FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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July 10, 2001

DYNATEC MINING CORPORATION, Contestant	:	EQUAL ACCESS TO JUSTICE PROCEEDING
	:	Docket No. EAJ 2001-3
v.	:	
	:	Formerly WEST 94-645-M
	:	Magma Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	ID. No. 02-00152 WJ6

DECISION

Before: Judge Manning

This case is before me on an Application for Award of Fees and Expenses under the Equal Access to Justice Act ("EAJA"), 5 U.S.C. § 504 and 29 C.F.R. § 2704.100 *et seq*. Dynatec Mining Corporation ("Dynatec Mining") filed the application against the Department of Labor's Mine Safety and Health Administration ("MSHA") based on my decision in *Dynatec Mining Corporation*, 20 FMSHRC 1058 (Sept. 1998), as modified by the decision of the Commission at 23 FMSHRC 4 (Jan. 2001). MSHA issued one citation and 13 orders of withdrawal under section 104(d)(1) against Dynatec Mining following an accident at the Magma Mine in which four people died. I vacated six of these orders of withdrawal and reduced the total penalty on the remaining eight items from $300,000 to $90,000. On review, the Commission vacated six additional orders of withdrawal with the result that one citation and one order remained and the total penalty is $60,000. Dynatec appealed the Commission's decision upholding the remaining citation and order to the Court of Appeals for District of Columbia Circuit.

Dynatec Mining contends that it prevailed against MSHA because 12 of the 14 citation/orders were vacated and the Secretary's total proposed penalty was reduced from $700,000 to $60,000. The Secretary opposes Dynatec Mining's application in this case and moved to dismiss the application. For the reasons set forth below, I grant the Secretary's motion to dismiss this application on the grounds that Dynatec Mining is not an eligible party.

The EAJA limits recovery, as pertinent here, to "any . . . corporation . . . , 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 the time the adversary adjudication was initiated." 5 U.S.C. § 504(b)(1)(B). The Commission's regulation implementing this provision is at 29 C.F.R. § 2704.104. The Commission's regulation requires the aggregation of affiliates, 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, will be considered an affiliate for purposes of this part, unless the administrative law judge determines that such treatment would be unjust and contrary to the purposes of the Act in light of the actual relationship between affiliated entities.

29 C.F.R. § 2704.104(b)(2).

An applicant for an award of fees and expenses has the burden of establishing that it is an eligible party. Dynatec Mining argues it is eligible because it had a net worth of less than seven million dollars and fewer than 500 employees at the time it contested the MSHA citation and orders. It presented credible evidence to support its position. It contends that its net worth and number of employees should not be aggregated with that of its affiliates. The Secretary presented evidence to show that if the Commission's aggregation regulation is applied in this case, Dynatec Mining would not meet the EAJA eligibility requirements. Dynatec Mining did not present conflicting evidence on this issue. Consequently, for purposes of this decision, I find that if Dynatec Mining's corporate affiliates are considered when evaluating eligibility under section 2704.104, Dynatec Mining cannot be awarded fees and expenses under the EAJA because its net worth was greater than seven million dollars or it had more than 500 employees. I also find, based on the evidence presented by Dynatec Mining, that if the net worth and number of employees of its corporate affiliates are not considered, it would be an eligible party under the EAJA. Thus, this case raises issues concerning the application of the Commission's aggregation regulation and appears to be a case of first impression.

Dynatec Mining contends that the Commission's aggregation regulation is *ultra vires* because it conflicts with the plain and unambiguous language of the EAJA. It argues that the EAJA does not require or authorize the aggregation of affiliated corporations. Further, because the Commission's aggregation regulation changes the EAJA eligibility requirements, it is unlawful and cannot be used to determine Dynatec Mining's status as an eligible party in this EAJA case. In making this argument, it relies, in part, on *Tri-State Steel Const. v. Herman*, 164 F.3d 973, 977-80 (6th Cir. 1999). That case arose following an adjudication involving the Department of Labor's Occupational Safety and Health Administration ("OSHA"). The Occupational Safety and Health Review Commission ("OSHRC") aggregated the net worth and number of employees of Tri-State's corporate parent and determined that it was not an eligible party under the EAJA. The Sixth Circuit held that the Tri-State's net worth should not have been aggregated with that of its corporate parent because Tri-State was a separate corporate entity litigating on its own behalf and the interrelationship between Tri-State and its corporate parent did not justify aggregation.

