Secretary of Labor, Complainant, v. Performance Site Management, Respondent.	OSHRC Docket No. **00-0535**

Appearances:

Anthony M. Stevenson, Esq.
U. S. Department of Labor
Office of the Solicitor
Cleveland, Ohio
For Complainant

Corey V. Crognale, Esq.
Schottenstein, Zox & Dunn
Columbus, Ohio
For Respondent

Before: Administrative Law Judge Nancy J. Spies

Decision on Fee and Expense Application

Performance Site Management (Performance) 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 February 15, 2000. For the reasons stated below, Performance's application is denied.

Background

Performance was engaged in the installation of sanitary and storm sewer lines for a housing project in Cleves, Ohio, on October 28, 1999. It was using an 80-ton Komatsu PC 650 trackhoe. In 1992, Performance had added a hydraulic Hendrix J.B. "Quick Coupler" hitch to the trackhoe arm. This allowed the operator to quickly detach and re-attach various trackhoe buckets throughout the day. On October 28, 1999, Performance superintendent John Young was operating the trackhoe while employees Gene Wells and Jimmy Ruckman were working in the excavation made by the trackhoe. At some point, the bucket disengaged from the trackhoe and rolled onto Wells, fatally injuring him. Occupational Safety and Health Administration (OSHA)

compliance officer James Denton investigated the fatality, and the Secretary subsequently issued a citation alleging serious violations of the following four construction standards:

Item 1:	§ 1926.20(b)(2) for failure to have a safety program which required inspection after each change of a trackhoe bucket.
Item 2:	§ 1926.21(b)(2) for failure to instruct employees in how to safely use the bucket changing equipment.
Item 3:	§ 1926.651(a) for permitting employees to work underneath equipment loads.
Item 4:	§ 1926.652(a)(1) for failure to provide cave-in protection for employees in an excavation.

Prior to the September 21, 2000, hearing, the Secretary withdrew item 3. In her Decision and Order issued on March 8, 2001, the undersigned vacated item 1, item 2, and the previously withdrawn item 3. She affirmed item 4, reducing the Secretary's proposed $4,500.00 penalty to $4,300.00. The decision became a final order on April 9, 2001.

On May 8, 2001, Performance filed an application for attorney's fees and expenses in the amount of $39,025.71. The Secretary filed a response objecting to Performance's application on June 5, 2001. Performance filed a reply on June 28, 2001, in support of its application, but reducing its claims to $19,391.25 in attorney's fees and $1,985.74 in expenses, in apparent acknowledgment of the Secretary's argument that Performance's original calculation was excessive.

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's 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. 1999).

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). Performance timely filed its application.

The prevailing party 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 must 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).

Attached to Performance's application is the affidavit of Rick Levy, Performance's chief financial officer. Levy avers that Performance is a corporation that had a net worth of less than 7 million dollars and fewer than 500 employees at the time of the notice of contest. The undersigned found in her decision that Performance employed 350 employees. Performance attached no documentation, such as tax records, balance sheets, or accounting statements, supporting its statement of net worth.

The Secretary argues that Performance's application should be dismissed because it fails to provide sufficient evidence that Performance 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 . . . ."

The undersigned found that the more appropriate course would be to allow supplementation of Performance's application. Commission Rule 2204.202 provides, "The Commission may require an application to file additional information to determine its eligibility for an award." Along with its reply, Performance submitted supplemental financial information that establishes that its net worth is in fact less than 7 million dollars. Performance moved to protect that financial information from public disclosure, which the undersigned now grants as follows:

> The five page financial submission shall be placed in a separate envelope marked "confidential financial information." Disclosure shall not be made to any person, other than the parties' and their professional and clerical staff or to the Review Commission and its clerical staff without the express Order of the Commission. Disclosure shall not be made for any purpose other than this action. Persons who receive access to the noted information pursuant to this Order shall mark and keep such information in accordance with the purpose and intent of this Order. Upon conclusion of this matter, the material shall be returned to respondent or (at its option) destroyed.

Performance has established that it meets the eligibility requirements of the EAJA.

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.

Three of the four items cited by the Secretary in this case were vacated. In her response objecting to Performance's application, the Secretary states she "does not dispute the determination that P[erformance] is the prevailing party" (p.6).

