

**UNITED STATES OF AMERICA  
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

SECRETARY OF LABOR,  
Complainant,

v.

UXB INTERNATIONAL, INC., and its successors,  
Respondent.

OSHRC DOCKET  
NO. 08-0137

**DECISION AND ORDER ON APPLICATION FOR LEGAL FEES AND EXPENSES  
PURSUANT TO THE EQUAL ACCESS TO JUSTICE ACT**

This matter comes before the court for consideration of Respondent’s post-decision application for attorney’s fees and costs pursuant to the Equal Access to Justice Act (“EAJA”), 5 U.S.C. §504, and the Commission’s implementing regulations at 29 C.F.R. §2204. The court has reviewed and considered *Respondent’s Application for Costs, Fees, and Expenses Pursuant to the Equal Access to Justice Act*, *Complainant’s Answer to Respondent’s Application for Costs, Fees, and Expenses Pursuant to the Equal Access to Justice Act*, and *Respondent’s Reply to Respondent’s Opposition to Petitioner’s Application for Award of Fees and Expenses*.

**Procedural History**

As a result of an OSHA inspection following a fatality accident on July 14, 2007, at White Sands Missile Range in New Mexico, Respondent was issued a *Citation and Notification of Penalty* alleging two serious violations of the Act. Respondent’s employee, Ralph Almodovar, was struck and killed by the bucket of an excavator during the process of retrieving an un-detonated bomb. (Tr. 75, 83, 85). Citation 1 Item 1 alleged a serious violation of Section 5(a)(1) of the Act, commonly referred to as the General Duty Clause, for exposing employees to the hazard of a trench collapse and cave-in. A penalty of \$2,800 was proposed for this violation. Citation 2 Item 1 alleged a second serious violation of Section 5(a)(1) for exposing employees to the hazard of working within the swing radius of an excavator. A second penalty

of \$2,800 was proposed for that violation. Respondent contested the citation and an administrative trial was conducted in Denver, Colorado on December 16 and 17, 2008. On May 3, 2009, the undersigned issued a *Final Decision and Order* finding that the Secretary failed to establish a *prima facie* violation of the Act in each instance. The decision was formally docketed on May 22, 2009 and was not petitioned, or designated by the Commission, for review. Therefore, the decision became a final order of the Commission on June 22, 2009 pursuant to Commission Rule 90(d).

### **Discussion**

The Equal Access to Justice Act (“EAJA”) entitles certain parties who prevail in litigation against the government to receive related attorney’s fees and expenses. 29 C.F.R. §2204.101. A party seeking an EAJA award is required to submit an application within 30 days of the final disposition of the case. 29 C.F.R. §2204.302. In this instance, the Secretary does not dispute that Respondent submitted a timely application for EAJA fees. (Secretary’s Answer to EAJA Application, p. 3).

When an eligible party prevails over the Secretary of Labor in an OSHRC proceeding, that party may receive an award of attorney fees and expenses unless the Secretary’s position throughout the proceeding was substantially justified or special circumstances make an award unjust. 29 C.F.R. §2204.101. The Secretary bears the burden of persuasion that an award should not be made to an eligible prevailing party because the Secretary’s position was substantially justified. 29 C.F.R. §2204.106. Accordingly, Respondent’s application will be analyzed pursuant to these principles.

### **Is Respondent Eligible for an EAJA Award?**

An EAJA eligible corporation is one with a net worth not exceeding \$7 million and no more than 500 employees. 29 C.F.R. §2204.105. Based upon financial information submitted by Respondent, the Secretary does not dispute that Respondent is an eligible party for the purposes of an EAJA award. (Secretary’s Answer to EAJA Application, p. 3).

### **Was Respondent the Prevailing Party?**

“An applicant is considered to be the ‘prevailing party’...if it has succeeded on any of the significant issues involved in the litigation, and if, as a result of that success, the applicant has achieved some of the benefit it sought in the litigation.” *K.D.K. Upset Forging, Inc.*, 12 BNA OSHC 1856, 1986-87 CCH OSHD ¶27,612 (No. 81-1932, 1986). Both of the alleged violations contested in this case were vacated by the court because the Secretary failed to establish all of the necessary elements of *prima facie* violations. The Secretary does not dispute that Respondent was the prevailing party in the proceeding. (Secretary’s Answer to EAJA Application, p. 4).

### **Was the Secretary Substantially Justified in Proceeding to Trial?**

The EAJA was not designed to deter the Secretary of Labor from pursuing, in good faith, cases which are reasonably supported and intended to advance the objective of workplace safety. H.R. Rep. No. 96-1418. The test for whether the Secretary’s actions were substantially justified is essentially one of reasonableness in law and fact. *Mautz & Oren, Inc.*, 16 BNA OSHC 1006, 1993 CCH OSHD ¶29,986 (No. 89-1366, 1993). The reasonableness test has three elements: (1) that there is a reasonable basis for the facts alleged, (2) that there is a reasonable basis in law for the theory propounded; and (3) that the facts alleged will reasonably support the legal theory. *Gatson v. Bowen*, 854 F.2d 379 (10th Cir. 1988).

There is no presumption that that Secretary’s position was not substantially justified simply because she lost the case, or that the Secretary’s decision to litigate was based on a substantial probability of prevailing. *Hocking Valley Steel Erectors, Inc.*, 11 BNA OSHC 1492, 1983-84 CCH OSHD ¶26,549 (No. 80-1463, 1983). The Secretary’s position can be substantially justified even though it was incorrect. *Pierce v. Underwood*, 487 U.S. 552 (1988).

