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. SAIPAN KOREANA HOTEL, Respondent.	OSHRC Docket No. 02-2129

APPEARANCES:

Howard M. Radzely, Esq., Joseph M. Woodward, Esq., Daniel J. Mick, Esq., Peter J. Vassalo, Esq., U.S. Department of Labor, Washington, D.C.
For the Complainant

Joseph E. Horey, Esq., O'Connor Berman Dotts & Banes, Saipan, MP
For the Respondent

DECISION AND REMAND

Before: RAILTON, Chairman, and ROGERS, Commissioner.

BY THE COMMISSION:

This case arises under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, and is before the Commission a second time on review. In two decisions, one on remand from the Commission, Judge Robert A. Yetman rejected an application for EAJA fees filed by Saipan Koreana Hotel (Saipan) based on his finding that the Secretary was substantially justified in issuing Saipan a citation under a temporary labor camp standard set forth at 29 C.F.R. § 1910.142(c)(1).

For the following reasons, we remand the case to the judge for further proceedings in a manner consistent with this opinion.

Background

On November 21, 2002, OSHA issued a citation to Saipan, a hotel located in the Northern Mariana Islands, for its failure to provide an adequate water supply for employees who lived and worked on the hotel's premises. The Secretary alleged that Saipan had violated the temporary labor camp standard set forth at section 1910.142(c)(1), which requires that "[a]n adequate and convenient water supply…be provided in each camp for drinking, cooking, bathing and laundry purposes." A penalty of $750 was proposed for the alleged violation.

On September 30, 2003, the Secretary filed a motion to dismiss and withdrew her complaint due to Saipan's abatement of the cited condition. Soon after, on October 2, 2003, Saipan filed a motion for summary judgment. On October 22, 2003, the judge granted the Secretary's motion to dismiss and denied Saipan's motion for summary judgment because he found that there was no longer a case or controversy to be litigated. Saipan did not petition for review of the judge's decision.

On December 19, 2003, Saipan filed a timely application for EAJA fees that included a claim for attorney's fees devoted to the preparation of Saipan's summary judgment motion. On March 31, 2004, the judge rejected Saipan's application, concluding that while Saipan was a prevailing party and was eligible for EAJA fees, the Secretary was substantially justified in proceeding with the case through the time that her motion to dismiss was granted. The judge's decision was petitioned for review by Saipan. On remand from the Commission, the judge again held that the Secretary was substantially justified. Saipan petitioned for review a second time and the case was directed for review by Chairman W. Scott Railton.

Following the issuance of the Commission's briefing notice, the Secretary notified the Commission that she was formally withdrawing her substantial justification objection to Saipan's fee application, thereby conceding that Saipan is entitled to a fee award. The Secretary, however, retained her objection on reasonableness grounds to a fee award for the eight hours on October 1 through 3, 2003, which Saipan attributes in part to the preparation of its summary judgment motion. According to the Secretary, Saipan's work

on the motion was unreasonable because the Secretary had filed her motion to dismiss several days before the summary judgment motion was filed. The eight hours for which Saipan claims compensation also includes attorney work time to study the motion to dismiss. In addition, Saipan has requested attorney's fees incurred as a result of its efforts on review with regard to both of the judge's decisions.

Discussion

As the Secretary now concedes that Saipan is entitled to an EAJA award, the only issue remaining in this case is the final amount of that award.[1] This inquiry requires the resolution of two specific issues, neither of which was addressed by the judge. We find that a remand of these issues, set forth below, is appropriate under the circumstances. *See* Commission Rule of Procedure 92(c), 29 C.F.R. § 2200.92(c) ("The Commission will ordinarily not review issues that the Judge did not have the opportunity to pass upon").

