United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

SECRETARY OF LABOR, Complainant, v. TRI-STATE STEEL CONSTRUCTION COMPANY, INC., Respondent.	: : : : : : : : : :	OSHRC DOCKET NO. 89-2611

DECISION AND ORDER ON REMAND

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 *et seq*. ("the Act"). Specifically, this case is before the undersigned pursuant to the Commission's remand order dated August 18, 1999, to determine whether Respondent, Tri-State Steel Construction Company, Inc. ("Tri-State"), should be awarded attorney fees and expenses pursuant to the Equal Access to Justice Act ("EAJA"), 5 U.S.C. § 504.

Background

This case arose in May of 1989, when the Occupational Safety and Health Administration ("OSHA") inspected a work site in Cincinnati, Ohio, where Tri-State and National Engineering and Contracting Company ("NEC"), Tri-State's parent company, were engaged in a bridge rehabilitation project. NEC was removing pavement and guardrails, while Tri-State was repairing end dams and expansion joints, and OSHA went to the site pursuant to a complaint that the traffic control plan was hazardous for workers at the site. After this condition was abated, OSHA decided to expand the inspection to the entire site; however, since the general contractor, Tri-State and NEC objected, OSHA first obtained a warrant. After the inspection, OSHA issued citations to Tri-State and NEC; the citations alleged, *inter alia*, that employees had been exposed to the hazard of being struck by traffic and that the companies had also violated OSHA's hazard communication ("HAZCOM") standards. The cases were consolidated, and, after a hearing on the merits, the undersigned issued a

decision on May 1, 1991; the decision upheld the validity of the warrant and the inspection, vacated the traffic control items, and affirmed the HAZCOM items except for one pertaining to Tri-State.

On July 1, 1991, Tri-State and NEC filed a joint petition for legal fees as to the items that had been vacated; Tri-State's application was based on the EAJA, or, alternatively, Rule 11 of the Federal Rules of Civil Procedure ("Rule 11") and Commission Rule 32 ("Rule 32"), while NEC's application was based solely on Rules 11 and 32. However, since the companies had also petitioned for review of their Fourth Amendment claim and various affirmed items, the Commission stayed the applications on July 26, 1991, pending its decision. On December 23, 1991, and after Tri-State and NEC had filed a brief as to the matters pending before the Commission, the Secretary withdrew the HAZCOM items, leaving for resolution only the Fourth Amendment issue and one item that had been affirmed as to NEC. The Commission's decision on September 30, 1992, dismissed the Fourth Amendment claim and vacated the remaining citation item, and, on January 6, 1993, the Commission lifted its stay and referred the fee applications to the undersigned.[1] Pursuant to my order, Tri-State and NEC filed an amended petition on March 8, 1993. The Secretary filed an answer opposing the petition on April 9, 1993, and the companies filed a reply on April 27, 1993; the Secretary filed a response on May 5, 1993, and the companies filed a further reply on May 14, 1993.

On January 1, 1997, I issued a decision and order denying the applications, finding that the EAJA was the sole remedy for legal fees and expenses in matters before the Commission and that Tri-State was not eligible for an EAJA award because of its subsidiary relationship to NEC, which was itself ineligible due to its net worth.[2] The decision became final on February 10, 1997, after which Tri-State and NEC sought review in the Sixth Circuit Court of Appeals. In a decision dated January 13, 1999, the Sixth Circuit held that while the EAJA was in fact the sole remedy for legal fees and expenses in cases before the Commission, Tri-State was not ineligible for an EAJA award because of its relationship to NEC. The Sixth Circuit remanded this matter to the Commission for further

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[1]The D.C. Circuit upheld the Commission's dismissal of the Fourth Amendment claim. *See Tri-State Steel Constr. Co., Inc. v. OSHRC*, 26 F.3d (D.C. Cir. 1994).

[2]A company having a net worth of over $7 million is not eligible for an EAJA award. *See* 5 U.S.C. § 504(b)(1)(B); 29 C.F.R. § 2204.105(b)(4).

proceedings consistent with its decision, and the Commission remanded this matter to me.[3] On June 21, 1999, Tri-State filed a motion requesting the Commission to rule on its pending application for fees and expenses and to accept accompanying additional support. The Secretary filed an answer to the motion on July 20, 1999, and Tri-State filed a reply on July 27, 1999.

