

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR,	:	
Complainant,	:	
	:	
v.	:	OSHRC DOCKET NO. 97-0960
	:	
SCAFAR CONTRACTING, INC.,	:	
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. §§ 651-678 (1970) (“the Act”) and the Equal Access to Justice Act, 5 U.S.C. § 504(a) and 28 U.S.C. § 2412(b) and (d)(1) (“EAJA”). More specifically, it is before me as a result of the remand order of the Commission of November 21, 2000.

Scafara Contracting, Inc. (“Scafara”) seeks reimbursement for attorney fees and costs incurred in contesting citations issued to it by OSHA alleging that it had violated safety and health requirements. Scafara also seeks reimbursement for the fees and costs it incurred in the civil action before the U.S. Court of Appeals for the Third Circuit (“Third Circuit”) and in the ensuing EAJA application and litigation. This case has traveled a rather convoluted procedural path to reach this point. Scafara’s EAJA application is granted under the terms set forth below.

Jurisdiction

In its decision and order of November 21, 2000, examining Scafara’s EAJA application, the Commission specifically distinguished between legal fees and costs incurred in a “civil action” and those incurred in an “adversary adjudication.” This frame of reference places nearly all of counsel’s activities before the Commission in the latter category and those before the Third Circuit largely into the former. The Commission views the Third Circuit’s remand order of April 24, 1999, as bestowing upon it jurisdiction under section 11(a) of the Act, 29 U.S.C. § 660, and 28 U.S.C. § 2412 to determine Scafara’s application for fees and costs incurred in the civil action. The Commission denied Scafara’s application for fees and costs attributable to the administrative adjudication.

Background and Procedural History

On August 5, 1998, after an administrative hearing on the merits, I issued a decision and order vacating three citation items issued to Scafar for alleged violations of the Act. My decision and order became final on September 9, 1998. *See* section 12(j) of the Act, 29 U.S.C. § 661(j). On October 30, 1998, the Secretary submitted a petition for discretionary review to the Third Circuit (“the civil action”). On December 20, 1998, the Secretary submitted a motion to the Third Circuit seeking to withdraw her petition. The Third Circuit granted the motion on January 25, 1999.

On February 24, 1999, Scafar filed in the Third Circuit a “motion for fees and expenses pursuant to the Equal Access to Justice Act as enacted and amended at 5 U.S.C. § 504 and 28 U.S.C. § 2412.” The Third Circuit remanded the application to the Commission on April 24, 1999, with a direction that the Commission “treat the motion as if filed on the date it was filed in this court [*i.e.* February 24, 1999].” The Commission remanded the case to me, and on September 2, 1999, I held that Scafar had prevailed in the administrative adjudication and in the civil action before the Third Circuit. I further held that the Secretary’s position had not been “substantially justified” in either matter and that Scafar was eligible to receive an EAJA award as to both matters. I then awarded Scafar attorney fees of \$30,500.00 and expenses of \$3,174.00. I also awarded Scafar consultant fees in the amount of \$24,570.81, as well as attorney fees for its EAJA brief in the amount of \$3,625.00.

The Secretary sought review of my decision. On November 21, 2000, the Commission held that Scafar’s application was untimely to the extent it sought an EAJA award under 5 U.S.C. § 504(a), for the administrative adjudication, but that it was timely to the extent it sought an EAJA award under 28 U.S.C. § 2412, for the civil action. The Commission remanded the application to me to consider Scafar’s request for an award solely under 28 U.S.C. §§ 2412(b) and (d)(1).¹

Scafar’s Eligibility for an EAJA Award

On May 2, 2002, I issued an order directing Scafar to submit proof that as of October 30, 1998, its net worth was less than \$7,000,000.00 and it had fewer than 500 employees. Scafar submitted the requisite proof on May 30, 2002. The Secretary did not submit a reply. Based on

¹ Scafar filed a petition in the Third Circuit that sought a stay of the Commission proceedings and a review of the remand order. The Third Circuit denied the petition because the remand order was not a final agency action.

Scafara's submissions, I find that as of October 30, 1998, Scafara had fewer than 500 employees and a net worth of less than \$7,000,000.00. Accordingly, I conclude that Scafara is a party eligible for an EAJA award under the terms of 28 U.S.C. § 2412(d)(1)(B).

The EAJA Application

The Secretary correctly argues that Scafara has failed to identify a statute or common law rule providing for an award of fees under 28 U.S.C. § 2412(b).² See *Morgan v. Perry*, 143 F.3d 670 (3d Cir. 1998). Scafara's application for an award under that section is therefore denied. Scafara's request under 28 U.S.C. § 2412(d) is granted in part, however, for the reasons set forth below.

