

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.

Summit Contractors, Inc.,

Respondent.

OSHRC Docket No. **04-0492**

Appearances:

Leslie Paul Brody, Esq., U. S. Department of Labor, Office of the Solicitor, Atlanta, Georgia
For Complainant

Robert E. Rader, Jr., Esq., Rader and Campbell, Dallas, Texas
For Respondent

Before: Administrative Law Judge Stephen J. Simko, Jr.

Decision on Fee and Expense Application

Summit Contractors, Inc., seeks an award for attorneys' fees and expenses in accordance with the Equal Access to Justice Act, 5 U.S.C. § 504, 29 C.F.R. § 2204.101, *et seq.* (EAJA), for costs incurred in defending against a one-item citation. The Secretary issued the citation, alleging a violation of 29 C.F.R. § 1926.1052(c)(12), on May 15, 2004. The court heard the case on November 9 and 10, 2004, and vacated the cited item in a decision issued April 1, 2005. The decision became a final order on May 6, 2005.

On May 10, 2005, Summit filed an application for fees and expenses in the amount of \$31,706.06. The Secretary filed an answer to Summit's application on June 13, 2005. Summit filed a response to the Secretary's answer on June 24, 2005.

For the reasons discussed below, the court denies Summit's application.

Issue

The Secretary does not dispute Summit's eligibility under the EAJA or the amount of the award it seeks. The sole issue is:

Was the Secretary substantially justified in bringing this case against Summit?

Findings of Fact

Summit, as general contractor, supervised several subcontractors on the Tuscany Lakes Apartments construction project. TuscanyLakes comprises fourteen three-story apartment buildings, plus a clubhouse, maintenance building, and laundry building. The construction project covered a ½ mile by ½ square mile area.

As the general contractor, Summit had four full-time employees on the job: general superintendent Patrick White and assistant superintendents Michael White, Kevin Bass, and Vincent Reali. Summit contracted with Workers Temporary Staffing, Inc. (WTS), to send out a crew of day laborers as needed.

On October 27, 2003, per Summit's request, WTS sent out a crew of four laborers. The crew's driver was George Province. The other three laborers were Antonio Chevre, Kevin Isom, and Gordon Beyette. When the crew arrived at the construction site, driver Province took the work order into Summit superintendent Patrick White's trailer. White issued the specific work instructions for the day. He told Province that he and his crew needed to clean up trash around the lake shore, the clubhouse, and the buildings around the lake near Building 1. The WTS crew proceeded to the assigned area.

Shortly before noon, laborer Isom told assistant superintendent Bass that the WTS crew had finished with its assigned task and asked, "Do you want us to go around Building 2?" Bass replied, "Yes" (Tr. 389). The WTS laborers proceeded inside Building 2 and began cleaning. They followed their normal procedure, which was to start at the top of the three-story building and work down. Beyette was sweeping the stairway clear of debris. As he was sweeping the mid-landing between the second floor and third floor, he apparently backed up and stepped off the mid-landing, falling 15 feet to the floor below. Beyette died at the scene. The guardrail that had been nailed in place at the mid-landing had been removed. Beyette was not using any other form of fall protection.

Compliance officer Nancy Hodensius investigated the fatality. She interviewed a number of employees, including WTS laborer Kevin Isom. Based upon her recommendation, the Secretary

issued a citation to Summit alleging a violation of 29 C.F.R. § 1926.1052(c)(12).¹ The Secretary's position at the hearing was Summit knew WTS employees were working in Building 2, and should have known the guardrail was missing from the mid-landing from which Beyette fell.

Principles of Law

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 an adversary adjudication. 5 U.S.C. § 504(a)(2). The prevailing party must meet the established eligibility requirements before it can be awarded attorneys' 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."

¹ Section 1926.1052(c)(12) provides:

Unprotected sides and edges of stairway landings shall be provided with guardrail systems. Guardrail systems criteria are contained in subplot M of this part.

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 of the notice of contest “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.”

