UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Secretary of Labor, Complainant v. Latite Roofing & Sheet Metal, LLC, successor to Latite Roofing & Sheet Metal Company, Inc., Respondent.	OSHRC Docket No. **09-0816** **EAJA**

Appearances:

Jeremy K. Fisher, Esquire, Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia
For Complainant

William F. Kaspers, Kaspers & Associates Law Offices, LLC, Atlanta, Georgia
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER ON EAJA APPLICATION

Latite Roofing & Sheet Metal, LLC (Latite LLC), the successor to Latite Roofing & Sheet Metal Company, Inc. (Latite Inc.) seeks an award for attorney's fees and expenses under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, 29 C.F.R. §2204.101, *et seq.* The fees and expenses were incurred by Latite LLC in defending against a serious citation for alleged violation of 29 C.F.R. §1926.502(h)(1)(v), issued on April 28, 2009. The Secretary withdrew the citation immediately prior to the scheduled hearing on October 20, 2009 in Fort Lauderdale, Florida. Latite LLC's EAJA application, dated October 30, 2009, claims fees and expenses of at least $19,522.91 for the period since June 16, 2009 and an additional $4,000.00 after filing its EAJA response.

For the reasons discussed, Latite LLC's application under the EAJA is denied.

Background

Latite Inc., a large roofing contractor in south Florida, has been involved in an ongoing 20-year dispute with the Occupational Safety and Health Administration (OSHA) regarding the use of fall protection systems (guardrails, safety nets, and personal fall arrest) and safety monitoring systems to protect its roofers. See *Latite Roofing & Sheet Metal Company, Inc.*, 19 BNA 1287 (No. 99-1292, 2000) ("*Latite I*") and *Latite Roofing & Sheet Metal Company, Inc.*, 2002 CCH OSHD ¶32,661 (No. 02-0656, 2003) rev'd on the basis of fair notice by the Review Commission, 21 BNA 1282 (2005) ("*Latite II*").

On June 1, 2007, Latite LLC became a successor to Latite Inc. Although Latite Inc. remains a corporation in the State of Florida, it is kept active, according to Latite LLC, for the purposes of accounts payable, accounts receivable, insurance and contractual reasons. (Latite's Reply, Exh. E).

On March 12, 2009, OSHA compliance officer Anthony Campos initiated an inspection of a residential apartment and townhome complex, under construction, in Plantation, Florida. The inspection was conducted as part of a Local Emphasis Program.

When he arrived on site, Campos observed three employees, which he later identified as employees of Latite Inc., engaged in roofing activities. Campos made his observations and took photographs while remaining on the ground. The three employees were working without guardrail, safety net or personal arrest systems. Campos observed the employees on different sides of the low-pitched roof engaged in what appeared to be cutting and installing flashing at the roof's edge. After coming off the roof, one employee identified himself as the foreman and safety monitor. Campos did not believe the designated safety monitor's attention was fully on his monitoring duty from the employees' locations on the roof and their engagement in roofing activities.

Based upon the inspection, OSHA issued to Latite Inc.,[1] a serious citation for violation of OSHA's safety monitoring standard at §1926.502(h)(1)(v). The standard requires a safety monitor to perform no duties which could take his attention from his monitoring function. The serious citation proposed a penalty of $5,000.00.

[1]The citation was issued to Latite Inc. Based upon the Secretary unopposed motion, the citation and case caption were amended to Latite LLC, the successor to Latite Inc. *See* Order dated February 22, 2010.

Latite LLC timely contested the citation and the case was initially docketed for Simplified Proceedings. After it was removed from Simplified Proceedings, the parties engaged in discovery. The hearing was scheduled to begin on October 20, 2009, in Fort Lauderdale, Florida.

On October 19, 2009, the Secretary's counsel informed the court's office that the case was settled. Since the court was in travel status, the parties were informed that the terms of the agreement should be placed on the record at the scheduled hearing.

At the hearing, the Secretary announced that she was withdrawing the citation. Latite LLC did not join in the agreement and asserted it would seek fees and expenses pursuant to the Commission's authority to impose sanctions. Latite's counsel stated that Latite LLC did not meet the EAJA's net worth eligibility criteria (Tr. 8).

