United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant,	:	
v.	:	OSHRC DOCKET No. 02-2129
SAIPAN KOREANA HOTEL, Respondent.	:	

REMAND ORDER

Before: RAILTON, Chairman; STEPHENS and ROGERS, Commissioners.

BY THE COMMISSION:

Respondent filed a Petition for Discretionary Review of the judge's decision and order in the above-referenced case, which Chairman Railton directed for review on April 30, 2004. In his decision, Administrative Law Judge Robert A. Yetman rejected respondent's timely filed application for attorney fees and expenses pursuant to the Equal Access to Justice Act

(EAJA), 5 U.S.C. § 504, finding that respondent was a prevailing party, but that the Secretary was substantially justified in pursuing the case. In its Petition, respondent correctly notes that the judge did not discuss the record evidence, contained in numerous affidavits, supporting his conclusion that the Secretary had a "reasonable basis" for her assertion that respondent provided housing to its employees as a "formal or de facto" condition of employment, which is a jurisdictional prerequisite to the cited standard. After citing applicable precedent on the legal issues, the judge summarily stated that "[t]he opposing theories presented by both parties appear to be sound and well supported within their respective memoranda . . . , [that] [i]t is not necessary . . . to decide which side would have ultimately prevailed in this complex issue[,]" and that "[b]ased upon the submission of both parties it is concluded that the Secretary was substantially justified in initiating this action in fact and law." Nor, as respondent argues, did the judge specify the factual basis for his conclusion that the Secretary was substantially justified in classifying the hotel as a "temporary labor camp." Noting the complexity of the issue and quality of the parties' legal arguments, the judge simply observed that both parties' sought support for their conflicting interpretations of the issue from many of the same circuit court decisions and OSHA interpretive letters and memoranda, none of which he either cited or identified.

In these circumstances the Commission finds that the judge's decision fails to set forth the requisite evidentiary basis for his conclusion that the Secretary established "substantial justification" for the jurisdictional basis of the citation. *See First Nat'l Bank of Circle*, 732 F.2d 1444, 1447-48 (9th Cir. 1984) (holding that trial court must explain basis of decision denying EAJA fees beyond merely stating that "the legal position of [the government] was defensible, asserted in good faith, and substantially justified"); Administrative Procedure Act, 29 U.S.C. § 557(c)(A); Commission rule 90(a), 29 C.F.R. §2200.90(a).

Accordingly, we remand this case to the judge for issuance of a decision consistent with this opinion.

So Ordered.

/s/
W. Scott Railton
Chairman

/s/
James M. Stephens
Commissioner

/s/
Thomasina V. Rogers
Commissioner

Dated: May 3, 2004

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SECRETARY OF LABOR, Complainant, v. SAIPAN KOREANA HOTEL, and their successors, Respondent.	OSHRC DOCKET NO. 02-0929

DECISION AND ORDER

Respondent, Saipan Koreana Hotel, seeks attorney fees and expenses in accordance with the Equal Access to Justice Act, 54 U.S.C. § 504 ("EAJA") and implementing regulations set forth at 29 C.F.R. §2204.101, *et seq.*, for costs incurred in its defense against the Occupational Safety and Health Administration (OSHA).

BACKGROUND

On August 30, 2002, a compliance officer employed by the Occupational Safety and Health Administration (hereinafter "OSHA" or "Complainant") inspected the Respondent's facilities located at Chalan Kanoa, Saipan, Commonwealth of the Northern Mariana Islands (CNMI). Respondent states that it is a corporation organized and existing under the laws of CNMI and engaged in the hotel business for tourists and other visitors to Saipan. At the time of the inspection, Respondent employed ten employees; four of whom resided on the sixth floor of the hotel. The compliance officer obtained a tap water sample from one of the rooms occupied by the employees which, upon analysis, revealed that the sample was contaminated with fecal coliform (e. coli bacteria). Four additional water samples collected from the hotel were similarly contaminated by fecal coliform. A citation was issued to Respondent alleging one serious violation of 29 C.F.R. § 1910.142(c)(1) on the ground that Respondent failed to provide an adequate and convenient water supply for purposes of drinking, cooking, bathing and laundry to its employees. A penalty in the amount of $750 was proposed for the alleged violation.

