

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

Secretary of Labor,
Complainant

v.

Joseph Watson, d/b/a Joseph Watson Masonry,
Respondent.

OSHRC Docket No. **00-1726**

EAJA on Remand

Appearances:

Sharon D. Calhoun, Esquire, and Deborah Wakefield, Esquire, Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia
For Complainant

Mark A. Waschak, Esquire and J. Larry Stine, Esquire, Wimberly, Lawson, Steckel, Nelson & Schneider, Atlanta, Georgia
For Respondent

Before: Administrative Law Judge Ken S. Welsch

**DECISION AND ORDER
GRANTING EAJA APPLICATION ON REMAND**

This matter is on remand pursuant to the Review Commission's decision entered September 6, 2006, for a determination as to the eligibility of Joseph Watson d/b/a Joseph Watson Masonry (JWM) for an award under the Equal Access to Justice Act (EAJA) and, if eligible, the amount of fees and expenses to be awarded. JWM seeks a total award of \$27,337.50. The Secretary opposes the eligibility of JWM and the amount of the award.

For the reasons discussed, JWM is an eligible party and is award \$11,275.00, in fees under the EAJA.

Background

On August 25, 2000, JWM and Metric Constructors, Inc.(Metric) received citations for violations of the scaffolding, fall protection, training and recordkeeping standards following an inspection by the Occupational Safety and Health Administration (OSHA) on February 29, 2000 of a construction site at Hunter Airfield outside Savannah, Georgia. Metric was the construction general contractor on the project and JWM was the masonry subcontractor.

JWM was cited for serious violations of 29 C.F.R. § 1926.20(b)(1) (item 1), § 1926.502(b)(1) (item 2a), § 1926.502(b)(2)(i) (item 2b), §1926.502(b)(9) (item 2c). The willful citation alleged JWM violated 29 C.F.R. §1926.451(e)(1) (item 1a) and §1926.451(g)(4)(i) (item 1b). The repeat citation alleged JWM violated 29 C.F.R. §1926.451(c)(2) (item 1), §1926.451(f)(7) (item 2) and §1926.454(a) (item 3). The total proposed penalties as to JWM was \$82,000.00.

Metric was cited for serious violations of 29 C.F.R. §1926.451(e)(1) (item 1), §1926.451(g)(4)(i) (item 2), §1926.502(b)(1) (item 3a), §1926.502(b)(2)(i) (item 3b) and §1926.502(b)(9) (item 3c). The total proposed penalties as to Metric was \$19,000.00.

The cases were consolidated for hearing. The hearing was held for four days in January and February, 2001, in Savannah and Atlanta, Georgia. JWM and Metric were represented by the same law firm. The court's decision and order dated January 24, 2002, as to JWM, vacated item 1 of Citation No. 1, item 1a of Citation No. 2, and item 2 of Citation No. 3. Items 2a, 2b and 2c of Citation No. 1 and items 1 and 3 of Citation No. 3, were affirmed. Item 1b of Citation No. 2 was affirmed as serious instead of willful. JWM was assessed total penalties of \$13,000.00. *Joseph Watson d/b/a Joseph Watson Masonry*, 19 BNA OSHC 1808 (No. 00-1726, 2002).

By separate decision and order dated January 24, 2002 as to Metric, items 2, 3a, 3b and 3c were affirmed. Item 1 was vacated. Metric was assessed total penalties of \$12,000.00. *Metric Constructors, Inc.*, 19 BNA OSHC 1813 (No. 00-1930, 2002).

Based upon the court's decision, JWM petitioned the court to award fees and expenses under EAJA for \$32,616.44, on March 8, 2002. On October 14, 2002, the court denied JWM's EAJA application on the basis the Secretary was substantially justified with regard to the three items vacated and the change in classification to serious on a willful item.

Upon review, the Review Commission by decision entered September 6, 2006, concluded the Secretary was substantially justified as to two items and the willful classification. However, the Commission determined the Secretary was not substantially justified as to two issues; Citation No. 2, item 1a, violation of §1926.451(e)(1) which was vacated and Citation No. 2, item 1b, violation of §1926.451(g)(4)(i) as to the proposed penalty of \$56,000.00. *Joseph Watson d/b/a Joseph Watson Masonry*, 21 BNA OSHC 1649 (No. 00-1726, 2006).