The first issue – the Secretary's continuing objection to the eight hours of attorney's fees claimed by Saipan from October 1 through October 3, 2003 – was never reached by the judge because he concluded that an EAJA award was not appropriate. With substantial justification no longer at issue, the judge must now assess the reasonableness of Saipan's request for these fees. This determination, the basis of which should be fully articulated by the judge on remand, is governed by Commission EAJA Rule 106(b), 29 C.F.R. § 2204.106(b), which provides that "[a]n award will be reduced or denied if the applicant has unduly or unreasonably protracted the proceeding." *See also*

[1] Saipan claims that, notwithstanding the Secretary's withdrawal of her objection to a fee award, the Commission should decide whether the Secretary was substantially justified in issuing the citation. However, this issue has been rendered moot by virtue of the Secretary's concession and Saipan has provided no compelling reason for the Commission to otherwise address the question. *See* Commission EAJA Rule of Procedure 106(a), 29 C.F.R. § 2204.106(a) ("A prevailing applicant may receive an award for fees and expenses in connection with a proceeding…, unless the position of the Secretary was substantially justified…. The burden of persuasion that an award should not be made to an eligible prevailing applicant because the Secretary's position was substantially justified is on the Secretary."). Therefore, we reject Saipan's request for a ruling on the issue of substantial justification.

EAJA, 5 U.S.C. § 504(b)(1)(A) ("fees and other expenses" defined as those that are "reasonable").

In resolving this question, we see no basis for the judge to reject as unreasonable Saipan's request for fees for the brief amount of time spent on October 1, 2003, reviewing the Secretary's motion to dismiss. Indeed, it would be difficult to characterize counsel's review of any motion filed by an opposing party, particularly one that could result in ending the case, as "unduly or unreasonably" protracting a proceeding. We do note, however, that the judge should determine from Saipan precisely what portion of the eight hours identified on its invoice for the dates in question is directly attributable to its review of the Secretary's motion, and what portion is directly attributable to its preparation of its summary judgment motion.

The second issue remanded to the judge for disposition is the reasonableness of Saipan's supplemental requests, filed both before the judge and the Commission, for fees accrued since Saipan petitioned for review of the judge's first decision rejecting its EAJA application. The judge had no reason to address the supplemental fee requests filed with him because he concluded that Saipan was not entitled to an EAJA award in the first place. As the Secretary now concedes that an award should be granted, Saipan is also "entitled to reasonable attorneys' fees and expenses for the fee litigation itself." *Timothy Victory*, 18 BNA OSHC 1023, 1027, 1995-97 CCH OSHD ¶ 31,431, p. 44,450 (No. 93-3359, 1997).

In resolving this question, we note that the judge should seek clarification of the current record. Although the Secretary states in her letter brief to the Commission that she is willing to pay Saipan an award in the amount of $12,256.37, she provides no explanation for how this amount was calculated or what specific fees it covers. As the amount is more than that sought by Saipan in its original EAJA application, the Secretary is apparently willing to compensate Saipan for some unspecified portion of the supplemental fees it has requested. In a subsequent brief filed with the Commission, the Secretary does raise an objection to the supplemental fees which Saipan claims have accrued from March 2004 to the present. Given her objection, together with the

Secretary's failure to detail how she arrived at the award amount previously identified in her letter brief, it is simply not clear how much and for what the Secretary is willing to pay Saipan.

Once the judge has obtained clarification from the Secretary as to what portion of Saipan's supplemental fees she objects to and what timeframe the proffered $12,256.37 amount covers, he can then assess the reasonableness of Saipan's requests for supplemental fees, including any future requests that may be filed. The judge should specifically address the Secretary's allegation that, "by spurning settlement and pressing [the] issue [of substantial justification]," Saipan has unreasonably protracted this proceeding. *See* Commission EAJA Rule 106(b). We note, however, that Saipan was justified in challenging the issue of substantial justification up until the Secretary conceded the point before the Commission in her letter brief of July 15, 2005. Thus, Saipan is at least entitled to an award of reasonable attorney's fees incurred from the time that it petitioned for review of the judge's first EAJA decision up until the Secretary's concession. *See Timothy Victory*, 18 BNA OSHC at 1027.

As with Saipan's fee request for the eight hours spent on its summary judgment motion, the judge should fully explain the basis for his determinations with regard to Saipan's supplemental fee requests. Moreover, the judge should proceed in a manner that minimizes, to the extent possible, the accrual of additional attorney's fees for Saipan. *See Hensley v. Eckerhart*, 461 U.S 424, 437 (1983) ("a request for attorney's fees should not result in a second major litigation"). Finally, we note that in calculating the final amount of Saipan's award, the judge is limited to compensating Saipan for its attorney's fees at an hourly rate of $125, not the hourly rate of $230 Saipan currently seeks. *See* Commission EAJA Rule 107(b), 29 C.F.R. § 2204.107(b), ("An award for the fee of an attorney…under these rules shall not exceed $125 per hour….).