On October 21, 2009, the Secretary filed a written notice of withdrawal, restating that the "evidence now available does not appear to sustain the violation as alleged." Latite LLC moved for an award of fees and expenses under the EAJA on October 30, 2009. By decision and order dated November 12, 2009, the court approved the Secretary's withdrawal of the citation.

Equal Access to Justice Act

The EAJA applies to proceedings before the Review 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 employer is not deterred from seeking review of, or defending against, unjustified actions by the Secretary of Labor because of the expense. *K.D.K. Upset Forging Inc*., 12 BNA OSHC 1856, 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. 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.

The party seeking an award must submit an application "whenever an applicant has prevailed in a proceeding . . . ,but in no case later than thirty days after the period for seeking appellate review expires." 29 C.F.R. §2204.302(a). Latite LLC's application dated October 30, 2009 was filed after the Secretary's withdrawal announcement at the hearing on October 20, 2009 and her written notice of withdrawal dated October 21, 2009. The court approved the Secretary's withdrawal on

November 12, 2009. Latite LLC's EAJA application is accepted as timely filed because at the time of withdrawing the citation, respondent became the prevailing party.

Eligibility

The party seeking an award must meet certain eligibility requirements. Under Commission Rule 2204.105(b)(4), 29 C.F.R. §2204.105(b)(4), an eligible employer includes any "corporation . . . that has a net worth of not more than $7 million and employs not more than 500 employees."

There is no dispute that Latite LLC is a corporation doing business in the State of Florida. The record also shows that at the time of filing its notice of contest, May 21, 2009, Latite LLC employed 393 employees (Latite's Application, Att. A).

To establish its net worth, the applicant must "provide with its application a detailed exhibit showing the net worth of the applicant." Although it may be in any form, the exhibit must provide "full disclosure of the applicant's assets and liabilities." *See* 29 C.F.R. § 2204.202(a).

To support its net worth claim of less than $7 million, Latite LLC submits two affidavits by its chief financial officer (CFO) and a Compliance Certificate dated May 31, 2009, under seal,[2] which was provided to its principal financial lending institution under a credit agreement (Latite's Application, Att. B, Latite's Reply, Exh. E). The Compliance Certificate purportedly shows the summary P&L, summary balance sheets, EBITDA per annex schedule, and the Leverage ratio for Latite Holdings Company, LLC (Latite Holdings). According to the Certificate, Latite Holdings is identified as one of the borrowers along with Latite LLC, Gold Coast Roofing and Builders, LLC (Gold Coast) and M&L Roofing. LLC (M&L). In its corporate disclosure statement, Latite Holdings, is identified as the parent company, and Latite LLC, Gold Coast, and M&L are affiliated subsidiaries of Latite Holdings. According to the CFO's affidavit, Latite Holdings has no separate holdings, assets, liabilities, equity or employees and states (Latite Reply, Exh E):

> The "Total Assets" and "Total Liabilities" figures on the third to the last page of the Certificate attached to my earlier affidavit reflect the total assets and total liabilities of Latite Roofing & Sheet Metal, LLC, and the "Total Equity" figure reflected on the third to the last page of that same Certificate reflects the net worth of Latite Roofing & Sheet Metal, LLC as of May 31, 2009.

[2]Latite LLC's motion to seal its financial records was granted on February 23, 2010.

A review of the financial information establishes Latite LLC's eligibility requirement for EAJA. The Compliance Certificate shows its net worth was substantially less than $7 million as of the date of filing the notice of contest. Although in the prior *Latite Inc.* cases, company officers testified that Latite Inc. was making in excess of $50 million a year, it is common knowledge that the commercial and residential construction work in the State of Florida has been in a deep recession since 2008. See *Latite II*, decision by ALJ issued May 1, 2003 which identified Latite Inc.'s annual revenues of approximately $50 million and 400 employees as of September 3, 2002.

Although the financial information appears to belong to Latite Holdings, the court accepts the CFO's affidavit that the net worth of Latite Holding is the net worth of Latite LLC. Latite LLC is identified as a borrower under the Compliance Certificate. The Secretary has not provided any contrary information. Also, despite that it is unaudited information, the Compliance Certificate is for the purposes of maintaining credit with its financial institution and probably attempts to portray a more optimistic picture of a company's net worth. This is reflected by listing "goodwill" as an asset.

Latite LLC shows it meets the financial criteria for eligibility under the EAJA.