Respondent filed a timely notice of contest to the citation and, in answer to the complaint filed by Complainant with this Commission, Respondent generally denied the allegations and affirmatively stated, *inter alia*, that Complainant had no jurisdiction over the hotel and the conditions described in the citation

"do not constituted (sic) violations" of the standard cited. Respondent also requested that the complaint be dismissed. (Respondent's answer filed with the Commission on January 17, 2003). By electronic mail dated September 16, 2003, Respondent, through its representative, notified OSHA that Respondent "remediated the water problem by removing the water from the tank, and then having the tank cleaned, sanitized and chlorinated . . . " The record reveals that the hotel was equipped with a large water tank on the roof of the hotel which supplied water to the entire building. On September 30, 2003, Complainant filed a motion to dismiss the complaint and citation. By motion dated October 2, 2003, Respondent filed a motion for summary judgment in its favor. By order dated October 15, 2003, Complainant's motion to dismiss was granted and Respondent's motion for summary judgment was denied on the ground that a case or controversy that needed to be litigated no longer existed. That order became a final order of the Commission on November 21, 2003. On December 19, 2003, Respondent filed a timely application for attorney fees. (29 CFR § 2200.302(a)) seeking $4,358" in legal fees based upon the statutory hourly rate of $125 per hour. Complainant opposes the application for fees on the grounds that (a) Respondent is not the prevailing party, (b) Complainant was substantially justified in bringing the action, (c) special circumstances make an award unjust and (d) the fees claimed are unreasonable.

DISCUSSION

The Equal Access to Justice Act (EAJA) applies to proceedings before the Commission through section 10(c) of the Occupational Safety and Health Act of 1970 (Act), 29 U.S.C. § 651, *et seq.* The purpose of the EAJA is to ensure that an eligible applicant is not deterred from seeking review of, or defending against, unjustified actions by the Secretary. *K.D.K. Upset Forging, Inc.*, 12 BNA OSHC 1857, 1859, 1986 CCH OSHD ¶ 27,612 (No. 81-1932, 1986). An award is made to an eligible applicant who is the prevailing party if the Secretary's action is found to be without substantial justification and there are no special circumstances which make the award unjust. *Asbestos Abatement Consultation & Engineering*, 15 BNA OSHC 1252, 1991 CCH OSHD ¶ 28,628 (No. 87-1522, 1991). While the applicant has the burden of proving eligibility, the Secretary has the burden of demonstrating that her action was substantially justified, 29 C.F.R. § 2204.106(a). However, EAJA does not allow routine award of attorney's fees and expenses to a prevailing party. There is no presumption that the Secretary's position was not substantially justified, simply because she lost the case. Moreover, the Act does not require that the Secretary's decision to litigate be based on substantial probability of prevailing. *S & H Riggers & Erectors, Inc. V. OSHRC*, 672 F.2d 426, 430 (5th Cir. 1982).

ELIGIBILITY

To be eligible for costs pursuant to EAJA, an applicant must establish that on the date that it filed its notice of contest, it was a "partnership corporation, association, or public or private organization that has a net worth of not more than seven million dollars and employs not more than 500 employees." 29 C.F.R. § 2204.105. Respondent's petition provides documentation establishing its net worth as $3,375,000 as well as the assertion that "the company employed 10 employees" at the time that the notice of contest was filed. Complainant does not dispute Respondent's eligibility under the Act. Accordingly, Respondent's petition establishes its eligibility at the time of its notice of contest.

PREVAILING PARTY

To be considered as a prevailing party within the meaning of the Act, the record must establish that Respondent succeeded on any significant issue involved in the case and achieved some benefit which it sought in pursuing litigation. *K.O.K. Upset Forging, Inc.*, 12 BNA OSHR 1856, 1857 (1986). It is not necessary for Respondent to have prevailed on all issues but only as to a "discrete substantive portion of the proceeding." *H.P. Fowler Contracting Corp.*, 11 BNA OSHC 1841, 1845 (1984).

