

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.

Saiia Construction, LLC,

Respondent.

OSHRC Docket No. **03-0391**

DECISION ON FEE AND EXPENSE APPLICATION

Saiia Construction, LLC (Saiia), seeks an award for fees and expenses in accordance with the Equal Access to Justice Act, 5 U.S.C. § 504, 29 CFR § 2204.101, *et seq.*, (EAJA) for costs incurred in its defense against item 1a of citation no. 1 and the proposed penalty issued by the Secretary on February, 2003. For the reasons discussed below, Saiia's application is denied.

Background

In December 2002, Saiia was engaged in underground pipelaying construction at the Edgewood Town Center on Greensprings Road in Homewood, Alabama. Occupational Safety and Health Administration (OSHA) compliance officer Eric Harbin conducted an inspection of the worksite on December 12, 2002. As a result of Harbin's inspection, the Secretary issued a two-item citation to Saiia on February 4, 2003.

The citation contained two grouped items. Items 1a, 1b, and 1c alleged serious violations of §§ 1926.651(e), 1926.251(a)(4), and 1926.251(b)(1). Items 2a and 2b alleged serious violations of §§ 1926.652(a)(1) and 651(k)(2). Saiia filed a notice of contest to the citation and proposed penalties on February 14, 2003.

This case was designated as an E-Z case on March 21, 2003. The undersigned issued an order setting the case for hearing for May 13, 2003. On April 16, 2003, the Secretary filed the first in a series of motions to stay the proceeding because compliance officer Harbin, an army reservist, had been called up for active duty. The undersigned granted this and the Secretary's four subsequent motions to extend stay until Harbin returned from Iraq, where he had been deployed, in May 2004.

The Secretary withdrew item 1a on July 1, 2004. The parties entered into a partial settlement agreement regarding items 1b and 1c. A hearing on items 2a and 2b was held on August 19, 2004.

On August 2, 2004, Saiia filed an application for attorneys' fees and expenses totaling \$14,613.47 incurred for the underlying action on item 1a. The Secretary filed an answer to Saiia's application on September 30, 2004. Saiia filed a reply to the Secretary's answer on October 20, 2004. In its reply, Saiia requested an additional amount be added to the award to cover the attorneys' fees and expenses incurred in filing the EAJA application and reply.

The Equal Access to Justice Act

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). Saiia timely filed its application.

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." 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.”

Saiia submitted the affidavit of its chief financial officer Richard DeShazo, who avers that Saiia employed 304 employees on February 14, 2003, the date of Saiias’s notice of contest (Saiia’s application, Exh. C). DeShazo also avers that on February 14, 2003, Saiia had a net worth of \$2,782,157.00 (Saiia’s application, Exh. C). Attached to DeShazo’s affidavit is a balance sheet for Saiia showing its assets and liabilities in February 2003.

Saiia has established that it employed fewer than 500 employees and had a net worth of less than \$7 million at the time it filed its notice of contest. It has met the eligibility requirements of the EAJA.

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.

The Review Commission stated in *K.D.K. Upset Forging, Inc.*, 12 BNA OSHC 1856, 1857 (No. 81-1932, 1986):

Although the term is not defined in the EAJA, an applicant is considered to be the “prevailing party” . . . if it has succeeded on any of the significant issues involved in the litigation, and if, as a result of that success, the applicant has achieved some of the benefit it sought in the litigation.

In the instant case, the Secretary withdrew item 1a of the citation and does not dispute that Saiia was the prevailing party on the item. Saiia was the prevailing party on item 1a.

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).

Item 1a alleged a serious violation of § 1926.651(e), which provides in pertinent part:

No employee shall be permitted underneath loads handled by lifting or digging equipment.

The citation alleges that on December 12, 2002, “employees standing in an excavation were exposed to being struck by a section of concrete pipe being placed in the excavation by an excavator.”

Harbin conducted an inspection of Saiia’s worksite in Homewood, Alabama, on December 12, 2002. At the time of the inspection, Saiia’s crew was installing a concrete pipe in an excavation. On the OSHA-1B completed by Harbin on January 15, 2003 (approximately one month after the inspection), he wrote (Secretary’s answer, attachment A):

20. Instance Description–Describe the following:

a) Hazards–Operation/Condition–Accident: Struck by hazard for employees standing in an excavation while a section of pipe was lifted over their heads. The employees were exposed to being crushed by the approximately 2,000 pound section of pipe.

