



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR,

Complainant,

v.

MARCELLA NURSING &
REHABILITATION CENTER,
CINNAMINSON NURSING CENTER,
GERIATRIC MEDICAL SERVICES,
COOPER RIVER, EAST,

Respondent.

OSHRC Docket Nos. 00-0918, 00-0921,
00-0922

DECISION

Before: RAILTON, Chairman; ROGERS and STEPHENS, Commissioners.

BY THE COMMISSION:

At issue before the Commission is whether Marcella Nursing & Rehabilitation Center; Cinnaminson Nursing Center; and Geriatric Medical Services, Cooper River, East, are eligible for an award of attorney fees and expenses pursuant to the Equal Access to Justice Act ("EAJA"), 5 U.S.C. § 504. Chief Administrative Law Judge Irving Sommer found that they were not eligible and denied their applications. For the reasons that follow, we vacate the judge's decision and remand for further proceedings.

Marcella, Cinnaminson, and Geriatric are nursing home facilities located in Burlington, Cinnaminson, and Pennsauken, New Jersey, respectively. Following inspections

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of those facilities in 1999 and 2000, the Secretary issued citations alleging that Marcella, Cinnaminson, and Geratric had violated provisions of the bloodborne pathogens standard. At the request of the Secretary, the judge consolidated the three cases. In a decision and order dated May 17, 2001, the judge vacated all of the citations. The judge's decision was not appealed and became a final order of the Commission.

Marcella, Cinnaminson, and Geratric subsequently filed an application for attorney fees and expenses under the EAJA. At the time the notices of contest were filed, each applicant had fewer than 500 employees and a net worth of under \$7 million. The applicants are wholly owned subsidiaries of Genesis Health Ventures, Inc. Genesis had approximately 30,000 employees and a net worth of over \$587 million.

The applicants met the eligibility requirements of the EAJA on an individual basis.¹ The judge determined that he was required to aggregate the net worth and number of employees of each applicant with Genesis, however, unless such treatment would be unjust and contrary to the purposes of the EAJA.² The judge concluded that such treatment would

¹ Commission EAJA Rule 105(b)(4), 29 C.F.R. § 2204.105(b)(4), states that an applicant is eligible if it is:

[A] partnership, corporation, association, or public or private organization that has a net worth of not more than \$7 million and employs not more than 500 employees.

² Commission EAJA Rule 105(f), 29 C.F.R. § 2204.105(b)(4), states:

The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. Any individual, corporation, or other entity that directly or indirectly controls or owns a majority of the voting shares or other interest of the applicant, or any corporation or other entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interest, will be considered an affiliate for the purposes of this part, unless such treatment would be unjust and contrary to the purposes of the EAJA in light of the actual relationship between the affiliated entities. In addition, financial relationships of the applicant other than those described in this paragraph may constitute special circumstances that would make an award unjust.

not be unjust and contrary to the purposes of the EAJA here. In reaching his conclusion, the judge explained that counsel for the applicants frequently referred to the applicants as “centers” of Genesis and that rather than referring to the applicants individually, counsel and Genesis’ safety and loss prevention manager, Mark Santoleri, regularly referred to “the Respondent” or “the Company.” The judge also explained that the counsel’s billing reports showed the client to be Genesis and that the descriptions of legal services indicated that counsel for the applicants dealt with Mark Santoleri. The judge finally explained that the applicants were required to follow Genesis policy and were not free to act on their own. After aggregating the net worth and number of employees of the applicants with those of Genesis, the judge found that the applicants were not eligible for attorney fees and expenses and denied the applications.

Although the factors the judge relied on are relevant to the question of whether aggregation would be unjust, we conclude that the judge should have also considered the nature and extent to which Genesis exercised control over the safety program as well as the litigation strategy in this case.³ Accordingly, we remand the matter to the judge for further proceedings consistent with this opinion.⁴ Moreover, although the judge was not privy to the

³ The petitioners contend that *dicta* in the Sixth Circuit’s opinion in *Tri-State Steel Const. Co. v. Herman*, 164 F.3d 973, 978-79 n.6 (6th Cir. 1999) raises substantial doubts concerning the validity of the Commission’s EAJA rule insofar as it may be read to impose a *per se* aggregation requirement between a parent and a wholly-owned subsidiary. However, we need not reach this interpretative issue if the record evidence demonstrates that Genesis actually exercised control of a nature and extent such that it would not be unjust or otherwise contrary to EAJA to aggregate the net worth and number of employees of the applicants and all of its affiliates. *Cf. C.J. Hughes Constr., Inc.*, 18 BNA OSHC 1998, 1999 CCH OSHD ¶ 31,954 (No. 93-3177, 1999)(remand appropriate to consider additional evidence in resolving EAJA application).