Prevailing Party

The Review Commission stated in *K.D.K. Upset Forging, Inc.*, 12 BNA OSHC *id.* at 1857:

> 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.

Latite LLC, without dispute, was the prevailing party (Secretary's Answer, p. 9). The serious citation for alleged violation of §1926.760(a)(1), was withdrawn by the Secretary.

Substantial Justification

Although Latite LLC meets the EAJA eligibility criteria, it must be determined that the Secretary's position was not substantially justified in pursuing the case before it can receive an award for fees and expenses. There is no presumption the Secretary's position was not substantially justified simply because she lost the case or, as in this case, she withdrew the citation immediately prior to the hearing. See *K.D.K. Upset Forging, Inc.*, 12 BNA OSHC *id*. at 1859; *Hocking Valley*

Steel Erection, Inc., 11 BNA OSHC 1492, 1497 (No. 80-1463, 1983). Also, the Secretary's decision to litigate does not have to be based upon a substantial probability of prevailing.

The citation, in this case, alleged that "on or about 03/12/2009, a safety monitor was engaged in roofing activities and was not monitoring employees that were working on the roof of a building under construction at 201 NW 133 Road, in Plantation, Florida 33325." Section 1926.502(h)(1)(v) provides:

> The safety monitor shall not have other responsibilities which could take the monitor's attention from the monitoring function.

In order to establish a violation of a safety standard, the Secretary has the burden of proving:

> (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, ©) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Latite LLC admitted jurisdiction and coverage (Answer). The elements of (a), ©) and (d) of the Secretary's burden of proof were established, without dispute, prior to the scheduled hearing. Latite LLC does not dispute the application of §1926.502(h)(1)(v) to its roofing activities on the building under construction and that its three employees on the roof were utilizing a safety monitoring system to protect them from a fall hazard. Latite agrees the employees on the roof were exposed to a fall hazard of approximately 22 feet and that Latite knew of the conditions at the site. The crew foreman's knowledge is imputed to Latite LLC. Also, the roofers were utilizing Latite LLC's safety monitoring system and therefore Latite had constructive knowledge of the conditions at the worksite.

The issue in dispute (element (b) - compliance with §1926.502(h)(1)(v)),[3] was whether Latite LLC's safety monitor(s) performed other work responsibilities that took his attention away from his monitoring duties.

[3]Other issues raised by Latite, which will be dealt with subsequently involve claims of unpreventable employee misconduct, collateral estoppel, equitable estoppel, and vindictive prosecution.

Latite LLC claims its safety monitoring system on site protected the roofers from the fall hazard even if the monitor(s) performed roofing activities. It asserts that such activities did not distract the monitor(s) from his monitoring duties.

Under §1926.500(b), *definitions*, a "safety-monitoring system" means "a safety system in which a competent person is responsible for recognizing and warning employees of fall hazards." The safety monitoring system requires that an employer designate the safety monitor; the monitor is competent to recognize fall hazards; the monitor is able to warn the employee(s) when it appears that the employee(s) is unaware of a fall hazard or is acting in an unsafe manner; the monitor is standing on the same walking/working surface and within visual distance of the employee(s) being monitored and close enough to orally communicate with them, and, as alleged in this case, the safety monitor does not have other responsibilities which could take the monitor's attention from the monitoring duties. *See* §1926.502(h).

For EAJA purposes, "[T]he 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 requires the Secretary to show that: (1) there was a reasonable basis for the facts alleged, (2) there existed a reasonable basis in law for the theory she propounded, and (3) the facts alleged would reasonably support the legal theory advanced. *Gaston v. Bowen*, 854 F.2d 379, 380 (10th Cir. 1988).

As discussed further, the Secretary's alleged facts support her legal theory regarding a violation of §1926.502(h)(1)(v).

A. The Secretary's Basis for the Facts Alleged

The factual dispute in this case was whether Latite LLC's designated monitor(s) was performing roofing activities which distracted his attention from the monitoring duties.