Title 28 U.S.C. § 2412(d) requires a court to award fees and expenses to a prevailing party in an action brought by or against the United States, unless the position of the government was substantially justified or if special circumstances would make an award unjust. It is clear, and I conclude, that Scafara was the prevailing party in the Third Circuit because the Secretary withdrew her petition to that Court. I also conclude that the Secretary's position before the Third Circuit was not substantially justified. The burden on this issue rests with the Secretary. See *Dougherty v. Lehman*, 711 F.2d 555, 561 (3d Cir. 1983). Further, a determination as to whether the Secretary's position in the Third Circuit was substantially justified necessarily includes a determination of whether her position in the underlying agency adjudication, prior to filing with the Third Circuit, was substantially justified. See *INS v. Jean*, 496 U.S. 152 (1990). Thus, the Secretary must show that both positions were substantially justified. *Hanover Potato Prod., Inc. v. Shalala*, 989 F.2d 123, 128 (3d Cir. 1993). In my decision of September 2, 1999, I found that the Secretary's position in the administrative adjudication was not substantially justified. My finding in that regard is reaffirmed here for the reasons set out in that decision. See Exh. R-L. Based on that finding, and under *Hanover Potato Prod., supra*, I now find that the Secretary's petition for review in the Third Circuit lacked substantial justification.³

² Title 5 U.S.C. § 504 is not such a source, as the Commission has already determined that Scafara is not entitled to an award under that section.

³ In so finding, I have not adopted Scafara's argument that the Secretary's voluntary withdrawal of her petition proves that her position in the Third Circuit was not justified.

Even if I had not made the foregoing finding, I would still conclude that the Secretary's civil action was not substantially justified because her reply to Scafar's application to the Third Circuit failed to articulate a sufficient basis for her position. In defense of her position, the Secretary relied only on: (1) an incorporation by reference of her answer to Scafar's initial EAJA application; and (2) the argument that she filed a protective petition in order to preserve her rights in the event she later desired judicial review of the Commission decision. I rejected the factual and legal arguments in the Secretary's answer in my decision of September 2, 1999, and those arguments are rejected again for the same reasons given in my decision. With respect to (2), I find that a wish to retain a right to later seek review of an agency action does not, standing alone, justify the commencement of a civil action. The Secretary's second argument is accordingly rejected.

Allowable Rate for Attorney Fees Incurred in the Civil Action

Scafar seeks attorney fees at the rate of \$170.00 per hour. Scafar argues that this fee is in accordance with the prevailing market rate and that it is less than its attorney's customary rate. I find, however, that these circumstances are not special factors that warrant an hourly rate higher than the statutory amount. In addition, I find no basis in the record for a cost-of-living adjustment. *See* 28 U.S.C. § 2412(d)(2)(A)(ii). I conclude that Scafar is entitled to an award for attorney fees at the statutory rate of \$125.00 per hour.

Attorney Hours and Costs Relating to the Civil Action

The billing records show that Scafar spent 6.25 attorney hours in defense of the civil action. (Exh. R-BB). The Secretary argues that this figure is excessive, because there was no court appearance involved and Scafar was not required to submit opposition papers. My review of the billing records, however, persuades me that there were only two instances where the resources expended were higher than necessary. Further, the Secretary did not take into account the time necessarily spent by Scafar's counsel to review Third Circuit procedure, conduct telephone conferences with the Court and the Secretary, and report to the client on the status of the case. In light of these factors, I conclude that a 20 percent reduction of the attorney hours and costs claimed is appropriate.⁴ Scafar is thus entitled to five attorney hours for its defense of the Secretary's civil

⁴ The "lodestar" method was used to arrive at this reduction and the others set out *infra*.

action, at the rate of \$125.00 per hour, for a total of \$625.00. Scafara is likewise entitled to costs in the amount of \$29.89. (Exh. R-BB).

Attorney Hours and Costs Relating to Scafara's Petition to the Third Circuit

The Secretary urges that no award should be given for work relating to Scafara's unsuccessful petition to the Third Circuit that sought review of the remand order and a stay of the Commission proceedings. (Exhs. R-S through R-W). It is clear that EAJA applicants are not entitled to attorney fees and costs that relate to issues on which they did not prevail. *See Hensley v. Eckerhart*, 461 U.S. 437 (1983). *See also INS v. Jean*, 496 U.S. 152 n.10 (1990). Accordingly, Scafara is not entitled to either the 157.75 attorney hours or the \$2,184.84 in costs that it claims with respect to the preparation of the petition to the Third Circuit.⁵ (Exh. R-BB)

Attorney Hours and Costs for the Remainder of the Application

The remaining fees and costs are subject to a reduction that takes into consideration the fact that the Commission's remand order directs that no award under 5 U.S.C. § 504 be made. This reduction also takes into consideration the reasonableness of the hours and costs that are claimed.