Prevailing Party

Section 504(a)(2) of 5 U.S.C. provides:

A party seeking an award of fees and other expenses shall within thirty days of the final disposition in the adverse adjudication submit to the agency an application which shows that the party was the prevailing party.

Substantially Justified

The Secretary must prove that her 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).

Analysis

The Secretary does not dispute Summit’s assertion that it employed 200 employees and had a net worth of less than \$ 7 million on the date of its notice of contest (see Attachment B to Summit’s EAJA Application). The Secretary concedes Summit meets the eligibility requirements under the EAJA. The Secretary also concedes Summit prevailed in her proceeding against it. The Secretary disputes Summit’s claim she was not substantially justified in citing it for violating 29 C.F.R. § 1926.1052(c)(12).

Beyette died after falling from an unguarded mid-landing. Summit supervised the construction of the Tuscany Lakes project generally, and its supervisors personally instructed the WTS crew. Compliance officer Hodensius interviewed Kevin Isom and wrote down his statement.

Hodensius asked Isom where he was told to work. Isom replied, “Just one of the buildings. Start at the top and work our way down. This is the building where the accident happened” (Tr. 37-38). Hodensius interviewed Bass. Hodensius stated Bass told her Isom asked if Bass wanted the WTS crew “to do Building 2, or words to the effect, and he said, ‘yes’” (Tr.141).

Despite Bass’s ambiguous statement, Summit argues its superintendents informed Hodensius during her investigation that none of them had instructed the WTS crew to enter Building 2. Summit believes this is sufficient to remove any justification for the Secretary to prosecute the case. But it is not unusual for supervisory personnel to deny any wrongdoing on their part in the course of an OSHA inspection. Hodensius could reasonably conclude Summit’s supervisors, who had a vested interest in denying knowledge of the WTS crew’s presence in Building 2, were less credible than Isom.

The facts gathered by Hodensius during her inspection substantially justified her recommendation to the Secretary to cite Summit for 29 C.F.R. § 1926.1052(c)(12). These facts also justified the Secretary’s decision to go forward to the hearing. The Secretary had a witness, Kevin Isom, who stated Summit’s supervisory personnel instructed him and the WTS crew to enter Building 2. Isom also stated there were no guardrails in Building 2. Under these circumstances, the Secretary’s belief she could establish a *prima facie* case that Summit violated § 1926.1052(c)(12) was substantially justified.

This court’s decision finding the Secretary failed to establish her case hinged on finding Isom a less credible witness than the witnesses called by Summit. This court stated, “Isom’s demeanor ranged from nervous to combative, and his testimony was a times confusing or self-contradictory” (Decision, p. 7). In the Secretary’s words, Isom “succumbed to the pressure of the trial” (Secretary’s answer, p.10). The formal proceeding clearly unnerved and distressed Isom. Summit’s witnesses, on the other hand, appeared well-prepared and told consistent stories. It is difficult to predict whether witnesses will perform smoothly, as Summit’s witnesses did, or will be so rattled they testify poorly, as Isom did. In recognition of this reality, the Commission has held, “[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). Had Isom been less nervous and less combative, his testimony might have conformed more closely with his statement to Hodensius during the inspection.

The Secretary had a reasonable basis for the facts alleged: Isom told Hodensius a Summit supervisor had instructed him to work inside Building 2. Beyette fell to his death from a midlanding in Building 2 that was missing a guardrail.

The Secretary had a reasonable basis in law for her theory that Summit violated 29 C.F.R. § 1926.1052(c)(12): as the general contractor on a multi-employer worksite, Summit was responsible for violations of other employers where it could reasonably be expected to prevent or 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. 90-2873, 1994).

The facts alleged by the Secretary reasonably supported the legal theory advanced. If the court had resolved the credibility issue in Isom's favor, the Secretary could have shown Summit instructed the WTS crew to work in a building where Summit should have known a guardrail was missing. The Secretary has established she was substantially justified in prosecuting the case against Summit.

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:
Summit's application for attorneys' fees and expenses is denied.

/s/ Stephen J. Simko, Jr.
STEPHEN J. SIMKO, JR.
Judge

Date: September 8, 2005