

SECRETARY OF LABOR,

Complainant,

v.

MARCELLA NURSING &
REHABILITATION CENTER,
CINNAMINSON NURSING CENTER,
GERIATRIC & MEDICAL SERVICE,

Respondents.

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

DECISION AND ORDER ON REMAND

This matter is before the undersigned pursuant to a remand order of the Occupational Safety and Health Review Commission (“the Commission”). In a decision dated December 21, 2001, I found that the above-named Respondents (“Marcella,” “Cinnaminson,” and “Geriatric,” respectively) were not eligible for an award under the Equal Access to Justice Act (“EAJA”), 5 U.S.C. § 504, because the parent company, Genesis Health Ventures, Inc. (“Genesis”), was not eligible and the aggregation of the assets of Genesis with those of the Respondents was appropriate in the circumstances of this case. In its decision dated September 21, 2004, the Commission vacated my decision and remanded this matter to me for further proceedings. Specifically, the Commission ordered that, in regard to whether aggregation of the assets of Genesis with those of the Respondents was appropriate, I consider “the nature and extent to which Genesis exercised control over the safety program as well as the litigation strategy in this case.” The Commission also ordered that I consider the affidavit of a Genesis official stating that Genesis had paid the attorney fees and expenses that had been incurred and then had charged Marcella, Cinnaminson and Geriatric for those fees and expenses. Finally, the Commission ordered that I determine whether the Secretary’s position in this matter was substantially justified. It is undisputed that each of the named Respondents in this case is individually eligible for an EAJA award, in that, at the time the notices of contest were filed, each had fewer than 500

employees and a net worth of less than \$7 million. It is also undisputed that all three Respondents are wholly-owned subsidiaries of Genesis, which had approximately 30,000 employees and a net worth of over \$587 million at the time the notices of contest were filed. The Commission's EAJA rules require the net worth and number of employees of an applicant and all of its affiliates to be aggregated to determine eligibility, "unless such treatment would be unjust and contrary to the purposes of the EAJA in light of the actual relationship between the affiliated entities." *See* Commission EAJA Rule 105(f), 29 C.F.R. § 2204.105(f).

With respect to the nature and extent of Genesis' control over the safety program, Mark Santoleri, the senior manager of safety and loss control of Genesis, testified at the hearing that he ran the safety and health programs for Genesis elderly care and multi-care operations. He further testified about the actions that were taken to convert to the use of safety syringes in all Genesis facilities. On July 7, 1999, Santoleri drafted C-6, a memo to Genesis management recommending the transition to safety syringes. He then made a presentation to Genesis' safety committee, and he later made presentations to small groups of clinical senior management, after which teams were formed to oversee the selection and evaluation of products. Vendors were chosen and products were selected for evaluation, and on October 4, 1999, Genesis issued R- 16, a press release announcing its decision to begin using safety syringes in all its facilities. The next step was evaluation and selection of safety syringes, which the teams carried out by testing products in their regions. In December 1999, Genesis contacted the selected vendors and developed a plan to ensure the timely distribution of the products in its 340 operations. Genesis began the conversion to safety syringes in early March 2000 and completed the conversion by early June 2000. Santoleri noted that Genesis was the first long-term care company to make the transition to safety syringes; he also noted that the transition cost approximately \$265,000.00. (Tr. 207-08; 217-21; 224-26; C-6-7; R-7-16).

In addition to the above, Laura Spina, the OSHA industrial hygienist ("IH") who inspected Marcella, testified that when she discussed abatement of the alleged violations with Marcella management, she was told that final abatement decisions were up to Mark Santoleri. (Tr. 8-10; 26; 30). Similarly, Timothy Louden, the OSHA IH who inspected Cinnaminson and Geriatric, testified

that when he spoke to Cinnaminson management, he was told that any proposed abatement would have to be presented to Mark Santoleri. Louden also testified that he spoke mostly to Santoleri about the safety syringes issue and that Santoleri told him about the plan to begin using the syringes; Louden further testified that he spoke to Santoleri about the violations he had found at Cinnaminson and Geriatric. (Tr. 46-49; 53-59; 64).

