

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

TRI-STATE STEEL CONSTRUCTION
COMPANY, INC.,

Petitioner,

v.

SECRETARY OF LABOR,

Respondent.

Docket Nos. 93-0512 and 93-0513

DECISION AND ORDER ON REMAND

On September 24, 1996, the Commission remanded these cases to the Administrative Law Judge for a determination whether Petitioner, Tri-State Steel Construction Company, Inc. (“Tri-State”) is an eligible party under the Equal Access to Justice Act, 5 U.S.C. § 504 *et seq.* (“EAJA”) and, if so, whether and in what amount to award attorney fees and expenses pursuant to EAJA.

The determinative issue in this EAJA application is whether Tri-State’s net worth is to be determined solely on the basis of its own assets or should the calculation include imputing to it the assets of NEC. For the reasons which follow¹, the assets of NEC are imputed to Tri-State and based upon the aggregated assets, which exceed \$7,000,000, it is determined that the Petitioner, Tri-State, is not eligible for an EAJA award. Tri-State’s petition is thus DENIED.

The Commission has approved and adopted the aggregation of assets theory in assessing eligibility for EAJA. While the Commission declined to adopt a *per se* rule of aggregation of assets, it specifically held that the “real party in interest” doctrine was to be used for determining whether the assets of a subsidiary should be aggregated with those of the parent company in determining net

¹ The motions of both parties to admit into the record various documents, exhibits and affidavits are granted.

worth under EAJA. *Nitro Electric Co.*, 16 BNA OSHC 1596 (No. 91-3090, 1994)(“*Nitro*”).²

Under *Nitro*, the “real party in interest” is determined by answering the following questions:

1. Against which entity was the government action taken ?
2. With which entity has the government dealt ?
3. Is the petitioner a wholly-owned subsidiary ?
4. Is the Petitioner autonomous ?
5. Do the companies have the same president and do they occupy the same offices ?
6. Does the principal entity perform various administrative functions for the Petitioner ?
7. Does the attorney for the principal represent the Petitioner ?
8. Which entity pays the attorney³ ?

Applying the above factors, consideration is given to the following.⁴

1. OSHA issued citations to both Tri-State and NEC.
2. The government has apparently dealt with one attorney for both entities after citations were issued individually to both Tri-State and NEC.
3. Tri-State has been a wholly-owned subsidiary of NEC since 1970. NEC itself is not an

² Respondent’s argument that the “most current authorities demonstrate that [aggregation] should not be done” (Petitioner’s Reply to Complainant’s Opposition to Petition for an Award of Attorney Fees and Expenses, p.2) is to no avail before the administrative law judge who is bound to follow Commission precedent in the absence of contrary precedent in the federal circuit in which the case arose.

³ In *Nitro*, the Commission placed particular emphasis on the principal corporation’s availability to advance to the petitioner the funds required to mount a defense. *Nitro Electric Company*, 16 BNA OSHC 1596, 1598 (No. 91-3090, 1994).

⁴ Chief Judge Sommer, in a thorough and instructive opinion, applied the *Nitro* test concluding, *inter alia*, that the net worth of NEC and Tri-State was to be aggregated and that when aggregated, Tri-State was not eligible under EAJA. *Tri-State Steel Const. Inc., and National Engineering & Contracting*, Nos. 89-2611 & 89-2705 (January 2, 1997)(ALJ), *petition for review filed*, No. 97-3348 (6th Cir., April 11, 1997).

Since the Commission did not act on Tri-State’s petition seeking review of Judge Sommer’s decision it evolved into a final order of the Commission by operation of law. Judge and is regarded as having no precedential value. *Leone Construction Co.*, 3 BNA OSHC 1979 (No. 4090, 1976). Nonetheless, Judge Sommer’s learned rationale is adopted herein.

eligible party under EAJA because its net worth exceeds \$7,000,000. NEC has a number of other wholly-owned subsidiaries.

4. Respondent places great emphasis on the “independence” of Tri-State from NEC. In support of its claim that Tri-State is not “captive” of NEC, it points to examples of areas in which it operates independently. It emphasizes that there are times when Tri-State does work for contractors other than NEC, there are times when NEC does not use Tri-State on a project and that Tri-State sometimes submits bids to and works for NEC competitors.

5. Three individuals (Robert J. Ibos, John DeLuca, Wayne E. Junod and John S. Shott) had, for at least three years preceding the filing of NEC’s notice of contest, served as directors of both Tri-State and NEC. All of these individuals were also officers of NEC. Alan T. Sheppard, president of Tri-State since 1990, serves on the NEC board of directors. There is considerable overlap between the officers and boards of directors of NEC and Tri-State.

6. The companies identify their principal places of business as the same building which is owned by NEC. Office equipment is used by both companies and they use the same receptionist. Shared services⁵ include negotiating and purchasing insurance, payroll services, accounting services, bookkeeping and data processing services and benefit plans of various types.

7. Not only have both Tri-State and NEC been represented by the same counsel in the OSHA cases, their safety programs have been run by the same individual, Mr. William L. Bunner, who at the time of the filing of the petition, was the director of litigation for NEC and whose duties included selecting counsel. A review of earlier Commission cases involving Tri-State and NEC indicates that the companies have consistently been represented by the same attorney.⁶

⁵ It is undisputed that pro-rata charges for several of the services which are shared (supplied by NEC to Tri-State) are billed to or paid for by Tri-State. There is, however, no showing by Petitioner that the costs it incurs for such services are equivalent to what it would pay on the open market were it to seek them as a totally separate entity. Moreover, it is reasonable to infer that the sharing of such services, even if conducted by employees of NEC and charged to Tri-State, result in significant integration of operation and savings to Tri-State due to economy of scale and consolidation of personnel. These advantages and the degree of integration are such that they are considered to be shared for the purposes of EAJA aggregation.

⁶ See, 16 BNA OSHC 1930 (Nos. 92-1550 & 92-1551, 1994); 15 BNA OSHC 1903

8. Neither party has pointed to specific evidence as to the source of funds for mounting a legal defense. Petitioner's filings imply that costs incurred as a result of the OSHA citations to Tri-State would be charged to it as a separate entity. This argument is not persuasive. First, although the Commission was particularly impressed by a parent corporation's "availability to advance to [a subsidiary corporation] funds required to mount a defense," *Nitro*, supra, 15 BNA OSHC at 1598, the funding of the litigation is neither the sole nor the determining factor. Indeed, in this case, the evidence of the closely integrated operations and management of the two corporations is more persuasive. Second, Petitioner, as the party seeking to recover fees has the burden of establishing its eligibility. *Love v. Reilly*, 924 F.2d 1492 (9th Cir. 1991). The liability for the failure to produce specific evidence as to this issue must thus fall upon Petitioner. Finally, the continuation of the same legal representation which served both parent and subsidiary and the fact that Tri-State's net income or loss is incorporated into NEC's consolidated financial statement are strong indicators that NEC is the real party in interest.

Based on the totality of the above, I find that aggregation of assets is appropriate in this matter and that upon aggregating such assets the Petitioner, Tri-State Steel Construction Company, Incorporated, is not eligible for an award under EAJA. Accordingly, its petition is DENIED.

Dated:

Washington, DC

Michael H. Schoenfeld
Judge, OSHRC

⁶(...continued)
(Nos. 89-2611 & 89-2705); 10 BNA OSHC 2107; 10 BNA OSHC 2107 and 2166 (Nos. 81-2758 and 2750) and *petition for review*, No. 97-3348 (6th Cir., April 11, 1997).