

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

Secretary of Labor,

Complainant,

v.

Quandel Construction Group, Inc.,

Respondent.

OSHRC Docket No. **14-1434**

(EAJA)

Appearances:

Wayne P. Marta, Esquire, U.S. Department of Labor, Office of the Solicitor, Cleveland
For the Secretary

Douglas J. Suter, Esquire, Hahn, Loeser & Parks, LLP, Columbus, Ohio
For Respondent

Before: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER DENYING EAJA APPLICATION

Quandel Construction Group, Inc., (Quandel) seeks an award for attorney fees and expenses in accordance with the Equal Access to Justice Act, 5 U.S.C. § 504 (EAJA), for costs incurred in defending against a one-item citation. The Secretary issued the Citation and Notification of Penalty, alleging a serious violation of 29 C.F.R. § 1926.453(b)(2)(v), on September 3, 2014. The Court held a hearing in this matter in accordance with *Subpart M—Simplified Proceedings*, 29 C.F.R. § 2200.200-211, on January 8, 2015. The Court vacated the cited item in a Decision and Order issued February 23, 2015. The Decision became a final order of the Commission on March 30, 2015.

On April 29, 2015, Quandel filed a “Motion for Attorneys’ Fees” in the amount of \$8,929.00.¹ The Secretary filed an answer to Quandel’s application on June 3, 2015.² The Secretary does not dispute Quandel’s eligibility under the EAJA or its status as the prevailing party (Answer, p.1).³ The issue in dispute between the parties is whether the Secretary was substantially justified in bringing this case against Quandel.

For the reasons discussed below, the Court finds the Secretary was substantially justified and denies Quandel’s application.

Background

Quandel is a construction company with approximately 250 employees. At the time of the OSHA inspection at issue, it was the general contractor on a project at an hhgregg store. Quandel had been onsite on the project for one to two months. On July 24, 2014, Quandel was in the process of constructing the new storefront. On that day, while at the drive-through of a fast food restaurant, OSHA CSHO Stowell observed two employees in an elevated Skyjack aerial lift at the hhgregg project construction site which was adjacent to the restaurant. One of the employees observed by the CSHO turned around in the aerial lift, indicating to the CSHO that the employee was not connected while in the aerial lift. The CSHO took photographs of the employee. After examining the photographs, the CSHO determined the employee was not, in fact, tied off in the aerial lift.

¹ The Secretary moved for an extension of time to file a response in opposition to Quandel’s motion. In an order issued May 6, 2015, the Court construed Quandel’s “Motion for Attorneys’ Fees” to be an application for fees under EAJA, pursuant to Commission Rule 2204.303, and noted,

[T]he Secretary is permitted 30 days after the filing of the Application to file his Answer, which in this matter would be May 29, 2015. In his Motion for Extension of Time, the Secretary seeks until May 29, 2015 to file his response. Premises considered, the Court finds the Secretary’s Motion is moot. Pursuant to the Commission’s Rules, the filing date for the Secretary’s Answer is the same as the date requested by the Secretary in his motion. Since no additional time is being sought, the Court finds there is no issue necessitating ruling by the Court.

On May 26, 2015, the Secretary moved for an extension until June 3, 2015, in which to respond. The Court granted this extension.

² Under Commission Rule § 2204.304, Quandel had until June 18, 2015, to file a reply to the Secretary’s answer (“Within 15 days after service of an answer, the applicant may file a reply.”). Quandel declined to do so.

³ The Court determines Quandel failed to establish its net worth as of the date it filed its notice of contest. Due to the disposition of this case, it is unnecessary for Quandel to provide supplementary evidence it meets the eligibility requirement for net worth.

As a result of what he had observed for approximately 10 to 15 minutes, the CSHO went to the jobsite to open an inspection. Once onsite, he identified himself and asked to speak to the person in charge. He was directed to Quandel employee Chad Havens who was the person he observed unconnected in the aerial lift. CSHO Stowell interviewed Havens. Havens identified himself as a foreman and admitted he was not tied off in the aerial lift because he just forgot to connect his lanyard (Exh. C-9). CSHO Stowell interviewed other employees on the site, including Quandel's project superintendent, Pat Collins. A week after OSHA's inspection, Quandel's general superintendent, Robert Tullett, mailed CSHO Stowell copies of the company's safety program and records of some toolbox talks at the project's worksite. (Exh. R-A, pp. 55-66).

