UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. WTG GAS PROCESSING LP EAST VEALMOOR PLANT, Respondent.	DOCKET NO. 16-0853

ORDER DENYING AMY OGLE'S ELECTION OF PARTY STATUS AND, IN THE ALTERNATIVE, PERMISSIVE INTERVENOR STATUS

This matter comes before the Court on *Amy Ogle's Brief Regarding Electing Party Status and, in the Alternative, Permissive Intervenor Status*.[1] Amy Ogle's husband, Jason Ogle, was an employee of Respondent. On November 1, 2015, Jason Ogle was killed when a flash fire occurred at Respondent's workplace. In response to the incident, Complainant conducted an investigation of Respondent and issued a *Citation and Notification of Penalty*, alleging six violations of the Occupational Safety and Health Act ("the Act"). Amy Ogle seeks to elect party status pursuant to Rule 20 of the Commission Rules of Procedure. *See* 29 C.F.R. § 2200.20. After reviewing the parties' and Mrs. Ogle's briefs, the Court finds Mrs. Ogle is not eligible to elect party status under Rule 20 or to seek, in the alternative, intervention under Rule 21.[2]

1. Mrs. Ogle filed her Petition to Elect Party Status on November 16, 2016. The Court entered a briefing Order dated November 17, 2016 directing counsel for the parties and Mrs. Ogle to address whether the Estate of Jason Ogle had standing to elect party status under Commission Rule 20, 29 C.F.R. § 2200.20.

2. Although Mrs. Ogle did not directly address intervention under Rule 21, Complainant hinted at the possibility that Mrs. Ogle, as representative of the Estate of Jason Ogle, could pursue permissive intervention. *See Complainant's Brief Regarding Amy Ogle Seeking to Elect Party Status* (citing *Wayne Farms, LLC*, OSHRC Docket No. 14-1672 (Order dtd February 27, 2015)). As such, the Court shall address both possibilities.

Party Status Pursuant to Commission Rule 20

Commission Rule 20(a) states, "Affected employees and authorized employee representatives may elect party status concerning any matter in which the Act confers a right to participate." *Id.* An 'affected employee' is defined by the Act as "an employee of a cited employer who *is* exposed to or *has access to* the hazard arising out of the allegedly violative circumstances, conditions, practices, or operations." *Id.* § 2200.1(e) (emphasis added). An 'authorized employee representative' means "a labor organization that has a collective bargaining relationship with the cited employer and that represents affected employees." *Id.* § 2200.1(g). The Court finds Mrs. Ogle does not qualify under either definition, thereby precluding her from electing party status in this matter under Rule 20.

As noted above, Mrs. Ogle is the spouse of an employee who was killed in a flash fire at Respondent's workplace. Although she claims that she is the legal representative of Jason Ogle, she is, in fact, the personal representative of the *Estate of* Jason Ogle. Though she may be a personal representative of the estate, Mrs. Ogle does not qualify under the plain language of the term 'authorized employee representative', because that term is specifically limited to "a labor organization that has a collective bargaining agreement with the cited employer *and* that represents affected employees." 29 C.F.R. § 2200.1(g) (emphasis added). Mrs. Ogle is not a labor organization, nor does she represent an affected employee.

As noted by ALJ Joys, the definition of 'affected employee' refers to exposure in the present tense. *See Wayne Farms, LLC*, *supra*. Thus, she concluded the Commission did not intend to allow former employees to claim party status because they are not actively exposed to the hazard under review by the Commission. *Id.* In other words, current employees have a unique interest in ensuring the continued safety of their workplace, whereas former employees

do not. *See id.* (citing *Donovan v. Oil, Chemical, and Atomic Workers Int'l*, 718 F.2d 1341, 1352 (5th Cir. 1983)). Tragically, due to the flash fire, Mr. Ogle is no longer an employee of Respondent and, therefore, no longer has an interest in the ongoing safety of Respondent's workplace. Accordingly, neither Jason Ogle, the Estate of Jason Ogle, nor Mrs. Ogle meets the necessary qualifications for party status under Rule 20.

Texas Estate Code Confers No Rights to Party Status

According to the Texas Estates Code ("Estate Code"), which Mrs. Ogle cites, an 'estate' means "a decedent's property." Tex. Estates Code Ann. § 22.012 (Vernon 2014). The Estate Code also states that the administration of an estate is entirely a proceeding *in rem*. *Id.* § 32.001. Black's Law Dictionary defines an action *in rem* as "[a]n action determining the title to property and the rights of the parties, not merely among themselves, but also against all persons at any time claiming an interest in that property; a real action." Black's Law Dictionary, "Action *in rem*" (10th ed. 2014). Thus, although Mrs. Ogle has authority to commence lawsuits on behalf of the estate, the scope of that authority is limited to: "(1) recovery of personal property, debts, or damages; or (2) title to or possession of land, any right attached to or arising from that land, or an injury or damage done to that land." Tex. Estates Code Ann. § 351.054 (Vernon 2014). Mr. Ogle's estate, the administration of which is entirely *in rem*, only has a property-based interest in any litigation. Thus, Mrs. Ogle's authority to commence litigation only extends to claims related to the recovery of personal property, debts, or damages and title to or possession of land. *See* Tex. Estates Code Ann. § 351.054, *supra*.