To establish the factual basis for the citation, the Secretary submits the affidavit of compliance officer Anthony Campos, who conducted the inspection (Secretary's Answer, Exh, 1). Campos recommended the citation based upon his observations and interviews. According to his affidavit, upon arrival at the site, Campos observed one roofer, later identified as Benjamin Veronica, working at the edge of a low slope roof on the north side of a two-story building. He was wearing an orange vest and a white hard hat. He observed the employee working at the edge of the roof and leaning over with a putty knife. He noted a yellow line, painted or taped, a few feet from

the edge of the roof. He saw Veronica walking past this yellow line to the roof's edge. From Campos' perspective on the ground, Veronica was working alone. He did not see anyone else on the north side, observing Veronica's activities. The photographs taken by Campos appear to support these observations (Secretary's Answer, Exhs 11, 12). Campos estimated the roof to be approximately 25 feet in height.

When he traveled to the south side of the building, Campos stated he observed two other employees, later identified as Jaime Valerio and Abel Antunez. Valerio was wearing an orange vest and blue hard hat. Antunez was wearing a blue hard hat and no vest. He observed both employees at times working within a few feet of the roof's edge. Campos saw Valerio with his back to the edge and bending over. He was facing away from Antunez who was working near the edge at the other corner of the roof. It appeared to Campos that Valerio was laying roof flashing. Antunez was cutting and trimming strips of aluminum (Secretary's Answer, Exhs. 13, 14). Campos made these observations over a period of several minutes. He did not see Valerio cross over to the north side of the roof and because of the hip in the roof design, Campos did not believe Valerio could see Veronica working on the north side.

Campos asked the site superintendent, not an employee of Latite LLC, to call the employees off the roof. Campos interviewed the employees in Spanish. According to Campos, Valerio told him that he was the foreman and the safety monitor for Latite. He also stated that he could not always monitor because he needed to help the other employees. Campos recalls Valerio stating that there were only three roofers and he must work because they were rushing to complete the job. Campos states that when he interviewed the other employees, no one else identified himself as a safety monitor.

As part of its application, Latite submits several photographs apparently taken by Campos, a statement of Benjamin Veronica dated March 13, 2009, and excerpts from the deposition of the OSHA assistant regional administrator Benjamin Ross dated August 26, 2009 (Latite's Application, Attachments G, H). According to Veronica's statement, he was asked "What is the vest for? I had it on when I would be using as a monitor. Asked me about the painted line? It was a warning line for the danger zone."

Latite LLC claims Campos made several mistakes during his inspection including his failure to recognize that there were two safety monitors on the roof, the height of the roof was 22 feet and

not 25 feet, and erroneous interpretation of the standard that the monitor could not perform work other than his monitoring duties. Latite LLC argues these mistakes rendered the Secretary's case unjustified under the EAJA because Campos should have known otherwise. Latite LLC states that two of the three roofers were wearing orange vests indicating they were safety monitors under Latite LLC's monitoring plan. Also, since Campos did not measure the roof height and it was less than 22 feet, there is no presumption favoring conventional fall protection. Finally, Latite claims Campos' interpretation of the standard to not allow the monitor to perform roofing work in addition to monitoring duties affected his inspection and was contrary to the court's ruling in *Latite I.*

Despite Latite LLC's arguments, Campos' observations and interviews establish a reasonable factual basis for the issuance of the citation and pursuing the matter to hearing. The alleged "mistakes" are disputed by the Secretary and do not render Campos' observations unreasonable for EAJA purposes. The Secretary disputes whether there was more than one monitor based upon Campos' interviews with the employees. Also, regardless of the number of safety monitors or the height of the roof, the issue under the cited standard is whether the roofing activities observed being performed by the monitor(s) distracted his attention from the monitoring duties. Other than questioning Campos' perspective from the ground, Latite LLC offered no facts disputing Campos' observations as to the roofing activities being performed by the employees on the roof. With regard to Campos's erroneous interpretation of the standard which he acknowledges in his affidavit, such interpretation does not negate his factual observations of the roofers' activities. Campos affirms the citation would still have been issued under the correct interpretation.

Latite LLC admits Valerio was a safety monitor and the crew chief. Its discovery responses admit that its crew was "installing metal flashing at the edge' at the time of the inspection (Secretary's Answer, Exh. 16). Latite LLC also agrees Valerio was "helping and working with the other crew members as he was monitoring them." It concedes its roofers sometimes worked at opposite sides of the roof and that Valerio worked within 3 feet of the edge of the roof. Veronica was observed working at the very edge of the roof, but pass the yellow line placed three feet from the edge. The employees were exposed to a potential fall hazard of 22 feet if the safety monitor was distracted by other work activities. Campos observed the employees installing and cutting metal flashing or using a putty knife. These observations of roofing activities *prima facially* establish potential distractions from monitoring duties.