Respondent asserts that it is the "prevailing party" with respect to item 1 of the citation because the Secretary withdrew that item from the matters to be tried at the hearing. Thus, according to Respondent, it has prevailed on a "discrete substantive portion of the proceeding" by achieving that which it sought in pursuing litigation; that is, the dismissal of item 1 of the citation. Complainant, however, disputes that Respondent constitutes a prevailing party within the meaning of the Act. According to Complainant, Respondent has not achieved its primary purpose in filing its notice of contest nor has it accrued tangible benefits as a result of Complainant's dismissal of the action. The essence of the jurisdictional dispute between the parties is whether Respondent hotel constitutes a temporary labor camp by virtue of the fact that employees resided at the hotel as part of the terms of their employment. According to both parties, the Secretary must establish that the Hotel was a temporary labor camp in order to prevail under the standard cited. Indeed, the theory presented by Respondent in its motion for summary judgment was offered in support of the conclusion that the hotel was not a temporary labor camp within the meaning of the cited standard and therefor, the citation should be dismissed due to Complainant's failure to establish the jurisdictional requirements for the citation. Thus, according to Complainant, Respondent has failed to achieve that which it sought to achieve by filing its notice of contest; that is, a determination that the hotel is not a temporary labor camp. However, in its answer to the complaint filed in this matter, Respondent listed eleven affirmative defenses in addition to its general denial of the allegations. For all the grounds listed in its answer, including lack of jurisdiction, Respondent's prayer for relief demanded that the citation

and complaint be dismissed. Although Respondent may have preferred to obtain a judgment in its favor with respect to the jurisdictional issue, it is clear that Respondent was seeking dismissal of the matter. Since this is precisely what occurred in this case, Respondent must be considered as the prevailing party.

SUBSTANTIAL JUSTIFICATION

As an eligible prevailing party, Respondent may be entitled to an award of attorney fees and expenses unless the Secretary establishes that her position was substantially justified in pending litigation or the record shows special circumstances which makes an award unjust. "The test of whether the Secretary's action is substantially justified is essentially one of reasonableness in law and fact." *Mautz & Orem, Inc.*, 16 BNA OSHC 1006, 1991-1993 CCH OSHD ¶ 29,986, p. 41,066 (No. 89-1366, 1993). The Secretary must show that there is a reasonable basis for the facts alleged; for the theory she propounds; and that the facts alleged will reasonably support the legal theory advanced. *See Gaston v. Bowen,* 854 F.2d 379, 380 (10th Cir. 1988). The fact that the Secretary may have lost as to these items does not mean that her position in pursing them in litigation was not substantially justified. *S & H Riggers & Erectors, Inc. v. OSHRC, supra,* at 430. In cases before the Commission, facts need to be proved by only a preponderance of the evidence, not by clear and convincing evidence or beyond a reasonable doubt. The EAJA should not be read to deter the Secretary from pursuing in good faith cases which are reasonable in advancing the objective of workplace safety and health, if such cases are reasonably supportable in fact and law. The facts forming the basis of the Secretary's position need not be uncontradicted. If reasonable persons fairly disagree whether the evidence establishes a fact in issue, the Secretary's evidence can be said to be substantial. The phrase "substantially justified" means "justified in substance or in the main . . ., that is, justified to a degree that could satisfy a reasonable person. This interpretation of the phrase accords with related uses of the term 'substantial' and is equivalent to the 'reasonable basis both in law and fact' formulation adopted by the vast majority of courts of appeals." *Pierce v. Underwood,* 108 S. Ct. 2541, 2543 (1988).

As stated previously, a major issue addressed by each party is whether the hotel constitutes a temporary labor camp as a jurisdictional prerequisite for the standard cited. Both parties have submitted extensive and learned memoranda of law with respect to both sides of this complex issue. Complainant states that some of the employees who resided at the hotel were nonresident workers and the housing provided by Respondent was a condition of employment. Therefor, the hotel accommodations fall within the jurisdiction of the Nonresident Workers Act. Title 3 § 4411, *et seq.*, of the CNMI Code. Since the housing was a condition of employment, it also falls within the coverage of the OSH Act. (Citing *Frank Diehl Farms v. Secretary of Labor,* 696 F.2d 1325, 11th Cir. 1983). Complainant seeks support for her

theory from other circuit court decisions as well as OSHA interpretive letters and memoranda. Respondent, on the other hand, vigorously disputes Complainant's argument and, by citing many of the same cases and memoranda relied upon by Complainant, arrives at a conclusion diametrically opposed to Complainant's.

