



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, S.W.
Atlanta, Georgia 30303-3104

Secretary of Labor,
Complainant

v.

Wildcat Renovation, LLC,
Respondent.

OSHRC Docket No. **21-0387**
(EAJA)

Representatives:

Richard A. Latterell, Esq.
U.S. Department of Labor, Office of the Solicitor, Atlanta, GA, for Complainant

John M. Miller, Esq. and Katherine Cook, Esq.
BOY AGNEW POTANOVIC, PLLC, for Respondent

JUDGE: Administrative Law Judge Heather A. Joys

**DECISION AND ORDER
DENYING EAJA APPLICATION**

After the Decision and Order (Decision) in this matter became final, Respondent, Wildcat Renovation, LLC (Wildcat) moved for an award under the Equal Access to Justice Act, 5 U.S.C. § 504 (EAJA). The Secretary opposed Wildcat's Motion for the Award of Fees and Expenses Pursuant to EAJA (EAJA Motion). After the Secretary filed her opposition, Respondent moved to file a supplemental affidavit and exhibit (Leave Motion). The Secretary also opposed the Leave Motion.

Respondent's Leave Motion is **GRANTED**. However, Respondent's EAJA Motion is **DENIED**.

Background

After learning of a fatality at a worksite at which Wildcat was a contractor, OSHA investigated the worksite.¹ The parties agreed on what occurred just before the worker's death.

¹ Stip. 1-2. Stipulation 1 is: "On September 30, 2020, OSHA conducted an inspection, number 1495408, of Respondent's worksite located at Respondent's worksite at the Sun 'n Fun Waterpark, 1500 Livingston Road, Naples,

Wildcat's employees were working on a reinforced concrete wall that had previously supported a pedestrian bridge.² Using a concrete saw, the decedent cut a horizontal line near the wall's base.³ The wall began to tip as he cut and then fell on him. (Dec. 4-5.) Efforts to rescue him were unsuccessful, and he died of his injuries.⁴

OSHA initially assigned the investigation to Compliance Health and Safety Officer (CSHO) Chad Schulenberg and a trainee. When CSHO Schulenberg left OSHA's employ, the matter was reassigned to CSHO Reginald Benson. OSHA completed its investigation, and then the Secretary issued a Citation.

As amended, the Citation contained two allegations. Item 1a alleged Respondent violated 29 C.F.R. § 1926.850(a), and Item 1b asserted a violation of 29 C.F.R. § 1926.859(g). Respondent contested the Citation. Following a hearing and briefing, the undersigned found that the Secretary failed to establish violations of the cited standards and vacated both items.

Equal Access to Justice Act, 5 U.S.C. § 504 (EAJA)

Under EAJA, prevailing private parties that meet certain limits on net worth and size may receive certain attorneys' fees and other expenses, unless the government's position was "substantially justified" or special circumstances make an award unjust. 29 C.F.R. § 2204.101. *See Aquatek Sys., Inc. v. OSHRC*, 23 F. App'x 404, 405 (5th Cir. 2007) (unpublished). In matters before the Commission, to pursue an EAJA award, a prevailing private party must apply within thirty days of the final disposition. 29 C.F.R. § 2204.301(a). The application must state how many

Florida 34109." Stipulation 2 is:

OSHA's inspection was prompted by Respondent's reporting to OSHA a fatal worksite accident occurring on September 29, 2020, when one member of Respondent's 3-man demolition crew at the Sun 'n Fun waterpark was crushed by a steel reinforced poured concrete wall that fell on him after he had cut a horizontal line along the width of its base.

² Stips. 4-6. The parties stipulated:

4. Respondent's 3-man crew at the Sun 'n Fun worksite comprised foreman Matthew Norton, laborer [WH], and the decedent laborer [AG].
5. The photographs show that the decedent cut a horizontal line near the base of the entire width of the second concrete wall.
6. The concrete wall measured approximately 6 feet high by 10 feet wide by 8 inches deep.

(Stips. 4-6.)

³ Stips. 5, 8. Stipulation 8 is: "The decedent was using a self-contained, gas engine, hydraulic concrete saw cutter, called a 20-inch Diamond Ring Saw.