Upon considering the foregoing, I conclude that Genesis exercised great control over the safety programs of its facilities.¹ In particular, I note the testimony of Santoleri that he “ran the safety and health programs for Genesis elderly care and multi-care operations.” (Tr. 207-08). I also note his testimony about how Genesis made the decision to convert to the use of safety syringes in all of its facilities and how that conversion was undertaken. Finally, I note the testimony of the IH’s that management officials of the inspected facilities told them that Santoleri had the final say in regard to any abatement actions; moreover, IH Louden testified that he discussed the violations he had found at Cinnaminson and Geriatric with Santoleri.

As to the nature and extent of Genesis’ control of the litigation strategy, it is apparent from the attorney billing records that Mark Santoleri (and therefore Genesis), together with counsel, exercised absolute control of the litigation strategy in this case. Those records, which were submitted as Exhibit C, Part 1, to the Respondents’ application for attorney fees and expenses, have numerous references to phone calls and meetings between counsel and Santoleri; one such reference, dated April 28, 2000, describes a “call from Mark regarding meeting to work on defense,” and another, dated May 1, 2000, describes a “[c]all from Mark regarding meeting to review strategy regarding citations in New Jersey.” *See* Exh. C, Part 1, p. 1. Santoleri was the Genesis representative who accompanied counsel to an informal conference held with OSHA on May 12, 2000, he was the person with whom counsel spoke when settlement negotiations were occurring in August and November of 2000, and he was with counsel at a meeting held with witnesses from the cited facilities on September 25, 2000. *See* Exh. C, Part 1, pp. 2, 4-5, 9, 11. Santoleri was also the individual who assisted counsel with discovery, who met with counsel just before the hearing, and with whom counsel discussed the post-hearing brief and the decision on the merits in this case. *See* Exh. C, Part 1, pp. 11-18. In sum, based on Exhibit C, Part 1, Santoleri

¹As stated on page 4 of the original EAJA decision, the Genesis facilities were required to follow Genesis policy and were not free to act on their own.

was intimately involved in the litigation strategy in this case at every step along the way, and, so far as I can tell, he was the only person affiliated with Genesis who was so involved. In fact, except for meeting with witnesses from the cited facilities on September 24 and 25, 2000, and again on January 4, 2001, and having telephone conferences with some of those witnesses on January 10, 2001, counsel evidently had no contact with individuals from the cited facilities.² See Exh. C, Part 1, pp. 9, 14-15.

In regard to the affidavit of Santoleri stating that Marcella, Cinnaminson and Geriatric were charged for the fees and expenses that were incurred in this matter, I note that there is no assertion that the facilities have paid the amounts they were billed. However, even if they have, I find that this factor is an insufficient basis upon which to conclude that the assets of Genesis should not be aggregated with those of the three Respondents, in light of the circumstances of this case.

For all of the foregoing reasons, and for those set out in the original EAJA decision, I find that aggregating the assets of Genesis with those of the three Respondents is appropriate. Respondents are accordingly ineligible for an EAJA award, and the application for attorney fees and expenses is DENIED.³ So ORDERED.

/s/
Irving Sommer
Chief Judge

Dated: October 12, 2004
Washington, D.C.

²Another exception would appear to be Jo Bohony, who was the only employee witness actually called to testify at the hearing besides Santoleri. (Tr. 165).

³In regard to the question of whether the Secretary's position in citing the facilities for not having safety syringes was substantially justified, I find that it was not, for the reasons set out on pages 4-12 of my decision on the merits, issued on May 17, 2001. I also find that the Secretary's position in citing Marcella for not having mobile sharps containers was likewise not substantially justified, for the reasons set out on pages 12-14 of my decision on the merits.