Whether Tri-State Paid its own Legal Fees and Expenses

As a preliminary matter, the Sixth Circuit stated in its decision as follows:

> We note that the record is devoid of any specific evidence on the question of whether, to what extent, and when Tri-State paid its share of attorney fees and expenses incurred in this case. Such evidence may be relevant to the determination of whether and to what extent Tri-State is entitled to an award under the EAJA.

164 F.3d at 980 n.7.

However, the Sixth Circuit noted that in the consolidated case it was deciding along with the present matter, the evidence showed that invoices for legal services were sent to NEC but Tri-State had reimbursed NEC for its share of the services. *Id*. at 976. The Sixth Circuit also noted that when the Commission directed review of the consolidated case in 1997, the appeal in the present matter was already pending; thus, although Tri-State and NEC moved to remand the pending appeal so that additional evidence offered in the consolidated case could be considered, the Commission issued a decision before the motion could be decided and the motion was denied.[4] *Id*. at 976 n.3. In its latest motion, Tri-State asks that the evidence in the consolidated case be considered here; in particular, Exhibit 1 to the motion is an interrogatory response indicating that Tri-State is charged for and pays its own legal fees and expenses, while Exhibit 2 is a deposition excerpt wherein Tri-State's president states that such is the case. Tri-State has also submitted, with its July 27, 1999 reply, an affidavit of its president stating that Tri-State reimbursed NEC in full for its share of the legal services in this case. Although the Secretary objects to Tri-State's latest filings, and the additional documentation, I conclude that it is appropriate to consider these submissions in order to properly dispose of this

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[3]*See Tri-State Steel Constr. Co., Inc.*, 164 F.3d 973, 979-80 (6th Cir. 1999).

[4]As set out in footnote 1 of Tri-State's memorandum in support of its latest motion, the other Tri-State case settled after the Sixth Circuit issued its decision, with the Secretary paying most of Tri-State's total claim.

matter. After full consideration of the parties' respective submissions and arguments, I find that the record establishes that Tri-State has in fact paid for its legal fees and expenses in this matter.

Whether the Secretary was Substantially Justified

Commission precedent is well settled that a party that has prevailed in a discrete portion of an adversary adjudication and that is otherwise eligible for an EAJA award may be reimbursed for its legal fees and expenses unless the Secretary shows that her position was substantially justified or that an award would be unjust under the circumstances. *William B. Hopke Co.*, 12 BNA OSHC 2158, 2159 (No. 81-206, 1986). Even if the Secretary shows that her position was initially justified, she may nonetheless be liable for legal fees incurred after this was no longer the case. *Consolidated Constr., Inc.*, 16 BNA OSHC 1001, 1002 (No. 89-2939, 1993). The test in this regard is in essence one of reasonableness in law and fact, that is, whether the Secretary's position was substantially justified to a degree that would satisfy a reasonable person. *Hocking Valley Steel Erectors, Inc.*, 11 BNA OSHC 1492, 1497 (No. 80-1463, 1983). The loss of her case or her withdrawal of a citation is not necessarily determinative of whether the Secretary was substantially justified; however, once facts become known during the litigation that could make her proceeding with the case unreasonable, the Secretary must act expeditiously to alter her position in view of such facts. *Id*.

As to the items on which it prevailed, my decision vacated Item 1a of Citation 1, which alleged that Tri-State did not have a HAZCOM program in violation of 29 C.F.R. 1926.59(e)(1). The OSHA compliance officer ("CO") who inspected the site viewed NEC's HAZCOM program in the job site trailer and determined it was adequate. He knew at the time of the inspection that Tri-State was a subsidiary of NEC, that the companies had the same safety and loss control officer, William Bunner, and that they shared the same supervisory personnel and used the same job site trailer; he also knew that at least some of Tri-State's employees were aware that material safety data sheets ("MSDS's") for materials used at the site were in the trailer. (Tr. 439-48). In addition, Bunner testified that Tri-State and NEC used the same HAZCOM program, and his testimony was corroborated by two individuals who had worked at the site, a Tri-State ironworker and an NEC clerk who had maintained the MSDS's. (Tr. 595-98; 674; 690-92; 813-14; 822-23). Although the CO at the hearing reiterated his belief that Tri-State and NEC did not use the same program, his belief was evidently based primarily on his opinion that Tri-State should have had its own separate program.

