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

SECRETARY OF LABOR, Complainant, v. BFW CONSTRUCTION CO., Respondent.	OSHRC Docket No. 91-1214

DECISION

Before: WEISBERG, Chairman; GUTTMAN, Commissioner.

BY THE COMMISSION:

On review is a decision of Administrative Law Judge Stanley M. Schwartz awarding BFW Construction Co. ("BFW") attorney's fees under the Equal Access to Justice Act, 5 U.S.C. § 504 ("the EAJA"). BFW is a wholly-owned subsidiary of the Turner Corporation ("Turner"). The issue before us is whether the judge erred in declining to aggregate the net worth of BFW, which was less than the $7,000,000 maximum for recovery of fees, with the net worth of Turner, which alone exceeded $7,000,000. See 5 U.S.C. § 504(b)(1)(B).[1] Our consideration of this case has led us to conclude that the Commission should amend its EAJA rule at 29 C.F.R. § 2204.105 to address the appropriateness of aggregation in future cases. For the reasons stated below, however, we affirm the judge's conclusion that BFW was eligible for the fee award.

[1]Section 504(b)(1)(B) of the EAJA, as amended in 1985, provides that an eligible "party" includes a business entity, "the net worth of which did not exceed $7,000,000 at the time the adversary adjudication was initiated, and which had not more than 500 employees at [that] time . . . ." *See* 29 C.F.R. § 2204.105(b)(4) and (c) (Commission regulations implementing this EAJA requirement).

I. Adoption of a New Rule

When the EAJA was enacted, it required each federal agency to adopt its own rules implementing the EAJA after consultation with the (former) Administrative Conference of the United States ("ACUS"). 5 U.S.C. § 504(c)(1).[2] ACUS suggested model rules for agencies. 46 Fed. Reg. 32,900 (1981). Model Rule 0.104(f) provided:

> 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 purposes of this part, unless the adjudicative officer determines that such treatment would be unjust and contrary to the purposes of the Act in light of the actual relationship between the affiliated entities. In addition, the adjudicative officer may determine that financial relationships of the applicant other than those described in this paragraph constitute special circumstances that would make an award unjust.

46 Fed. Reg. at 32,912. Most federal agencies adopted an aggregation rule that closely followed model rule 0.104(f). *See, e.g.*, 29 C.F.R. §§ 16.105(f) (Department of Labor), 102.143(g) (National Labor Relations Board), and 2704.104(f) (Federal Mine Safety and Health Review Commission). However, the Commission declined to adopt that rule, stating instead that it would decide the aggregation issue "on a case-by-case basis." 46 Fed. Reg. 48,078, 48,079 (1981), *reprinted in* 1980-1981 CCH ESHG New Developments ¶ 12,365, p. 15,458 (October 6, 1981).

We have taken a "second look" at the ACUS model rule, and we hereby announce that, like many other federal agencies have already done, the Commission will soon propose adoption of a new aggregation rule based on the ACUS model rule. We have found the present Commission test developed from federal and Commission case law on the

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[2]The EAJA is silent as to whether the net worth of a subsidiary should be aggregated with that of its parent for purposes of determining eligibility.

aggregation issue to be unwieldy to apply and, because it does not clarify which of the multiple factors or combination of factors is dispositive, to allow significant and unnecessary collateral litigation.[3] Accordingly, we conclude that the ACUS model rule represents a more reasoned approach to the aggregation issue than the case-by-case method adopted by the Commission. As ACUS stated in the preamble to its model rules, "[i]n our view, the intent of Congress in passing the Act was to aid truly small entities rather than those that are part of larger groups of affiliated firms," and the model rule is in accord with that intent. 46 Fed. Reg. at 32,903. By adopting the clear language of the model rule, the Commission will realize this intent rather than focusing on details of financial relationships whose significance is uncertain.[4] According to ACUS, "[t]his rule identifies a clear case in which aggregation of net worth and number of employees is *almost always justified*, and applicants who fall within this definition will know from the start that they must provide aggregated eligibility data." 46 Fed. Reg. at 32,903 (emphases added).