...

23. Employer Knowledge: Jerry Robinson, Pipe Superintendent, was on site and directing the work of the exposed employees at the time the inspection was initiated. Robinson was active observing the employees while they were exposed to being struck by the falling load. Robinson did not attempt to remove the employees from the hazard until the CSHO requested the employees move.

24. Comments (Employer, Employee, Closing Conference): The exposed employee said that he needed to be where he was to ensure the pipe was in the proper location.

25. Other Employer Information: The exposed employees were removed from being under the load of the excavation.

Harbin took several photographs of the worksite during his inspection. The Secretary concedes that none of the photographs show employees standing in an excavation underneath a section of concrete pipe.

At the time of the December 12 inspection, Harold Ciancio was the acting area director for OSHA's Birmingham, Alabama, area office where Harbin worked. Ciancio signed the citation issued to Saiia on February 4, 2003. Ciancio testified that he spoke with Harbin on December 12 after Harbin came back from inspecting Saiia's worksite. Ciancio asked Harbin if he had found any violations. Harbin replied "that there was a person underneath a load and the trench wasn't correct" (Secretary's answer, attachment D, Ciancio's deposition, p. 59).

In its application, Saiia states that the Secretary "was not substantially justified in issuing this item of violation in the first instance when Mr. Harbin, who observed and photographed the installation process, knew that no one was ever observed underneath the load" (Saiia's application, p. 4). The evidence does not establish that Harbin "knew that no one was ever observed underneath the load." Harbin, who submitted an affidavit and who testified in a deposition and at the hearing, did not state that he did not observe anyone underneath the concrete pipe. His affidavit and his deposition and hearing testimony were all given after his return from his tour of duty in Iraq. In his affidavit, Harbin states (Secretary's answer, attachment F, Harbin affidavit, p. 3):

[D]uring the first week of my return to work at OSHA, I was not able to fully and confidently recollect the specific facts concerning the elements of the violation cited in Item 1(a). As a result, I was reluctant to swear under oath that I specifically recalled observing the suspended pipe being swung directly over the heads of employees.

Harbin has consistently stated that, after his tour of duty in Iraq, his recollection of the December 12, 2002, inspection was not specific enough to allow him to swear under oath that he observed an employee or employees underneath the concrete pipe. Saiia is incorrect in asserting that the record establishes that Harbin knew no employees were ever underneath the load the day of the inspection.

Based upon the information supplied by Harbin following his inspection of Saiia's worksite, the Secretary was substantially justified in citing Saiia for violating § 1926.651(e). An experienced compliance officer reported that he had observed an employee or employees standing in an excavation underneath a concrete pipe. Harbin reported this verbally to Ciancio, and he wrote it on the OSHA-1B. Harbin's observations supported the legal theory that Saiia was in violation of § 1926.651(e).

From the time it received the citation, Saiia took the position that no employees were underneath the concrete pipe at any time on the project. Saiia argues that the Secretary failed to withdraw item 1a after it became apparent that there was no basis for the allegation. Saiia states, “Even after Mr. Harbin confirmed that no employee was observed underneath the load, the Secretary did not immediately dismiss this item” (Saiia’s application, p.4). First, as noted above, Harbin never “confirmed” that employees were not under the load; Harbin only stated that he could not specifically recollect, almost a year and a half after the inspection, observing an employee or employees underneath the load. This is a point that Saiia consistently misstates or ignores in its application and reply. Taken together, the affidavits and the depositions are inconclusive with regard to whether or not Harbin observed an employee or employees underneath the concrete pipe on December 12.

In its reply, Saiia states, “OSHA’s photographs of the concrete pipe installation confirm that no employee was ever underneath any load of concrete pipe at any time during the installation process” (Saiia’s reply, p. 2). To draw such a conclusion from the photographs Harbin took is patently incorrect. By their nature photographs capture only a split second in time. Simply because the photographs fail to show employees underneath a pipe does not prove that “no employee was ever underneath any load of concrete pipe at any time during the installation process.”

