United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR, Complainant, v. AQUATEK SYSTEMS, INC., and its successors, Respondent.	OSHRC DOCKET NO. 03-1351

DECISION ON APPLICATION FOR LEGAL FEES AND EXPENSES

Respondent Aquatek Systems, Inc., (Aquatek) has filed an application for attorney fees and expenses under the Equal Access to Justice Act, 5 U.S.C. §504, *et seq.* (EAJA), and the Commission's implementing regulations set forth at 29 C.F.R. §2204.101 through 2204.311. Aquatek seeks to recover legal fees and expenses incurred in defending against a 2003 citation alleging violation of 29 CFR 1926.501(b)(13). The violation, though originally upheld by this judge, was vacated by the Commission in its order of February 6, 2006.

Commission Rule 101, C.F.R. §2204.101 provides:

> The Equal Access to Justice Act, 5 U.S.C 504, provides for an award of attorney or agent fees and other expenses to eligible individuals and entities who are parties to certain administrative proceedings (called "adversary adjudications") before the Occupational Safety and Health Review Commission. An eligible party may receive an award when it prevails over the Secretary of Labor, unless the Secretary's position in the proceeding was substantially justified or that special circumstances make an award unjust.

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). The prevailing party must meet the established eligibility requirements before it can be awarded attorney fees and expenses. Commission Rule 2204.105(b)(4) requires that an eligible employer be a "corporation . . . that has a net worth of not more than $ 7 million and employs not more than 500 employees." Commission Rule 2204.105(c) provides: "For the purpose of eligibility, the net worth and number of employees shall be determined as of the date the notice of contest was filed." Commission Rule 2204.202(a) requires the applicant to "provide with its

application a detailed exhibit showing the net worth of the applicant as of the date of the notice of contest "that provides full disclosure of the applicant's assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards in this part."

The citation in this matter was issued on July 10, 2003. Aquatek filed its notice of contest on July 23, 2003. The record establishes that Aquatek is a small employer, with only four employees. With its petition, Aquatek has submitted a statement prepared by B. Glenn Graham, C.P.A., setting forth its assets, liabilities and equity as of December 31, 2003 and 2004. Though neither affidavits nor exhibits were submitted demonstrating Aquatek's exact net worth on the relevant date, its submissions are sufficient to show that it employed fewer than 500 employees and had a net worth of less than $ 7 million at the time it filed its notice of contest. It has met the eligibility requirements of the EAJA.

Prevailing Party

It is undisputed that Aquatek is the prevailing party in this matter.

Substantial Justification

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. *See* Commission Rule 2204.106(a). "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).

Factual Background. Aquatek is a small company engaged in various types of waterproofing work. At the subject worksite, in Euless, Texas, Aquatek was engaged in waterproofing balconies and breezeways for an apartment complex under construction. When Aquatek arrived on the worksite on January 7, 2003, all but two or three of the balconies had guardrails. Though Aquatek foreman Ronnie Morris asked the general contractor about installing guardrails on the unprotected balconies, none were installed by the time his crews were ready to begin waterproofing those areas. Morris had only that day to complete his work and believed it would take only a few minutes to finish the job. Therefore, rather than halting work, he instructed his crew to complete its work on hands and knees to minimize the workers' exposure to the fall hazard. Ronnie Morris knew he was violating Aquatek's safety policy, but believed that no one would find out about it.

This hearing judge found that the Secretary had established her prima facie case, and rejected Aquatek's assertion that it could not have known that its supervisor would ignore company work rules, or direct his crew to work without fall protection. Discounting the testimony of Kenneth and Ronnie Morris, the company's owner and the supervisor involved, this judge found that Aquatek failed to establish it had a relevant work rule that was adequately communicated and effectively enforced. That finding was based on the involvement of the entire work crew in the cited misconduct, and the presence of a supervisor on the site, as well as the complete absence of any written documentation supporting the existence of a safety program.

The Commission reversed, holding that Aquatek had rebutted the Secretary's prima facie showing of knowledge. The Commission stressed that an employer's safety program need not be in writing, and found that the testimony in the record was sufficient to establish both that Aquatek had a verbal rule prohibiting working without fall protection, which was adequately communicated and effectively enforced. The Commission further held that there was no need to monitor employee compliance with work rules in this case, where there was no history of prior safety violations. The violation was, therefore, vacated.

Discussion. In this case, there can be no question that the Secretary was substantially justified in initiating the cited action. Both at the hearing and upon Commission review, the Secretary was found to have presented enough evidence to establish a prima facie case. Aquatek, however, argues that the Secretary should have anticipated its affirmative defense of employee misconduct, conducted further investigation, and dropped the matter upon learning of Kenneth and Ronnie Morris' intended testimony. Aquatek's position cannot be supported.

First, this case proceeded under the Commission's E-Z Trial procedures (now Simplified Proceedings, see Commission Rule 2200.200 through 211). Under E-Z (simplified) proceedings, pleadings are not required; discovery is not permitted except as ordered by the judge. The Secretary, therefore, cannot be faulted for failing to conduct investigations into affirmative defenses that may or may not be pursued by Respondent at hearing.

Secondly, though Aquatek suggests the hearing judge's opinion was based entirely on the absence of a written safety program, that is not the case. The questions of whether there *was* a safety program, either written or verbal, and whether it was effectively communicated and enforced were raised by the Secretary and supported by multiple factors, including: 1) the lack of any documentation of training and/or enforcement, 2) the unanimity of the violative conduct, and 3) the participation of a supervisor in the misconduct. Commission precedent cited in the judge's opinion recognizes these factors as evidence contraindicating an effective safety program. (Amended Decision and Order, p. 5) The evidence

establishing Aquatek's safety program consisted entirely of testimony from Kenneth and Ronnie Morris, Aquatek's owner and the foreman involved in the cited misconduct. While the Secretary had no physical evidence contradicting the Morrises' testimony, she believed and argued that "[t]he testimony of the Morrises lack[ed] credibility and d[id] not come close to establishing the defense of employee misconduct." (Secretary's Post-hearing Brief, p. 17).

In this case, there existed a reasonable basis in law for the theory propounded by the Secretary. The facts alleged reasonably supported the legal theory advanced. Because the final resolution of the issues rested on the credibility findings of the hearing judge the Secretary was substantially justified in pressing her position.

Based on the foregoing, it is hereby ORDERED that: Aquatek's application for attorney's fees and expenses is DENIED.

/s/
Benjamin R. Loye
Judge, OSHRC

Date: June 26, 2006