UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Secretary of Labor, Complainant v. Fastrack Erectors, Respondent.	OSHRC Docket No. **04-0780** **EAJA**

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER
DISMISSING EAJA APPLICATION

Fastrack Erectors seeks an award for fees and expenses in accordance with the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, 29 C.F.R. §2204.101, *et seq*., which it incurred in its defense against serious Citation No. 1, alleging a violation of 29 C.F.R. §1926.760(a)(1), issued on March 4, 2004. The alleged violation was vacated after hearing by Decision and Order dated November 19, 2004. The decision became a final order of the Commission on December 30, 2004. Fastrack's application dated January 26, 2005, claims costs totaling $13,091.40. For the reasons discussed, Fastrack's application is **DENIED**.

Background

In February 2004, Fastrack was engaged in steel erection activities for an addition to a bank in Troy, Missouri. On February 25, 2004, Occupational Safety and Health Administration (OSHA) Compliance Officer Larry Davidson observed two employees of Fastrack without fall protection walking on steel beams at the roof level. He estimated that the employees were within 3 feet of the edge. Davidson made his observations from across the street of the worksite. He did not see the employees on the roof when he entered to inspect the worksite. Based on the inspection, OSHA issued to Fastrack serious and "other" than serious citations on March 4, 2004. Fastrack timely contested the citations.

Citation No. 1 alleged a serious violation of 29 C.F.R. §1926.760(a)(1) for failing to protect employees exposed to a fall hazard engaged in steel erection with fall protection. The citation proposed a penalty of $2,500.00. Citation No. 2, alleging an "other" than serious violation of 29 C.F.R. §1904.40(a) for failing to provide copies of OSHA Forms 300 and 330-A within four hours of their request. The citation proposed a penalty of $500.00.

The hearing was held in St. Louis, Missouri, on September 3, 2004. By Decision and Order dated November 19, 2004, Citation No. 1, alleging a violation of §1926.760(a)(1), was vacated. Citation No. 2, in violation of §1904.40(a), was affirmed and a penalty of $300.00 was assessed.

On November 24, 2004, Fastrack petitioned the Review Commission for discretionary review. The Commission declined to review the case, and the court's decision and order became final on December 30, 2004. Fastrack then moved for an award of fees and expenses under the EAJA on January 26, 2005.

Equal Access to Justice Act

EAJA applies to proceedings before the Commission through §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 (No. 81-1932, 1986). An award under the EAJA 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 (No. 87-1522, 1991). While the applicant has the burden of persuasion to show that it meets the eligibility requirements to receive an award, the Secretary has the burden to show that her position in the matter was substantially justified. 29 C.F.R. §§2204.105 and 2204.106.

Eligibility

The party seeking an award for fees and expenses must submit an application within thirty days of the final disposition in an adversary adjudication. 5 U.S.C. §504(a)(2). There is no dispute that Fastrack timely filed its application.

Also, the party seeking an award must meet certain eligibility requirements. Commission Rule 2204.105(b)(4) requires an eligible employer to be a "corporation . . . that has a net worth of not more than $7 million and employs not more than 500 employees." Commission Rule, 29 C.F.R. § 2204.202(a), requires that the applicant "provide with its application a detailed exhibit showing the net worth of the applicant" as of the date of the notice of contest, and that the applicant provide sufficient "full disclosure of the applicant's assets and liabilities" to determine whether it qualifies under the EAJA.

There is no dispute that Fastrack is a Missouri corporation (Complaint/Answer).[1] The record shows that Fastrack employed approximately 26 employees in February 2004 (Tr. 85, 125). Fastrack submitted financial information for DNRB, Inc., d/b/a Fastrack Erectors, in the form of a balance sheet showing assets and liabilities as of March 26, 2004, the date of the notice of contest.[2] The net worth reflected in the balance sheet is substantially less than $7 million.

However, it is noted that the certified public accountant indicates the balance sheet compilation was limited to the representations of management. The accountants state that "[w]e have not audited or reviewed the accompanying balance sheet and, accordingly, do not express an opinion or any other form of assurance on it." They further state that:

> Management has elected to omit substantially all of the disclosures required by generally accepted accounting principles. If the omitted disclosures were included with the balance sheet, they might influence the user's conclusions about the Company's financial position. Accordingly, this balance sheet is not designed for those who are not informed about such matters.

Even considering the accountants' disclaimers and the possible effect of the omitted disclosures on the employer's net worth, the record in this case leaves little doubt that Fastrack meets the eligibility requirements of the EAJA. The Secretary agrees that Fastrack is an eligible applicant under EAJA (Complainant's Memorandum in Opposition, p. 2). Even if there is doubt about

[1]Fastrack's application states that it is a Missouri corporation whose true name is DNRB, Inc., d/b/a Fastrack Erectors. It is noted that the identity of DNRB, Inc., was not disclosed during the proceedings in this case contrary to the requirements of Commission Rule 2200.35.

[2]Fastrack's motion to seal the balance sheet was granted on March 2, 2005.

eligibility, it is unnecessary to allow Fastrack to supplement its application because, as discussed, it is determined that the Secretary was substantially justified in pursuing this case.

