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

SECRETARY OF LABOR, Complainant, v. HORST CONSTRUCTION dba HORST GROUP, INC., Respondent.	OSHRC DOCKET No. 15-1482

Appearances:

Michael P. Doyle, Esq., Office of Regional Solicitor, U.S. Department of Labor, Philadelphia, PA.
For the Complainant.

James Sassaman, Non-attorney representative, Sassaman LLC, Conshohocken, PA.
For the Respondent.

Before: Administrative Law Judge Keith E. Bell

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (the Commission) on Horst Construction, Inc.'s (Respondent or Horst) Application for Award Under the Equal Access to Justice Act, 5 U.S.C. § 504 (EAJA), received on February 3, 2016. The Secretary of Labor (Secretary) filed his Answer on February 22, 2016.[1] Both the Complaint and Answer in this matter were timely filed. Respondent seeks attorney fees in the amount of $484.10. Compl. ¶ 8. For the reasons that follow, Respondent's Application for Award Under the Equal Access to Justice Act is hereby DENIED.

[1] Respondent filed its Reply to Complainant's EAJA Answer on March 8, 2016. All filings related to this matter were considered by the undersigned in reaching this decision.

Background

On April 1, 2015, the Occupational Safety and Health Administration (OSHA) conducted an inspection of Respondent's worksite located at 101 Babb Drive, Luther Village III, Dover DE. As a result of the inspection, one "serious" citation was issued for an alleged violation of 29 C.F.R. § 1926.501(b)(13) for employees working at 6 feet or above ground level without fall protection on August 20, 2015. On August 26, 2015 [2], Respondent timely filed its Notice of Contest. This case was docketed by the Commission on September 3, 2015. On or about October 23, 2015, the Secretary notified the undersigned of his intent to withdraw the Citation and Notification of Penalty (Citation) in this case. Thereafter, on December 3, 2015, the undersigned issued a Decision and Order approving the Secretary's withdrawal.

Equal Access to Justice Act

The EAJA applies to proceedings before the Commission in section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651, *et seq*. 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). Under EAJA, an award is made to an eligible applicant who is the prevailing party only if the government's action is found to be without substantial justification and there are no special circumstances that make the award unjust. *Asbestos Abatement Consultation & Eng'g*, 15 BNA OSHC 1252 (No 87–1522, 1991). The EAJA does not routinely award attorneys' 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), 29 C.F.R. § 2204.106(a).

Timeliness

An EAJA application must be filed within thirty days after the period for seeking appellate review expires. 29 C.F.R. § 2204.302(a). The undersigned's Decision and Order approving the settlement in this case was docketed on December 7, 2015. Horst had sixty days from the December 7, 2015, to file any appeal. Fed. R. App. P. Rule 4(a)(B). Respondent's EAJA

[2] Although Respondent's Notice of Contest is dated August 26, 2015, it was marked received by OSHA on August 28, 2015, and thereafter received by the Commission on September 3, 2015.

application in this case was received by the Commission on February 3, 2016, and its timeliness is undisputed. Accordingly, the undersigned finds that the application was timely filed.[3]

Prevailing Party

A party need not have prevailed on all issues. It is sufficient that "... the party seeking fees need not have prevailed as to the central issue in the case but only as to a discrete substantive portion of the proceeding." *H.P. Fowler Contracting Corp*., 11 BNA OSHC 1841, 1845 (No. 80–3699, 1984). Also, a party may be deemed prevailing if it obtains a favorable settlement of the case; a concept that was grounded in an early committee report of EAJA. H.R. Rep. No. 96-1418 at 11 (1980) ("A party may be deemed prevailing if he obtains a favorable settlement of his case"). In the instant case, a resolution was reached based on the Secretary's withdrawal of his Citation involving one "serious" item with a proposed penalty in the amount of $4,410.00. The Commission has held that a withdrawal by the Secretary is considered a favorable outcome for Respondent thereby making it the "prevailing party." *See Valley Constr. Co.*, No. 92-3644, 1995 WL 455809, at *1 (O.S.H.R.C.A.L.J. July 20, 1995) (finding that Respondent was the "prevailing party" with respect to citations withdrawn by the Secretary as part of a settlement agreement). Moreover, the Secretary does not dispute the fact that Respondent was the "prevailing party" in this case.

Net Worth

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. In its application, Respondent submitted an affidavit from its President, Harry Scheid, along with balance sheets of its assets and liabilities showing the company's net worth in the amount of $3,622,495.[4] RX-1 & 2.[5] Also, the President certified that the company has 49 employees. In his Answer, the Secretary does not dispute Respondent's EAJA eligibility. Therefore, I find that Respondent has met EAJA eligibility requirements.