Exercising an ability to split hairs, Saiia states, “It is noted that the OSHA-1B does not state that Mr. Harbin observed anyone under a load. Instead, it merely makes an assertion that employees were ‘standing in an excavation while a section of concrete pipe was lifted over their heads’” (Saiia’s reply, p.4). Saiia also turns its parsing skills to the deposition testimony of Ciancio (*Id.*):

Additionally, it is noted that contrary to the Secretary’s assertion in her Answer, Mr. Ciancio never testified during his deposition that Mr. Harbin told him that he observed anyone under a load. The excerpts included in Attachment “D” to the Secretary’s answer do not contain any testimony that Mr. Harbin ever stated to anyone that he observed someone under a load. Instead, Mr. Ciancio testified that he asked Mr. Harbin if he had any violation, to what Mr. Harbin told him “there was a person underneath a load.”

Saiia is apparently arguing that Harbin did not tell Ciancio that “I observed” or “I saw” someone under the load, but merely that somebody was under the load, without accounting for how

he came by that information. Saiia's interpretation of the deposition testimony is rejected. Harbin's personal observations are inferred from his OSHA-1B and his statement to Ciancio.

Saiia argues, and the Secretary concedes, that Harbin could not have seen the employees in the excavation from where he parked his car. The excavation walls were higher than the employees' heads. The employees were not visible until Harbin walked up to the edge of the excavation. Three employees were in the excavation when Harbin approached it. Saiia extrapolates from this the conclusion that it was impossible for Harbin to have seen any employees underneath the concrete pipe. But Harbin could have observed the concrete pipe suspended over the area of the excavation where he subsequently observed the employees. Because he had the excavation area in view as he approached the edge of the excavation and did not see anyone enter or exit the trench, he knew that the employees were inside of it from the time he parked his vehicle. If he saw the concrete pipe suspended over the excavation during this time, Harbin reasonably could conclude that the employees were underneath the load. It is undisputed that when Harbin first arrived at the site, he observed a section of concrete pipe suspended by the excavator (Saiia reply, attachment H, Exh. C-2).

Saiia relies heavily on the statements of its employees that they were never underneath the concrete pipe. These contradict Harbin's statements to Ciancio and those written in his OSHA-1B. Resolving the contradiction would require a credibility determination by the undersigned. Saiia accepts the statements of its employees at face value. It apparently does not occur to Saiia that employees can make self-serving statements, especially when being questioned by their employer regarding whether their conduct violated safety standards that could result in the employer paying a financial penalty. Saiia states in its reply that the Secretary should have withdrawn item 1a once Saiia alerted her that its employees "confirmed no one was ever under a load" (Saiia's reply, p.7). The employees' statements confirmed nothing; they contradicted the statements of Harbin, who had less reason than the employees to shade the truth. The Secretary is not required to withdraw an item once the employer notifies her that its employees deny they were engaged in violative conduct. Contrary to Saiia's statement, item 1a involved a credibility determination. "[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 Secretary has established that she was substantially justified in issuing item 1a and in declining to withdraw it until Harbin returned from Iraq. Harbin inspected Saiia's worksite on December 12, 2002, and, contemporaneous with that inspection, made written and verbal comments indicating that employees were underneath a section of concrete pipe. There was a reasonable basis for the facts alleged. Employees working beneath a suspended load violate § 1926.651(e). Thus, a reasonable basis in law existed for the theory the Secretary propounded. The facts alleged supported the legal theory advanced by the Secretary that Saiia was in violation of § 1926.651(e).

Once Harbin returned from Iraq and averred that he no longer remembered with certitude whether he had observed employees underneath the pipe, the Secretary withdrew item 1a. This withdrawal does not imply that there never was a basis for citing Saiia nor that Harbin's recollection had dimmed prior to his 14-month long tour of duty. The withdrawal is an acknowledgment that, at the time of Harbin's return, he could no longer accurately recall the details specific to the violative conduct alleged in item 1a.

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:

Saiia's application for attorney's fees and expenses is denied.

 /s/ Nancy J. Spies
NANCY J. SPIES
Judge

Date: May 9, 2005