B. Reasonable Basis in Law

Section 1926.502(h)(1)(v) requires that a safety monitor not engage in other activities which could distract his attention from the monitoring responsibilities. In *Latite I*, the court determined that a monitor could perform other work activities as long as it did not distract the monitor's attention from his monitoring duties. It is clear, however, that the monitor's primary duty remains monitoring employees' activities who may be exposed to a fall hazard.

The observations of Campos establish a reasonable basis in law that the monitor(s) was performing other work which distracted their attention from the monitoring duties.

C. The Alleged Facts Reasonably Support the Legal Theory

The alleged facts as described in Campos' affidavit *prima facially* support a violation of §1926.502(h)(1)(v) in that the safety monitor's attention was potentially distracted by his other roofing work. Campos' observations are not rendered unreasonable *per se* because he was on the ground. The weight given Campos' observations would depend, among other factors, upon his line of sight, distance from the roof, clarity of vision, and the testimony of other witnesses. Latite LLC's argument regarding the visual perspective of an employee on the roof may affect the weight given such testimony but the Secretary's substantially justification in pursuing the citation.

The Secretary disputes the existence of two safety monitors. Latite LLC claims the two safety monitors were Valerio and Veronica who should have been identified by the orange, high visibility vests. The Secretary's inspection photographs show the two employees in orange vests.

According to Campos' affidavit, only Valerio identified himself as a safety monitor during the inspection. With regard to the orange vests, the Secretary argues this does not necessarily establish the two employees were functioning as safety monitors. A safety monitor is defined as a competent person who is able to recognize fall hazards. The standard does not discuss or require the use of orange vests to designate the safety monitor.

The Secretary states that the issue of two monitors was not raised until two days before the deposition of OSHA assistant regional administrator Benjamin Ross on August 29, 2009 when she was given a copy of a statement from Veronica (Latite's Application, Attachment G). The Secretary questions the statement because it was in English even though Veronica preferred to speak in Spanish. Also, Campos refutes Veronica ever told him that he was serving as a safety monitor (Secretary Answer, Exh. 1).

Campos states that only Valerio identified himself as a monitor. If Valerio and Veronica disputed Campos' testimony at hearing, it becomes a credibility issue which the court would have had to evaluate. "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, therefore, was justified in continuing litigation after receiving the interview statement on August 26, 2009.

Even if the record establishes the presence of two safety monitors, it is undisputed that Veronica was the only safety employee on the north side of the roof. He was working within three feet of the roof's edge. If Veronica was working by himself with no second employee responsible for watching him, the issue becomes whether it is permissible under the standard to allow an employee to monitor himself.

Without deciding the issue, the Secretary was justified in pursuing it. There is no case law regarding the issue of self monitoring. The plain language of the standard requires the employer to designate a competent person to monitor the safety of other employees. *See* §1926.502(h)(1). The Secretary's interpretation appears reasonable.

If Latite LLC's argument was that since there were two monitors, the third employee would have been within visual sighting and oral communication distance of the monitors, such argument involves other requirements for a safety monitor and is not the issue alleged by the citation. Similarly, the Secretary's case is not rendered unjustified because of Campos' failure to take accurate measurements of the roof and Latite LLC's use of both the painted warning line system and a safety monitoring system.

Having concluded that the Secretary was substantially justified in issuing the citation based upon Campos' observations during the inspection, the Secretary was also substantially justified to pursue the case to the hearing. The alleged mistakes by Campos did not affect the Secretary's substantial justification for pursuing the case. The facts or legal theories asserted by Latite LLC after the citation was issued did not support or require a withdrawal of the citation. Based upon the reasonableness of the facts alleged by the Secretary, the applicable law and the application of facts to law, the Secretary's substantial justification to pursue the matter to hearing is established. The affirmative defenses asserted in Latite LLC's answer, also, as discussed below, do not render the Secretary's position unjustified.

Equitable Estoppel

Latite LLC argues equitable estoppel because Campos interpreted the standard to require a monitor to exclusively monitor and not engage in any other work. As noted by the Secretary, even if Campos was mistaken in his interpretation, such error did not change the conditions observed on the roof. Campos' affidavit indicates that he still would have recommended the citation under the correct interpretation (Secretary Answer, Exh. 1).