[3] The Secretary does not dispute the timeliness of Respondent's EAJA application.

[4] Such documentation is required by Rule 202(a) of the Commission Rules of Procedure. 29 C.F.R. § 2204.202(a).

[5] Respondent's EAJA Application exhibits are herein referenced by the letters "RX".

Substantial Justification

Having established that Horst met the EAJA eligibility criteria and that it was the prevailing party as to the Secretary's withdrawal of the Citation at issue, Horst is entitled to an award of fees and expenses under the EAJA unless the Secretary establishes that his position was substantially justified in pursuing litigation as to those violations, or the record shows special circumstances which would make an award unjust. 29 C.F.R. § 2204.106. "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, 1991–93 (No. 89–1366, 1993). The test for "reasonableness" is comprised of three parts. The Secretary must show: (1) that there is a reasonable basis for the facts alleged; (2) that there exists a reasonable basis in law for the theory it propounds; and (3) that the facts alleged will reasonably support the legal theory advanced. *Gaston v. Bowen*, 854 F.2d 379, 380 (10th Cir. 1988). A position is substantially justified if it has a "reasonable basis in both law and fact" or is "justified in substance or in the main." "[T]hat is, justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 563-66 (1988). The government's position can be justified even though it is not correct. *Hackett v. Barnhart*, 745 F.3d 1166, 1172 (10th Cir. 2007).

On April 1, 2015, OSHA Compliance Officer (CO) Dalia Nichols observed three employees working on a roof top without fall protection for approximately 20 to 30 minutes. Nichols Decl. ¶¶ 5&6. CO Nichols observed Mr. Alan Sloan, Horst Construction's Field Superintendent, standing nearby the area where the employees were working on the roof top. When asked if he saw the employees working without fall protection, Mr. Sloan replied, "[y]es, unfortunately I was standing in front of the working area and did not check to see if they were tied off. I need to check that closely each day." Further, Mr. Sloan indicated that he was the person responsible for the worksite. Nichols Decl. ¶¶ 7-10. Based on her years of experience, CO Nichols believed Mr. Sloan's remarks constituted an admission that he was aware that the employees working on the roof were doing so without adequate fall protection. Nichols Decl. ¶ 12. At some point during the inspection, CO Nichols determined that the employees she observed working without fall protection were employed by Frame Masters, a subcontractor of Horst Construction. When asked how long they had been working without fall protection, the employees said only since they returned from lunch. Further, the employees indicated that they had been properly tied off before lunch. Nichols Decl. ¶¶ 13 & 14. Based on the employee's

statements and the fact that she first observed them around 2:00 p.m., CO Nichols concluded that they had probably been working for approximately two and a half hours without fall protection. The Citation issued to Horst was based on its status as a controlling employer under the multi-employer citation policy. Nichols Decl. ¶¶ 16-17.

If this case had proceeded to a hearing on the merits, the Secretary would have had to prove: (a) the applicability of the cited standard; (b) the employer's noncompliance with the standard's terms; (c) employee access to the violative conditions; and (d) the employer's actual or constructive knowledge of the violation (*i.e.* the employer knew or, with reasonable diligence could have known, of the violative conditions). *Atl. Battery Co.*, 19 BNA OSHC 2131, 2138 (No. 90-1747, 1994). In view of the fact that there was no hearing on the merits, the Secretary's burden of proof serves as the lens through which to evaluate whether the Secretary was "substantially justified," in law and in fact, in issuing the "serious" Citation to Respondent, Horst, for a violation of 29 C.F.R. § 1926.501(b)(13).

29 C.F.R. § 1926.501(b)(13) applies to "residential construction" and provides:

> Each employee engaged in residential construction activities 6 feet (1.8 m) or more above lower levels shall be protected by guardrail systems, safety net systems, or personal fall arrest system unless another provision in paragraph (b) of this section provides for an alternative fall protection measure. Exception: When the employer can demonstrate that it is infeasible or creates a greater hazard to use these systems, the employer shall develop and implement a fall protection plan which meets the requirements of paragraph (k) of § 1926.502.