Based on the CSHO Stowell's observations, his photographs, and Mr. Havens' statement, OSHA issued the instant Citation on September 3, 2014, alleging Quandel had violated § 1926.453(b)(2)(v). Quandel contested OSHA's citation on September 17, 2014. On November 12, 2014, Quandel's attorney sent additional documents to David Wilson, CSHO Stowell's supervisor. Included among those documents were several pages of Quandel's safety audits at the project's worksite between April 11, 2014, and August 15, 2014, and one disciplinary notice relating to Quandel's enforcement of its work rules (Answer, Exh. 1, Affidavit of David Wilson).

The Court held a prehearing conference with the parties' attorneys on December 8, 2014. The Court scheduled the hearing to begin on January 8, 2015. Neither party moved for permission to take depositions or conduct other discovery. Accordingly, under Commission Rules §§ 2200.200(4) and 208, no discovery was conducted prior to the hearing.

Commission Rules Implementing EAJA

Commission Rule § 2204.101 provides:

The Equal Access to Justice Act, 5 U.S.C. 504, provides for an award of attorney or agent fees and other expenses to eligible individuals and entities who are parties to certain administrative proceedings (called "adversary adjudications) before the Occupational Safety and Health Review Commission. An eligible party may receive an award when it prevails over the Secretary of Labor, unless the Secretary's position in the proceeding was substantially justified or that special circumstances make an award unjust.

Commission Rule § 2204.106(a) provides in pertinent part:

The position of the Secretary includes, in addition to the position taken by the Secretary in the adversary adjudication, the action or failure to act by the Secretary upon which the adversary adjudication is based. The burden of persuasion that an award should not be made to an eligible prevailing applicant because the Secretary's position was substantially justified is on the Secretary.

Commission Rule § 2204.201(a) provides in pertinent part:

The application shall show that the applicant has prevailed and identify the position of the Secretary that the applicant alleges was not substantially justified.

Eligibility

The party seeking an award for fees and expenses must submit an application within 30 days of the final disposition in adversary adjudication. § 2204.302(a). The prevailing party must meet the established eligibility requirements before it can be awarded attorney fees and expenses. Commission Rule § 2204.105(b)(4) requires that an eligible employer be a "corporation . . . that has a net worth of not more than \$7 million and employs not more than 500 employees." Commission Rule § 2204.105(c) provides, "For the purpose of eligibility, the net worth and number of employees shall be determined as of the date the notice of contest was filed." Commission Rule § 2204.202 (a) requires the applicant to "provide with its application a detailed exhibit showing the net worth of the applicant as of the date [it filed the notice of contest]. 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."

The Secretary does not dispute Quandel's assertion it employed fewer than 500 employees and had a net worth of less than \$7 million on the date of its notice of contest (Answer, p.1). Quandel submitted the affidavit of Robert Tullett, its general superintendent. In the affidavit, Tullett states,

10. Pursuant to Commission Rule 2204.202, Quandel attaches a Net Worth Exhibit as of October 9, 2014 when the Notice of Contest was filed;

11. Quandel stands ready to provide additional financial information that the Review Commission might request in order to determine Quandel's eligibility under Commission Rule 2201.105.

(Application, Exh. Affidavit of Robert Tullett).

Paragraph 10 of Tullett's affidavit contains two errors: Quandel filed its notice of contest on September 17, 2014, not October 9, 2014, and Quandel's Net Worth Exhibit is a balance sheet showing Quandel's assets and liabilities as of March 31, 2015, approximately six and a half months after it filed its notice of contest (Application, Exh. Balance Sheet).

Due to these discrepancies, the Court finds Quandel has not provided a detailed exhibit showing its net worth as of September 17, 2014, the date the notice of contest was filed, as required by Commission Rules §§ 2204.105(c) and 202(a). If the Court had determined the Secretary failed to establish substantial justification for going forward in the underlying proceeding, the Court would have afforded Quandel the opportunity to provide supplementary documentation in order to establish its eligibility under EAJA. The Court, however, finds the Secretary has established substantial justification; therefore, the issue of Quandel's financial eligibility is moot.

Prevailing Party

Commission Rule § 2204.302(a) provides:

An application may be filed whenever an applicant has prevailed in a proceeding or in a discrete substantive portion of the proceeding, but in no case later than thirty days after the period for seeking appellate review expires.

The Court vacated Item 1 of the Citation and assessed no penalty. The Court's Decision and Order became a final order on March 30, 2015. The Secretary concedes Quandel was the prevailing party in the underlying proceeding (Answer, p. 1). Based upon the underlying Decision and Order and the stipulation of the Secretary, the Court determines Quandel was the prevailing party in the underlying proceeding.