⁴ Dec. 5, Stip. 10. Stipulation 10 is: "The Collier County District Twenty Medical Examiner's report states the cause of death to be blunt force injuries."

employees there are and include “adequate documentation of” the applicant’s net worth. 29 C.F.R. §§ 301(b), (c), 302. The application must also state the amount of fees and expenses sought and include adequate documentation thereof. 29 C.F.R. §§ 2204.301(d), 303. While the applicant has the burden of proving eligibility, the government has the burden of demonstrating that its action was substantially justified. *Scarborough v. Principi*, 541 U.S. 401, 403 (2004); *Dole v. Phoenix Roofing, Inc.*, 922 F.2d 1202, 1209 (5th Cir. 1991); *Joseph Watson*, 21 BNA OSHC 1649 (No. 00-1726, 2006); 29 C.F.R. § 2204.301(b).

Issues

The parties agree that the application was filed within thirty days of the final disposition. They part ways on the application’s sufficiency. Specifically, the issues in dispute are:

1. Did Wildcat establish it is an eligible party within the meaning of EAJA and the Commission’s implementing regulations?
2. If so, did the Secretary establish her position was substantially justified in issuing and litigating the Citation, or are there other circumstances that make an award unjust?

Eligibility

The applicant seeking an EAJA award must include “a detailed exhibit showing the net worth of the applicant.” 29 C.F.R. § 2204.302. “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 as a party as defined in § 2200.201.” *Id.* In other words, an EAJA award applicant must show: (1) prevailing party status, (2) eligibility to receive an award, and (3) the amount sought. *Scarborough*, 451 U.S. at 403.

Wildcat’s initial application did not meet these criteria. It simply included unsupported allegations. Wildcat’s owner provided an affidavit asserting that Wildcat had fewer than 500 employees and a net worth of less than \$7,000,000, without including any financial information. (EAJA Mot. Ex. 1.) *See, e.g., Asphalt Supply & Serv., Inc. v. U.S.*, 75 Fed. Cl. 598, 601-2 (2007) (denying award when the plaintiff failed to demonstrate it fell below the maximum net worth and employee thresholds).

Later, Respondent moved for leave to provide some additional economic information. (Leave Mot. 1-2.) While the Leave Motion was pending, Respondent filed an affidavit from an accountant indicating that he “compiled” the attached balance sheet. (Leave Mot. Ex. 1.) The

Secretary opposes the Leave Motion and argues that the subsequently filed exhibit should not be considered. (Opp'n to Leave Mot. 3-6.) In her view, the information is late, and Wildcat failed to establish "good cause" or grounds for equitably tolling the filing deadlines. *Id.*

A party must file for an EAJA award within thirty days of when a decision becomes final. 5 U.S.C. § 504(a)(2), 29 C.F.R. §§ 2204.201 (defining final disposition), 2204.301(a) (30-day requirement). In the EAJA context, a Commission decision is not final until after two events: the time to file a Petition for Discretionary Review before the Commission has elapsed and the time to seek appellate review has closed. *See Martin Constr., Inc.*, 22 BNA OSHC 1089 (No. 06-0700, 2008.) Because the supplemental materials were filed within thirty days of when it was still theoretically possible to seek appellate review, the Leave Motion is granted. The supplemental exhibits will be considered part of the EAJA application.

Nonetheless, even as supplemented, Wildcat's application does not conclusively establish that it meets the eligibility criteria. Neither the affidavits nor the balance sheets indicated that the financial information had ever been audited. There is no evidence the documents were kept in the ordinary course of business or used for purposes other than the EAJA award. As the Court of Federal Claims stated, "Self-serving affidavits and unaudited balances, alone, are not considered sufficient to establish a plaintiff's net worth." *Info. Scis. Corp. v. U.S.*, 86 Fed. Cl. 269, 280 (2009), *amended on denial of reconsideration on other grounds*, 88 Fed. Cl. 626 (2009). *See also Doe v. U.S.*, 54 Fed. Cl. 337 (2002) (affidavit with unsupported statement insufficient); *Shooting Star Ranch, LLC v. U.S.*, 230 F.3d 1176, 1178 (10th Cir. 2000) (party status denied when unverified and unsworn accountant's letter submitted).

