SECRETARY OF LABOR, Complainant, v. CONTOUR ERECTION AND SIDING SYSTEMS, INC., Respondent.	:	Docket No. 96-0063

DECISION

BEFORE: WEISBERG, Chairman and ROGERS, Commissioner.

BY THE COMMISSION:

This case is before us pursuant to the Secretary's Petition for Review of an order by Administrative Law Judge Robert A. Yetman. Judge Yetman's order granted respondent's application for attorneys' fees and expenses filed under the Equal Access to Justice Act, 5 U.S.C. § 504. Although we modify the size of the award, we otherwise affirm the judge's decision.

I. *History*

On June 16, 1995, a Manitowoc 4100W Crawler Crane operated by Contour tipped over during a lift of a roof radial truss member at the Crossroads Sports Arena project in Buffalo, NY. As a result of the incident, Contour was issued a serious citation alleging

violations of 29 C.F.R. §1926.550(a)(1), for failing to comply with the manufacturer's specifications and limitations applicable to the operation of crane(s) or derrick(s), and 29 C.F.R. §1926.550(b)(2) for loading the crane beyond the rated load.

The Secretary's theory of the case as to what caused the crane to tip over was developed by Michael Marshall, a civil engineer and OSHA employee with no particular expertise in the operation of cranes. Marshall visited the site, where he obtained measurements and took photographs. He also observed the crane's manufacturer perform mechanical tests on the crane's hoist loading system. As a result of these observations, Marshall dismissed the possibility of mechanical failure as a cause of the accident. He instead focused on proving that the crane was in an overloaded condition. Based on his calculations, the safe operating radius of the crane, given its load (approximately 88,000 lbs), was 50 feet. From selected employee interviews, and his own calculations, Marshall concluded that, as a result of the overload, to keep the load from hitting the boom and to lift the load over the temporary towers that had been constructed to support the roof, the boom had to be extended to a radius of 55 feet, which exceeded the safe operating radius of the crane.

During his investigation, Marshall twice consulted Paul Zorich, a recognized expert in all aspects of crane operations,[1] who he believed agreed with his theory of the case. Marshall consulted with no other experts. On July 12, Contour amended its answer to an interrogatory to state its intent to call Zorich as its expert witness at the hearing scheduled for Tuesday, July 30, 1996. Zorich's deposition was taken on Thursday, July 25, 1996, but was not introduced into evidence. At the hearing, Zorich testified that, in his expert opinion, the accident was probably caused by an electrical malfunction that caused the boom to lower

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[1]Zorich has extensive experience investigating accidents involving cranes. He is recognized by the Secretary as a leading crane expert and is often consulted by OSHA in its work activities involving cranes. He is also chairman of the American National Standards Institute committee responsible for drafting safety standards for cranes.

beyond the safe operating radius and into the tipping radius of the crane.[2] On cross-examination by the Secretary, Zorich denied that he ever concurred with Marshall's conclusion that the accident was the result of operating the crane beyond its safe operating radius.

In his decision on the merits, Judge Yetman found that Marshall was "not an expert in the design or operation of cranes and is not qualified to render an expert opinion regarding any mechanical failure of the crane." The judge also observed that, in reaching his conclusions, Marshall disregarded the testimony of nine employees, including both the foreman and crane operator, which established that the crane was operated properly. Instead, he relied on the unsworn statements of three ironworkers, which contained conflicting estimates of the position of the load before the collapse.[3] Indeed, the judge noted that the Secretary failed to call any "percipient" witnesses to corroborate Marshall's testimony or to verify the factual basis for his conclusions. The judge took specific notice of the fact that Zorich, who he considered a highly qualified expert on cranes, could not even understand the methodology used by Marshall to arrive at his conclusions. Accordingly, he concluded that the Secretary failed to establish "by creditable evidence" that the crane was overloaded, and he vacated the citation.

Following issuance of the judge's decision, Contour timely filed an EAJA application seeking reimbursement for legal fees and expenses incurred from the commencement of the action. The judge granted the application in part, finding that, after taking Zorich's deposition, the Secretary's position was no longer substantially justified. The judge found that, although it was unclear what transpired between them, Marshall, who had "no

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[2]Prior to the collapse, the operator had lowered the boom approximately two feet, resulting in an increase in the operating radius from 45 feet to 47 feet . He then tried to boom up. However, according to Zorich, the prior order to lower the boom was stuck in the crane's memory. This caused the boom to lower, despite the best efforts of the operator to reverse the process.