Order

Accordingly, we remand this case for further proceedings in a manner consistent with this opinion.

SO ORDERED.

_/s/_____
W. Scott Railton
Chairman

__/s/_____
Thomasina V. Rogers
Commissioner

Dated: February 2, 2006

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SECRETARY OF LABOR,
Complainant,

v.

SAIPAN KOREANA HOTEL,
and its successors,
Respondent.

OSHRC
Docket No. 02-2129

DECISION AND ORDER ON REMAND

In this Equal Access to Justice Act matter, 54 U.S.C. § 504 (EAJA), Respondent seeks attorney fees incurred in the defense against a citation issued by the Occupational Safety and Health Administration (OSHA). By decision dated March 23, 2004, it was found that Respondent was eligible to recover fees pursuant to the EAJA and was a prevailing party within the meaning of the statute.[1] However, Respondent's application for fees was denied on the ground that Complainant was substantially justified in fact and law in bringing the action against Respondent. 2004 CCH OSHD ¶ 32, 717.

Since the citation and complaint were dismissed upon Complainant's motion without an evidentiary hearing,[2] the EAJA claim was decided based upon information contained in Respondent's application for fees and reply with supporting documentation, Respondent's brief in support of its motion for summary judgment and Complainant's opposition to the application for fees. In its petition for

[1] These findings are not challenged by Respondent and are not subjects of the remand order.
[2] Complainant withdrew the citation and complaint upon being notified that Respondent had abated the alleged violations by draining and sanitizing the tank supplying water to the hotel. Although the Secretary considered amending the citation to allege a violation of 29 CFR § 1910.141(b), the sanitation standard, which covers the entire hotel as a workplace, the decision was made to withdraw the citation on the ground that continuing the litigation at Saipan could not be economically justified.

discretionary review, Respondent asserts that "[t]he Commission should review the decision because it raises an important issue of law whether the Secretary is exceeding her lawful authority by inspecting residences rather than workplaces and citing them as 'temporary labor camps' when they are, in fact, permanent housing for year-round workers. It raises the issue, in other words, of whether OSHA has stepped beyond its proper role as workplace regulator, and begun operating as a *de facto* housing authority as well."

Although an application for attorney fees under EAJA is reviewed by the Commission *de novo; see Central Brass Mfg.*, 1987-90 CCH OSHD ¶ 29,144 (1990); *Administrative Procedures Act*, 5 U.S.C. § 556(a), (e) and 55(b), the matter has been remanded for an analysis of the "requisite evidentiary basis for [the] conclusion that the Secretary established 'substantial justification' for the jurisdictional basis for the citation." In this instance, the Secretary issued one citation to Respondent alleging a violation of a temporary labor camp standard requiring an adequate water supply suitable, *inter alia*, for drinking. (29 CFR 1910.142(c)(1).

A brief review of the facts is required. Respondent, Saipan Koreana Hotel, is a corporation organized under the laws of the Commonwealth of Northern Mariana Islands engaged in the hotel business catering to tourists and other visitors to the Island of Saipan. The hotel constitutes a workplace and Respondent acknowledges that the Secretary of Labor has jurisdiction over "the workplace or environment where work is performed" pursuant to 29 U.S.C. 657(a)(1). (Application for attorney fees unnumbered page 4). On August 30, 2002, a compliance officer employed by the Occupational Safety and Health Administration (OSHA) inspected Respondent's facilities located at Chalan Kanoa, Saipan. The record reveals that the hotel had a central potable water supply in a tank located on the roof of the hotel. All water supplied to the hotel was stored in the tank prior to distribution throughout the hotel. The compliance officer collected four water samples, which, when tested, indicated that the water

supplied to the hotel was contaminated with fecal coliform (e. coli bacteria). Although it is not clear where within the hotel the water samples were obtained, it is agreed by the parties that at least one sample was obtained from a room occupied by an employee living on the sixth floor of the hotel. However, the water supply was contaminated throughout the hotel due to the centrally located water tank. Indeed, Respondent informed OSHA that the contamination had been eliminated by draining and sanitizing the water tank.

