

SECRETARY OF LABOR,

Complainant,

v.

C.J. HUGHES CONSTRUCTION, INC. ,

Respondent.

OSHRC Docket No. 93-3177

DECISION

Before: ROGERS, Chairman; and VISSCHER, Commissioner.

BY THE COMMISSION:

Administrative Law Judge Irving Sommer denied an application for fees and other expenses filed by C.J. Hughes Construction, Inc. ("Hughes") under the Equal Access for Justice Act, 5 U.S.C. § 504 ("EAJA"). The judge concluded that Hughes "had not established that it meets the financial criterion to qualify for an EAJA award." At issue is whether the judge erred in concluding that based on the record, Hughes had not carried its burden of establishing eligibility for an EAJA award under Commission EAJA Rule 105, 29 C.F.R. § 2204.105, specifically in light of the requirements under Commission EAJA Rules 202(a) and 105(c), § 2204.202(a) and § 2204.105(c). In light of the judge's reliance on *Nitro Electric Co.*, 16 BNA OSHC 1596, 1993-95 CCH OSHD ¶ 30,335 (No. 91-3090, 1994), as a basis for denying the application, we reverse and remand the case for a determination of Hughes' net worth.

With its original EAJA application, Hughes filed an affidavit from its safety officer

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which stated that "at the time the adversary adjudication was initiated, [Hughes]...had a net worth which did not exceed \$7,000,000.00 and further, had less than 500 employees."¹ In her answer to Hughes' EAJA application, the Secretary objected to the sufficiency of the application on two grounds: that Hughes had failed to disclose its corporate parents, subsidiaries, and affiliates as required by Commission Rule 35, § 2200.35, and that Hughes' application contained "no detailed net worth exhibit and/or detailed net worth exhibit of any parents, subsidiaries and affiliates as required by [Commission] EAJA Rules § 2204.201, § 2204.202, [and Commission Rule] § 2200.35."²

Hughes responded to the Secretary's objections in its reply brief to the judge. First, Hughes provided an affidavit from its controller/treasurer which stated that the company had

¹ Under Commission EAJA Rule 105(b)(4), § 2204.105(b)(4), a corporation can seek fees and expenses incurred in connection with an adversary adjudication if at the time the adjudication was initiated, the corporation's net worth did not exceed \$7,000,000 and it did not have more than 500 employees. *See also* 5 U.S.C. § 504(b)(1)(B).

² Commission EAJA Rule 201(b), § 2204.201(b), states that absent a showing that the applicant qualifies as a tax-exempt organization or cooperative association, each application for an EAJA award "shall include a statement that the applicant's net worth does not exceed \$2 million (for an individual) or \$7 million (for all other applicants)."

Commission EAJA Rule 202(a), § 2204.202(a), provides:

Each applicant except a qualified tax-exempt organization or cooperative association shall provide with its application a detailed exhibit showing the net worth of the applicant as of the date [of the notice of contest]. The exhibit may be in any form convenient to the applicant 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 Commission may require an applicant to file additional information to determine its eligibility for an award.

Commission Rule 35, § 2200.35, is not part of the Commission's EAJA rules and generally requires that initial pleadings filed by a corporation be accompanied by a separate declaration either listing all of the corporation's parents, subsidiaries, and affiliates, or stating that the corporation has none. Hughes' failure to file this information with its answer in the underlying case does not foreclose its ability to establish eligibility for an EAJA award.

no parent or subsidiary corporations, only an affiliate, Contractors Rental Corporation ("CRC"), whose ownership was largely the same as Hughes.³ Second, Hughes provided a report from an accounting firm which had audited balance sheets of Hughes for fiscal years 1995 and 1996. These balance sheets, copies of which were also provided by Hughes, indicated that for those years, the company had a net worth of less than seven million dollars.

It is not clear from the judge's decision whether the basis of his decision denying Hughes' EAJA application was an insufficient showing of Hughes' net worth, or that Hughes' net worth, once aggregated with that of CRC, rendered it ineligible. The judge simply cited to the Commission's decision in *Nitro*. In that case, the Commission held that for the purposes of determining eligibility for an EAJA award, an applicant's net worth may be aggregated with that of its parent corporation where the applicant is not the "real party in interest" as determined under an eight-factor test. *Nitro*, 16 BNA OSHC at 1597, 1993-95 CCH OSHD at p. 41,819.

However, the *Nitro* approach to aggregation was recently rejected by the Sixth Circuit in *Tri-State Steel Constr. Co. Inc.*, 164 F.3d 973, 979 (6th Cir. 1999), *rev'g*, 17 BNA OSHC 2136, 1995-97 CCH OSHD ¶ 31,402 (No. 93-512, 1997) (consolidated).⁴ Noting that the EAJA is silent on the issue of aggregation, the court concluded that the relationship between Tri-State and its parent did not justify the Commission's decision to aggregate the assets of

³ With its petition for discretionary review, Hughes filed a second affidavit from its controller/treasurer which stated that balance sheets of CRC for fiscal years 1995 and 1996, copies of which were attached, establish that CRC had a negative net worth.

