

United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
1120 20th Street, N.W., Ninth Floor  
Washington, DC 20036-3457

<hr style="border-top: 1px solid black;"/> SECRETARY OF LABOR, Complainant,	:	
	:	
v.	:	OSHRC DOCKET NO. 01-2098
	:	
FPM GROUP, LTD.,	:	
Respondent.	:	
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**DECISION AND ORDER**

This matter is before the Occupational Safety and Health Review Commission (“the Commission”) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (“the Act”). Specifically, this case is before the undersigned to determine whether the above-named Respondent, FPM Group, Ltd. (“FPM”), is entitled to legal fees and expenses under the Equal Access to Justice Act (“EAJA”), 5 U.S.C. § 504.

Pursuant to a complaint, the Occupational Safety and Health Administration (“OSHA”) conducted an inspection of FPM’s facility on October 25 and 26, 2001. As a result, OSHA issued a one-item serious citation to FPM on October 26, 2001; the citation alleged a violation of 29 C.F.R. 1910.101(b) and proposed a penalty of \$875.00. FPM contested the citation, and this case was designated for E-Z Trial pursuant to Commission Rule 203(a). However, before this matter was set for hearing, the Secretary filed a notice of withdrawal of the citation, after which the proceeding was dismissed. On April 19, 2002, FPM filed an application for fees and expenses under the EAJA. The Secretary filed an answer on May 21, 2002, and FPM filed a reply on June 3, 2002.

**Background**

FPM is an engineering consulting business located in Ronkonkoma, New York. Gary Molnar, FPM’s president and a licensed professional engineer, has been FPM’s representative throughout this proceeding. After the citation was issued, Mr. Molnar had an informal conference with an official of the OSHA office that issued the citation. The conference did not result in a settlement, and Mr.

Molnar filed a notice of contest (“NOC”) on November 19, 2001.<sup>1</sup> In the four-page NOC, FPM contested not only the citation but also OSHA’s failure to “prosecute a false complaint” and its “wrongful abuse of power.” FPM also claimed damages caused by OSHA’s “wrongful acts.”

On December 13, 2001, the Secretary filed a motion for an extension of time to file her complaint, stating the subject case had been designated as appropriate for settlement and that more time was necessary to attempt to amicably resolve the matter. On December 14, 2001, Mr. Molnar moved for sanctions, noting that the request for an extension had not been filed within the required 20 days and that the Secretary should be found in default and the case against FPM dismissed. Mr. Molnar further noted that FPM intended to file suit against the Secretary whether the case was dismissed or not. The Secretary filed a response opposing the motion on December 19, 2001, and on December 21, 2001, FPM’s motion was denied and the case was assigned to E-Z Trial.

On January 15, 2002, the Secretary sent a stipulation of withdrawal to Mr. Molnar. On January 21, 2002, FPM filed a “counterclaim” of 11 pages and 10 exhibits; the counterclaim essentially reiterated the claims in the NOC and set out two more, that is, OSHA’s “wrongful diversion of funds” and “negligence for failure to use qualified personnel.” On January 25, 2002, FPM filed a motion to discontinue E-Z Trial and proceed under conventional procedures, giving as reasons the need for document requests, interrogatories and depositions, six or more witnesses, including experts, and four to five days of hearings.<sup>2</sup> On February 11, 2002, the Secretary filed a notice of withdrawal of the citation. On February 12, 2002, FPM filed a response, acknowledging the notice of withdrawal but stating that it did not desire to withdraw its counterclaim. I dismissed the proceeding on February 25, 2002. As noted above, FPM filed its EAJA application on April 19, 2002, after which the Secretary filed an answer and FPM filed a reply.

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<sup>1</sup>On page 3 of her notice of withdrawal, dated February 11, 2002, the Secretary asserts that at the informal conference, Mr. Molnar represented that the cited condition had been abated, after which the OSHA official offered to reclassify the alleged violation as “other” and to delete the penalty. The Secretary further asserts that Mr. Molnar declined the offer and said that he wanted to take the case to court “as a matter of principle.” On pages 1-2 of his response to the notice of withdrawal, dated February 12, 2002, Mr. Molnar denies these assertions.

<sup>2</sup>Mr. Molnar did not mention the Secretary’s offered stipulation of withdrawal in either his counterclaim or his motion to discontinue E-T Trial.

*Discussion*

The Commission's EAJA provisions provide for the award of attorney or agent fees and other expenses to eligible individuals and entities who have prevailed over the Secretary in an adversary adjudication before the Commission, unless the Secretary's position was substantially justified or special circumstances make an award unjust.<sup>3</sup> See Commission Rule 101. The Secretary evidently does not dispute that FPM is an "eligible applicant" for EAJA purposes or that FPM is the prevailing party in this matter.<sup>4</sup> However, the Secretary does dispute that FPM is entitled to an EAJA award.