[3]One of these employees was called by Contour to testify at the hearing.

experience in the design, mechanics or operation of cranes" and who did not "possess any experience in investigating crane collapses," believed that "Mr. Zorich concurred with his theory" that Contour had deliberately overloaded the crane. The judge found that, based on this belief, Marshall's decision to recommend that a citation be issued was reasonable and justified. However, the judge also found that the reasonableness of the Secretary's theory was "severely undermined" when Zorich was retained by Contour as its expert witness. "The individual relied upon by the government to support its theory now disputed the validity of the citation issued to Respondent." He found that the basis for Zorich's alternative theory became clear, or should have become clear, during the Secretary's deposition of Zorich on July 25. The judge found that the Secretary's failure to seek technical assistance to corroborate and explain her theory of the violation after learning that Zorich did not support it and had an alternative theory, leads to the conclusion that, as of the date of the deposition, the Secretary was no longer substantially justified in proceeding with the original theory.[4]

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[4]We note that Zorich's deposition was never entered into the official record of this case. On review, the Secretary has moved the Commission to receive Zorich's deposition so it may consider the text of the deposition. In the Secretary's view, "reference to the actual text of Zorich's statements is indispensable to the full and fair presentation of her case on discretionary review." We agree. Normally, a determination of substantial justification is based on the record made on the merits of the case and additional evidence is not allowed. *See e.g.*, Commission EAJA Rule 307(a)(1) and (a)(2); 29 C.F.R. § § 2204.307(a)(1) and (a)(2). Here, however, we are asked to determine if the judge correctly determined that the Secretary was no longer substantially justified in pursuing the case after deposing Zorich. The nature of that deposition is, of course, central to the proper consideration of that issue. Since Zorich was its own witness, Contour had no reason to introduce the deposition. Moreover, the Secretary never sought to use the deposition to impeach or undermine Zorich's testimony or otherwise introduce it into the record. Apparently, the judge inferred from this that the substance of Zorich's deposition was substantially the same as that given at the hearing. While such an inference is not unreasonable, we find in the interest of fairness and substantial justice, that the deposition should be considered in order to evaluate the judge's finding. *See Article II Gun Shop., Inc.*, 16 BNA OSHC 2035, 2036, 1993-95 CCH OSHD ¶30,563, p. 42,299 (No. 91-2146, 1994)(consolidated). Accordingly, we grant the Secretary's motion. Commission EAJA Rule 310, 29 C.F.R. § 2204.310. As we discuss, *infra*, our review of that deposition establishes that the judge's assumptions regarding the nature of Zorich's

Accordingly, he awarded fees and expenses incurred by Contour from the date of the deposition.

II. *Standard of Review*

Judges' awards under the EAJA are reviewed by the Commission *de novo. Central Brass Mfg. Co.*, 14 BNA OSHC 1904, 1905, 1987-90 CCH OSHD ¶ 29,144, p. 38,955 (No. 86-978, 1990)(consolidated). The standard of review in these cases is not whether the judge abused his discretion in finding that the Secretary's position was or was not substantially justified, but whether the Secretary's position *was* substantially justified. *Consolidated Construction Inc.*,16 BNA OSHC 1001, 1002, 1991-93 CCH OSHD ¶ 29,992, p. 41,072 (No. 89-2839, 1993).

Thus, a party that prevails on a discrete portion of an adversary adjudication and otherwise meets the size and financial criteria of the Equal Access to Justice Act may be reimbursed for its attorneys' fees and expenses unless the Secretary demonstrates by a preponderance of the evidence that her position in the matter was substantially justified or that particular circumstances would render an award unjust. 5 U.S.C. § 504. *William B. Hopke Co.*, 12 BNA OSHC 2158, 2159, 1986-87 CCH OSHD ¶ 27,729, p. 36,255 (No. 81-206, 1986). Even where the Secretary establishes that she was substantially justified in bringing an action, she may be liable for fees and expenses incurred after determining that her position was no longer justified. *Consolidated Construction Inc.*, *Id.* at 1002, 1991-93 CCH OSHD at p. 41,073.

The loss of a case is not determinative of whether her position was substantially justified. *Hadden v. Bowen*, 851 F.2d 1266, 1267 (10th Cir. 1988). Also, that the government's case lacked "substantial evidence" does not mandate a conclusion that its case was not "substantially justified." *Id.* at 1269.

