UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Corson Services, Inc.,	)	Docket No. FIFRA-09-0433-C-85-12
	)	
Respondent	)	

RECOMMENDED DECISION

This is an application for attorney's fees and expenses pursuant to the Equal Access to Justice Act ("EAJA"), as amended, 5 U.S.C. 504 (Supp. III 1985), and the Agency's regulations thereunder, 40 C.F.R. Part 17.

The applicant, Corson Services, Inc. ("Corson"), was the respondent in an adjudicative proceeding under the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), § 14(a), 7 U.S.C. 136 l(a), for the assessment of civil penalties for alleged violations of FIFRA.

The complaint was issued April 10, 1985, and an order granting amendment of the complaint was issued June 25, 1985. The amended complaint alleged that, on July 26, 1984, Corson distributed in commerce three different pesticide products that were not packaged in child resistant containers, in violation of FIFRA § 12(a)(1)(E), and 40 C.F.R. § 162.16. EPA proposed a civil penalty of $5,000 for each alleged violation, totalling $15,000. Applicant Corson filed a timely answer contesting both the violation and the penalty.

A hearing took place on December 5, 1985, before then Chief Administrative Law Judge Edward B. Finch. At the conclusion of EPA's case, Corson made an oral motion to dismiss on the grounds that EPA failed to establish a prima facie case. Corson submitted its motion in writing on December 17, 1985, at the request of Judge Finch, who had refused to rule from the Bench on the motion. Judge Finch granted the motion to dismiss on April 21, 1986, and EPA appealed. On December 23, 1987, the Judicial Officer affirmed the dismissal order and also denied without prejudice Corson's request for attorney's fees, 1/ which was included in its Motion to Dismiss. The application for attorney's fees and costs was filed on January 21, 1988. The EPA filed its response in opposition to said application on March 22, 1988. 2/

The Adjudicative Proceeding

The complaint alleged that three pesticide products, on or about July 26, 1984, were distributed, offered for sale, shipped, or held for sale in containers that did not conform to the standards for child-resistant packaging ("CRP") in violation of 40 C.F.R. § 162.16, and FIFRA § 12(a)(1) (E). 3/ Corson admitted it distributed and sold those products

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1/ Corson's request was filed prematurely under 40 C.F.R. § 17.14.

2/ The EPA's memorandum is marked on the first page as "Confidential Information." The only confidential information contained therein, however, is the matter set forth on page 8, lines 2-9, and the exhibit referred to. That material is made in camera; as such, it can be disclosed only to counsel for the parties, to EPA personnel reviewing this decision and to any reviewing court. The remainder of the memorandum is made part of the public record.

3/ Reference to the C.F.R. are to the 1984 Edition. Current regulations governing child resistant packaging are at 40 C.F.R. Part 157.

as alleged in the complaint. Judge Finch found, however, that the evidence presented by Complainant was insufficient to establish the sale or distribution of the products in containers not conforming to CRP standards. Judge Finch observed that at the hearing the containers themselves were not produced but only pictures of them from which "[i]t is difficult to discern, even from a detailed analysis, whether these packages would be childproof under 40 C.F.R. 162.16." He further noted that no witnesses were presented by Complainant who could testify as to what conconstituted CRP. 4/ Accordingly, he dismissed the complaint.

The Judicial Officer affirmed the dismissal order. He agreed that neither the documentary evidence nor the testimony of EPA witnesses adequately supported the EPA's claim that Corson's packaging did not meet federal standards. He pointed out that the EPA conceded on the appeal that it presented no witness who could answer the presiding officer's question: "Are the products contained in child resistant packaging." 5/

Statutory Framework

The Act, 5 U.S.C. § 504, provides in pertinent part:

> (a)(1) An Agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of of the Agency was subtantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

4/ Order Granting Motion to Dismiss at 9-10.

5/ Order of Chief Judicial Officer (December 23, 1987) at 5.

The EPA has established procedures for the submission and consideration of applications for awards of attorney's fees and expenses at 40 C.F.R. Part 17. 6/

The proceedings initiated by the complaint are adversary adjudications clearly within the meaning of the EAJA and are specifically identified in the Agency regulations as such. 7/ The Act, as amended, defines party to mean an individual whose net worth does not exceed two million dollars at the time the action was initiated and for corporations those whose net worth does not exceed seven million dollars at the time adjudication was initiated. The definition also states that the qualified party must not employ more than 500 persons at the time the action was initiated. 8/ The affidavits submitted with Corson's application demonstrate that Corson has a net worth of less than seven million dollars and employs less than 500 employees. The EPA's answer to application for attorney's fees does not dispute or put at issue any of these threshold factors. I find, accordingly, that Corson is eligbile for an award.