As explained in the court’s *Final Decision and Order*, the Secretary established all of the necessary elements for *prima facie* violations of the Act for both citation items, with the exception of

employer knowledge. Therefore, the court agrees with the Secretary's position that she was substantially justified with regard to the *prima facie* elements of the two alleged Section 5(a)(1) violations upon which she prevailed. The sole remaining issue is whether the Secretary was substantially justified with regard to factual evidence and legal argument relating to Respondent's actual or constructive knowledge of the violative conditions.

Respondent's arguments focus heavily on the alleged "inadequacy of the OSHA investigation" conducted prior to the issuance of the citations in this case. However, the court's review of OSHA's pre-citation investigation documents reveal that OSHA clearly obtained sufficient facts to reasonably conclude that Respondent's employees were knowingly exposed to serious, recognized excavation and swing radius hazards. (Respondent's Application, Exs. N, O, P). Therefore, the court concludes that OSHA was substantially justified in the original issuance of the *Citation and Notification of Penalty* to Respondent. The record also establishes that significant pre-trial discovery was conducted after the citations were issued which provided both parties with additional factual information relevant to the case.

With regard to evidence of Respondent's actual or constructive knowledge of the violative conditions at the time of trial, the record contains several factual and legal arguments which reasonably supported the Secretary's position. First, Joe Prather, Respondent's superintendent, personally visited the jobsite on several occasions leading up to the accident. (Tr. 453-455, 203). During his last visit, just two days before Mr. Almodovar was killed, he personally observed employees working inside the excavation, though he claimed that he did not remember whether any of those individuals worked for Respondent. (Tr. 205). The court also credited the deposition testimony of Karl Chavous indicating that, on the day of the accident, Mr. Almodovar entered an excavation was 35-40 feet deep, with 90 degree vertical walls, and no method of excavation protection. (Tr. 75, 83). There was also evidence

that Mr. Prather communicated with Mr. Almodovar by telephone daily and that Respondent's written policies required daily jobsite inspections. (Tr. 105-107; C-18). The Secretary argued that these facts supported the conclusion that Joe Prather, on behalf of Respondent, should have known that Respondent's employees would enter an unsafe excavation, within the swing radius of the excavator, on the day of the accident.

Second, the Secretary presented evidence supporting its argument that Mr. Almodovar was *not* a supervisor at the time of the accident, yet was the only UXB employee present on the jobsite that day. The Secretary combined this argument with Respondent's written "buddy policy," which prohibited a non-supervisory employee from working alone at this type of jobsite. (Tr. 313). The Secretary argued that if Respondent had followed its own policy of not having non-supervisory employees working alone, Respondent would have known (through the supervisor who would have been accompanying Mr. Almodovar) that the deceased employee entered an unprotected excavation within the swing radius of the excavator. It should be noted that Mr. Almodovar's promotion to supervisor was a strongly contested factual issue, with significant evidence and argument introduced by each party.

Third, Mr. Prather testified that he personally had safety concerns for his employees on this jobsite due to the fact that the third-party excavator operator expressed a lack of experience with the particular excavator being used. (Tr. 496). Despite this concern, he directed two employees to work alone (as the only UXB representatives at the site) over the next two days while the search for the bomb continued. (Tr. 229-230, 371, 375). To alleviate his safety concerns, Mr. Prather specifically directed the two employees not to enter the excavation over the weekend. (Tr. 372, 497). It should be noted that the Secretary strongly disputed that Mr. Prather actually gave the employees such instructions.

Fourth, Respondent's Standard Operating Procedure No. 10 required employees to dig the final twelve inches of dirt around an un-detonated bomb by hand (as opposed to using an excavator) if the bomb was inert. (Tr. 486; Ex. C-13). Mr. Prather testified that this particular bomb was inert. (Tr. 221). The Secretary argued that these facts established that employees were *required* to enter the excavation on the day of the accident, and thus, there should have been a finding of constructive knowledge of Respondent's employee's entrance into the unprotected excavation. However, the court concluded that Mr. Prather had specifically instructed Mr. Almodovar and a second employee to deviate from this normal procedure and to stay out of the excavation.

Finally, although the Secretary disputed Mr. Almodovar's status as a supervisor, the court found that he had been orally notified of his promotion ten days before the accident. (Tr. 127, 132, 134, 226). Therefore, Mr. Almodovar's supervisory status alone established a reasonable factual and legal argument that knowledge of the violative conditions could be imputed to Respondent through Mr. Almodovar himself. *A.P. O'Horo Co.*, 14 BNA OSHC 2004, 1991 CCH OSHD ¶29,223 (No. 85-369, 1991). However, as discussed in the decision, the court concluded that such imputation was improper in this instance because of Mr. Almodovar's brief tenure as a supervisor and Mr. Prather's specific instructions to him the night before the accident. *Kerns Bros. Tree Service*, 18 BNA OSHC 2064, 2000 CCH OSHD §32,053 (No. 96-1719, 2000); see also *Mountain States Tel. v. OSHRC*, 623 F.2d 155 (10<sup>th</sup> Cir. 1980).

Based upon the factual evidence and legal arguments presented in this case, the court finds that the Secretary has established that: (1) there was a reasonable basis in fact to allege actual or constructive knowledge of the violative conditions by Respondent, (2) there was a reasonable basis in law to conclude that Respondent knew or should have known that its employee would enter the unprotected excavation on the day of the accident, and (3) the factual evidence relating to employer

