

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, SW
Atlanta, Georgia 30303-3104

Secretary of Labor,
Complainant,

v.

Chenal Valley Construction Inc.,
Respondent.

OSHRC Docket No. 11-1353

Appearances:

Lindsay Wofford, Esquire
Brian L. Hurt, Esquire
Office of the Solicitor
U.S. Department of Labor
525 South Griffin Street
Dallas, TX. 75202
For the Complainant

W.D.Walker, Esquire
6805 Talmadge Drive
Little Rock, AR 72204
For the Respondent

Before:

Administrative Law Judge Sharon D. Calhoun,

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

Chenal Valley Construction, Inc., seeks attorneys' fees and expenses pursuant to 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 of a five-item citation and proposed penalties issued by the Secretary on April 8, 2011. For reasons stated below, the application for fees and expenses is denied.

Background

Chenal Valley Construction, Inc. (Chenal Valley), is a construction company engaged exclusively in residential construction activities. On February 17, 2011, Chenal Valley was operating as a general contractor at a construction site located at 13410 Fox Field Lane, Little Rock, Arkansas, in a residential area known as the Woodlands Edge subdivision. Jim Miles is the owner and President of the company, which has two other officers. As general contractor,

Chenal Valley subcontracted Red Construction, LLC (Red Construction), to perform masonry work on the jobsite at issue.

On February 17, 2011, Occupational Safety and Health Administration (OSHA) Compliance Officer (CO) Michelle Martin initiated an inspection of the construction site. As a result of Martin's inspection, on April 8, 2011, the Secretary issued a Citation and Notification of Penalty to Chenal Valley for five serious items alleging violations of the OSHA scaffolding and fall protection standards¹, and proposing total penalties in the amount of \$19,800.00.

The undersigned issued a decision in this matter vacating all items on September 23, 2011. Although Chenal Valley had no employees at the site, it had supervisory authority and control over the worksite. If a hazard was found, Chenal Valley would contact the foreman of the offending subcontractor and, if that foreman was unavailable, Chenal Valley had the power to terminate an individual or stop work at the site. Although this Court found the Secretary established the cited standards were violated as alleged, the Court also found that Chenal Valley had exercised its duty to inspect the work area and the record failed to establish that the cited conditions existed when Chenal Valley last inspected the site on the day before the inspection. On that basis, this Court found the Secretary failed to establish Chenal Valley knew, or, with the exercise of reasonable diligence, could have known, of the violation and vacated the Citation and Notification of Proposed Penalties in its entirety.

The Court's decision became a final order of the Commission on November 3, 2011. On November 30, 2011, Chenal Valley filed its Application seeking fees and expenses in the amount of \$31,485.84. The Secretary filed an Answer to the Application on January 30, 2012. Chenal Valley filed its Response to the Secretary's Answer on March 16, 2012, an Amended Response to the Secretary's Answer on April 17, 2012, and a Supplemental Response on April 23, 2012.

¹ The citation alleged the following violations:

Item 1: 29 C.F.R § 1926.451(c)(1)(iii)(scaffold equipped with cantilevered platform not restrained from tipping);

Item 2: 29 C.F.R § 1926.451(c)(2)(i)(unstable pieces of lumber and brick placed between concrete blocks supporting scaffold);

Item 3: 29 C.F.R § 1926.451(e)(1)(employee dismantled scaffold platform by climbing down scaffold crossbraces);

Item 4: 29 C.F.R § 1926.451(g)(1)(employee observed sitting on unguarded scaffold platform);

Item 5: 29 C.F.R § 1926.501(b)(13)(employee on a pitched roof performing masonry activities not protected from falling).

The Equal Access to Justice Act

The Equal Access to Justice Act 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(a). 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. A prevailing party who meets the financial qualifications 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.

Timeliness

In her Answer, the Secretary asserts the Application should be denied as untimely. The Secretary properly notes that an EAJA application must be submitted within 30 days after the period for seeking appellate review expires. 29 C.F.R. § 2204.302(a). (Secretary's Answer, p. 6). The Secretary relies on this Court's Notice of Decision issued on September 23, 2011, and counts the appellate review period as beginning on that date. The Secretary asserts the period for seeking appellate review in this matter expired on October 24, 2011. Therefore, she argues, the Application was due on November 23, 2011. (Secretary's Answer, p. 6). Chenal Valley's application was filed on November 30, 2012.

Commission Rule 90(b)(2), 29 C.F.R. § 2200.90(b), states that the Judge's decision shall first be transmitted to the parties, and 11 days later, docketed with the Executive Secretary. The 30-day period for obtaining review of the Judge's decision commences from the date of docketing. Commission Rule 90(d) 29 C.F.R. § 2200.90(d). Consistent with the Rules, this Court stated in the Notice of Decision, that the decision would become final 30 days from the date the decision is docketed with the Executive Secretary, and that the Executive Secretary would notify the parties of the date of docketing. The Executive Secretary issued its Notice of Docketing on October 4, 2011, starting the clock on the 30-day period for the Commission to direct review. The case was not directed for review and became a Final Order of the Commission on November 3, 2011. Accordingly, the 30-day period for Chenal Valley to file its Application for Fees and Expenses began to run on November 3, 2011, and expired on December 3, 2011. The Application, having been filed on November 30, 2011, is therefore timely.