(Tr. 446). In a different case, I might have agreed with the CO's opinion. However, in this case, and especially in view of the relationship between Tri-State and NEC and the circumstances at the site, Tri-State was not required to have its own separate program. Moreover, as I see it, the CO should have reached this conclusion himself during the inspection. Based on the record, I find that the Secretary was not substantially justified in issuing this item and that Tri-State is entitled to recover its legal fees relating to this item.

My decision affirmed Items 2-4 of Citation 1, which alleged violations of 29 C.F.R. §§ 1926.59(f)(5)(ii), (g)(1) and (h), respectively, and Tri-State petitioned the Commission for review of these items.[5] As Tri-State notes, it spent 22 hours researching and briefing these items following the Commission's direction for review on June 3, 1991; however, after Tri-State filed its brief on November 6, 1991, the Secretary on December 23, 1991, withdrew all of the HAZCOM items that were on review before the Commission. Tri-State asserts that it should be reimbursed for the 22 hours spent researching and briefing these items, which would not have been necessary if the Secretary had withdrawn the items in a more timely manner; in this regard, Tri-State notes that the Secretary waited over six months to withdraw the items and has failed to offer any reason for the delay. I agree with Tri-State that the Secretary has not justified her delay in withdrawing the items, and I conclude that Tri-State is entitled to an award for its legal fees in this regard.

The final citation item for which Tri-State seeks an award is Item 1 of Citation 2, the traffic control item, which alleged a violation of 29 C.F.R. 1926.201(a)(1), or, alternatively, 29 C.F.R. 1926.202. My decision vacated this item, based on the Secretary's failure to show that the standards applied and her further failure to show that violations of the standards had occurred. The record establishes that the bridge rehabilitation project involved a part of I-75 in downtown Cincinnati, Ohio. The Ohio Department of Transportation ("ODOT") awarded the project to John R. Jurgensen Company ("Jurgensen"), the general contractor, and Jurgensen subcontracted the bridge work, other than the deck overlay, to NEC; NEC, in turn, subcontracted the steel erection part of the job to Tri-State. ODOT was responsible for designing a traffic control plan for the project, while Jurgensen was

[5]My decision also affirmed Item 1b of Citation 1, which alleged a violation of 29 C.F.R. 1926.59(e)(1)(i); however, Tri-State did not petition for review of this item.

responsible for implementing it, and only ODOT could approve changes to the traffic control plan. (Tr. 9-16; 50-51; 63-64; 400-04; 414-16).

On the evening of April 27, 1989, Jurgensen repositioned the traffic lanes on a portion of I-75 by placing barrels every 50 feet to form a "V" shape.[6] Although this was done pursuant to the traffic control plan and was intended to rechannel traffic past the area where Tri-State ironworkers would be welding, the rush-hour traffic the next day caused heavy congestion, and, as a consequence, some vehicles cut through the area marked off by the barrels. In an effort to alleviate the hazard, Tri-State had employees park vehicles and equipment so as to try to shield welders and keep motorists out of the area. Tri-State also had employees use sign paddles with "slow" printed on them in an attempt to keep traffic out of the area and away from welders. Finally, employees put discarded guardrails and other debris between the barrels in an effort to prevent traffic from entering the work area; however, ODOT told Tri-State to remove these materials because they created a traffic hazard. The traffic problem was discussed at a 10:00 a.m. meeting that day, and ODOT directed Jurgensen to space the barrels every 25 feet. After the meeting, Jurgensen began placing the additional barrels, but, evidently due to ODOT's instructions and/or a shortage of barrels, the 25-foot spacing ended at the point where Tri-State's work area began and vehicles continued to cut through the area. The problem persisted the rest of that day, a Friday, and on into the next week, and Tri-State employees complained to their union representatives, resulting in a complaint being filed with OSHA. The CO arrived at the site on Thursday, May 4, 1989, and observed the situation for about two hours, and he returned the next day for a short time; the traffic problem was finally resolved on Sunday evening, May 7, 1989, by placing the barrels 10 feet apart and attaching mesh snow fencing to the barrels.[7] The CO returned to the site on Monday, May 8, 1989, to make sure that the traffic problem had been resolved. (Tr. 16-87; 106-41; 145-68; 189-211; 376-80; 389-91; 396-416; 420-38; 676-78; 681-85; 705-06; 710-12; 715-20; 728-32).

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[6]Jurgensen also used flashing arrow boards and signs to rechannel traffic. (Tr. 13-15; 36-38).