6/ The EAJA initially applied only to adjudications pending between October 1, 1981, and September 30, 1984. Amendments to the EAJA on August 5, 1985, extended its coverage to cases pending on or commenced after that date, Pub. L. 99-80, §7, 99 Stat. 183, 186 (1985). It should be noted that EPA's regulations in conformity with the law prior to its amendment state that "[t]he Act applies to an adversary adjudication pending before EPA at any time between October 1, 1981 and September 30, 1984." 40 C.F.R. § 17.4. Although the regulations have not yet been amended to incorporate the changes made by the 1985 amendments they are considered as still applicable to the extent they are consistent with the amended Act. See Order of Chief Judicial Officer at 11, n. 15.

7/ 40 C.F.R. §17.3(5).

8/ 5 U.S.C. 504(b)(1)(B).

Discussion

The language of the statute requires that several specific questions be answered in determining whether or not ultimately an award of fees and expenses shall be made. The first of these questions is whether or not the Applicant was the prevailing party. The EPA admits in its answer that Corson is a prevailing party within the meaning of 40 C.F.R. § 17.5, and 5 U.S.C. § 504.

The next threshold issue to be determined is whether the EPA was substantially justified in bringing this action. Before the 1985 Equal Access to Justice Act extension and amendment, courts were divided on the meaning of "substantial justification." The legislative history to the 1985 amendment confirmed some lower court holdings that "substantial justification" means more than merely reasonable 9/ and should, in fact, be slightly more stringent than one of reasonableness. 10/ Agency action found to be unsupported by substantial evidence, on the other hand, does not raise a presumption that the agency was not substantially justified. 11/ The test, in sum, is a middle ground between an automatic award to a prevailing party and a restrictive standard which would require the prevailing party to show the government position to be frivolous and groundless. 12/

9/ House Rep. No. 99-120, Part I, 99th Cong., 1st Sess. 9, reprinted in 1985 U.S. Code & Cong. News 138. The legislative history said that the rejection by Congress in 1980 of a standard of "reasonably justified" in favor of "substantially justified" meant that the test must be more than mere reasonableness.

10/ Massachusetts Fair Share v. Law Enforcement Assistance Administration, 775 F.2d 1066, 1068 (D.C. Cir. 1985).

11/ See Pullen v. Bowen, 820 F.2d 105, 108 (4th Cir. 1987).

12/ Bazaldua v. United States I.N.S., 776 F.2d 1266, 1269 (5th Cir. 1985).

The legislative history also states that an inquiry for EAJA purposes extends beyond litigation arguments and requires an assessment of the governmental actions that formed the basis of the suit. The House Judiciary Committee Report states:

> In cases where the private party is a prevailing defendant, the definition of "position of the United States [or agency]" necessarily includes an evaluation of the facts that led the agency to bring the action against the private party to determine if the agency or government action was substantially justified. To meet its burden on proof in these cases, the agency must demonstrate to the court or adjudicative officer that it was substantially justified.
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> When the case is litigated to a final decision by a court or adjudicative officer . . . the evaluation of the government's position will be straightforward, since the parties will have already aired the facts that led the agency to bring the action. No additional discovery of the government's position will be necessary, for EAJA petition purposes. (Citation omitted.) 13/

The regulation that Corson was charged with violating provides that a pesticide must be sold in child resistant packaging if it meets any one of six specified toxicity criteria, its labeling recommends or implies residential use, and it is not restricted to use by or under the supervision of a certified applicator. 14/ Child resistant packaging is defined as:

13/ H.R. Rep. No. 99-120, 99th Cong., 1st Sess. 13, reprinted in 1985 U.S. Code Cong. & Ad. News 132, 141.

14/ 40 C.F.R. § 162.16(b) (1984) (current version at 40 C.F.R. § 157.22).

> [P]ackaging that is designed and constructed to be significantly difficult for children under five years of age to open or obtain a toxic or harmful amount of substance contained therein within a reasonable time, and that is not difficult for normal adults to use properly. 15/

Two contested issues were raised on the motion to dismiss: (1) Whether the chemical in the containers whose distribution was the basis for the complaint required CRP; and (2) whether the containers met the standard for CRP. Corson claims that on neither issue was the EPA position substantially justified.

On the first issue, whether the chemical in the containers required CRP, Judge Finch questioned the EPA's proof because no witness testified that the contents of the containers had been chemically analyzed. 16/ Nevertheless, the EPA established that the three sample containers with their labels were purchased from Corson at the time of inspection and were delivered intact to the laboratory. The label on each of the containers showed that it contained a chemical for which child resistant packaging was required. 17/

15/ 40 C.F.R. § 162.16(a)(2) (1984) (current version at 40 C.F.R. § 157.21(b)).