The Commission remanded JWM's EAJA application to determine:

as a threshold matter whether JWM is eligible for an award of fees and expenses under the EAJA. See 29 C.F.R. § 2204.105. If JWM is an eligible party, then we direct the judge to award in accordance with Commission EAJA Rule 107, 29 C.F.R. § 2204.107, the reasonable fees and expenses for work performed in connection with JWM's defense of Citation 2, Item 1a, and the proposed penalty for Citation 2, Item 1b.

JWM's ELIGIBILITY

In its affidavit, JWM asserts it is a sole proprietorship. Pursuant to Commission Rule 105(b), 29 C.F.R. § 2204.105(b), in pertinent part, provides that an eligible applicant is:

The sole owner of an unincorporated business who has a net worth of not more than \$7 million and employs not more than 500 employees.

The party seeking an award under EAJA has the burden of establishing that it meets the eligibility requirements. Commission Rule 202(a), 29 C.F.R. § 2204.202, provides, in pertinent part:

Each applicant except a qualified tax-exempt organization or cooperative association shall provide with its application a detailed exhibit showing the net worth of the applicant as of the date specified by § 2204.105(c). The exhibit may be in any form convenient to the applicant that provides full disclosure of the applicant's assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards in this part.

It is noted the net worth and number of employees is determined at the time the notice of contest was filed. In this case, the notice of contest was filed on September 22, 2000. 29 C.F.R. § 2204.105(c).

There is no dispute that JWM employs less than 500 employees. The court's decision and order dated January 24, 2002, found that JWM employed 10 to 30 employees at any given time. It had approximately 12 employees on the worksite at issue (Tr. 59). In his affidavit attached to the EAJA application, Joseph Watson states that the greatest number of JWM's employees during 2000 was 21 employees. The Secretary does not dispute JWM's number of employees.

With regard to its net worth, JWM attaches the affidavit of Joseph Watson and a "noodle sheet" which reflects calculations made by Watson and his accountant showing JWM's assets as of December 31, 2000. In his affidavit, Watson declares his assets totaled approximately \$251,833.82¹ based on his cash on hand (\$4,433.82) and calculating the value of fixed assets including machinery and equipment (\$30,400.00), automobile (\$33,000.00), truck (\$14,000.00), house (\$135,000.00) and personal belongings (\$35,000.00). During the hearing in January 2001, Watson testified his annual net income was \$18,841.00 in 1997, \$20,796.00 in 1998 and \$27,151.00 in 1999 (Tr. 956).

The Secretary argues that JWM's affidavit is not sufficient to show net worth as required by the EAJA. The Secretary asserts the affidavit fails to meet the requirements because the "noodle sheet" is not a detailed statement of assets and liabilities but a laundry list of various generic types of assets. Also, the Secretary argues that Watson's affidavit is based on "his belief" and not personal knowledge as required by Rule 602, Federal Rules of Evidence.

For the purpose of EAJA eligibility, the court finds that JWM is an eligible party. The Commission's rule provides that the exhibit reflecting net worth can be "in any form convenient" to the employer. 29 C.F.R. § 2204.202. The EAJA does not require the level of detail requested by the Secretary. The affidavit of Joseph Watson is sufficient for the court to establish that JWM's net worth was far less than \$5 million on September 22, 2000. The "noodle sheet" identifies JWM's assets based on a reconstruction and Watson's personal knowledge. JWM does not identify any liabilities. In preparing the noodle sheet, Watson was assisted by his accountant. It is recognized

¹It is noted that in its initial EAJA application, JWM showed a decrease in net worth to \$83,000.00 as of March 2002.

that JWM is a small employer and the reconstruction of its net worth involved information six years old.

As an eligible party, JWM is entitled to reasonable fees and expenses as directed by the Review Commission's remand order.

JWM'S FEES AND EXPENSES

Having determined JWM's eligibility, it is necessary to calculate JWM's EAJA award. The burden is on JWM to establish the reasonableness of its fees and expenses and the facts necessary to enable the Commission to fashion an appropriate award. *Ruhlin Co.*, 17 BNA OSHC 1068, 1069 (No. 93-1507, 1995).

JWM was represented in this proceedings by attorneys with the law firm of Wimberly, Lawson, Steckel, Weathersby & Schneider P.C. of Atlanta, Georgia. The attorneys request a total award of \$27,337.50 in fees. The attorneys' itemized statement shows the hours expended in handling JWM's case on the merits and its EAJA application, a description of services performed, and the rate at which the fees were computed.