At the time of the inspection, Respondent employed ten employees; four of whom resided rent free on the sixth floor of the hotel. The other employees lived in private or rented apartments away from Respondent's worksite. In an affidavit dated October 2, 2003, Charlotte Tenepere, Respondent's General Manager (Exhibit A to Respondent's motion for summary judgment) states that some employees are employed on one-year renewable contracts. It appears that these employees are immigrant nonresidents of Saipan. According to Ms. Tenepere's affidavit dated February 4, 2004 (attached as Exhibit B to Respondent's Reply in Support of Attorney Fees), during the year 2000 to February 4, 2004, Respondent employed, during various periods, twenty employees. Eight of these employees were immigrant nonresidents of Saipan. Also attached to Respondent's aforesaid "Reply" are nine affidavits executed by Respondent's employees. Four employees state they are nonresident workers, three of whom are citizens of the Philippines and one a citizen of the Republic of China. Five other employees have an immigration status of resident worker and are citizens of Bangladesh, Federated States of Micronesia or the Philippines and one is a citizen of the United States. Of these employees, three nonresident workers and three resident workers lived at the hotel on the date of their affidavits. The remaining employees lived away from the hotel.

Although both parties acknowledge that the entire hotel constitutes a "worksite" within the meaning of the Act, Complainant, for reasons which are not set forth in the record, issued a citation to

Respondent for failing to provide an adequate and convenient water supply to a temporary labor camp (employer provided rooms) based upon the finding that the rooms occupied by nonresident employees were supplied with contaminated water. The citation did not address the contaminated water hazard to which employees were exposed throughout the rest of the hotel. As stated previously, this matter has been remanded for an analysis of the jurisdictional basis for the citation alleging that the rooms occupied by employees constituted a temporary labor camp.[3]

In support of its position that employer-supplied housing within the hotel does not constitute a temporary labor camp within the meaning of the cited standard, Respondent makes the following arguments:

(a) Contrary to 29 U.S.C. 657(a)(1) which grants the Secretary jurisdiction over workplace or environments where work is performed, no work was performed on behalf of Respondent within the rooms occupied by employees. The employees who live in the hotel clean their own rooms. Hotel employees clean rooms occupied by guests, not rooms occupied by employees.

(b) Residence in Respondent's hotel is not a condition of employment. Respondent imposes no requirement that its employees live at company supplied housing, nor is there any kind of practical necessity forcing employees to live in the hotel because adequate and affordable housing is available within the community.

(c) The rooms occupied by employees do not meet the definition of a temporary labor camp within the meaning of the standard cited because it is permanent housing for year round employees. The employees are not temporary migrant workers.

[3] Neither party interprets the citation as classifying the entire hotel as a temporary labor camp. The citation and the memoranda filed by the parties limits the temporary labor camp theory of coverage to the rooms occupied by employees.

Complainant, on the other hand, argues that there was substantial justification for issuing the citation to Respondent pursuant to the temporary labor camp standard by virtue of the fact that Respondent exposed its employees to contaminated water in the apartments supplied by Respondent. First, argues Complainant, the housing provided by Respondent was a condition of their employment (Complainant's brief pg. 6) and, therefore, falls within the coverage of the standard. According to Complainant, "[w]orker housing is a condition of employment when there is either a formal requirement that the employee reside in employer provided housing in order to be employed, or practical, economical, geographical or physical necessity" leads to the result that employer housing is a condition of employment. (Complainant's brief, pg. 6, citing *Frank Diehl Farms v. Secretary of Labor*, 696 F.2d 1325, 1332-33). Complainant further asserts (1) there was a formal requirement that nonresident employees must live in housing provided by Respondent unless said employees chose to live in government approved self-arranged housing or (2) as a matter of practical and economic realities existing on the island of Saipan, it was necessary for nonresident employees to live in employer supplied housing. (Complainant's brief, pg. 6). Nonresident workers housing at the hotel was a condition of employment, according to Complainant, because the practical realities of the housing situation on Saipan "effectively requires that most, if not all, of Saipan Koreana's nonresident workers live in employer provided housing." *Ibid.*, p. 7, citing *Frank Diehl Farms, supra,* at 1333.