The fair notice issue in *Latite II* related to what fall protection system Latite was using, and the Commission's finding was based upon past interactions with OSHA. The Review Commission concluded that Latite Inc. did not have notice as to whether it was permissible to use such a system. This earlier case has nothing to do with the issue of whether a safety monitor was unable to perform his monitoring duties because of distractions caused by his other work activities. Latite LLC concedes that it believed that a safety monitor was allowed to perform other work as long as this work did not distract from the monitoring duties.

Based upon this record, there is an insufficient showing that Latite LLC would prevail on its equitable estoppel argument.

Vindictive Prosecution

Latite LLC's vindictive prosecution argument is also not established for EAJA purposes. Campos' inspection was initiated pursuant to a Local Emphasis Program on construction fall hazards. According to his affidavit, Campos did not know the roofers on site worked for Latite LLC until midway through the inspection. Despite Latite Inc.'s extensive history with OSHA, there is no showing the inspection or pursuit of the citation was the result of a bad or retaliatory motive. *National Engineering & Contracting Co*., 18 BNA OSHC 1075, 1078 (No. 94-2787, 1997) ("In addition to evidence of animus or retaliatory motive" the party "must produce evidence tending to show that it would not have been cited absent that motive"). No such evidence was presented by Latite LLC in its EAJA application.

Collateral Estoppel

Latite LLC's collateral estoppel argument does not render the Secretary's position unjustified for EAJA purposes. In claiming the relitigation of issues already decided, Latite LLC relies on the

Court's decision in *Latite I* which found that the compliance officer was not in a position to adequately observe the Latite Inc.'s safety monitoring system from the ground, 50 feet away. In *Latite II,* the Court explained this was just an element of Secretary's failure to meet her burden of proof and that it was not a requirement for the compliance officer to go onto the roof to observe the monitoring system.

In this case, Campos' affidavit states he did not climb on the roof because of personal safety concerns. As discussed, an issue of weight, given to witnesses' testimony based upon his vantage point from the ground, does not render the Secretary's position in pursuing the matter as lacking substantial justification.

Unpreventable Employee Misconduct

Latite LLC's assertion of an unpreventable employee misconduct defense does not establish the Secretary's lack of justification. Employee misconduct is an affirmative defense which Latite has the burden of proof. According to the Secretary, in its discovery responses, Latite stated it "has no evidence of misconduct by any member of the dry-in crew at the worksite in question on the date and time of the inspection." Latite LLC's prehearing statement of issues filed with the court failed to identify employee misconduct as a defense. Therefore, the court's deems the defense waived by Latite LLC.

Conclusion

The EAJA is not to be read to deter the Secretary from pursing in good faith cases that 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. Similarly, credibility determinations made by the court do not mean the Secretary's position lacked substantial justification.

The Secretary in this case has not disclosed the reason(s) for her withdrawal of the citation on the day of the hearing. Under the EAJA, the Secretary has the burden to show substantial justification, but there is no presumption of the lack of justification merely because the citation was withdrawn. The Secretary acknowledges that the timing of the withdrawal of the citation at the start of the hearing was admittedly unfortunate.

The Secretary's refusal to identify the reasons for the withdrawal of the citation does not change the court's finding of the Secretary's position as substantially justified. According to the Secretary, the withdrawal of the citation had nothing to do with expert reports from Latite LLC's former owners David and Steve Struve who looked at OSHA's photographs and found no violation or her opposition to the deposition of Benjamin Ross. The Review Commission stated in *Hocking Valley Steel Erectors, Inc.*, 11 BNA OSHC *supra* at 1498, that:

> In fact, one could infer from his unexplained abandonment of his case that the Secretary believed that the Commission would vacate the citation if it ruled on the case. While this is not tantamount to an admission that his position was not substantially justified, it is not supportive of the substantial justification otherwise found on this record. Moreover, the Secretary's unexplained termination of the case at this point may well leave Hocking Valley with the impression that it was put through the expense and inconvenience of contesting and trying a citation that was issued for no valid purpose. The Secretary's cause would have been better served had he candidly explained why he had decided to terminate the case, even if to do so would have required him to admit that he believed the case was weak or that the violation was so momentary that it did not warrant litigation.
>
> However, EAJA does not permit an award of fees if the Secretary's position as a party to the proceeding was substantially justified. As explained above, we have concluded that the Secretary's position in seeking affirmance of the citation was substantially justified under Commission precedent. Though the Secretary's withdrawal is not clearly explained, the substantial justification of his position on the merits is not altered by the termination on review when the entire case is considered. Indeed, by terminating the case the Secretary did precisely what Hocking Valley urges the Secretary should have done, albeit not as quickly as Hocking Valley desired.