[7]At the CO's request, ODOT on May 5 had Jurgensen station a patrolman at the site to ticket motorists who tried to enter the work area; ODOT also approved spacing the barrels every 10 feet and attaching snow fencing to them. (Tr. 48-49; 56-58; 65; 86; 178-79; 396-97; 414-15; 428-29).

As issued on August 4, 1989, Item 1 of Citation 2 alleged a willful section 5(a)(1) violation. However, upon filing the complaint on November 13, 1989, the Secretary amended this item to allege a serious violation of 29 C.F.R. 1926.201(a)(1), or, in the alternative, 29 C.F.R. 1926.202. These standards provide as follows:

> **1926.201 Signaling.** (a) *Flagmen*. (1) When operations are such that signs, signals, and barricades do not provide the necessary protection on or adjacent to a highway or street, flagmen or other appropriate traffic controls shall be provided.
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> **1926.202 Barricades.** Barricades for protection of employees shall conform to the portions of the American National Standards Institute D6.1-1971, Manual on Uniform Traffic Control Devices for Streets and Highways, relating to barricades.

The record shows that despite the use of signs, signals, barrels and flagmen, traffic continued to cut through Tri-State's work area until the barrels were spaced 10 feet apart and snow fencing was attached to them. However, the CO testified that in his opinion, neither of the above standards applied to the situation at the site, which was why he had recommended a 5(a)(1) violation. The CO said that flagmen would have been effective only if they had been spaced closely enough between the barrels so as to prevent traffic from entering the work area; he did not believe this was the intent of the standard, and he said it would have been overly burdensome cost-wise. (Tr. 419-20). The CO also said that the Manual on Uniform Traffic Control Devices did not really deal with interstate highways and that it gave no guidance in this regard.[8] (Tr. 416-19).

In her post-hearing brief, the Secretary asserted that Tri-State had violated 1926.201(a)(1) because the flagmen used were not effective, or, alternatively, 1926.202 because the barrels as initially spaced were not deterring traffic from entering the work area. My decision noted the CO's testimony and found the Secretary had not established that the cited standards applied. My decision further found the Secretary had likewise not established that violations of the standards had occurred. As to 1926.202, I noted that the standard required barricades to conform to a particular ANSI standard and that the Secretary had presented no evidence in that regard; specifically, the Secretary never

[8]The CO stated that barrels would have been effective only if they had been spaced closely enough to form a physical barrier against traffic. (Tr. 409-15).

introduced the ANSI standard into the record.[9] As to 1926.201(a)(1), the Secretary contended that since the flagmen used at the site were not effective, the standard required other appropriate traffic controls, *i.e.*, spacing the barrels 10 feet apart and attaching fencing to them. However, the standard provides for flagmen or other appropriate traffic controls, and because the Secretary herself conceded in her brief that flagmen were used, I concluded there was no violation of the standard.

In her responses to the EAJA application, the Secretary contends my decision was in error. The Secretary asserts that despite her own admission that flagmen were used, I should deny the EAJA application due to evidence that there were no flagmen at the site on May 4, 1989. The CO's testimony does, in fact, indicate that he observed no flagmen during his time at the site from about 1:30 to 3:30 p.m. on May 4, 1989. (Tr. 202-03; 379-80; 389). However, the Secretary's post-hearing brief made no mention of this evidence, and the Secretary failed to petition for review of my decision on this item. Moreover, on page 21 of her answer to the EAJA application, the Secretary notes that the CO's video of the site on May 4 shows sign paddles on barrels on both sides of the highway, which indicates that the sign paddles were in use. Finally, Tri-State's witnesses, which included a non-management employee, all testified that flaggers with sign paddles were utilized at the site. (Tr. 125-26; 133; 153-54; 160-62; 166-67; 681-82; 705-06; 715-17; 730). In any case, for the reasons that follow, I conclude the Secretary was not substantially justified in issuing this item.

In defense of this item, Tri-State asserted the multi-employer work site defense.[10] To meet this affirmative defense, an employer has the burden of establishing that it did not create or control the violative condition and that it either (1) took alternative measures to protect its employees or (2) did not know and could not reasonably have known that the violative condition was hazardous. *Anning-Johnson Co.*, 4 BNA OSHC 1193, 1198-99 (Nos. 3694 & 4409, 1976), and *Grossman Steel & Aluminum Corp.*, 4 BNA OSHC 1185, 1188-89 (No. 12775, 1976).