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, Citation No. 1, alleging a violation of §1926.760(a)(1), was vacated after a hearing by Decision and Order dated November 19, 2004. The Secretary agrees that Fastrack was the prevailing party as to Citation No. 1 (Complainant's Memorandum in Opposition, p. 3). Fastrack meets the EAJA requirement as the prevailing party.

Substantially Justified

In order for Fastrack to be awarded costs under the EAJA, it must be determined that the Secretary's position in bringing this case was not 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). There is no presumption that the Secretary's position was not substantially justified simply because she lost the case. Also, the Secretary's decision to litigate does not have to be based on a substantial probability of prevailing. *See, S&H Riggers & Erectors, Inc. v OSHRC*, 672 F.2d 426, 430 (5th Cir. 1982).

Citation No. 1 alleged a serious violation of §1926.760(a)(1), which provides:

> Except as provided by paragraph (a)(3) of this section, each employee engaged in a steel erection activity who is on a walking/working surface with an unprotected side or edge more than 15 feet (4.6 m) above a lower level shall be protected from fall hazards by guardrail systems, safety net systems, personal fall arrest systems, positioning device systems or fall restraint systems.

The citation alleges Fastrack failed to protect employees who were on the roof along an unprotected edge, approximately 38 feet above the ground, by appropriate fall protection. Fastrack did not dispute the employees were on the roof without any means of fall protection or that the foreman was aware of the employees' activities (Exhs. C-1, C-2; Tr. 29-30, 97, 99, 103, 135-136).

Fastrack initially argued the employees were not engaged in steel erection because they were taking measurements for the installation of roof decking. Also, Fastrack argued that its employees were not exposed because they were more than 6 feet from the unprotected edge.

Fastrack's first argument was rejected because taking measurements for the placement of roof decking is still considered part of steel erection and not roof decking. *See* §1926.750(b)(2). The record showed the employees were using a black magic marker and tape measure to mark every 3 feet on the bar joists (Tr. 151-152). It was also determined that the exception in §1926.760(a)(3) did not apply because no controlled decking zone had been established, and the metal decking was not being installed (Tr. 86, 98-99).

With regard to lack of exposure argument, Fastrack mis-characterizes the decision when it states the court found "no evidence to prove a violation of the cited standard because there was a total failure to show employees were exposed to a fall hazard more than 15 feet to the outside of the building" (Fastrack's Motion, p. 3). To establish employee exposure, the Secretary relied on the observations and videotape made by Compliance Officer Davidson. Davidson testified that he saw the employees come within 36 inches of the unprotected edge of the roof twice during a two-minute period (Tr. 16, 30-31). The videotape made by Davidson tends to support his observations when comparing the location of the employees' feet to the unprotected edge (Exh. C-2).

However, Davidson's observations and videotape were not found persuasive when the court considered Davidson's observations were made from across the street and at ground level, approximately 75 yards from the roof. The roof was approximately 30 feet above ground level (Tr. 40, 49). At such a distance and angle, Davidson's view may have been distorted. Also, after he entered the worksite, the employees were no longer working on the roof.

Fastrack's evidence was not much more persuasive than the Secretary's evidence. It consisted of the foreman, who was working below the employees and Fastrack's owner. The

foreman testified the employees were standing on the decking bundle which had been placed at least 6 feet from the edge (Tr. 109). However, it was unclear from the record that the foreman was in a position to see the employees at all times working overhead while he was preparing the floor for decking (Tr. 97-98, 127). Fastrack's owner, in describing the procedures for laying metal decking, testified there was no reason for the employees to be closer than 6 feet from the edge while taking the measurements (Tr. 135, 151). However, the owner was not present during OSHA's inspection and did not observe the employees' actual work.

Based on this record, it was reasonable for the Secretary to pursue this matter based on Davidson's observations and videotape. Although the employees denied working at the roof's edge when interviewed by Davidson, they did not testify during the hearing, and it was not shown that Davidson asked the distance they were working from the edge. Also, according to the Secretary, the factual basis of Fastrack's defense was not provided during discovery so that the Secretary could have confirmed the validity of the argument prior to the hearing (Secretary's Memorandum in Opposition, p. 5).

In cases before the Commission, facts need to be proven by a preponderance of the evidence. The Secretary failed to meet her burden. The decision on employee exposure in this case was resolved on the basis of witnesses' credibility and contradicted facts.

The EAJA is not to 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 do not need to be uncontradicted. Determinations based on disputed facts which are not resolved in favor of the Secretary do not necessarily render the Secretary's position as unjustified. If the credibility determinations in this case had been resolved in favor of the Secretary, as opposed to Fastrack, the Secretary's claim of violation would have been supported "[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 pursuing the alleged violation of §1926.760(a)(1). She had a reasonable basis: the observations of the compliance officer, which were supported by a videotape for the facts alleged. Fastrack did not deny the

employees were on the roof approximately 30 feet above the ground without fall protection. The standard cited requires employees utilize fall protection if exposed to a fall hazard. Thus, a reasonable basis in fact and law existed for the case the Secretary propounded. The alleged facts supported the legal theory advanced by the Secretary that Fastrack violated §1926.760(a)(1).

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.

ORDER

Based upon the foregoing decision, it is ORDERED:

Fastrack's EAJA application for attorney fees and expenses is **DENIED**.

/s/_____
KEN S. WELSCH
Judge

Date: April 8, 2005