⁴ Two years prior to the Sixth Circuit's decision, the Commission had effectively overruled *Nitro* by announcing in *BFW Constr. Co.*, 17 BNA OSHC 2131, 1995-97 CCH OSHD ¶ 31,384 (No. 91-1214, 1997), its intention to adopt a new aggregation rule based upon the model rule of the Administrative Conference of the United States. See 46 Fed. Reg. 32,900, 32,912 [Rule 1.104(f)] (1981). The new rule, which the Commission gave prospective effect, is found at 29 C.F.R. § 2204.105(f) (1998). *BFW*, 17 BNA OSHC at 2133, 1995-97 CCH OSHD at p. 44,331. Although the validity of the Commission's new aggregation rule was not before the Sixth Circuit in *Tri-State*, the court seemed to give credence to Tri-State's contention that the rule impermissibly alters the EAJA. *Tri-State*, 164 F.3d at 978-79, n.6.

the two for the purposes of determining eligibility under the EAJA. *Id.* at 979-80. Since the present case arose within the jurisdiction of the Sixth Circuit, *Tri-State* is controlling on the issue of aggregation.

A decision to aggregate typically follows a determination of an applicant's net worth alone, an exercise which may automatically render the applicant ineligible for an EAJA award and the issue of aggregation moot. Commission EAJA Rule 105(c), § 2204.105(c), requires that an applicant's net worth be determined as of the date the notice of contest was filed. Here, the information supplied thus far by Hughes does not provide a detailed exhibit showing the company's net worth in 1993, the year in which its notice of contest was filed. The safety officer's affidavit filed with Hughes' initial application stated only that "at the time the adversary adjudication was initiated, [Hughes]...had a net worth which did not exceed \$7,000,000.00 and further, had less than 500 employees." *See* 5 U.S.C. § 504(b)(1)(B). The subsequently filed balance sheets for fiscal years 1995 and 1996 cannot be considered adequate proof of Hughes' net worth in 1993 without an explanation from Hughes that relates the data contained in these documents to the company's financial status in 1993.⁵

We recognize that the burden of showing eligibility for an EAJA award is on the applicant. We note that Commission EAJA Rule 202(a), § 2204.202(a), permits the Commission or its judges to require the applicant "to file additional information to determine its eligibility for an award." In light of the totality of the circumstances here, particularly the judge's reliance on *Nitro*, we conclude that it would be appropriate for the judge to provide Hughes an opportunity to submit net worth information for 1993, or an explanation that

⁵ Chairman Rogers notes that both the EAJA regulations and the Secretary's answer to Hughes' application should have alerted the company to the fact that its net worth information was inadequate.

relates the data already provided to the company's net worth in 1993. Accordingly, the judge's decision is reversed and the case is remanded for proceedings consistent with this opinion.

/s/
Thomasina V. Rogers
Chairman

/s/
Gary Visscher
Commissioner

Dated: October 22, 1999

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

SECRETARY OF LABOR, :
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 Complainant, :
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 v. :
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 C.J. HUGHES CONSTRUCTION, INC., :
 :
 Respondent. :

OSHRC DOCKET NO. 93-3177

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("the Act"), to determine whether Respondent's application for attorney fees and expenses pursuant to the Equal Access to Justice Act ("EAJA"), 5 U.S.C. § 504, should be granted.

The decision on the merits in this matter, which was issued on March 6, 1995, affirmed three and vacated two of the alleged violations, and Respondent petitioned for review of the affirmed items; one of these items was withdrawn by the Secretary, and the other two were reversed by the Commission in its decision issued on September 6, 1996. Respondent filed its application for fees and expenses pursuant to the EAJA on December 5, 1996, and the Secretary filed her answer on February 6, 1997. Respondent filed a reply to the Secretary's answer on February 20, 1997, and this matter was assigned to the undersigned on March 25, 1997.⁶

Respondent's application included an affidavit of its safety director which stated that the company's net worth did not exceed \$7,000,000.00 and that it had less than 500 employees.⁷ However, in her answer, the Secretary pointed out that Respondent's application did not contain all

⁶The decision on the merits was issued by Administrative Law Judge John H. Frye, III, the Commission judge who presided over the hearing in this matter.

⁷Commission rule 2204.105, which implements this EAJA requirement, disqualifies from consideration an entity having a net worth and employees exceeding these figures.

of the information required to establish eligibility for an EAJA award; specifically, the application included neither a statement disclosing Respondent's parent, subsidiary and affiliate corporations, if any, nor a detailed exhibit fully disclosing assets and liabilities which is sufficient to determine eligibility under the EAJA. *See* Commission Rules 2200.35, 2204.105 and 2204.202(a). In its reply, Respondent included a balance sheet setting out its assets and liabilities for 1995 and 1996; Respondent also included an affidavit of its controller and treasurer which states as follows:

C. J. Hughes Construction Company, Inc. has no parent or subsidiary corporations. Contractors Rental Corporation is an entirely separate corporation from C. J. Hughes Construction Company, Inc., but the ownership of each company is largely the same.

After reviewing the submissions of the parties and the relevant Commission rules, I conclude that Respondent has not established that it meets the financial criterion to qualify for an EAJA award. *See Nitro Elec. Co.*, 16 BNA OSHC 1596 (No. 91-3090, 1994), and cases cited therein.⁸ Accordingly, on the basis of the information provided, Respondent's application for fees and expenses pursuant to the EAJA is DENIED. So ORDERED.

/s/

Irving Sommer
Chief Judge

Date: JUL 9 1998

⁸The Commission has since decided to follow the ACUS model rule requiring that the assets and employees of EAJA applicants be aggregated with those of their affiliates for purposes of eligibility under the EAJA. *See BFW Constr. Co.*, 17 BNA OSHC 2131 (No. 91-1214, 1997). However, *BFW* was issued on August 6, 1997, and, given its prospective application, the test for case-by-case determination of EAJA eligibility set out in *Nitro* applies in this case.