In view of the record, Tri-State did not create or control the violative condition. In addition, I conclude that Tri-State took alternative measures to protect employees, even though those measures

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[9]The Secretary's assertions in her brief and other submissions as to what the ANSI standard requires are legal arguments, not evidence; further, the Secretary's submitting a copy of the ANSI standard as an appendix to her brief is not the equivalent of offering the document into evidence.

[10]This defense was not addressed in my decision, as this item was vacated on other grounds.

were not entirely effective. The record establishes that on April 28, after the traffic problems began, Tri-State's general foreman had employees act as flaggers and place vehicles, equipment, and guardrails and other debris in an effort to deter traffic from cutting through the work area and to provide protection for the welders. The superintendent for NEC and Tri-State became aware of the situation, and he asked ODOT to provide two police cruisers. ODOT advised the superintendent to pull Tri-State off the job and to remove the guardrails and other debris because it was creating a traffic hazard. At the 10:00 a.m. meeting that day, the superintendent brought up the traffic issue, and an ODOT official said that Tri-State could go back to work and that it was not ODOT's responsibility to furnish police protection at the site. However, another ODOT official said that a decision had been made to place more barrels and that a field check would be made to determine what other measures could be taken, and he instructed a Jurgensen official to double-space the barrels. This did not resolve the problem, and Tri-State continued to use flaggers, vehicles and equipment to protect employees pending ODOT's further action; after the CO's arrival, and pursuant to a telephone conference among the CO, his area office director and a Jurgensen official, ODOT approved the proposed abatement measure of spacing the barrels 10 feet apart and attaching mesh snow fencing to them. (Tr. 12-16; 29-33; 48-51; 58-68; 84-90; 94; 106-15; 124-28; 132-41; 152-54; 160-68; 210-11; 397-404; 407-08; 414-16; 420-38; 677-85; 705-06; 715-18; 728-32; C-6).

In finding that Tri-State met its burden of proof with respect to the multi-employer work site defense, I am well aware of the evidence showing that welders were exposed to the hazard of traffic cutting through the work area until the barrels were placed 10 feet apart with fencing attached to them; in particular, the record indicates that as many as ten vehicles might have cut through the area during morning rush-hour traffic, while about five cut through when the CO was there May 4 from about 1:30 to 3:30 p.m. (Tr. 189-90; 195-200; 210-11; 397-98; 429-39; 677-85; 705-06; 715-18; 728-31). However, the CO agreed that the traffic going by the area was moving very slowly and that the welders depicted in the May 4 OSHA video were behind parked vehicles and equipment; he also agreed that the union business agent who made the complaint to OSHA had said that Tri-State was doing everything it could about the traffic problem. (Tr. 190-91; 385-86; 427-28; 433-38). Further, the shop steward at the site indicated that the ironworkers, the general foreman and the union representatives were doing the best they could to protect against traffic. (Tr. 710-12; 729-31). Finally,

the general foreman testified that he "definitely" believed that Tri-State's efforts had helped to keep the traffic as far away from the welders as possible, even though it had been closer at times than he would have liked. (Tr. 160-63). Based on the record, and due to the CO's knowledge of the circumstances at the site, I find that the Secretary was not substantially justified in issuing the traffic control citation and that Tri-State is entitled to recover its legal fees relating to this item.

Whether an Award Would be Unjust under the Circumstances

As noted *supra*, a party that is eligible for an EAJA award and that has prevailed in a discrete portion of an adversary adjudication may recover its legal fees and expenses unless the Secretary shows that her position was substantially justified or that an award would be unjust under the circumstances. *William B. Hopke Co.*, 12 BNA OSHC 2158, 2159 (No. 81-206, 1986). Having addressed the substantial justification issue, I turn now to the Secretary's contention that an award in this case would be unjust. The Secretary claims that Tri-State's attorney committed a "fraud" on this court in asserting there was no evidence that flagmen were not used at the site, because he was present when the CO was there and is even shown in the CO's video. Tri-State moved to strike that part of the answer setting out this claim, the Secretary filed a response, and Tri-State filed a reply to the Secretary's response. After consideration of the parties' submissions, I conclude that an EAJA award would not be unjust in this case. The Secretary's contention is accordingly rejected.