Prevailing Party

In the decision on the merits, this Court vacated the Citation, all items and penalties. The parties do not dispute that Chenal Valley was the prevailing party in this action.

Net Worth

In its Application, Chenal Valley included a signed statement from a CPA attesting Chenal Valley has a net worth of under \$7 million and fewer than 500 employees. The Secretary asserts Chenal Valley's application is deficient because it fails to provide any details of its assets or liabilities as required by 29 C.F.R. § 2204.202(a). That rule requires the Application to be accompanied by an exhibit which "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." 29 C.F.R. § 2204.202(a) permits the Commission to "require an applicant to file additional information to determine its eligibility for an award." In its Response to the Secretary's Answer, Chenal Valley submitted such additional information, meeting the requirements of 29 C.F.R. § 2204.202(a). Based on that supplemental filing, the Court finds that Chenal Valley is financially eligible for an EAJA award.

Substantial Justification

The burden is on the Secretary to establish that her position in bringing this case was substantially justified. 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, 1009 (No. 89-1366, 1993). The reasonableness test comprises 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). There is no presumption the Secretary's position was not substantially justified simply because she lost the case. *Hocking Valley Steel Erectors, Inc.*, 11 BNA OSHC 1492, 1497 (No. 80-1463, 1983). Rather, 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 would satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 563-66 (1988).

The citation was vacated because the Secretary failed to establish Chenal Valley knew, or, with the exercise of reasonable diligence, could have known, of the hazardous conditions. There is no dispute Chenal Valley did not have actual knowledge of the violative conditions. Rather,

the issue is whether the Secretary was substantially justified in concluding that Chenal Valley had constructive knowledge of the violations.

An employer has constructive knowledge of a violation if it fails to use reasonable diligence to discern the presence of the violative condition. *Pride Oil Well Serv.*, 15 BNA OSHC 1809 (No. 87-692, 1992). “Reasonable diligence implies effort, attention, and action; not mere reliance upon another to make violations known.” *N & N Contractors, Inc.*, 18 BNA OSHC 2121, 2124 (No. 96-0606, 2000), *aff’d*, 255 F.3d 122(4th Cir. 2001). Reasonable diligence does not “impose a requirement for continuous full time monitoring...” *New York State Electric & Gas Corp.*, 19 BNA OSHC 1227, 1231 (No. 91-2897, 2000). However, reasonable diligence requires more than sole reliance on subcontractors to provide safe working conditions at a controlling employer’s worksite. *See generally, N & N Contractors*, 18 BNA OSHC at 2124 (reasonable diligence means more than “mere reliance” on the actions of others.).

The instant citation was the result of hazards observed by the CO on the last of three sites controlled by Chenal Valley and inspected on February 17, 2011. Hazards were allegedly found by the CO on the first site. Although work at the first site was being performed by a different subcontractor, the Secretary asserted the hazards encountered on that site should have put Chenal Valley on notice that hazards may have existed at the third site, even though the work was being performed by a different subcontractor. Noting the Secretary failed to establish any connection between the subcontractors and that the subcontractors were performing different activities, this Court found the first inspection did not provide sufficient notice to establish constructive knowledge of the existence of violative conditions on the third site. Chenal Valley asserts the Secretary had no substantial justification for asserting constructive knowledge based on the actions of a different and unrelated subcontractor at a different site. This, however, was not the Secretary’s only basis for asserting constructive knowledge. The Secretary’s primary theory was the nature of the violative conditions suggested to the CO that they had existed for a day or two prior to the inspection. The Secretary asserted a reasonably diligent contractor would have inspected the site with sufficient frequency to have detected such hazards. According to the Secretary, that Chenal Valley did not detect the violative conditions demonstrated Chenal Valley did not act with reasonable diligence, thereby establishing constructive knowledge.

However, Chenal Valley’s owner, Miles, testified he inspected the worksite on February 16, 2001, the day before the OSHA inspection, and the violative conditions did not exist. Miles

testified the work being done by the contractor was performed very quickly and the scaffold could be moved in less than an hour. This contrasted with the CO who testified, in her opinion, the nature of the hazards indicated they existed the day before the inspection, when Chenal Valley allegedly inspected the site. It was the Secretary's position that, had Chenal Valley acted with reasonable diligence, it would have discovered the violations during that inspection.

