

Secretary of Labor,	:	
Complainant,	:	
v.	:	OSHRC Docket No. <b>96-0064</b>
Horizon Roofing & Sheetmetal, Inc.,	:	<b>EAJA</b>
Respondent.	:	

**DECISION AND ORDER**

Respondent, Horizon Roofing & Sheetmetal, Inc. (Horizon), applied for an award of attorney fees and expenses pursuant to 29 C.F.R. Part 2204, which provides for the implementation of the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, in Review Commission proceedings. Horizon was the prevailing party in this case decided by Judge Richard DeBenedetto on April 12, 1999. Subsequent to entering this decision, Judge DeBenedetto retired and this matter was assigned to me for consideration of respondent's EAJA application. For the reasons that follow, Horizon's application is denied.

The Secretary conducted an inspection and investigation of respondent's worksite at a United States Postal Service facility in Albany, New York, as a result of an accident that occurred on September 26, 1995. As a result of this inspection, Horizon was issued a six-item citation on December 18, 1995. On March 15, 1996, the Secretary filed a complaint in which item 5 was withdrawn. A hearing was held on August 20 to 21, 1996, April 22 to 23, 1997, and August 5 to 7, 1997. On the first day of hearing, prior to any testimony, the Secretary withdrew item 4 of the citation. Judge DeBenedetto vacated items 1, 2, 3 and 6 in his April 12, 1999 decision.

The Equal Access to Justice Act at 5 U.S.C. § 504(a)(1) provides, in part:

(a)(1) An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

The Review Commission standard for award under EAJA at 29 C.F.R. § 2204.106(a) provides:

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.

#### Prevailing Party and Eligibility

It is undisputed by the Secretary that the respondent was the prevailing party in this case. Horizon, a corporation, seeks an award of attorneys' fees and costs in the amount of \$114,464.54. To be eligible for an award under EAJA, a corporation must show that it has a net worth of not more than \$7,000,000 and employs not more than 500 employees. Respondent has made an uncontroverted showing in its application that it is eligible for an EAJA award since its net worth does not exceed \$7,000,000 and it employs not more than 500 employees.

#### Substantial Justification

Remaining to be determined is whether the Secretary's position was substantially justified at each identifiable stage of this case. The burden rests on the Secretary to make such showing [29 C.F.R. § 2204.106(a)]. The test of whether the Secretary's position was substantially justified is one of reasonableness. The statutory phrase "substantially justified" means justified to a degree that could satisfy a reasonable person. Where the agency can show

its case had a reasonable basis in law and fact, even though it lost the case, no award will be made. *Pierce v. Underwood*, 487 U.S. 552, 108 S.Ct. 2541 (1988); *S & H Riggers, Inc. v. OSHRC*, 672 F.2d 426, 430 (5th Cir. 1982). The facts forming the basis for Governmental action need not be uncontradicted. If reasonable persons may fairly disagree whether evidence establishes a fact in issue, the evidence can be said to be substantial. *Megawest Financial, Inc.*, 17 BNA OSHC 1598, 1995-97 CCH OSHD ¶ 30,931 (No. 93-2879, 1995).

The question for determination is whether the Secretary was substantially justified in pursuing its action against Horizon for the alleged violations of standards set forth in items 1 through 6 of the citation.

Alleged Violation of 29 C.F.R. § 1926.502(j)(7)(i)  
Citation Item 5

In item 5 of the citation, the Secretary alleged a violation of 29 C.F.R. § 1926.502(j)(7)(i) which provides: “Materials and equipment shall not be stored within 6 feet (1.8 m) of a roof edge unless guardrails are erected at the edge.”

The citation was issued on December 18, 1995. Less than three months later, the Secretary filed her complaint in which this item was withdrawn. During the inspection, the compliance officer determined that there was no fall protection at the roof edge in the area of the debris chute and that bundles were stored or stockpiled at the edge of the roof. His determination was based on three employee interview statements and his field notes of conversations with two other employees.

The Secretary, in her response, states that the decision not to litigate the meaning of “stored” or “storage” under the Act was based on Commission case law as to the length of time materials must remain in one location to be deemed in storage. While the case cited by the Secretary involved another standard, her point is well taken that cases such as this are fact specific. I find that it was reasonable for the compliance officer to cite this item and that the Secretary withdrew this item after analysis by her attorneys when a legal decision was made not to pursue this alleged violation. The Secretary was substantially justified in citing item 5.