Substantial Justification

To be sure, there is no competing evidence that Respondent's net worth exceeds the limit permissible for an EAJA award. Rather than a protracted assessment of eligibility, the undersigned will turn to whether the Secretary's position was substantially justified, *i.e.*, did it have a reasonable basis in both law and fact. *Hensley et al. v. Eckerhart et al.*, 461 U.S. 424, 437 (1983) ("A request for attorney's fees should not result in a second major litigation.") The Secretary's position must be "justified to a degree that could satisfy a reasonable person." *Salco Constr., Inc.*, No. 05-1145, 2007 WL 2127304, at *2 (OSHRC July 18, 2007). To meet this threshold, the Secretary need not succeed in the underlying proceeding. *S & H Riggers & Erectors, Inc. v. OSHRC*, 672 F.2d 426, 430 (5th Cir.1982). "Conceivably, the Government could take a position that is not substantially

justified, yet win; even more likely, it could take a position that is substantially justified, yet lose.” *Pierce v. Underwood, et al.*, 487 U.S. 552, 569 (1988).

In its application, Respondent misstates the positions the Secretary took. For Item 1a, the Secretary argued that 29 C.F.R. § 1926.850(a) requires an engineering survey that takes into account the possibility of unplanned collapses. For Item 1b, the Secretary asserted that 29 C.F.R. § 1926.859(g) requires inspections by a competent person to detect hazards as the demolition work progresses. As the Decision states, the Secretary focused on her perception of the engineering survey’s inadequacy. (Dec. 5-11, 14; EAJA Mot. Opp’n 3-5.) She also disputed the frequency with which the foreman observed the wall for hazards. (Dec. 5-6, 12-15; EAJA Mot. Opp’n 3-5.)

The Secretary bears the burden of proving a violation. *JPC Grp., Inc.*, No. 05-1907, 2009 WL 2567337, at *2 (OSHR Aug. 11, 2009). In this case, meeting that burden depended upon several credibility determinations and expert testimony. When a case turns on credibility issues, reallocating litigation expenses under EAJA is typically not appropriate. *See Consol. Constr. Inc.*, No. 89-2839, 1993 WL 69989, at *7 (OSHR Mar. 3, 1993). The Secretary could reasonably have believed the witnesses’ statements and doubted Wildcat’s owner. *See Hocking Valley Steel Erectors, Inc.*, 11 BNA OSHC 1492, 1497 (No. 80-1463, 1983) (finding Secretary’s position substantially justified even though she withdrew the citation while Commission review was pending). She also sought out expert testimony on her position.

As the Decision states, the undersigned ultimately credited the owner’s recounting of key factual events and declined to draw the same inferences the Secretary’s expert had. (Dec. 8, 10-15.) The vacation of Item 1a turned mainly on the credibility of Mr. Miller’s testimony regarding whether he considered each of the elements the Secretary identified when he developed his plans for demolishing the concrete walls. There were genuine disputes about the demolition plans, what instructions were given, and the reasonableness of the oversight during the demolition. (Dec. 8-15.) Besides witness testimony, there was also a police report, photographs, and other evidence to be weighed and considered. *Id.*

For Item 1b, in addition to credibility assessments and expert testimony, the resolution also turned on a matter of degree. The undersigned had to address the reasonableness of Wildcat’s actions under the circumstances. (Dec. 14-15.) The Secretary failed to show that Wildcat’s level of diligence and oversight was insufficient. *Id.* This evaluation turned on multiple factual findings and the credibility of those describing what occurred. *Id.* If the circumstances differed somewhat,

Wildcat's actions would not have been reasonable, and the Secretary would have prevailed.

The alleged descriptions of events gathered by the Secretary reasonably supported the legal theory she advanced. *See S&H*, 672 F.2d at 430-31 (the government does not have to establish that the decision to litigate was based on a substantial probability of prevailing). She may have succeeded if the undersigned had resolved the credibility issue differently or if fewer inferences were needed. Determinations made in Wildcat's favor do not mean the Secretary's position lacked substantial justification. Similarly, the expert's assessment failed to carry the argument, but he was well-qualified, and the Secretary's reliance on him was substantially justified. Combining his assessment with the facts as the Secretary reasonably believed them to be further counsel against finding an EAJA award appropriate here. *See M&M Road Recycle, Inc.*, No. 97-0075, 1998 WL 372896 (OSHR CALJ June 25, 1997) (denying EAJA award for items about which there was conflicting expert testimony). *Cf. Contour & Siding Sys., Inc.*, 18 BNA OSHC 1714, 1716-17 (No. 96-0063, 1999) (finding Secretary was not substantially justified when expert she relied on undermined her legal theory during a deposition).