⁴ In their brief before the Commission, the applicants argue that because they had filed for bankruptcy under Chapter 11 at the time of their EAJA applications, aggregation would be unjust in this case. We disagree. Under Commission EAJA Rule 105(c), 29 C.F.R. § 2204.105(c), eligibility is determined by the status of the applicant at the time the notice of contest is filed. *See Kuhns v. Board of Governors of the Federal Reserve System*, 930 F.2d

information at the time of his decision, he should also consider the affidavit by Mark Santoleri indicating that Genesis charged the applicants for the attorney fees and expenses. Furthermore, given the possibility that this matter may reappear before the Commission, the judge should also determine whether the Secretary's position in this matter was substantially justified.

So Ordered.

/s/
W. Scott Railton
Chairman

/s/
Thomasina V. Rogers
Commissioner

/s/
James M. Stephens
Commissioner

Dated: September 21, 2004

39, 40, n.1 (D.C. Cir. 1991)(that applicant filed for bankruptcy under Chapter 11 is of no particular significance to whether applicant's net worth within EAJA limits, especially where details of that bankruptcy have yet to be determined). Here, the applicants filed the notices of contest on May 12, 2000. The balance sheets of the applicants indicate that they were solvent at that time.

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Respondents.

OSHRC DOCKET NOS. 00-0918,
00-0921 & 00-0922

DECISION AND ORDER

This matter is before the Occupational Safety and Health Review Commission (“the Commission”) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (“the Act”). In particular, this case is before the undersigned to determine whether the above-named Respondents (“Marcella,” “Cinnaminson” and “Geriatric”) are entitled to attorney fees and expenses pursuant to the Equal Access to Justice Act (“EAJA”), 5 U.S.C. § 504.

The three Respondents in this case are nursing home facilities. The Occupational Safety and Health Administration (“OSHA”) conducted inspections of the facilities in late 1999 and early 2000, and, as a result, issued citations to all three facilities. OSHA entered into an informal settlement agreement with each facility, which resolved all of the citation items except for two as to Marcella and one each as to Cinnaminson and Geriatric.¹ After a hearing on the merits, I issued a decision and order on May 17, 2001, that vacated the remaining citation items.² The three Respondents have now filed an application for attorney fees and expenses pursuant to the EAJA, and the Secretary has filed

¹ The items alleged that all three facilities had violated 29 C.F.R. 1910.1030(d)(2)(I), because syringes with safety features were not in use, and that Marcella had violated 29 C.F.R. 1910.103(d)(4)(iii)(A)(1)(I), because “sharps containers” for disposing of razors used to shave residents were not located in the immediate vicinity of residents’ rooms.

² My vacating the alleged violations of 29 C.F.R. 1910.1030(d)(2)(I) was based on a finding that the Respondents had not had fair notice that they were required to use “safety syringes.”

her response and objections to the application.

Discussion

As the Secretary notes, an applicant seeking legal fees and expenses must, as a threshold matter, establish that it meets the eligibility requirements under the EAJA. As the Secretary also notes, the Commission's EAJA eligibility requirements are set out at 29 C.F.R. 2204.105.³ Subpart (b) lists the kinds of eligible applicants, and (b)(4) includes the following:

Any other partnership, corporation, association, or public or private organization that has a net worth of not more than \$7 million and employs not more than 500 employees.

Subpart (c) sets out the date used to determine an applicant's net worth and number of employees, as follows:

For the purpose of eligibility, the net worth and number of employees of an applicant shall be determined as of the date the notice of contest was filed, or, in the case of a petition for modification of abatement period, the date the petition was received by the Commission under § 2200.34(d).

Finally, Subpart (f) provides as follows:

The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. Any individual, corporation, or other entity that directly or indirectly controls or owns a majority of the voting shares or other interest of the applicant, or any corporation or other entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interest, will be considered an affiliate for the purposes of this part, unless such treatment would be unjust and contrary to the purposes of the EAJA in light of the actual relationship between the affiliated entities. In addition, financial relationships of the applicant other than those described in this paragraph may constitute special circumstances that would make an award unjust.

It is undisputed that all three of the corporate Respondents in this case are wholly owned subsidiaries of Genesis Health Ventures, Inc. ("Genesis"). It is also undisputed that Genesis operates nursing homes in 15 states and has approximately 30,000 employees. The citations were contested in May 2000, and Exhibit A to the Secretary's brief is a Dun and Bradstreet report dated May 17,

³ Other than subpart (f), discussed below, the Commission's eligibility requirements mirror those of the EAJA.

2000.⁴ According to Exhibit A, Genesis had sales of over \$1.4 billion and a worth of over \$587 million during the relevant period of time.