The test of whether the Secretary's action is substantially justified is essentially one of reasonableness in law and fact. *Hocking Valley Steel Erectors, Inc.*, 11 BNA OSHC 1492,

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deposition were correct.

1497, 1983-84 CCH OSHD ¶ 26,549, p. 33,906 (No. 80-1463, 1983). The Secretary's position must be substantially justified to a degree that must satisfy a reasonable person. *Consolidated Construction Inc.*, *Id.* at 1002, 1991-93 CCH OSHD at p. 41,072.

> The reasonableness test breaks down into three parts: the government must show 'that there is a reasonable basis...for the facts alleged...that there exists a reasonable basis in law for the theory it propounds; and that the facts alleged will reasonably support the legal theory.

Gatson v. Bowen, 854 F.2d 379, 380 (10th Cir. 1988)(citations omitted).

The "substantial justification" standard was adopted as a "caution to agencies to carefully evaluate their case and not to pursue those which are weak or tenuous." *William B. Hopke Co.*, *Id.* at 2159, 1986-87 CCH OSHD at p. 36,255-6 (citing H.R. Rep. No. 1418, 96th Cong., 2d Sess. at 14, *reprinted in* 1980 U.S. Code Cong. & Ad. News at 4993).

III. *Discussion*

In formulating the Secretary's theory of the case, Marshall relied on photographs, the manufacturer's specifications, his own measurements and the statements of the three ironworkers (which were given to the first compliance officer to visit the site and passed on to Marshall when he continued the investigation). Marshall believed that these statements established the proximity of the load to the boom and how much higher the load had to be raised before the lift could be completed. From these figures, together with the other information he gathered, Marshall made complex mathematical calculations to conclude that the lift could not have been successfully made at an operating radius of less than 55 feet, five feet more than what the parties have agreed was the safe operating radius of the crane.

The underlying weakness in Marshall's theory was, as the judge noted, that he used selected statements to support his theory of the violation and ignored statements from the job foreman and crane operator, and others, that tended to show that the load was within safe limits. Nonetheless, Marshall believed that his theory was supported by Zorich, whom he

consulted in this matter.[5] We agree with the judge that the Secretary was substantially justified in issuing the citation. At that time, the Secretary had reason to believe that Zorich, a highly respected expert in all aspects of crane operation, concurred with Marshall's theory and there was no alternative theory to explain the collapse.

The basis for that support ceased to exist, however, after the Secretary deposed Zorich, on July 25, 1996. In his deposition, Zorich first set forth his theory for the boom collapse. It was based on his review of the photographs and the statements of the crane operator and others and, if correct, would have largely exonerated respondent.[6] The Secretary's case was further weakened by Zorich's testimony that the Secretary's investigative report was incomplete and, therefore, inconclusive, because her investigator failed to conduct tests on the crane mechanism that would have determined whether an electrical malfunction caused the accident.[7] Despite having her case seriously challenged in this manner, the Secretary made no attempt before the hearing to seek further technical assistance to reexamine Marshall's theory. Nor was the Secretary able to counter the challenges to her case made by Zorich at the hearing. We therefore find that, after the deposition, the Secretary was no longer substantially justified in pursuing the case.

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[5]The exact nature of the consultation is not clear from the record. While Marshall testified that Zorich concurred with his theory, Zorich could not recall the consultations in detail.

[6]The Secretary apparently relied heavily on the tip over in her conclusion that the crane was being operated beyond its safe operating radius. After Zorich put forth his theory, however, the evidentiary value of the accident was substantially reduced. An electrical failure which, Zorich opined, caused the crane to tip over, could have occurred regardless of whether the crane was intentionally being operated beyond its safe operating radius. On the other hand, under Marshall's theory it is unclear what caused the crane to tip over since, according to his calculations, the lift could have been made at an operating radius of 55 feet, significantly below the 67 foot tip radius of the crane.

[7]If such an examination established that there was no electrical malfunction, the only remaining explanation for the accident would have been that the crane was operated beyond its safe operating limits and into the tip radius.