According to Complainant, the Nonresident Workers Act, Title 3 § 4411, *et seq.* of the Commonwealth Code (Northern Mariana Islands of which Saipan is a member) requires employers seeking to hire nonresident workers to submit to the Chief of Labor a fully executed employment contract with the nonresident employee which must include provisions relating to lodgings.[4] Unless the nonresident worker voluntarily decides to reside in self-arranged housing and provides verification thereof

[4] The contracts required by the Nonresident Workers Act for the nonresident workers employed by Respondent, assuming they exist, are not included in any submission by the parties.

for approval by the Chief of Labor, the employer must provide housing to the nonresident workers. These assertions are not challenged by Respondent.

Complainant relies upon the affidavit of Charlotte Tenepere to establish that some employees who were provided housing at the hotel were nonresident workers with one year renewable contracts. Complainant reasons that since these employees "did not opt for, or could not obtain, government approved self-arranged housing," it logically follows that Respondent provided the housing in accordance with the requirements of the Nonresident Workers Act, *supra*. Moreover, Complainant points to an OSHA Regional Instruction dated October 3, 1999, wherein OSHA determined that "[t]he present situation in the NMI is that the infrastructure and employee housing is inadequate to accommodate the number of temporary workers currently working in the NMI." (San Francisco Regional Instruction CPL 2.10205) as support for the conclusion that sufficient numbers of government approved affordable self-arranged housing units were not available to temporary[5] nonresident workers on Saipan. Since the workers were earning low wages, argues Complainant, they were extremely limited in securing affordable housing. Thus, Respondent was required to provide housing for these employees. Indeed, Complainant asserts that seventy-five percent of the employees (six of eight employees) were housed in the hotel due to the unavailability of affordable housing.[6]

Finally, Complainant asserts that the provisions of the temporary labor camp standards (29 CFR §1910.142) are not limited to migrant or agricultural housing. In support of this conclusion, Complainant points to an OSHA interpretive memorandum which states "there is no language in 1910.142 to restrict the application of this standard to migrant housing. Similar housing for the use of other kinds of workers

[5] Complainant also asserts that the nonresident workers are "temporary" because their one-year employment contracts are renewable at the discretion of Respondent with the approval of the Chief of Labor.

[6] Complainant also takes the position that the housing provided by Respondent was "job related" and subject to the provisions of 29 CFR 1910.142. However, this theory is rejected on the basis of the holding in *Frank Diehl Farms*, 696 F.2d 1385

would be subject to the same standard and should meet the same specifications" (OSHA Standards Interpretation and Compliance Letter dated 7/23/1981) (Exhibit G to Complainant's Memorandum).

In its reply to the Secretary's opposition to Respondent's application for fees, Respondent reemphasizes the points that affordable housing was available to nonresident workers on the island of Saipan. Moreover, there was no requirement established by Respondent that employees must reside at the hotel. Thus, in accordance with the teachings of *Frank Diehl Farms, supra*; residing at the hotel was not a condition of employment. Moreover, there is nothing "temporary" about the housing that Respondent offers to its employees. Respondent cites the OSHA Field Operations Manual, Chapter XI, Section (A)(2)(a)(1989) which defines "temporary labor camp" as "[f]arm housing directly related to the seasonal or temporary employment of migrant farm workers." Respondent also relies upon an OSHA Interpretive Memorandum dated February 21, 1978, which states "housing which is occupied by the same workers year round is considered permanent; housing which is occupied only periodically or by different workers during a year is considered temporary." Thus, argues Respondent, since the nonresident workers were residing at the hotel on a permanent basis, their quarters may not be considered as a temporary labor camp within the meaning of the cited standard.[7]

As previously stated, attorney fees may be awarded to Respondent in the event that the Secretary fails to establish that her factual and legal litigation positions were "substantially justified." 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 OSHR 1006; 1991-1993, CCH OSHD ¶ 29,986 (1993). In *Gaston v. Baven*, 854 F.2d 379, 380, the Tenth Circuit Court of appeals stated:

> [T]he reasonableness test breaks down into three parts; the government must show that there is a reasonable basis . . . for the facts alleged . . that there exists a reasonable basis in law for the theory it propounds; and that the facts alleged will reasonably support the legal theory advanced." *See also Mautz Orem Inc., supra.*

[7] Respondent has not discussed the relevance of the Nonresident Workers Act, *supra,* to the facts of the case.