As the Secretary points out, Gary Molnar, the president of FPM, has represented FPM on a *pro se* basis throughout this proceeding. As the Secretary also points out, although the Commission's procedural rules allow an authorized officer or agent to represent a company, the courts of appeals have uniformly held that parties that represent themselves are not entitled to fees under the EAJA. See *Kooritzky v. Herman*, 178 F.3d 1315, 1320-21 (D.C. Cir. 1999), *cert. denied*, 528 U.S. 1160 (2000); *Fanning, Phillips and Molnar v. West*, 160 F.3d 717, 721-22 (Fed. Cir. 1998); *SEC v. Waterhouse*, 41 F.3d 805, 808 (2d Cir. 1994); *Celeste v. Sullivan*, 988 F.2d 1069, 1070 (11th Cir. 1992); *Demarest v. Manspeaker*, 948 F.2d 655, 656 (10th Cir. 1991); *Merrell v. Block*, 809 F.2d 639, 641-42 (9th Cir. 1987); *Crooker v. EPA*, 763 F.2d 16, 17 (1st Cir. 1985). Finally, the Secretary points out that FPM was well aware of this fact before OSHA issued the citation in this matter because FPM was formerly Fanning, Phillips and Molnar and Mr. Molnar represented that company in the above-noted case in the Court of Appeals for the Federal Circuit.<sup>5</sup> Based on the cases cited by the Secretary, I find that FPM is not entitled to fees under the EAJA for the time that Mr. Molnar and his administrative assistant expended in this matter.

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<sup>3</sup>The Commission's EAJA provisions essentially mirror those of the EAJA.

<sup>4</sup>Exhibits to FPM's application represent that FPM has under 500 employees and a net worth of under \$7 million. See Exhibits 5-6 to FPM's application. See also Commission Rule 105(b)-(c).

<sup>5</sup>FPM's letterhead specifically states that it was "*formerly Fanning, Phillips and Molnar,*" and Exhibit 6, FPM's net worth exhibit, shows Fanning, Phillips and Molnar to be a related company of FPM. Moreover, in *Fanning, Phillips and Molnar v. West*, 160 F.3d at 719, the text therein establishes that Gary Molnar represented the company in that case. The Supreme Court denied Mr. Molnar's *pro se* motion to direct the Clerk of the Court to file a petition for a writ of certiorari. *Fanning, Phillips and Molnar v. West*, 526 U.S. 1015 (1999).

I further find that FPM is not entitled to its expenses in this matter. FPM failed to mention any of the above-noted cases in its application, which are clearly decisive here. Most significantly, FPM failed to disclose its participation in *Fanning, Phillips and Molnar v. West*, 160 F.3d 717, wherein the court plainly stated that the EAJA was not intended to compensate a party for its personal absence from its business in prosecuting its claim.<sup>6</sup> *Id.* at 722. FPM thus knew it was not entitled to an award of fees and nonetheless filed an EAJA application, which, in my opinion, is a special circumstance that makes any award in this matter unjust. *See* Commission Rule 106(b). FPM also declined the Secretary's offered stipulation of withdrawal, and it filed unnecessary pleadings and made a number of what can only be termed frivolous claims, which leads me to conclude that FPM unduly protracted the proceeding such that denial of an award is appropriate. *Id.*

For the foregoing reasons, FPM's application for fees and expenses under the EAJA is DENIED.<sup>7</sup> So ORDERED.

/s/

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Irving Sommer  
Chief Judge

Date: 17 JUNE 2002  
Washington, D.C.

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<sup>6</sup>In its reply, FPM finally addressed *Fanning, Phillips and Molnar*, first asserting that the case was not applicable and then suggesting that it was wrongly decided. FPM's reply did not address any of the other cases the Secretary cited, which, along with *Fanning, Phillips and Molnar*, are clearly controlling precedent on the issue at bar that the Commission is bound to follow. The other arguments set out in FPM's reply have been considered and found to be without merit.

<sup>7</sup>Although the reasons set out *supra* are sufficient to dispose of this matter, I agree with the Secretary that FPM's claim for time expended before the citation was issued was improper. *See Central Brass Mfg. Co.*, 14 BNA OSHC 1904, 1906 (Nos. 86-978 & 86-1610, 1990). I also agree that the number of hours claimed was excessive, that the hourly rate Mr. Molnar sought was too high because it was over the statutory maximum, and that the FedEx expenses were unnecessary because FPM could simply have mailed its filings. Finally, I agree with the Secretary that FPM was not entitled to the cost of the claimed engineering report because FPM did not demonstrate that the report was necessary for the preparation of its case. *See* Commission Rule 107(d).