Commission judges are constrained to follow the Commission's procedural rules. *See, e.g., Asarco, Inc.*, 8 BNA OSHC 2156, 2162 (Nos. 79-6850, 79-6912 & 80-1028, 1980). On that basis, and in view of the foregoing, aggregation is required in this case unless Respondents can show that "such treatment would be unjust and contrary to the purposes of the EAJA in light of the actual relationship between the affiliated entities." As the Secretary points out, Respondents' application contains nothing to support such a claim, and the record in this case leads to a contrary conclusion.⁵ First, while a July 13, 2000 letter from Respondents' counsel to the Secretary's counsel initially references the three facilities, it thereafter refers to either "the Respondent" or "the company" and discusses the decision, before the OSFIA inspections, to adopt a company-wide "safe medical device initiative."⁶ *See* Exhibit A to EAJA application. Second, a "cc" of this letter went to Mark Santoleri, the safety and loss prevention manager of Genesis, but no copies went to the cited facilities. Third, at the hearing, Mr. Santoleri referred to the company's facilities as "centers" of Genesis, and he testified about the decision of "the company" to issue a press release announcing it would be the first long-term care company to convert to safety syringes. (Tr. 219; 230-31). Fourth, Respondent's counsel referred to the employer as "Genesis," both at the hearing and at depositions prior to the hearing. (Tr. 35-36; 39; 72; 113; 172; 184; 216-19; 231). *See also* Exhibit B to Secretary's response. Fifth, the balance sheets included with the EAJA application refer to the cited facilities as "centers," the billing reports show the client to be Genesis, and the descriptions of the legal services provided indicate that the company representative counsel dealt with was Mark Santoleri. *See* Exhibits B and C to EAJA application. Sixth, the record clearly shows that, with respect to OSHA compliance and

⁴ The report, printed on May 17, 2000, "reflects information in D&B's file as of May 15, 2000," and is based on the financial statement of Genesis dated September 30, 1999.

⁵The application states only that each separate facility has less than 500 employees and a net worth of less than \$7 million, and that all three facilities are currently operating in bankruptcy, none of which provides a basis for not following the Commission's rule regarding aggregation.

⁶ As set out in my decision of May 17, 2001, Genesis began converting to safety syringes on March 6, 2000, and completed the process in all of its facilities by June 6, 2000.

abatement issues, Genesis facilities were required to follow Genesis policy and were not free to act on their own. (Tr. 26; 30; 53-54; 57-59; 207-08; 217-20; 240-41; C-6-7; R-7-16).

Based on the above, Respondents are not eligible for an EAJA award. In so finding, I am aware of the Sixth Circuit's decision reversing the Commission's aggregation of the net worth and number of employees of an eligible company with those of its parent company. *See Tn-State Steel Constr. Co. v. Herman*, 164 F.3d 973 (6th Cir. 1999). I am also aware of the Sixth Circuit's footnote in that case suggesting that, while the Commission's aggregation rule was not before it, the adoption of that rule was questionable.⁷ *Id.* at 978 n.6. Finally, I am aware that the Commission commented on that footnote in a different EAJA case that it was remanding for further proceedings, in light of *Tn-State*. *See C.J. Hughes Constr., Inc.*, 18 BNA OSHC 1998, 2000 n.4 (No. 93-3177, 1999). However, the Commission has not changed its aggregation rule, and, as noted above, I am bound by the Commission's procedural rules. Further, should this case be appealed to the Circuit Court level, it would be in the Third Circuit, which has no precedent as to the aggregation of net worth and number of employees under the EAJA.⁸ Regardless, I conclude that, even under the Sixth Circuit's decision in *Tn-State*, aggregation would be appropriate here. Respondents are not entitled to an award, and the application for fees and expenses is DENIED. So ORDERED.

/s/
Irving Sommer
Chief Judge

Dated: December 21, 2001
Washington, D.C.

⁷The Commission adopted its aggregation rule in 1998. *See Ci. Hughes*, 18 BNA OSHC 1998, 2000 n.4 (No. 93-3 177, 1999). Thus, the issue in *Tn-State* was the Commission's previous "real-party-in-interest" test, set out in *Nitro Elec. Co.*, 16 BNA OSHC 1596 (No. 91-3090, 1994).

⁸Other circuits, however, have addressed this issue. *See, e.g., Nat 'l Ass 'n of Mfrs. v. DOL*, 159 F.3d 597 (D.C. Cir. 1998); *Texas Food Indus. Ass'n v. USDA*, 81 F.3d 578 (5th Cir. 1996); *Grason Elec. Co. v. NLRB*, 951 F.2d 1100 (9th Cir. 1991).