Alleged Violation of 29 C.F.R. § 1926.502(d)(15)  
Citation Item 4

In item 4 of the citation, the Secretary alleged a violation of 29 C.F.R. § 1926.502(d)(15) which provides:

Anchorage used for attachment of personal fall arrest equipment shall be independent of any anchorage being used to support or suspend platforms and capable of supporting at least 5,000 pounds (22.2 kN) per employee attached, or shall be designed, installed, and used as follows:

- (i) as part of a complete personal fall arrest system which maintains a safety factor of at least two; and
- (ii) under the supervision of a qualified person.

The Secretary asserts that the compliance officer relied on his observations and information from Horizon's foreman during the inspection that an anchorage for an employee lanyard was not separate from an anchorage supporting a debris chute. She further states that during trial preparation, it was not clear that the anchorage supported both the chute and the lanyard. Due to this uncertainty, the Secretary withdrew this item at the beginning of the hearing. During the hearing, after this item was withdrawn, Horizon's foreman testified that a 6-foot safety belt was, in fact, hooked to one of the staging planks that supported the debris chute. After reviewing the evidence and submissions on this point, I conclude that the Secretary was substantially justified in issuing the citation and withdrawing the item at the hearing when she questioned the sufficiency of her evidence. The subsequent admission by the foreman validated the Secretary's original position. The Secretary's timing of her withdrawal of this item is justified in that she questioned her evidence during trial preparation prior to the hearing. I find no undue delay by withdrawal at the start of the hearing.

Alleged Violations of 29 C.F.R. §§ 1926.252(a), 1926.501(b)(10),  
1926.501(c)(3) and 1926.852(f)

Item 1 alleges a violation of 29 C.F.R. § 1926.252(a) which provides:

Whenever materials are dropped more than 20 feet to any point lying outside the exterior walls of the building, an enclosed chute of wood, or equivalent material, shall be used. For the purpose of this paragraph, an enclosed chute is a slide, closed in on all sides, through which material is moved from a high place to a lower one.

The Secretary relied on the testimony of three former Horizon employees and two postal employees that they had seen material thrown over the edge of the roof or had thrown material over the roof edge without using the enclosed chute. The roof was 32 feet above the ground. The Secretary further showed that she obtained signed statements from six postal employees stating that they saw bundles of material thrown over the side of the roof.

After hearing testimony on direct and cross-examination, Judge DeBenedetto found that all five witnesses lacked credibility, discounted their testimony, and held that the Secretary failed to provide credible evidence that Horizon did not use the debris chute to dispose of roofing debris.

Item 2 alleges a violation of 29 C.F.R. § 1926.501(b)(10) which provides:

*Roofing work on Low-slope roofs.* Except as otherwise provided in paragraph (b) of this section, each employee engaged in roofing activities on low-slope roofs, with unprotected sides and edges 6 feet (1.8 m) or more above lower levels shall be protected from falling by guardrail systems, safety net systems, personal fall arrest systems, or a combination of warning line system and guardrail system, warning line system and safety net system, or warning line system and personal fall arrest system, or warning line system and safety monitoring system. Or, on roofs 50-feet (15.25 m) or less in width (see Appendix A to subpart M of this part), the use of a safety monitoring alone [i.e. without the warning line system] is permitted.

The compliance officer testified that he observed a 21-foot gap in the roof's perimeter guarding on September 27, 1995, one day after the time period during which the Secretary alleges violations occurred. He testified that he relied on a witness statement in concluding that this condition existed on September 26, 1995, the final date that the Secretary alleges the

condition existed. At the hearing, that witness testified he no longer believed that debris had fallen from the roof on September 26, 1995. Prior to the hearing, the Secretary also relied on statements of three other Horizon employees and one postal employee regarding lack of adequate fall protection.

Judge DeBenedetto observed that the Secretary's proof of a violation depended largely on the credibility of three employee witnesses that employees worked beyond the warning lines with no fall protection. The judge discounted their testimony based on credibility findings and determined the Secretary failed to produce credible evidence of the violation.