JWM's claim for award reflects a percentage-based allocation of fees based on 63% of the total hours expended through the court's decision dated January 24, 2002, and 100% of the hours expended in pursuing the EAJA award. JWM's proposal of 63% is the percentage of \$56,000.00 (the proposed penalty for Citation No. 2, item 1a, which was vacated) to the total proposed penalties of \$82,000.00.

In this case, JWM's claims a total of 161.65 hours expended through the court's decision, January 24, 2002. Using 63% of 161.65 hours, JWM claims 101.8 hours is reasonable representation of the hours expended in prevailing on the two issues which the Review Commission determined OSHA was not substantially justified. In preparing the initial EAJA application and handling the matter before the Review Commission, JWM claims an additional 116.9 hours which it asserts should be awarded at 100% of the hours. Using the allowable rate of \$125.00 per hour times 218.7 total hours, JWM seeks \$27,337.50 in fees.

Although Exhibit A, in its fee petition reflects expenses of \$2,105.34, JWM's application does not claim reimbursement for any expenses. In its petition and reply, JWM's calculations and arguments did not address expenses. Since JWM failed to provide any supporting documentation

that expenses were expended in defending the alleged ladder violation and OSHA's use of an incorrect FIRM, JWM's expenses, if claimed, are disapproved.

The Secretary opposes JWM's formula and argues that it is not a reasonable representation of the hours worked on only two issues. The Secretary asserts that "the use of such a technique here [pro rata reduction] is particularly inappropriate where the relative importance of the items involved is not necessarily concomitant with the amount of penalties awarded" (Secretary's Objections, p. 14). The Secretary requests a downward lodestar adjustment of at least 80%. She argues that many of the claimed fees are excessive and unallowable. The Secretary's proposal reduces JWM counsels' total hours of 278.55 to 55.71 hours for an award to JWM of \$6,963.75 in fees.

The court agrees JWM's fee proposal is not reasonable relative to the issues upon which it prevailed. The Commission specifically concluded the Secretary was not substantially justified only as to Citation No. 2, item 1a which cited JWM for not providing ladders at its worksite. The Commission determined that the Secretary should have cited JWM for failing to have adequate ladders. Also, the Commission found that although the Secretary was substantially justified in classifying Citation No. 2, item 1b as "willful," she was not substantially justified as to the penalty proposed of \$56,000.00. According to the Commission, the Secretary failed to make an appropriate penalty reduction based on JWM's size because of the area director's reliance on an outdated version of the FIRM. It is noted, the proposed penalty of \$56,000.00, was a grouped penalty with no specific allocation to items 1a or 1b of Citation No. 2. Also, Metric, the general contractor, received a similar citation alleging the same violations reflected in items 1a and 1b and therefore the time spent by counsel who also represented Metric, needs to be allocated between the two employers.

The Commission denied JWM's EAJA application as to vacated item 1 of Citation No. 1, and item 2 of Citation No. 3, upon finding the Secretary substantially justified in pursuing the issues. The Commission also agreed the Secretary was substantially justified as to the willful classification of Citation No. 2, item 1b. Further, it is noted the court's decision dated January 24, 2002, affirmed items 2a, 2b, and 2c of Citation No. 1, and items 1 and 3 of Citation No. 3.

The issues upon which JWM prevailed involve two discrete legal questions: whether the Secretary had cited the correct ladder regulation and calculated the penalty using the correct FIRM. Both issues are more technical and non-complex in nature and did not require substantial amounts

of attorney time to pursue. A review of the hearing transcripts shows that of the total 990 transcript pages, only 159 pages or 16% of the hearing referenced ladders, the \$56,000.00 penalty and the FIRM.

Neither of the items upon which JWM prevailed justify a recovery of 63% of the total hours for handling the case through the court's decision on January 24, 2002 and 100% of the hours in pursuing its EAJA application. There were nine alleged violations issued to JWM and the court affirmed six violations. Three items were vacated, as well as the classification of willful was reduced to serious. On review of its EAJA application, the Commission concluded that the Secretary was substantially justified as to two of the vacated items and the willful classification.