The Award to which Tri-State is Entitled

As found above, Tri-State may recover its legal fees pertaining to its defense of Item 1(a) of Citation 1 and Item 1 of Citation 2, as well as its fees for the 22 hours spent on Items 2-4 of Citation 1 following the Commission's direction for review on June 3, 1991. Tri-State may also recover its legal fees relating to preparing its EAJA application and responding to the Secretary's submissions. *See, e.g., Central Brass Mfg. Co.*, 14 BNA OSHC 1904, 1910 (Nos. 87-978 & 86-1610, 1990), and cases cited therein. According to its submissions, Tri-State seeks reimbursement for 308.55 attorney hours.[11] For the reasons that follow, 290 attorney hours are compensable.

[11]The submissions setting out the fees requested are Tri-State's July 1, 1991 petition and first itemized statement, its March 8, 1993 amended petition and second itemized statement, its June 21, 1999 motion and third itemized statement, and its July 27, 1999 final reply to the Secretary's answer.

The 308.55 attorney hours set out in the EAJA application include 18.75 hours for pre-citation matters, such as the attorney going to the site after the CO's arrival and conferring with his client about the inspection. Tri-State urges that it is entitled to an award for these hours because they relate primarily to its defense of the traffic control citations. However, a review of Tri-State's first itemized statement shows that although the 18.75 hours involved the traffic control issue in part, a significant portion of this time involved the Fourth Amendment issue, for example, researching and preparing the motion to stay the inspection. The Commission has held that while an employer may recover its pre-citation legal fees and expenses in some situations, *i.e.*, where the employer has successfully challenged the OSHA inspection, the adversary adjudication for EAJA purposes normally begins with the issuance of the citation. *Central Brass Mfg. Co.*, 14 BNA OSHC 1904, 1906 (Nos. 87-978 & 86-1610, 1990). Tri-State was not successful in challenging the OSHA inspection, and, accordingly, it may not recover its fees for the 18.75 pre-citation attorney hours in its application. Regardless, Tri-State is entitled to reimbursement for a total of 290 attorney hours, which are the hours claimed dating after August 4, 1989, the date the citations were issued.[12]

In making the above determination, I have noted the Secretary's contention that Tri-State has not properly itemized its legal fees. For example, the Secretary asserts that Tri-State is claiming too many hours for the items on which it prevailed and that it is attempting to recover its fees for issues it lost, such as the warrant issue. The Secretary also asserts that Tri-State is seeking excessive reimbursement here for the cost of the appeal in the Sixth Circuit, which involved this case and another Tri-State matter, and that it also seeks to recover its fees for the Rule 11 issue on which it did not prevail. However, I have carefully reviewed Tri-State's submissions, and, except for the 18.75 hours discussed *supra*, I conclude Tri-State has properly itemized its fees and that it is neither claiming too many hours nor seeking recovery for issues unrelated to this case or on which it did not prevail. In my opinion, the number of hours for which Tri-State seeks reimbursement is reasonable, and the application and itemized statements are sufficiently detailed to award the hours claimed.

The final issue to resolve is the amount of Tri-State's EAJA award. The statutory maximum under the Commission's EAJA rules was $75.00 per attorney or agent hour at the time the adversary

[12]308.55 hours less 18.75 hours equal 289.80 hours, which, rounded off, equal 290 hours.

adjudication began in this case, but the rate was raised to $125.00 per hour, for fees incurred on or after July 3, 1997, when the Commission amended its rules in 1997. *See* 62 Fed. Reg. 35961 (1997). *See also* Commission Rule 107, 29 C.F.R. 2204.107. Tri-State asserts that it is entitled to a cost-of-living-adjustment allowance that would result in a rate of over $75.00 per hour for fees incurred before July 3, 1997, based on the statutory provisions of the EAJA itself and on a publication of the Department of Labor Bureau of Labor Statistics. However, as the Secretary points out, the Commission does not allow for recovery of an amount over the statutory hourly rate unless it has determined by regulation that an increase is justified. *See* Commission Rule 107(b). Further, the Commission has specifically held that the $125.00 hourly rate applies only to adversary adjudications begun after July 3, 1997. *Contour Erection and Siding Systems, Inc.*, 18 BNA OSHC 1714, 1717 (No. 96-0063, 1999). Tri-State is therefore entitled to recover its attorney fees at the hourly rate in effect at the time the citations in this case were issued, that is, $75.00 per hour.

Based on the foregoing, Tri-State's award for 290 attorney hours is $21,750.00. The company is also entitled to reimbursement for its claimed expenses, as set out in the submissions noted above, in the amount of $1650.00. Accordingly, Tri-State's total EAJA award is $23,400.00.

So ORDERED.

/s/

Irving Sommer
Chief Judge

Date: 15 JUN 2000