The Act provides no rights for the recovery of property. The estate simply has no *in rem* recourse under the Act, nor does it have an interest in the timing of any abatement agreed to

between the parties. Thus, the Estate Code does not vest any common law right of standing in the estate to participate in this proceeding.

Permissive Intervention Under Commission Rule 21

As an alternative to claiming party status under Rule 20, an interested individual may seek to intervene in the proceedings through Rule 21.[3] *See* 29 C.F.R. § 2200.21. In order to qualify for intervention as a non-party, a petitioner must: (1) set forth the interest of the petitioner in the proceeding; (2) show that the participation of the petitioner will aid in the determination of the issues in question; and (3) show that the intervention will not unduly delay the proceeding. *Id.* § 2200.21(b). Subsequently, the Commission or Judge "may grant a petition for intervention to such an extent and upon such terms as the Commission or the Judge shall determine." *Id.* § 2200.21(c). Based on the arguments presented by Mrs. Ogle, the Court denies the petition for permissive intervention under Rule 21.

First, Mrs. Ogle claims that she has an interest in the disposition of this action, but does not clearly express what that interest is. The only indication of interest appears in paragraph 7 of Mrs. Ogle's petition, which states, "A [sic] employee should be able to be represented in an action in death as in life. The opposite rule would create a situation where death in the employment prohibits the employee's representatives to be informed through the OSHA proceeding." *Amy Ogle's Br.* at ¶ 7. In other words, it appears Mrs. Ogle's sole interest in this litigation is to be informed of its progress and result; presumably because a ruling adverse to the employer in this context can serve as a basis for liability in an independent civil suit. This

3. Under the Act, unless the Commission has adopted a different rule, its proceedings shall be in accordance with the Federal Rules of Civil Procedure. 29 U.S.C. § 661(g). Mrs. Ogle argues that if she could be allowed intervention under the Federal Rules of Civil Procedure in other litigation, she should be allowed party status in this case. That argument fails to take into account that the Commission has adopted a specific rule for intervention different than the Federal Rules of Civil Procedure. Based on this statutory provision, the Commission has held that Commission Rule 21 is the sole means by which intervention can be accomplished and, thus, held F.R.C.P 24(a) inapplicable to Commission proceedings. *Brown & Root, Inc.*, 7 BNA OSHC 1526 (No. 78-0127, 1979).

individualized interest in the outcome, however, has nothing to do with "assur[ing] safe and healthful working conditions for working men and women . . . ." 29 U.S.C. § 651. Instead, Mrs. Ogle's interest is merely ancillary to the purpose of these Commission proceedings and, therefore, insufficient to justify her participation in the case at bar. Further, insofar as she wishes to be informed of the outcome or progress of this case, Mrs. Ogle's interests can be adequately fulfilled through a Freedom of Information ("FOIA")[4] request for documents.

Second, Mrs. Ogle has made no claim that her participation in this proceeding will aid in the determination of the issues in question. *See* 29 C.F.R. § 2200.21(b). Nor, for that matter, can the Court conceive how Mrs. Ogle's participation in this proceeding will aid in the determination of whether the cited standards apply, whether Respondent violated the standards, whether Respondent had knowledge of the hazardous condition, or whether employees were exposed to the condition. There has been no allegation that she possesses actual knowledge of any issue germane to the determination of liability or that she possesses specialized knowledge regarding the industry in question. *See Brown & Root*, 7 BNA OSHC 1526 ("The union's knowledge of structural steel construction techniques and procedures may lend significant assistance to a complete determination of the facts and issues in question.").

The Commission has held "that where a petitioner can show the three criteria set forth in Commission Rule 21(b), that petitioner should be granted leave to intervene unless the administrative law judge finds, in the exercise of his discretion, that the petitioner's interest is minimal and the petitioner's assistance in the proceeding would be insignificant." *Id.* Even if the Court were to find that Mrs. Ogle has met the three criteria of Commission Rule 21(b)—it does not—it would still find that her interest *in this proceeding* is minimal and her assistance would be insignificant. Accordingly, the Court denies Mrs. Ogle's petition for permissive intervention.

4. *See* 5 U.S.C. § 552. *See also* www.oshrc.gov and FOIA link to access procedure for submitting requests.

The Estate will not be Prejudiced

Neither the Court nor the Commission seeks to prevent Mrs. Ogle from representing her deceased husband's interests. Indeed, the Act specifically provides:

> Nothing in this Act shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.

29 U.S.C. § 653(b)(4). Nothing about this litigation will impact Mrs. Ogle's rights as a representative—or the estate's rights—in other litigation. The estate's interest in any litigation is purely pecuniary and such interests are adequately represented in proceedings under Texas' Estates Code.

SO ORDERED.

s/ Patrick B. Augustine
Patrick B. Augustine
Judge, OSHRC

Date: January 3, 2017
Denver, Colorado