JWM's approach, while perhaps reflecting a sensible approach has been rejected by the Commission. The Commission has determined that in arriving at an EAJA award, the judge cannot make a pro rata apportionment based on the percentage of the items found eligible for the award. In the court's opinion, a percentage allocation based on the penalty amount is the same attempt at a pro rata apportionment. The Commission in *Central Brass Manufacturing Co.*, 14 BNA OSHC 1904 (Nos. 86-978, 86-1610, 1990), stated:

In arriving at the award appropriate for this portion of the application, the judge made a pro rata apportionment based on the percentage of the items he found eligible for the award. As the Secretary properly argues, an award based on such a pro rata apportionment is not appropriate. Hensley v. Eckerhart, 461 U.S. at 435, n. 11, 103 S.Ct. at 1940, n. 11. Rather, the judge must determine the "lodestar" (hourly fee x reasonable hours expended). Action on Smoking & Health v. C.A.B., 724 F.2d at 221. When determining the "lodestar" the judge should consider the complexity and novelty of the issues based on his own knowledge, experience and expertise of the time required to complete similar activities. See William B. Hopke Co., 12 BNA OSHC 2158, 2160, 1986-87 CCH OSHD 27,729 at p. 36,257 (Docket No. 81-206, 1986).

The court, therefore, must determine the lodestar (the hourly fee times the reasonable hours expended). The hourly fee set by the Review Commission is \$125.00 per hour unless a "special factor" warrants a higher rate. 29 C.F.R. § 2204.107(b). JWM does not seek an increase in the allowable hourly fee.

JWM shows a total of 278.55 hours expended in handling the case and EAJA application. Unlike in *Central Brass*, the items cited in this case are not of equal complexity. Also, in determining the number of hours reasonably expended for purposes of calculating the lodestar, the court notes that the JWM case was consolidated with the Metric case for hearing. Metric, as general contractor, received similar citations as JWM. Both employers were represented by the same law firm.

A review of JWM's EAJA application shows no segregation between those issues upon the Commission determined JWM prevailed from those unsuccessful claims either during the discovery and trial stages of the proceedings as well as its pursuit of its EAJA application. Based on its time sheets, it is impossible to reconstruct the hours expended in pursuing the ladder violation and the penalty calculation as to employer's size.

The Court needs to adjust the lodestar up or down depending upon the following factors:

- (1) the time and labor required;
- (2) the novelty and difficulty of the questions;
- (3) the skill requisite to perform the legal service properly;
- (4) the preclusion of employment by the attorney due to acceptance of the case;
- (5) the customary fee;
- (6) whether the fee is fixed or contingent;
- (7) time limitations imposed by the client or the circumstances;
- (8) the amount involved and the results obtained;
- (9) the experience, reputation, and ability of the attorneys;
- (10) the "undesirability" of the case;
- (11) the nature and length of the professional relationship with the client; and
- (12) award in similar cases (the "*Johnson Factors*").

Hensley v. Eckerhart, 461 U.S. at 435-6, 103 S.Ct. at 1940-1, citing *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974).

Applying these factors, it is concluded that the hours claimed by JWM are not reasonable in relation to the relative non-complex nature of the issues upon which JWM prevailed. JWM's counsels are highly skilled in OSHA matters with vast experience in litigating such cases. The matters upon which JWM prevailed are technical in nature. The issues were not novel requiring the expenditure of a lot of hours. As noted, only 16% of the hearing transcript pages reference ladders, the \$56,000.00 penalty, and the FIRM. The time expended by the attorneys in representing JWM and Metric is duplicative because both employers were cited for the same or similar violations.

Of the 161.65 hours shown by JWM through the court's decision on January 24, 2002, the court determines the reasonable hours in preparing and trying the issues of the ladder and the use of the wrong FIRM in calculating the penalty is 40 hours. The court assumes that three fourths of the attorneys' time was spent in connection with the eight cited items for which the Secretary's position was substantially justified and counsel's simultaneous representation of Metric on the same violations. It is also noted the willful classification was deemed justified and thus a high penalty was appropriate.

Of the 96.9 hours JWM claims in pursuing the EAJA application through the Commission's decision dated September 6, 2006, JWM is not entitled to 100% of the hours because the Commission concluded the Secretary was substantially justified under EAJA as to two items and the willful classification which were vacated by the court. The reasonable hours for prevailing on the two non-complex, technical issues and considering the skill of counsel in pursuing the EAJA matter, is 30 hours until the Commission's remand decision.

JWM is entitled to 100% of the time expended in handling the EAJA application on remand. JWM shows that it expended 20.2 hours on the remand which the court determines is reasonable.

Accordingly, it is concluded that a total of 90.2 hours of attorney time at \$125.00 per hour are recoverable. Thus, an EAJA award of \$11,275.00, is reasonable.