Based on the Commission's denial of Scafara's claim pursuant to 5 U.S.C. § 504, the fees incurred in that regard must be disallowed. *See also Hensley v. Eckerhart*, 461 U.S. 437 (1983). It is infeasible, however, to segregate the hours expended relating to an award under 5 U.S.C. § 504 from those expended relating to an award under 28 U.S.C. § 2412. This is not due to a lacuna within Scafara's attorney billing records, which are more than adequately detailed. Rather, the claims here involve a common core of facts and parallel legal theories that render the time spent on one claim virtually indistinguishable from the time spent on the other. Further, a review of the billing records reveals that most of the attorney hours would have been required regardless of whether a claim pursuant to 5 U.S.C. § 504 had been asserted. Thus, under the guidance provided in *Inst. Juveniles v. Sec. Pub. Wel.*, 758 F.2d 897, 919 (3d Cir. 1985) (a percentage reduction may be appropriate when the attorney hours spent litigating the failed claim are related to the successful claim), and based on Scafara's level of success and the complex nature of the issues presented, I find that an across-the-board percentage reduction is appropriate.

⁵ The Secretary urges that 162 attorney hours should be deducted. The billing records, however, indicate that only 157.75 hours were actually spent on the petition. (Exh. R-BB).

I also find that a reduction is appropriate due to the fact that the work was largely in writing and did not involve hearings or other appearances. On the other hand, the factual and legal issues involved in this case have been complex, due primarily to the lengthy and intricate procedural history of this application. Indeed, according to the Commission's remand order, an apparently novel choice of law issue was presented of which neither the parties nor the administrative law judge was aware. Moreover, I have carefully reviewed the billing records, and I note that there were only a few instances where, in light of my own experience, the resources expended exceeded what was required to adequately pursue this EAJA application.

Taking into account all of the above factors, including the reasonableness of the hours claimed, I conclude that a reduction of 50 percent with respect solely to the hours is appropriate. Scafar is therefore entitled to an award of \$125.00 per hour for 67.63 hours, equaling \$8,453.75. I further conclude that the costs incurred by Scafar in this litigation were appropriate and were not affected by the assertion of the claim under 5 U.S.C. §504. Accordingly, after deducting the costs for Scafar's petition to the Third Circuit, I award Scafar \$2,075.08 as reasonable costs.

FINDINGS OF FACT

All findings of fact necessary for a determination of all relevant issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are hereby denied.

CONCLUSIONS OF LAW

1. Pursuant to the Commission's remand order, the Third Circuit bestowed jurisdiction upon the Commission to determine this application under 28 U.S.C. § 2412.

2. Pursuant to 28 U.S.C. § 2412(d), Scafar is entitled to an award of \$125.00 per hour for five attorney hours, equaling \$625.00, and \$29.89 for costs, for work performed in defense of the Secretary's civil action for judicial review of the Commission final order dated September 9, 1998.

3. Pursuant to 28 U.S.C. § 2412(d) Scafar is entitled to an award of \$125.00 per hour for 67.63 attorney hours, equaling \$8,453.75, plus \$2,075.08 for costs, for work relating to the EAJA application and litigation.

4. Scafar is not entitled to an award pursuant to 28 U.S.C. § 2412(b).

5. Scafara is not entitled to an award for attorney fees and costs incurred in its petition to the Third Circuit for review of the Commission's decision and order of November 21, 2000.

ORDER

1. Scafara is entitled to attorney fees of \$625.00 and costs of \$29.89 for work performed in defense of the Secretary's civil action for judicial review of the Commission final order dated September 9, 1998.

2. Scafara is entitled to attorney fees of \$8,453.75 and costs of \$2,075.08 for work relating to the EAJA application and litigation.

3. Scafara's application for an award pursuant to 28 U.S.C. § 2412(b) is denied.

4. Scafara is not entitled to an award for attorney fees and costs incurred in its petition to the Third Circuit for review of the Commission's decision and order of November 21, 2000.

/s/

MICHAEL H. SCHOENFELD
Judge, OSHRC

Dated: 7-1-02

Washington, D.C.