We further note that other federal statutes intended to assist small businesses draw a bright line to deny eligibility based on affiliation with a large entity. For example, the 1996 amendment to the EAJA contained in section 231(a) and (b)(2) of the Small Business Regulatory Enforcement Fairness Act of 1996, 110 Stat. 847, 862-63, provides that "small entities" (therein authorized, with a few exceptions, to apply for fees under the EAJA for challenging proposed government penalties unreasonably substantially in excess of what is

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[3]As the Supreme Court has stated, "A request for attorney's fees should not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983), *quoted in H.P. Fowler Contracting Corp.*, 11 BNA OSHC 1841, 1847, 1983-84 CCH OSHD ¶ 26,830, p. 34,359 (No. 80-3699, 1984); *accord* ACUS model rule 0.306(a) (1981) ("[o]rdinarily, the determination of an award will be made on the basis of the written record"); 29 C.F.R. § 2204.307(a)(1) (Commission rule).

[4]As demonstrated by *Nitro Electric Co.*, 16 BNA OSHC 1596, 1598, 1993-95 CCH OSHD ¶ 30,335, pp. 41,819-20 (No. 91-3090, 1994), arguments also have been made in these cases concerning potential financial relationships thus compounding the level of uncertainty in these determinations.

finally adjudicated) are defined as ones that are "independently owned and operated" (and not dominant in their field of operation). See 110 Stat. at 863, referring to 5 U.S.C. § 601 ("small business" under § 601(3)), in turn referring to 15 U.S.C. § 632 (section 3 of the Small Business Act). *See also* 15 U.S.C. § 78(c)(53)(B)(ii) (definition of "small business concern" for purposes of federal securities laws); 13 C.F.R. § 121.103(a) & (c) (Small Business Administration regulations governing many programs).[5]

II. BFW's EAJA Application

Before the judge here determined the amount of the EAJA award,[6] the Commission issued its decision in *Nitro Electric Co.*, 16 BNA OSHC 1596, 1597-98, 1993-95 CCH OSHD ¶ 30,335, pp. 41,819-20 (No. 91-3090, 1994), in which it applied the real party in interest doctrine and the eight-factor test from *U.S.A. v. Lakeshore Terminal and Pipeline Co.*, 639 F.Supp. 958, 961 (E.D. Mich. 1986), and *Brock v. Gretna Machine and Ironworks, Inc.*, 1989 WL 1813 (E.D. La. 1989). The Commission also relied on another factor: whether the parent had the financial ability and might be available to advance the funds needed to mount a defense. The Commission concluded there that the judge's findings on the *Lakeshore/Gretna* factors and his finding that funds were available to Nitro from its parent showed that the parent company, not Nitro, was the real party in interest.

After *Nitro* was decided, the judge in the instant case granted the Secretary's motion to reconsider his initial ruling that BFW was eligible because only one of the eight factors favored aggregation, and he again concluded that aggregation was inappropriate.[7] The judge

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[5]*Cf.* 26 U.S.C. § 1361(b)(1) & (2)(A) (definition in Subchapter S of the Internal Revenue Code).

[6]The judge disposed of the various EAJA issues in a series of orders, which were incorporated into his last decision in the case.

[7]The uncertainty inherent in the real party in interest test is well illustrated by the proceedings below in this case. For example, BFW admitted that it did not know whether or not the parent would extend funds because the need had not arisen. Under *Nitro*, the

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found that neither the balance sheet explanation in the Dun & Bradstreet report (attached to the Secretary's motion to dismiss) that BFW was making payments to its parent "per agreement" nor that report's mention of "intercompany relations" consisting of "loans and advances to and from subsidiaries which are settled on agreed terms" established that Turner would be available to advance funds to BFW, the factor stressed in *Nitro*.

We have determined that it would be unfair to apply a new rule on aggregation retroactively. Accordingly, as we conclude that the judge has correctly applied the real party in interest test in declining to aggregate BFW's net worth with that of its parent, we affirm his finding that BFW was eligible for an EAJA award.

III. Order

We affirm the decision of the judge finding BFW eligible and awarding to it attorney's fees under the EAJA in the amount of $15,049.12. The Commission will revise its rules pertaining to EAJA eligibility consistent with this decision.

Stuart E. Weisberg
Chairman

Daniel Guttman
Commissioner

Dated: _____

[7](...continued)
litigation of such a hypothetical but acknowledged "potential" could be in order.