which truly turns on credibility issues is particularly ill-suited for the reallocation of litigation fees under the EAJA.” *Consolidated Construction, Inc.*, 16 BNA OSHC 1001, 1006 (No. 89-2839, 1993).

At the time the Secretary went to hearing, she was relying on information provided by Dierks that the scaffold was not properly guarded. She could have reasonably discounted the statements of the Moraru brothers because it was undisputed that they were not present at the time of the inspection. The Secretary interviewed Woods, the only other person present during Dierks's entire inspection, and called him as a witness. It was only during cross-examination that Woods expressed his belief that the employees were not working from the interior of the scaffold, but from the brackets. Furthermore, even if the Secretary had reason to believe that C&D's employees were standing on the brackets with the cross-bracing at their backs, the Secretary had a reasonable basis to proceed with the litigation. The Commission has held in the past that the presence of cross-bracing eliminates neither the fall hazard nor the requirement for a guardrail. *Dick Corporation*, 7 BNA OSHC 1951 (No. 16193, 1979).

The Secretary's position that C&D's employees were exposed to a fall hazard while working from an unguarded scaffold was substantially justified. No costs are awarded for item 3.

Item 1: §1926.20(b)(2)

Section 1926.20(b)(2) provides:

Such programs shall provide for frequent and regular inspections of the job sites, materials, and equipment to be made by competent persons designated by the employers.

Woods testified that he had not seen the Moraru brothers at the worksite during the week of the inspection (Tr. 77). Constantin Moraru testified that he was C&D's designated competent person and that he had visited the site twice the day of the inspection and had inspected the scaffolding (Tr. 88, 107). Woods admitted that Moraru could have come to the site without his knowledge (Tr. 80-81).

The Secretary was substantially justified in proceeding with this item. At the time of Dierks's inspection, no supervisor for C&D was present at the site. The supervisor for the general contractor told Dierks that he had not seen any C&D supervisors all that week. Dierks observed what he believed to be a scaffold violative of § 1926.451(d)(10). Based upon this information, the Secretary was substantially justified in her position that C&D had violated § 1926.20(b)(2).

Item 2: §1926.21(b)(2)

Section 1926.21(b)(2) provides:

The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

The Secretary moved to withdraw this item at the beginning of the hearing. The fact that the Secretary withdrew the item does not raise a presumption that the Secretary's position was without substantial justification. *Hocking Valley Steel Erectors, Inc.*, 11 BNA OSHC 1492 (No. 80-1463, 1983).

In its response to C&D's EAJA application, the Secretary states (Secretary's response, p. 12):

At the time of the OSHA inspection, the compliance officer found that due to the conditions at the worksite, employees were exposing themselves to hazards which could cause death. The compliance officer concluded that employees were working under these conditions because of a lack of training concerning the hazards associated with working from elevated heights.

Because item 2 was withdrawn at the beginning of the hearing, no evidence was taken on this point. The Secretary's position prior to the hearing was substantially justified. Given the report of the compliance officer, the Secretary could reasonably believe that C&D's employees had not been adequately trained.

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

ORDER

Based upon the foregoing decision, it is hereby ORDERED that:

C&D's application for attorney's fees and expenses is denied.

NANCY J. SPIES
Judge

Date: October 9, 1998