I reject Dynatec Mining's argument for a number of reasons. First and foremost, I do not have the authority to overturn or ignore a regulation duly promulgated by the Commission. The

Commission's aggregation requirement has been in place since the Commission first promulgated regulations implementing the EAJA. When the Commission recently revised these regulations, many comments were received in response to its notice of proposed rulemaking suggesting that the aggregation requirement be eliminated. 63 Fed. Reg. 63172, 63173 (Nov. 12, 1998). The Commission chose not to eliminate or modify this requirement in response to the comments. I cannot overturn the Commission's conclusion that an applicant's net worth should be aggregated with that of its corporate affiliates when determining whether an applicant is an eligible party.

As the Sixth Circuit noted, the EAJA is "silent on the question of whether the net worth and employees of an otherwise eligible corporation should be aggregated with any related or affiliated corporations." 164 F.3d at 978. Although the OSHRC now has an aggregation regulation that is the same as the Commission's regulation, the OSHRC used a case-by-case "real party in interest" test in *Tri-State*. (29 C.F.R. § 2404.105(f); *Nitro Elec.*, 16 BNA OSHC 1596 (1994)). The Sixth Circuit noted that the OSHRC's new regulation was not before the court. 164 F.3d at 978 n. 6. The court held that the OSHRC's application of its real-party-in-interest test to the facts of that case abrogated basic common law principles of corporate law. 164 F.3d at 979. The Commission has not adopted a real-party-in-interest test.

In the alternative, Dynatec Mining argues that aggregation of Dynatec Mining and its affiliates would "be unjust and contrary to the purpose" of the EAJA "in light of the actual relationship between" Dynatec Mining and its affiliates. (D. App. 3-4 *quoting* section 2704.104(b)(2)). First, it argues that aggregation would be unjust because it is contrary to circuit court precedent whereby recovery of fees is only precluded where the eligible party is a "front" or "sham" for an ineligible party or a nonparty that controls, directs, or finances the litigation. I find that Dynatec Mining is not a front or a sham and that MSHA issued the citations to Dynatec Mining not to its corporate parent. Based on these undisputed facts, Dynatec Mining argues that because it contested MSHA's citation, orders, and penalties on its own behalf, "its lawful relationship with its affiliates, which is typical in the mining industry, cannot justly be used to deny it eligibility under the EAJA." (D. App. 5). The court decisions cited by Dynatec Mining discuss the real-party-in-interest doctrine. The Commission has not adopted this doctrine. Moreover, as Dynatec Mining states, the relationship between it and its affiliates is typical for the mining industry. Dynatec Mining has not presented any facts to show that its relationship with its corporate affiliates is different from what is commonplace in the mining industry. Dynatec Mining is a wholly owned subsidiary of a corporation that is too large to be an eligible party under the EAJA. If I were to find that aggregation is unjust in this case based on Dynatec Mining's actual relationship with its affiliates, I would have to do so in virtually all cases. The "actual relationship" exception to the Commission's aggregation regulation would subsume the rule under Dynatec Mining's interpretation. In essence, I would be invalidating the regulation.