The facts asserted by the CO in her affidavit are not disputed and reveal that the employees were engaged in residential construction.[6] Nichols Decl. ¶ 5. Further, they reveal that the CO observed the employees working on a roof top without fall protection. *Id.* Mr. Sloan stated that the height of the roof was about 45 feet above ground at its peak. GX-A. Therefore, the applicability of the cited standard, the fact that the standard was violated, and the employee access/exposure to the violative condition are not at issue. Here, Respondent challenges employer knowledge of the violative condition which is based on Mr. Sloan's response to the Secretary's inquiry about his awareness. When asked if he was aware that the workers were

[6] The facts asserted in CO Nichol's affidavit are based on her own observations, witness interviews, and supported by her notes in the Violation Worksheet GX-A. Hereafter, government exhibits will be referenced with the letters "GX".

performing work without adequate fall protection, Mr. Sloan stated, "[y]es, unfortunately I was standing in front of the working area and did not check to see if they were tied off. I need to check that closely each day. Nichols Decl. ¶ 9. Respondent takes the position that the Secretary's interpretation of Mr. Sloan's response as an admission of his "knowledge" of the condition was not reasonable. Resp't. Reply at 1. However, Respondent's Reply fails to include an important part of Mr. Sloan's statement…his affirmative response to the question "[y]es." In addition to Mr. Sloan's answer in the affirmative, the CO states that she observed Mr. Sloan standing in an area directly below where the workers were performing work without adequate protection. Nichols Decl. ¶ 7. So, his answer to the question of whether he was aware of the condition seemed to be supported by the CO's own observations. In *Regina Construction Company,* 15 BNA OSHC 1044 (No. 87-1309, 1991), the Commission held that the Secretary established employer knowledge of the violative condition based on the rebutted statement of an employee who claimed that his supervisor was aware. In *Regina*, the employee whose statement was used to establish employer knowledge was not even called to testify despite the fact that the employer disputed his statement. Nevertheless, the Commission found that the Secretary had established employer knowledge while acknowledging that it was "obviously at the outer limits of sufficiency." *Regina*, 15 BNA OSHC at 1049 (citations omitted). In the instant case, the Secretary relied on her own observations of Mr. Sloan standing in the area where the employees were working in plain view to determine that he had knowledge of the hazardous condition along with his affirmative answer to the question of whether he was aware. The facts upon which the Secretary relied to determine actual employer knowledge in this case are not only reasonable but far less attenuated that those in the *Regina* case.

Even assuming, for the sake of argument, that Mr. Sloan's statement is not reasonably construed as an admission of actual knowledge, his statement that "[he] was standing in front of the working area and did not check to see if they were tied off" reflects a lack of "reasonable diligence" on his part to lean of the violative condition. The Commission has held that a statement such as the one given by Mr. Sloan is also indicative of a lack of "reasonable diligence" to discover the violative condition. *See Prestressed Sys., Inc.*, 9 BNA OSHC 1864, 1869-70 (No. 16147, 1981) (Commission finding that company Vice President's statement to CO that hazardous condition "should have been caught in [Respondent's] inspection" was an

admission that the company could have discovered the condition with the exercise of reasonable diligence.).

Despite the fact that none of Respondent's own employees were exposed to the alleged hazard, OSHA cited it under its multi-employer worksite citation policy. Though much disputed, OSHA's multi-employer worksite citation policy stands as an enforcement tool to be used by the agency on construction sites where the controlling employer's own employees aren't the ones exposed to the hazard if the controlling employer could have, with the exercise of reasonable diligence, prevented or eliminated the exposure. *Summit Contractors, Inc.*, 23 BNA OSHC 1196, 1206 (No. 05-0839, 2010) (affirming the legal principle that the Secretary may cite a non-exposing, controlling employer under the multi-employer worksite citation policy). Here, Mr. Sloan stated that he was responsible for safety and health at the worksite. Nichols Decl. ¶ 10. In *Summit,* the Commission held that the actual or constructive knowledge of a supervisor may be imputed to the employer. *Summit*, 23 BNA OSHC at 1207. Accordingly, the Secretary's theory for citing Horst Construction based on the knowledge of its Field Superintendent, Mr. Sloan, was reasonable. Altogether, the record supports a finding that the Secretary was "substantially justified" in citing Respondent, Horst Construction, for a "serious" violation of the cited standard. Finally, Respondent does not allege and the record does not reveal any special circumstance that would warrant an award under EAJA.

Findings of Fact and Conclusions of Law

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure and Rule 308 of the Commission Rules of Procedure. 29 C.F.R. § 2204.308.

ORDER

Based on the foregoing, Respondent's Application for Award Under the Equal Access to Justice Act is hereby DENIED.

SO ORDERED by:

Dated: June 14, 2016

/s/
Keith E. Bell
OSHRC Judge