We are sympathetic to the Secretary's assertion that the "eleventh hour" nature of the deposition gave her little time to assess her position. However, we find that this does not rise to the level of "special circumstances" sufficient to render an EAJA award unjust. Certainly, after the deposition, the Secretary should have known that her case, as then constituted, was no longer substantially justified. While time was short, the Secretary, at a minimum, could have sought a continuance of the case. Instead, she chose to proceed, forcing Contour to incur fees and expenses to defend itself when the Secretary knew she could no longer carry her burden of proving a violation.

IV. *Award*

In determining an appropriate award, the judge observed that § 2204.107 was amended to raise the compensable hourly rate for attorney fees from a maximum of $75 per hour to a maximum of $125 per hour for fees incurred on or after July 3, 1997 (*See* 62 Fed. Reg. 35961 (1997)); Commission EAJA Rule 107, 29 C.F.R. §2204.107. Accordingly, the judge awarded Contour attorney fees as follows:

7/25/96-7/2/97	226.60 hours @$75 per hour=	$16,995.00
7/3/97-8/2/97	19.05 hours @$125 per hour=	$2,381.25
		$19,376.25

The judge allowed an additional 25.55 hours @ $125 per hour ($3,193.75) for fees incurred in preparation of the EAJA application for a total of $22,570. Finally, the judge awarded $11,756.40 in expenses ($3,426.69 in general expenses and $8,329.71 in expert witness fees). Therefore, the judge awarded Contour a total of attorney's fees and expenses of $34,326.40.

While we agree with Judge Yetman that Contour is entitled to an award of attorneys' fees and expenses, we find that a modification of the award is appropriate. We find, unlike the judge, that the Secretary was substantially justified in pursuing the case until *after* the

taking of Zorich's deposition. Therefore, unlike the judge, we find it inappropriate to compensate Contour for the attorneys' fees and expenses incurred in connection with the deposition.

We also find that the judge erred by awarding attorneys' fees at a rate of $125 per hour for fees incurred after July 3, 1997. The maximum hourly amount allowed under the EAJA was raised from $75 to $125 per hour in the *Small Business Regulatory Enforcement Fairness Act*, Publ. L. 104-121, Title II, § 231(a) (March 29, 1996). The implementing provisions of that Act at § 233 clearly state that "The amendments made by sections 331 and 332 [sic] shall apply to civil actions and adversary adjudications *commenced* on or after the date of the enactment of this subtitle."[8]

Accordingly, the $125 per hour rate would only apply to actions commenced after March 29, 1996. The Commission has held that, as a general rule, the adversary adjudication begins upon issuance of the citation. *Central Brass Mfg. Co.*, 14 BNA OSHC 1904, 1906, 1987-90 CCH OSHD ¶ 29,144, p. 38,955 (No. 86-978, 1990)(consolidated). This citation was issued in December 1995. The $125 per hour rate, therefore, does not apply to this case.[9]

From the judge's award, we deduct 10.4 hours incurred on the day of the deposition. We also deduct the $3,403.50 in expert witness fees incurred up to and including the day of the deposition as well as the $20.42 in meal expenses incurred on that date. Finally, as noted,

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[8]This is apparently a typographical error. All three provisions are in Subtitle C of the Act entitled "Equal Access to Justice Act Amendments." Moreover, there are no sections 331 and 332 in the Act, and the "effective date" provision immediately follows sections 231 and 232. It is, therefore, apparent that the "effective date" provision should read "The amendments made by sections 231 and 232 shall apply . . ."

[9]The Commission revised its rules of procedure to adopt the higher hourly rate by rule, effective July 3, 1997. 62 Fed. Reg. 35961 (1997). However, where the particular circumstances of the case create an inconsistency between the rule and the statute, the terms of the statute are controlling.

we reduce the hourly rate from $125 to $75 for the 44.60 hours incurred on and after July 3, 1996 (including time incurred preparing this EAJA application).

We find that Contour is entitled to an award for 235.25 hours of work related to the substance of the case incurred *after* the date of the deposition and an additional 25.55 hours for fees incurred in preparation of the EAJA application, for a total of 260.80 hours compensated at a rate of $75 per hour for a total award of attorneys' fees of $19,560. In addition, Contour is entitled to general expenses in the amount of $3,406.27 and expert witness fees of $4,926.21. Accordingly, Contour is entitled to a total award of attorneys' fees and expenses of $27,892.48.

SO ORDERED.

/s/
Stuart E. Weisberg
Chairman

/s/
Thomasina V. Rogers
Commissioner

Date: April 27, 1999