In its application, Respondent alleges that the decedent violated his supervisor's instructions. (EAJA Mot. 1.) Respondent did not raise the affirmative defense of unpreventable employee misconduct in its initial Answer or Amended Answer to the Complaint. Affirmative defenses, such as unpreventable employee misconduct, must be raised in the Answer or "as soon as practicable." 29 C.F.R. § 2200.34(b)(4). The failure to raise the defense in the Amended Answer makes the Secretary's belief that Respondent could not establish the defense highly reasonable. *See Aquatek*, 2007 WL 870369, at *2 (noting that the employer bore the burden of proving the unpreventable employee misconduct defense and finding that the Secretary was substantially justified in pursuing the action). The Secretary's belief in her position is further supported by the lack of clear argument regarding the defense in Respondent's Post-Hearing brief. The Decision made no finding as to the precise instructions. (Dec. 14 n. 19.) Nor was there a finding that Respondent established any affirmative defense.

Besides her contentions regarding Respondent's eligibility and substantial justification, the Secretary also contends that there are other circumstances to support denying the requested fee. (EAJA Mot. Opp'n 8-9, 24-25, 27-28.) The Secretary is correct that certain litigation expenses were related to Respondent's failure to cooperate in discovery fully and appropriately. (Order Granting, In Part, The Secretary's Mot. to Compel. 3-6; Order Denying Mot. for Sanctions 3-4.)

An award for such time is typically not permitted. *See* 29 C.F.R. §§ 2204.101, 201 (“fees and other expenses may not be awarded to a party for any portion of the adversary adjudication in which the party has unreasonably protracted the proceedings”).

The Secretary also identifies several entries for which compensation would not be appropriate even if her conduct had not been substantially justified. (Opp’n to EAJA Mot. 25.) Respondent included substantial time on dates before OSHA issued a Citation. EAJA limits award to fees “in connection with” an adversary adjudication. 5 U.S.C. § 504(a)(1). For OSHRC proceedings, the “adjudication” begins with the citation’s issuance. *Central Brass Mfg. Co. Eyeglasses*, 14 BNA OSHC 1904, 1906 (No. 86-978, 1990) (consolidated). The Commission does not have jurisdiction until after a citation is issued and a party files a timely Notice of Contest. *See, e.g., Joel Yandell d/b/a Triple L. Tower*, 18 BNA OSHC 1623, 1628 n. 8 (No. 94-3080, 1990). Here, the Secretary issued the Citation on March 25, 2021. Yet, Respondent’s list of fees begins on September 29, 2020.

The Secretary also challenges the documentation supporting the sought hourly fee for attorney or paralegal time. Because no award is appropriate, the undersigned declines to assess the reasonableness of the proposed hourly rates. Likewise, the undersigned recognizes the limited nature of the information on expenses provided but finds further documentation would have been of no benefit as an award of any amount is not supportable.

The Secretary's position that she could establish a *prima facie* case and that Wildcat could not establish any properly asserted affirmative defenses was reasonable. Ultimately, the Secretary did not carry the burden, but her position was substantially justified. *See C.J. Hughes Constr., Inc.*, 19 BNA OSHC 1737, 1741 (No. 93-3177, 2001) (merits relevant but not determinative). Thus, no award is appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure and the Commission Rules implementing EAJA, 29 C.F.R. § 2204.101, et seq.

ORDER

Based upon the foregoing,

1. Respondent’s Motion for Leave to File Supplemental Net Worth Affidavit and Exhibit is **GRANTED**, and its Notice of Filing Supplemental Net Worth Affidavit and Exhibits is received.
2. Respondent’s Motion for Award of Attorneys’ Fees and Pursuant to the Equal Access to Justice Act is **DENIED**.

SO ORDERED.

Dated: October 27, 2023
Atlanta, GA

/s/ _____
Heather A. Joys
Administrative Law Judge, OSHRC