Item 3 alleges a violation of 29 C.F.R. § 1926.501(c)(3) which provides:

*(c) Protection from falling objects.* When an employee is exposed to falling objects, the employer shall have each employee wear a hard hat and shall implement one of the following measures:

- (1) Erect toeboards, screens, or guardrail systems to prevent objects from falling from higher levels; or,
- (2) Erect a canopy structure and keep potential fall objects far enough from the edge of the higher level so that those objects would not go over the edge if they were accidentally displaced; or,
- (3) Barricade the area to which objects could fall, prohibit employees from entering the barricaded area, and keep objects that may fall far enough away from the edge of a higher level so that those objects would not go over the edge if they were accidentally displaced.

The Secretary based her proof of employee exposure primarily on statements from four employee witnesses prior to hearing. At hearing, one employee's testimony varied from an earlier statement. Three other witnesses testified regarding the placement of debris near the roof edge. The judge found that the Secretary failed to prove employee exposure based on credibility findings. Item 6 alleges a violation of 29 C.F.R. § 1926.852(f) which provides:

Where the material is dumped from mechanical equipment or wheelbarrows, a securely attached toeboard or bumper, not less than 4 inches thick and 6 inches high, shall be provided at each chute opening.

The Secretary based her alleged violation on statements and testimony of an employee injured in this area of the worksite. Judge DeBenedetto found his testimony lacking credibility and held that the Secretary failed to prove the violation.

Under current practice, a party is not required to vouch for the testimony of witnesses called in his or her behalf. Federal Rule of Evidence 607 recognizes this in its abandonment of the traditional rule against impeaching one's own witness. Here the Secretary relied on Horizon employee witness statements which were corroborated by statements by six postal employees who had no stake in the outcome of the investigation or litigation.

Judge DeBenedetto ruled that the Secretary failed to provide credible evidence that Horizon violated the standards as alleged in items 1, 2, 3 and 6. This decision was based on credibility findings after he had the opportunity to observe the testimony, demeanor and behavior of all witnesses during extensive direct and cross-examination. While Judge DeBenedetto discounted the testimony of multiple witnesses for the complainant, there is nothing in the record to indicate that the Secretary acted unreasonably in relying on the testimony of these individuals. Their prehearing statements to the compliance officer and their direct testimony, if believed, could have been a basis for sustaining the alleged violations. Cross-examination and questions by the judge, along with contrary testimony by management and other employees of Horizon, provided a basis for the judge's findings regarding credibility. The Secretary's reliance on witness statements and testimony was not unreasonable conduct. The Secretary is not accountable for resolution of credibility issues by the judge. *Eastern Steel Erectors, Inc.*, 12 BNA OSHC 1006, 1984-85 CCH OSHD ¶ 27,160, p. 35,056 (No. 83-1107, ALJ Decision 1984).

Where, as here, the case truly turns on credibility issues, reallocation of litigation fees under the EAJA is ill-suited. *Consolidated Construction, Inc.*, 16 BNA OSHC 1001 at 1006, 1991-93 CCH OSHD ¶ 29,992 at p. 41,076 (No. 89-2839, 1993); *C & D European Stucco & Stone, Inc.*, 18 BNA OSHC 1657, 1998 CCH OSHD ¶ 31,709, p. 46,101 (No. 96-0929, ALJ Decision 1998).

There is no indication that further preparation in advance of hearing would have led the Secretary to question the validity of her position. *See Consolidated Construction, Inc., supra*,

16 BNA OSHC at 1004. The Secretary's action was based chiefly on corroborating statements and testimony of a great number of Horizon and U. S. Postal Service employees which complainant credited. She had no way of foreseeing that the judge would make the credibility determinations that he did in this case. Complainant's reliance on these witnesses was reasonable. She was substantially justified in proceeding with this matter at all stages of this proceeding. *See Europlast, Ltd. v. N.L.R.B.*, 33 F.3d 16 (7th Cir. 1994).

After reviewing the decision and record in this case, along with the submissions of the parties, I conclude that the Secretary made reasonable inquiry into the facts, and that the testimony presented by the Secretary at hearing, if found credible, could have established a prima facie case. The Secretary does not vouch for the testimony of respondent's employees, former employees or other fact witnesses. The Secretary was in possession of no evidence, other than statements of respondent's managers, that indicated that its witnesses were not credible.

The Secretary was substantially justified in pursuing this matter at all stages of this proceeding. No attorney fees or costs are awarded.

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 the application for attorney's fees and expenses in this case is **DENIED**.

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STEPHEN J. SIMKO, JR.  
Judge

Date: August 23, 1999