In this case, there appears to be agreement between the parties that contaminated water was provided throughout the hotel including rooms occupied by employees. Moreover, there is no dispute that Respondent employed nonresident immigrant workers, some of whom resided at the hotel, and those workers are subject to the requirements of the Nonresident Workers Act of the Commonwealth of Northern Mariana Islands. Thus, an employment contract between Respondent and the nonresident employees which included provisions for lodging was required to be submitted to the Chief of Labor, Island of Saipan, for approval. In the event that adequate housing was not available on the island, Respondent, pursuant to the Nonresident Worker Act, was required to provide housing to nonresident workers. Whether sufficient and adequate housing was available away from the hotel is a disputed question of fact. Complainant relies upon an OSHA instruction to support her conclusion that adequate housing was not available. Respondent relies upon employee affidavits that adequate housing was available away from the hotel for nonresident workers. However, based upon the position taken by the Department of Labor (OSHA Instruction dated October 5, 1999) that adequate housing was not available to nonresident workers, it is concluded that the Secretary was substantially justified in pursuing that position in this litigation.

Respondent also asserts that the housing offered to nonresident workers at the hotel was not "temporary housing"; thus, the rooms provided to nonresident workers do not constitute a "temporary labor camp" within the meaning of the standard cited. Moreover, according to Respondent, the employees performed no work on behalf of Respondent in the rooms provided and the employees were permanent residents. These points are also disputed by Complainant. First, Complainant argues that the nonresident workers were employed based upon a one-year renewable contract. Thus, the employment and the housing arrangement were temporary in nature. Moreover, the fact that no work was performed in the rooms is of no consequence since the term "temporary labor camp" within the meaning of the standard is

not restricted to migrant or agricultural workers (OSHA Compliance letter dated 7/23/81). Although the aforesaid facts and the legal conclusions drawn by the parties are in dispute, it is clear that there was substantial justification for the Secretary to rely upon the facts as interpreted by the Secretary to arrive at legal conclusions underlying this litigation.

Based upon the foregoing, it is concluded that Complainant's litigation position in this case was based upon ascertainable facts and published governmental positions including, significantly, regulations promulgated by the Commonwealth of Northern Mariana Islands. It cannot be said that the alleged facts relied upon by Complainant do not support, in general terms, the theory of law advanced by Complainant. This is not to say that Complainant would have prevailed in this matter had it been litigated in its entirety. Whether the Secretary would have prevailed on the facts and legal theory relied upon in pursuing this case is not the test to be applied in awarding attorney fees. *See S and H Riggers and Erectors, Inc.*, 672 F.2d 426 (5th Cir. 1982). The test is one of reasonableness in law and fact. Based upon the submissions of the parties, as set forth above, it is concluded that there is a reasonable basis for the facts alleged by the Secretary as well as the legal theory advanced and the facts reasonably support the legal theory. Thus, the Secretary was substantially justified in pursuant this litigation.

Finally, the Secretary asserts that an additional legal theory was contemplated at the time that the decision to dismiss this matter was made. In his affidavit in support of the Secretary's Opposition to the Award of Attorney Fees, OSHA's Regional Administrator, the person responsible for dismissing the case, stated that he considered amending the citation to allege a violation of 29 CFR § 1910.141(b), the general sanitation standard, alleging that contaminated water was present throughout the entire workplace (the hotel) to which employees were exposed. Pursuant to Rule 15, Fed. R. Civ. P., it is likely that the proposed amendment would have been granted. In that event, the temporary labor camp issue would have been eliminated from the litigation and, based upon the facts alleged, it is likely that the Secretary would

have prevailed on the merits. Thus, the Secretary would have been substantially justified in pursuing that legal theory.

CONCLUSION

For the reasons set forth above as well as the decision dated March 23, 2004, it is concluded that the position of the Secretary of Labor in this litigation was substantially justified and Respondent's application for attorney fees is DENIED.

_/s/_____
Robert A. Yetman
Judge, OSHRC

Dated: November 12, 2004