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." *Mautz &Oren, Inc.*, 16 BNA OSHC 1006, 1009 (No. 89-1366, 1993).

The Supreme Court has held:

> The statutory phrase "substantially justified" means justified in substance or in the main -- that is, justified to a degree that could satisfy a reasonable person. This interpretation of the phrase accords with related uses of the term "substantial," and is equivalent to the "reasonable basis both in law and fact" formulation adopted by the vast majority of Courts of Appeals.

Pierce v. Underwood, 108 S.Ct. 2541, 2543 (1988).

The fact that the Secretary did not prevail in the underlying case does not raise a presumption that her case was not substantially justified. *Ashburn v. United States*, 740 F.2d 843 (11th Cir. 1984).

The Alleged Violations

Performance, in its application, states (Application, p.6):

> Through the instant application, Performance is seeking reimbursement for all fees and expenses incurred in defense of the Secretary's citations. As demonstrated below, in light of the facts and the law, the Secretary's positions on Citation Items 1 and 2 were not substantially justified. Accordingly, Performance should be reimbursed for having to defend against the citations.

No mention is made of reimbursement for fees and expenses incurred in the defense of item 3, which was withdrawn by the Secretary prior to hearing. Despite this, in her response to Performance's application, the Secretary argues that the citation of item 3 was substantially justified. In its reply, Performance for the first time charges that the Secretary was not substantially justified in issuing the citation for item 3, and claims that it "was forced to incur fees and expenses in defending Secretary's baseless allegation" (Reply, p.6).

As the Secretary notes in her response, "[I]t appears from the itemized statements that no time was spent in trial preparation or in writing the post hearing brief with regard to this item" (Response, p.14, fn.7). The undersigned agrees.

Performance failed to claim attorney's fees and expenses for defense against the violation charged in item 3 in its application, and it has not demonstrated that any fees or expenses were actually incurred with regard to this item. Therefore, only items 1 and 2 will be considered in this decision on Performance's EAJA application.

<u>Items 1 and 2: §§ 1926.20(b)(2) and 21(b)(2)</u>

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.

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 undersigned determined in her decision that the Secretary's case failed for the following reasons (Decision, p.4):

> Performance maintains that its operator was trained to and did inspect the bucket connection by conducting a test dig after each attachment before work began. The Secretary disputes the adequacy of the procedure because she asserts that Performance relied too heavily on the absence of the sounding buzzer, which could indicate that the switch was still in neutral, as well as that it was properly locked. The Secretary also questions the adequacy of the test dig, asserting that it differed from the manufacturer's guidelines for testing the bucket connection.
>
> The Secretary's position has two problems. She cannot point to a standard which governs the bucket attachment procedure, and she has not shown that Performance's test differed in a significant way from the manufacturer's instruction. The Secretary implicitly argues that §§ 1926.20 and .21 turn the manufacturer's guidelines into requirements for use under the general duty clause, and require the guidelines to be reflected in an employer's safety program and training standards applied, even without reference to another OSHA standard.

Compliance officer Denton arrived at the site of the accident October 29, 1999, the day after the accident. No one was at the site and the excavation had been filled in. As Denton stated, "there was nothing there for me to inspect" (Tr. 100).

Denton interviewed several employees of Performance's: Tim Britts, safety director Tom Obert, assistant safety coordinator Pat McClure, and supervisor John Young (Tr. 100-101). He also spoke with Ken Garriot of Hendrix Manufacturing Company (the manufacturer of the coupler) and Dan Conley of Columbus Equipment Company (Tr. 102-103). He also interviewed Emily Ashcraft, assistant chief of the Miami Township Fire Department, who had entered the trench to assist in removing Wells after his accident (Tr. 67, 72).

Denton stated that he recommended that Performance be cited for violating § 1926.20(b)(2) (item 1) (Tr. 106):

> Because the company had no inspection program in place for inspecting to make sure that the quick coupler was properly attached to the bucket. The control switch was located behind the operator, which would have required him to visually look back and inspect to make sure it's in the right position, it's not in neutral when they're operating, it is in lock. There could be other visual checks as far as placing the bucket down onto the ground to make sure that you've got -- you're putting pressure on the bucket when you're doing the testing, but it primarily deals with not performing an inspection to make sure that everything is in position and being correctly operated.