As in this case, the EAJA provides the Secretary with every reason to withdraw a citation once the lack of substantial justification appears and to provide evidence that until the withdrawal occurred, her position was substantially justified. The record, here, establishes that the Secretary was substantially justified in pursuing the alleged violation of §1926.502(h)(1)(v). She had a reasonable basis; the observations of the compliance officer which were supported by the photographs, for the facts alleged. Latite LLC did not deny that the employees were on the roof approximately 22 feet above the ground without conventional fall protection and the employees were engaged in roofing activities including the designated safety monitor(s). Thus, a reasonable basis

in fact and law existed for the case the Secretary propounded. The facts alleged supported the legal theory advanced by the Secretary that Latite LLC violated §1926.502(h)(1)(v).

Special Circumstances

The record fails to show special circumstances. At the hearing, Latite claimed it was entitled to fees and expenses under Rule 11 of the Federal Rules of Civil Procedure. However, Rule 11 does not apply to proceedings before the Commission. See *Tri State Steel Construction Co. Inc. v Secretary of Labor*, 164 F.3d 973, 980 (6th Cir. 1999) (Circuit Court held that Rule 11 was not applicable because the Commission rules provide a substantially similar provision to Rule 11, specifically Commission Rule 2204.32, 29 C.F.R. § 2204.32. The explicit inclusion of some sanctions within Rule 32 indicates an intention to preclude monetary sanctions for violations of Rule 32). In *Tri State*, on remand, Chief Judge Sommer concluded the EAJA is the "sole remedy for legal fees and expenses in matters before the Commission." *Tri State Steel Construction Co. Inc.*, 19 BNA OSHC 1092, 1093 (No. 89-2611, 2000).

Although not finding the applicability of Rule 11 for fees and expenses in Commission proceedings, Latite LLC has not shown a violation of this rule occurred. It has not shown that it was eligible for fees and costs on any basis outside EAJA.

Latite's Fees and Expenses

Although finding the Secretary was substantially justified and therefore not entitling Latite LLC to an award under the EAJA, a review of Latite LLC's application for fees shows some problems. Latite LLC claims either $58,201.66 or $19,522.91 in attorney's fees and expenses depending on whether Latite LLC's counsel can claim his regular hourly rate of $400.00 per hour or is limited to the statutory rate of $125.00 per hour. In determining allowable fees and expenses under the EAJA, the Commission's regulation provides that such awards should be based on rates customarily charged by attorneys but that the fee "shall not exceed $125 per hour, "unless the Commission determines by regulation" that an increase to a higher fee is justified. 29 C.F.R. § 2204.107(a) and (b).

The Commission has not increased the $125.00 hourly rate by regulation. Also, Latite LLC's attorney claims he spent 140.65 hours between June 16, 2009 until filing the EAJA application on October 30, 2009 and an additional 10 hours spent in drafting the EAJA reply.

The alleged 140.65 hours worked on a single citation item case which did not proceed to full hearing seems excessive. The Commission considers a number of factors in determining the fee sought by an attorney, including time spent "in light of the difficulty or complexity of the issues," "time actually spent in the representation of the applicant" and other factors. In view of counsel's experience in OSHA proceedings, his familiarity with Latite LLC's operation as evident in *Latite I* and *Latite II*, the limited use of discovery, the lack of novelty, and the rather straightforward factual dispute between the parties, a reasonable amount of time for this case is 100 hours including the EAJA reply. Also, it appears that some of counsel's listed expenses are not compensable under EAJA such as phone costs, overtime, meals, and local transportation.

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 that:

Latite Roofing & Sheet Metal, LLC's EAJA application for attorney fees and expenses is **DENIED**.

\s\ Ken S. Welsch
KEN S. WELSCH
Judge

Date: March 16, 2010