The opposing theories presented by both parties appear to be sound and well supported within their respective memoranda of law. It is not necessary, however, to decide which side would have ultimately prevailed in this complex issue. Pursuant to an application for attorney fees under EAJA, it is only necessary to determine whether the Secretary was substantially justified in bringing the action; that is, has Complainant established that there was a reasonable basis for the facts alleged, for the theory propounded and whether the facts reasonably support that theory. See *Gaston v. Bowls, supra.*

Based upon the submission of both parties it is concluded that the Secretary was substantially justified in initiating this action in fact and law. The Secretary, however, was confronted with more practical consideration in exercising its prosecutorial discretion to dismiss this case. Upon being notified by Respondent on September 16, 2003, that the alleged violative condition had been abated and, thus, the hazard to which employees had been exposed was no longer present, Complainant was faced with the decision as to whether further litigation was economically justified. Complainant's opposition to the application for attorney fees includes the affidavit of Frank Strasheim, the Regional Administrator for OSHA's Region IX. Mr. Strasheim states that he is responsible for worksite inspections for the Northern Mariana Islands to ensure compliance with the Act. He, apparently, made the decision to terminate this litigation. His reasons for that decision are set forth in his affidavit as follows:

> "After learning that the employees of the Saipan Koreana Hotel were being exposed to contaminated water in the employer provided housing in which they lived and in their workplace, my primary concern was to ensure that the contamination was removed from the Saipan Koreana's water system as quickly as possible.
>
> After learning that Saipan Koreana Hotel had taken effective action to clean its water system to ensure that the water was no longer contaminated, I considered whether to continue the litigation against the Hotel.
>
> As part of the consideration of whether to continue the litigation against the Saipan Koreana Hotel, I also considered amending the citation to include a violation of 29 C.F.R. § 1910.141(b), OSHA's sanitation standard, which requires that potable water be provided in the workplace. This proposed amended citation would have been based on the fact that the Saipan Koreana Hotel had a single water system, so that contaminated water would have been the only water available in both the employer provided housing within the hotel as well as the rest of the hotel which comprised the employees' workplace.

> OSHA does not maintain an office on Saipan, so the consideration of whether to amend the citation and continue with the litigation was heavily influenced by the enormous costs that would be incurred.
>
> After considering the fact that the Saipan Koreana Hotel had satisfactorily abated the violation, thus eliminating the danger faced by its employees' due to their exposure to water contaminated with fecal matter, I concluded that the enormous costs associated with the continued litigation of this case could not be justified and that the citation should be withdrawn and the case dismissed."

Thus, on September 30, 2003, two weeks after being informed by Respondent that the hazardous condition had been corrected, the Secretary filed a motion to dismiss the matter. In light of the distances between Saipan and San Francisco and the costs associated with litigation, Complainant's decision to withdraw the case from further litigation is reasonable.

The remaining issue is whether Complainant was unreasonably tardy in deciding to dismiss the action and notifying Respondent that the Secretary would no longer pursue litigation. Respondent's submission indicates that two hours and fifty four minutes of attorney time was devoted to the defense of this case between September 17, 2003 and September 26, 2003, inclusive. If Complainant was unreasonably tardy in making the decision to withdraw after being notified that the hazard had been abated and filing the motion to dismiss, Respondent would be entitled to attorney fees expended during the period deemed to be unreasonable. However, given the complexities of the issues involved as well as the location

of the personnel involved in the decision making process, it is concluded that a two-week period for a governmental law enforcement agency to decide to withdraw litigation after being informed that employees were no longer at risk from a hazardous condition is not an unreasonable period of time. Accordingly, Respondent's petition for attorney fees pursuant to the Equal Access to Justice Act is DENIED.

FINDINGS OF FACT

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

CONCLUSIONS OF LAW

1. Respondent meets the eligibility requirements for recovering attorney fees in this matter pursuant to the EAJ Act.
2. Respondent is a prevailing party within the meaning of the EAJ Act.
3. Complainant's legal and factual positions were substantially justified up to and including the date that Complainant's motion to dismiss this matter was granted.
4. Respondent is not entitled to the award of attorney fees.

ORDER

Respondent's petition for attorney fees is DENIED.

/s/
Robert A. Yetman
Judge, OSHRC

Dated: March 23, 2004