Faced with this conflicting testimony, this Court noted Miles had been in the construction business for approximately 20 years, and he testified confidently regarding how rapidly conditions can change when doing masonry work. In contrast, this Court found that when testifying on this point, the CO seemed unsure and appeared to be merely speculating as to the length of time the conditions existed. Therefore, the undersigned credited the testimony of Miles over that of the CO, and found the Secretary failed to establish the cited conditions existed the day before the inspection, when Chenal Valley inspected the worksite.

A case which truly turns on credibility issues is particularly ill-suited for an award of fees and expenses under the EAJA. *Consolidated Constr., Inc.*, 16 BNA OSHC 1001, 1006 (No. 89-2839, 1993). Although this case turned on a credibility determination, the undersigned finds other reasons for concluding the Secretary was substantially justified in asserting Chenal Valley had constructive knowledge of the violative conditions.

The Secretary established the cited hazards existed on a worksite controlled by Chenal Valley and where Chenal Valley had the authority to have hazards abated. In this Court's decision, it was noted Chenal Valley fulfilled its responsibilities to inspect the worksite "albeit minimally." On February 17, 2012, the Secretary inspected and found safety violations at all three of Chenal Valley's worksites at the Woodlands Edge Subdivision. Given this Court's finding that Chenal Valley only "minimally" fulfilled its obligation to inspect its worksites, together with the widespread existence of hazards at all the sites inspected by the CO, it was not unreasonable for the Secretary to take the position that Chenal Valley failed to use reasonable diligence to discern the presence of the hazardous conditions, and therefore had constructive knowledge of the violations.

Chenal Valley contends the transitory nature of brick masonry makes it "obvious" that unless Miles actually saw the brick layers at work, there would be no way to know if they were violating the standards (Amended Response at p. 8). It points out the Secretary produced no witnesses from the subcontractor to testify that the conditions observed by the CO were present

the day before the inspection when Miles was on site to establish he reasonably could have been expected to detect the violations (Amended Response at p. 8). Chenal Valley further asserts these failures establish the Secretary's position was based on sheer conjecture and not substantially justified (Amended Response at p. 8-9).

Chenal Valley's assertion the Secretary did not call any witnesses to testify that the violative conditions existed the day before the inspection is factually correct. What it ignores, however, is that when the CO arrived at the site, some of the subcontractor's employees left the area and the CO could not interview the remaining employees due to a language barrier (Tr. 86-89).

That the Secretary had insufficient evidence to prove her case on the merits does not necessarily mean that she lacked substantial justification to prosecute the case. *Salco Constr., Inc.*, 21 BNA OSHC 2143 (No. 05-1145, 2007)(EAJA). This Court finds the Secretary had a reasonable basis for the facts alleged. The CO observed violative conditions on all three inspected sites where Chenal Valley had control over the worksites and the authority to require the subcontractors to abate hazards. Given the violations detected at these sites, it was reasonable for the Secretary to conclude Chenal Valley was not effectively carrying out its supervisory responsibilities. It also should be noted that item 5 alleged that an employee on a pitched roof was performing masonry activities without fall protection. This violation had nothing to do with scaffolding. However, when combined with the violations observed at this and the other sites, it was reasonable for the Secretary to conclude that Chenal Valley, who had ultimate authority over safety at the site, was not fulfilling its safety obligations in a reasonable manner and failed to convey the importance of safety to its subcontractors. Indeed, as noted, this Court found Chenal Valley was only minimally fulfilling its duty to inspect the worksite.

Chenal Valley further contends the undersigned found the Secretary's assertion of constructive knowledge to be "an unreasonable and unjustifiable position" (Amended Response at p. 10). It has mischaracterized this Court's conclusions. Rather, the decision clearly provides the lack of constructive knowledge finding was based on (1) the Secretary's failure to establish by a preponderance of the evidence that Chenal Valley was onsite the day before the inspection, at a time when the violative conditions existed, and (2) the unsafe conditions at the other sites were insufficient to provide notice to Chenal Valley that the subcontractor was working unsafely.

Contrary to Chenal Valley's assertion, nowhere in the decision is it stated or intimated the Secretary's position was "unreasonable and unjustified."

The record establishes the Secretary had a reasonable basis in law for her theory that Chenal Valley knew, or with the exercise of reasonable diligence should have known, of the violative conditions. Due to its supervisory authority and control over the worksite, Respondent could reasonably be expected to detect and abate the violations due to its supervisory authority and control over the worksite. *Centex-Rooney Construction Co.*, 16 BNA OSHC 2127, 2130 (No. 2873, 1994). The facts alleged by the Secretary reasonably supported the legal theory advanced. Moreover, had the Court resolved the credibility issue in the Secretary's favor, the Secretary would have established that Chenal Valley had constructive knowledge of the cited hazards. Accordingly, the Secretary has established she was substantially justified in prosecuting the case against Chenal Valley.

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 Chenal Valley's application for attorneys' fees and expenses is DENIED.

/s/Sharon D. Calhoun
Sharon D. Calhoun
Judge

Dated: October 30, 2012
Atlanta Georgia