Second, Dynatec Mining argues that requiring aggregation in this case would undercut one of the EAJA's primary goals, which is "deterring the unjustified action in the first place." *Tri-State*, at 978. It argues that excluding "otherwise eligible subsidiaries, such as Dynatec Mining Corporation, based on affiliation, means that, for all practical purposes, only a handful of

Section 110(c) claimants and uniquely unaffiliated mining entities will ever be EAJA eligible in Mine Act proceedings." (D. Br. 5). I agree. At the present time, there is a large number of unaffiliated sand, gravel, and aggregate operators, but even their number is becoming smaller as consolidation continues in that industry. Small mine operators in other mining sectors are affiliated with larger entities with increasing frequency. Nevertheless, the Commission was surely aware that the application of its aggregation requirement would disqualify many operators from recovering fees and expenses when it originally promulgated its EAJA regulations and revised them in 1998. I cannot invalidate the Commission's aggregation regulation on the basis that it prevents a large number of mine operators from recovering fees and expenses under the EAJA. Dynatec Mining must address these arguments to the Commission.

Dynatec Mining makes other arguments in its application and in its reply to the Secretary's answer and motion to dismiss. These arguments are made in support of its position that the Commission's aggregation regulation is inconsistent with the language of the EAJA, its legislative history, and the intention of Congress. For the reasons set forth above, I am required to apply the Commission's aggregation regulation in this case.

Dynatec Mining submitted the affidavit of John D. Marrington, General Manager and Vice President of Dynatec Mining, to support its application. In the affidavit, Mr. Marrington testified that Dynatec Mining was a wholly owned subsidiary of another corporation at the time the adjudication was initiated.[1] Marrington states that he controlled and directed the course of the adjudication of the citation and orders issued by MSHA. He states that MSHA's proposed $700,000 penalty against Dynatec Mining had an adverse impact on it because the proposed penalty required it to take a financial charge on its books in 1994, 1995, and 1996. Marrington also states that the civil penalty cases caused Dynatec Mining to incur substantial legal fees and expenses. Dynatec Mining paid all legal expenses and fees in the underlying adjudication and it received no funding from its affiliates specifically allocated for this purpose. He states that Dynatec Mining, not its affiliates, was liable for the proposed civil penalty, which was "nearly equivalent to the entire net worth of Dynatec Mining" and if assessed in full, would have substantially and adversely impacted Dynatec Mining's business. (Marrington Aff. ¶ 11).

The Commission's regulation provides that "[a]ny individual, corporation or other entity that directly or indirectly controls or owns a majority of the voting shares or other interest, will be considered an affiliate for purposes of this part." (emphasis added). At the time the underlying adjudication commenced, Dynatec Mining's corporate parent owned all of the voting shares of the company and its net worth is therefore required to be aggregated with that of Dynatec Mining under the regulation. As stated above, there has been no showing that Dynatec Mining's "actual relationship" with its corporate parent is so different or unique that its

[1] At the time the underlying cases were initiated, Dynatec Mining was a wholly owned subsidiary of Tonto Drilling Supplies, Inc. (renamed Dynatec Drilling Supplies, Inc.), which was wholly owned by Dynatec International, Ltd. (Marrington Aff. ¶ 5). In 1997, following a merger and reorganization, Dynatec Mining became a wholly owned subsidiary of Dynatec Corporation USA, which is wholly owned by Dynatec Corporation. (Marrington Aff. ¶ 7).

"treatment" under the Commission's regulation is "unjust and contrary to the purposes of the [EAJ] Act" when compared to any other mine operator or independent contractor that is owned by a larger entity. In its application, Dynatec Mining is asking that I directly or indirectly invalidate the Commission's aggregation regulation. Because I am bound by the Commission's aggregation regulation, I must interpret it so as to give it the force and effect of law. I conclude that Dynatec Mining is not an eligible party under 29 C.F.R. § 2704.104(b)(2). Consequently, I do not reach the merits of Dynatec Mining's application under section 29 C.F.R. § 2704.105.

For the reasons set forth above, the Secretary's motion to dismiss this case is **GRANTED** and this proceeding is **DISMISSED**.

Richard W. Manning
Administrative Law Judge

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