16/ Order granting motion to dismiss at 9. The analytical reports were ambiguous as to whether the contents of the containers had been analyzed to verify that all ingredients in the container were as stated on the label and the state chemist who signed the analytical reports was apparently unavailable to testify. See Tr. 97-100; EPA Exs. 8a-8c. The Judicial Officer on review did not consider it necessary to reach the issue in view of his finding that the EPA had failed to establish that the containers did not meet CRP standards. Order at 5, n. 8.

17/ See EPA Exs. 6-8; Tr. 118-19, 125-26.

The law requires that the label attached to the container have a correct statement of the composition of the product. 18/ It is to be normally presumed that people conduct their business in a lawful manner. 19/ Accordingly, I find that the label was sufficient evidence of the contents of the container to make the EPA's position that CRP was required substantially justified. 20/

I find, however, that the EPA has not shown that its position that the containers did not meet CRP standards was substantially justified. The evidence presented by the EPA on this issue has been succinctly summarized by Judge Finch, as follows:

> While EPA 9(a), (b), (c), (d) and (e) show depictions of the containers for the products concerned, the actual containers were not in the courtroom. It is difficult to discern, even from a detailed analysis, whether these packages would be child proof

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18/ See 40 C.F.R. § 162.10(a)(5).

19/ Cincinnati, New Orleans & Texas Pacific Ry. Co. v. Rankin, 241 U.S. 319, 327 (1916).

20/ I recognize that Corson's Vice President and General Manager on being cross-examined by EPA counsel, testified that he did not know if the compound on the label is contained in the product in the amount stated. Tr. 220-21. I doubt, however, if he intended to admit that his company was indifferent to FIFRA's requirements. In any event, such testimony might be relevant to a reviewing body in determining if a finding as to the contents of the container was supported by substantial evidence, or it might be persuasive to the Presiding Officer in determining which party should prevail on the issue. But an agency's position can be substantially justified even if not supported by substantial evidence and even if the agency does not prevail at the trial level, (supra at 5). A chemical analysis may have corroborated the presence of the toxic chemical but even without it the EPA would have been warranted in assuming that the label accurately stated the contents of the containers unless it had reason to believe otherwise.

> under 40 C.F.R. § 162.16. Thus, any meaningful cross-examination was impossible. It would seem that a demonstration by Complainant's witnesses of the method of opening the containers would have been helpful to the Court and to Respondent's counsel.
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> . . . No witnesses were presented by Complainant who could testify as to what constituted child resistant packaging, nor was any witness presented who knew the test procedures or whether or not any tests in accordance with 40 C.F.R. § 162.16 were actually performed. The only evidence presented in this regard was a memorandum from Rex. W. Neal to Sara Segal, EPA Region IX, in which he states "The containers used for distribution are not Child Resistant Packaging." However, upon cross-examination, Mr. Neal testified that he got that information from Ms. Bessey. Tr., p. 67. Upon cross-examination of Ms. Bessey, she testified with regard to her knowledge of child resistant packaging as follows:
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> ". . . so determining whether or not he has to have those products in child resistant packaging is not in my realm of authority or understanding."
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> Therefore, again, there were no witnesses presented by Complainant for cross-examination on this subject. 21/

The EPA argues that it introduced the photographs rather than the actual containers because it believed that they would sufficiently demonstrate that the containers were not child-resistant. It further asserts that Corson never disputed the fact that its packages were simple screw-cap containers and that even Corson's Vice President conceded that the package was merely plastic containers with lids. 22/ Corson's defense and the testimony of its officers, however, must be evaluated in light of the fact that Corson did not know what specific kind of package was

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21/ Order Granting Motion to Dismiss at 9-10. See also Tr. 18 (Paulson), 32-33 (Bessey), 69-70, 95 (Neal).

22/ See Tr. 213.

required under CRP standards. 23/ The standard requires that the packages be evaluated in terms of how difficult would it be for children under five to open them. It should have been obvious to the EPA that this could not be answered by the photographs, and for all that appears in the record, could not have been answered by an examination of the containers themselves without someone explaining why they did not meet CRP standards.

If the EPA's position is to be judged solely on the record made in the administrative proceeding, the conclusion is inescapable that the EPA proceeded in this matter upon insufficient evidence. No doubt, it was reasonable for the EPA to question whether the containers met CRP standards in view of the fact that Corson in the investigation took the position that it never attempted to specifically comply with the CRP requirements because it was of the opinion that compliance was voluntary. 24/ But this was not enough to make the EPA's position substantially justified. It apparently requires someone with specialized knowledge about the capabilities of a child under five to make the determination of what does and does not satisfy CRP standards. Without obtaining such expert opinion, it cannot be said

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23/ See Tr. 197, 236.