Substantially Justified

The Secretary must prove that his position in bringing this case was substantially justified. "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).

Quandel's main contention appears to be that, prior to the hearing, it provided the Secretary with documentation of its safety program sufficient to establish it would prevail in its employee misconduct defense. "OSHA had all of the evidence, testimony, and documentation to evaluate Quandel's affirmative defense of unforeseeable employee misconduct prior to the citations being issued. The Secretary never deposed any of the Quandel employees, foremen, or superintendents on the hgregg jobsite." (Application, p. 6.) This case was designated for simplified proceedings, in which discovery is not permitted except as ordered by the Court. The Secretary, therefore, cannot be faulted for failing to depose the employees listed by Quandel.

With regard to the documentation provided by Quandel to the Secretary prior to the hearing, the Secretary persuasively explains his analysis of the perceived inadequacy of Quandel's employee misconduct defense:

That second transmittal [of documents on November 17, 2014,] included copies of the safety audits at the worksite and a single disciplinary notice. The notice had been given to Chad Havens on July 25, 2014 for his infraction of the fall-protection rule the previous day which precipitated OSHA's citation. Because of its proximity to Mr. Stowell's inspection and its apparent exclusivity as the only written disciplinary notice issued by Quandel, the Secretary was reluctant to regard the notice as indicative of a robust enforcement policy. As for the safety audits, they contained references to six infractions of Quandel's fall-protection rule, two committed by its own employees (including Mr. Havens) and the remainder by its subcontractors. They also described numerous violations of Quandel's other work rules ranging from the failure to conduct toolbox talks to the improper use of scaffolds and ladders. The details of those instances recorded in the audits supported the inference that Mr. Havens was indeed the only offender who had ever received a written warning under Quandel's enforcement policy. . . . The designation of this action for simplified proceedings and the resulting restriction on discovery made it difficult for the Secretary to evaluate the credibility of whoever Quandel might offer at a hearing to explain its documentation that supposedly demonstrated unpreventable employee misconduct. Considering those circumstances and the documentation's inherent deficiencies, it was reasonable for the Secretary to subscribe to alleged facts that contradicted those asserted by Quandel in support of its affirmative defense.

(Answer, pp. 9-10; citations and footnotes omitted.) The Court finds the Secretary's analysis is reasonable and that it substantially justified his determination to go forward with this case.

The Secretary had a reasonable basis for the facts alleged: the CSHO had photographic evidence that Quandel employee Havens (whom the Court concluded was a supervisory

employee (Decision, p.8)) failed to tie off while in an aerial lift. The employee admitted his failure, both in a written statement taken by the CSHO and at the hearing.

The Secretary had a reasonable basis in law for his theory that Quandel violated § 1926.453(b)(2)(v): Havens identified himself to the CSHO as a foreman and he supervised another employee's work. Under these circumstances, the Secretary was substantially justified in proceeding in the face of Quandel's employee misconduct defense. "Where a supervisory employee is involved the proof of unpreventable employee misconduct is more rigorous and the defense is more difficult to establish since it is the supervisor's duty to protect the safety of his employees under his supervision . . . A supervisor's involvement in the misconduct is strong evidence that the employer's safety program was lax." *Archer-Western Contractors, Ltd.*, 15 BNA OSHC 1013, 1017 (No. 87-1076, 1991).

The Court's determination that Quandel established its employee misconduct defense was based in large part on the favorable impression made by Quandel's field manager, James Peck, and its project superintendent, Pat Collins. "Collins and Peck testified confidently and with certainty and their testimony is highly credited." (Decision, p. 13.) The Secretary did not lack substantial justification because he failed to foresee how the Court would resolve credibility issues and weigh evidence. "[A] case which truly turns on credibility issues is particularly ill-suited for the reallocation of litigation fees under the EAJA." *Consolidated Construction, Inc.*, 16 BNA OSHC 1001, 1006 (No. 89-2839, 1993).

The facts alleged by the Secretary reasonably supported the legal theory advanced. If the court had resolved the credibility issue against Peck and Collins, Quandel would have failed to establish its employee misconduct defense. Under these circumstances, the Secretary's belief he could establish a *prima facie* case that Quandel violated § 1926.453(b)(2)(v) and that Quandel would fail to establish its affirmative defense was substantially justified.

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: Quandel's application for attorney fees and expenses is DENIED.

SO ORDERED:

/s/ Sharon D. Calhoun

SHARON D. CALHOUN

Judge

Date: June 22, 2015