Denton recommended that the Secretary cite § 1926.21(b)(2) (item 2) "Because Performance Site Management failed to instruct Mr. John Young, the superintendent, in the proper method of testing the quick coupler when they attach on the bucket" (Tr. 111).

It appears that the Secretary relied primarily on statements by Young in citing item 1 and 2. Young's testimony at the hearing demonstrates that the Secretary's position was reasonable in fact.

When asked what training he had received on the quick coupler, Young replied, (Tr. 21-22):

Young: Just by working there and watching how other people use it, and just the manual a little bit; nothing really major on the manual.

Q.: Now, when you say, "just by watching it," is that on visual observation or some other method? Has Performance Site Management provided you with specialized training on the Hendrix quick coupler , and you mentioned - -

Young: No, they never sent me to school or nothing like that.

Q.: But, did you see someone do it, or did someone show you or --

Young: Yes, I mean, when you're around construction all day, you just see people using it all day; you know, all the time.

Q.: So, you learned by watching them use it?

Young: Correct.

Young was later questioned about Performance's inspection program (Tr. 38-43):

Q.: I'm saying, is that program written anywhere?

Young: No.

Q.: How do you know about the program?

Young: It's just the way I was taught.

Q.: And taught by whom?

Young: Just by all the other hoe operators in our company. That's how we all do it. I've seen other companies, other people, do the same thing.

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Q.: So, you're saying that you do something different than what the manual is saying?

• • •

Young: Yes, because it don't really say to go out and hit the ground with it and roll it out.

• • •

Q.: Okay, so you're saying that the test the manufacturer had is not the test that you use?

Young: Correct

Young's testimony regarding his training was equivocal, raising the question of whether he was actually instructed in the recognition and avoidance of unsafe conditions attendant to operating the coupler, or if he had just learned by watching others how to operate the coupler. And he was unambiguous in stating that he did not follow the method set out in the manual when testing the coupler's bucket attachment. When asked if he would have followed the manual's instructions had he read them prior to the accident, Young replied, "No, I like my way better" (Tr. 46).

A legal position is not substantially justified when it is based on supposition or conjecture. It must be supported by evidence. Evidence is substantial if it is the kind of evidence a reasonable mind might accept as adequate to support a conclusion. *Capitol Tunneling Inc.*, 15 BNA OSHC 1304 (No. 89-2248, 1991).

The Secretary's determination that Performance had failed to comply with the requirements of §§ 1926.20(b)(2) and .21(b)(2) was reasonable in fact and law. There was no evidence adduced at the hearing that Performance had either a written or unwritten program requiring inspections of the quick coupler after each attachment. Young testified that he had

learned to operate the coupler by watching others, and he was unfamiliar with the manufacturer's manual. Obert told Denton that no one had conducted safety training on the quick coupler with Young, but stated that all instruction manuals for the heavy equipment were available to the employees to read (Tr. 112-113).

The Secretary proceeded on the legal theory that Performance should have instructed its employees to operate the quick coupler in accordance with the instructions contained in the manufacturer's manual. An employer complies with § 1926.21(b)(2) when it instructs employees about hazards they may encounter on the job and the regulations applicable to those hazards. *Concrete Construction*, 15 BNA OSHC 1614 (No. 89-2019, 1992). Because of the potentially subjective nature of the standard, the Review Commission has incorporated a reasonableness requirement. "That is, to establish compliance, the Secretary must establish that the cited employer failed to provide the instruction that a reasonably prudent employer would have given in the same circumstances." *El Paso Crane & Rigging Co., Inc.*, 16 BNA OSHC 1419, 1424 (No. 90-1160, 1993). The Secretary's position that a reasonably prudent employer would have instructed its employees to follow the procedure contained in the manufacturer's manual is a reasonable one. In the absence of a settled interpretation by the Commission, the Secretary is substantially justified in proceeding based on a reasonable legal theory. *Mautz & Oren, Inc.*, 16 BNA OSHC at 1011.

The Secretary was substantially justified in proceeding with her case against Performance with regard to items 1 and 2. She had evidence that supported charges of violations of §§ 1926.20(b)(2) and 21(b)(2). Although the undersigned did not ultimately agree with the Secretary's position, the Secretary had a reasonable basis to proceed with the litigation.

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:

Performance's application for attorney's fees and expenses is DENIED.

/s/
NANCY J. SPIES
Judge

Date: August 23, 2001