24/ See EPA Exs. 2, 3, 5.

that the EPA's position was reasonable on the facts and, hence, one that was substantially justified. 25/

The EPA asserts in justification of its position that it has now obtained the expert opinion that the containers were not CRP. 26/ That evidence is rejected as evidence of substantial justification. Affirmative evidence that Corson's containers were not CRP was so basic to the EPA's case in establishing a violation that it should not have proceeded without it. 27/ The EPA argues that it was justified in relying upon the photographs because it was given the option in Judge Finch's prehearing exchange order to submit either the containers or depictions thereof. 28/ But the photographs of the containers are meaningless without credible evidence explaining why the containers did not meet the standard. Judge Finch was obviously not purporting to tell the EPA how to prove its case.

The case of Brinker v. Guiffrida, 798 F.2d 661 (3d Cir. 1986) is directly in point. There the government in opposing its liability under an insurance policy took a position that it later admitted was unjustifiable.

25/ See Wyoming Wildlife Federation v. United States, 792 F.2d 981, 985 (10th Cir. 1986).

26/ The evidence has been put in camera, see supra at 2, n. 2. It consists of an affidavit with test reports showing that the containers were examined and found not to conform to CRP standards.

27/ The burden of proof, by which is meant not only the burden of coming forward with evidence but also the burden of persuasion was upon the EPA to show that the violation occurred as alleged. See 40 C.F.R. § 22.24.

28/ Memorandum of points and authority in opposition to application at 7.

It waited, however, until filing its opposition to plaintiff's motion for summary judgment before doing so. The court held that although the government was now asserting a tenable position, it still did not meet its burden of showing that its position was substantially justified. The court stated as follows:

> [T]he government's burden is to show that the relationship of the facts and legal theories alleged in support of its position is such that the government is substantially justified in defending against a claim. A threshold requirement for meeting this burden is to show that the alleged facts have a reasonable basis in truth. * * * The facts as to which policy was applicable and what policy language was correct have been readily available to the agency from the outset. Nevertheless, until the final pleading of the litigation the government attempted to ground its position on policy language which could not have been probative of the coverage actually provided to the plaintiff.
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> By the time the agency proffered an arguably reasonable factual justification for its position, the plaintiff had filed every pleading and brief necessary to the district court's decision on summary judgment. The fact that an arguably reasonable position was advanced at the eleventh hour of the litigation cannot justify the government's protracted and unexcused failure to ascertain the correct policy language governing Mr. Brinker's claim. Therefore, the government has not met its burden to show substantial legal and factual justification for its position as a whole. 29/

Here the EPA waited until after it had lost the adjudicative proceeding to get the expert evidence to justify its position. Such delay is inexcusable and will not be allowed to defeat Corson's claim for attorney fees and expenses.

29/ Brinker v. Guiffrida, supra, 798 F.2d at 667.

Nor does the record disclose that there are special circumstances that would make an award unjust. This provision is a safety valve to protect the government's good faith advancement of a novel but credible extensions and interpretations of law or where there are equitable considerations for denying a fee award. 30/ There are no such considerations here. This case involves no novel interpretation of law. The defect in the EPA's position arises simply from a failure to produce sufficient evidence to make a prima facie showing of a violation. 31/

I find, accordingly, that the EPA has demonstrated neither that its position was substantially justified nor that there are special circumstances that make the award of a fee unjust.

The Computation of Fees

Corson has filed a claim for an award of $12,371.50 for attorney's time, $292.40 for non-attorney's time and $420.92 for expenses, making the total sought $13,084.82.

The attorney fees are based upon time spent both by Gordon G. Giles who appeared as attorney of record in this case and for Carlos Ronstadt

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30/ Brinker v. Guiffrida, supra, 798 F.2d at 667-68.

31/ It is not intended to imply that the government must have incontrovertible proof to show substantial justification for its position. If the EPA had presented a witness who could explain why in the witness' opinion Corson's packages were not CRP and still had not prevailed, that would, of course, have presented a different question on whether its position was substantially justified.

whom Giles states he consulted with as an expert in administrative and environmental law. Giles claims that he spent 110.2 hours for which he asks compensation at $100 per hour, and that Ronstadt spent 15.9 hours, for which he asks compensation at $85 per hour.

Of the 110.2 hours claimed for Giles, 20 hours, or 18%, are for time spent in preparing the EAJA application. While fees for such work are presumably not ordinarily billed to the client, they have been recognized by the courts as properly awarded under the EAJA. 32/ Instead of furnishing an itemized statement as he did for the work done in the adjudicative proceeding, Giles states simply that he estimates 20 hours were spent on the EAJA application. 33/ Since the estimate is not questioned by the EPA, and since it cannot be said from examination of the papers filed in connection with the EAJA application that it is unreasonable, Corson will be allowed 20 hours for the EAJA application.

The EPA objects to the allowance of more than $75 per hour, and I agree with its position. The law provides that attorney's and agent's fees shall not be awarded in excess of $75 per hour unless the agency determines by regulation that an increase in the cost of living or a

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32/ United Construction Co., Inc. v. United States, 11 Cl. Ct. 597, 602 (1987); Weber v. Weinberger, 651 F. Supp. 1379, 1395 (W.D. Mich. 1987); Volpe v. Heckle, 610 F. Supp. 144, 147 (S.D. Fla. 1985); Environmental Defense Fund v. Environmental Protection Agency, 672 F.2d 42, 62 (D.C. Cir. 1982).

33/ Memorandum in Support of Application for Attorney Fees at 11.

special factor such as the limited availability of qualified attorneys or agents for the proceedings involved justifies a higher fee. 34/ The statute, in short, requires that rates over $75 per hour must be authorized by regulation. The model rules issued by Administrative Conference of the United States under the amended EAJA also fix the maximum fee at $75 per hour, unless the agency adopts regulations authorizing a higher rate. 35/ Since the EPA has not adopted regulations authorizing a higher rate than $75 per hour, the maximum rate which can be awarded is $75 per hour, and Corson's application for higher rates is denied.

The EPA also objects to the allowances of fees for work done by Carlos Ronstadt asserting that fees are not authorized for consultants. It is true that neither he nor his firm appeared as attorney of record or as counsel on any of the papers filed in the proceeding. Nevertheless, Ronstadt's services appear to be purely legal in nature and similar to what would be furnished by an attorney assisting lead counsel in a matter. Accordingly, it is found that Corson is entitled to be awarded fees for Ronstadt's services, but at the $75 rate. I further find that Corson is entitled to be awarded the expenses for the legal work done by non-attorneys in Ronstadt's firm at the rate billed, namely, 4 hours for "MTC" at $40 an hour (probably a law clerk) and 2.8 hours at $33 per hour for "FK" (probably a paralegal).

34/ 5 U.S.C. § 504(b)(1)(A).

35/ See 51 Fed. Reg. 16666-667 (May 6, 1988).

Corson also claims other expenses in the amount of $420.92. Of these, $322.50 for depositions and $57.70 for photocopying are allowed. The remaining amount of $42.72 appears to consist of such items as postage, delivery service fees and mileage reimbursement costs which are disallowed as inappropriate expenses under the EAJA. 36/

One final question to be considered is whether Corson is entitled to an award based on all work done in the proceeding or whether since the EPA's position was found to be substantially justified on one issue, an award should not be allowed for the work done on that issue. The courts in some cases have calculated the award on this basis. 37/ The two issues here appear to be so closely related and to have been tried in such a fashion as to make it impractical to attempt to separate the work done on one from the other. 38/

In conclusion, I am of the opinion that Corson is entitled to the following fees and expenses under the EAJA:

36/ See Action on Smoking and Health v. CAB, 724 F.2d, 211, 224 (D.C. Cir. 1984); Oliveria v. United States, 11 Cl. Ct. 101, 109 (1986).

37/ See e.g., Copeland v. Marshall, 641 F.2d 880, 891-92 (D.C. Cir. 1980)

38/ See Environmental Defense Fund v. Environmental Protection Agency, supra n. 32, 672 F.2d at 55. While Judge Finch questioned whether the EPA had met its burden of showing that the containers required CRP, it is clear that what he considered dispositive of the case was the EPA's failure to affirmatively show that the containers did not meet CRP standards. The Judicial Officer on review found it unnecessary to consider whether the toxic content of the container had been proved.

Attorney Time:

Giles	110.2 hours at $75	$ 8,265.00
Ronstadt	15.9 hours at $75	1,192.50
		9,457.50
Non-attorney time (law clerk and paralegal)		252.40
Expenses (deposition & photocopying)		378.20
	TOTAL	$10,088.10

It is recommended, accordingly, that Corson be awarded fees and expenses in the amount of $10,088.10.

Gerald Harwood
Gerald Harwood
Chief Administrative Law Judge

DATED: April 22, 1988
Washington, D.C.