

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,	:	
Complainant,	:	
	:	
v.	:	OSHRC DOCKET NO. 01-0376
	:	
RWS BUILDING COMPANY,	:	
Respondent.	:	
	:	

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. §§ 651-678 (1970) (“the Act”). Respondent has filed an application for costs and attorney’s fees under the Equal Access to Justice Act, 5 U.S.C. § 504 (“EAJA”). The application was not filed within EAJA’s 30-day time limit, and the application is accordingly denied.

Background and Procedural History

The EAJA application in this case stems from a vacated citation issued to Respondent, RWS Building Company (“RWS”), pursuant to the Act. In the underlying citation, the Secretary of Labor (“the Secretary”) had alleged that violations had occurred at a construction site in Columbus, Ohio, where RWS had a work site. RWS contested the citation, and a hearing date of June 4, 2001 was scheduled. RWS appeared at the hearing, prepared to proceed. The Secretary, however, failed to appear, despite both telephonic and written confirmation of the hearing date, and I granted the motion of RWS to dismiss the citation. My written decision and order was docketed on June 19, 2001, and it became a final order on July 19, 2001. On June 20, 2001, the Secretary filed a motion for reconsideration, which I denied on June 27, 2001. RWS filed its EAJA application on October 18, 2001, almost two months after the expiration of EAJA’s 30-day time limit. The Secretary filed a response opposing the application, although her reasons did not include untimeliness.

Discussion

The conditions under which a prevailing party may seek attorney's fees and costs under EAJA are set forth at 5 U.S.C. § 504(a)(2), which states that "a party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency an application...."¹ The Secretary did not file a petition for review of my decision and order dated June 19, 2001, which, as noted above, became final on July 19, 2001. *See* Commission Rule 9, 29 C.F.R. § 2200. The 30-day period within which RWS could have filed a timely EAJA application thus ended on August 20, 2001. RWS did not file its EAJA application until October 18, 2001, nearly two months past the filing deadline.

There is Commission precedent holding that EAJA's 30-day time limit is not jurisdictional in nature. *See, e.g., Tri-State Steel Const. Co., Inc.*, 17 BNA OSHC 1769 (Nos. 93-0582 & 93-0583, 1996).² If the 30-day time limit were merely a statute of limitations and not jurisdictional, it would follow that the Secretary would have waived her right to assert untimeliness when she failed to raise it as a defense in her answer.³ *See* Fed. R. Civ. P. 8. For the reasons that follow, however, the untimeliness of the application deprived the Commission of jurisdiction, and the Secretary's failure to assert untimeliness as a defense did not result in a waiver of the issue. *See, e.g., Greater Detroit Recovery Auth. v. EPA*, 916 F.2d 317 (6th Cir. 1990). *See also* Fed. R. Civ. P. 12(h)(3).

The Commission is bound by the law of the Circuit Court to which an appeal may be taken. *Farrens Tree Surgeons, Inc.*, 15 BNA OSHC 1793 (No. 90-998, 1992). This case arose in the Sixth Circuit, where there is long-standing precedent that EAJA's 30-day filing period is jurisdictional in nature and cannot be waived or extended by the parties, an agency, or a court. *Peters v. Secretary of HHS*, 934 F.2d 693 (6th Cir. 1991); *Allen v. Secretary of HHS*, 781 F.2d 92 (6th Cir. 1986); *U.S.*

¹The Commission's rules implementing EAJA are in accord. *See* 29 C.F.R. § 2204.302.

²In *Tri-State*, the Commission relied on *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89 (1990), a Title VII case in which the Supreme Court held that principles of equitable tolling may be applicable in suits against the government.

³Even if the Secretary had asserted untimeliness as a defense, the facts in this case might support a decision to toll the time limit as a matter of equity, under *Tri-State*.

v. Lindert, 907 F. Supp. 1114, 1998 U.S. App. LEXIS 7203 (6th. Cir. 1998).⁴ See also *True v. U.S.*, 250 F.3d 410 (6th Cir. 2001), where the Court distinguished a party's failure to set forth the bases for EAJA eligibility in the initial application with a failure to file on time, in that the latter is a matter of jurisdiction. Moreover, the law on this issue in the D.C. Circuit, where RWS may alternatively seek an appeal from an adverse Commission decision, is unclear. Compare, *Scott v. Nat'l Transp. Safety Board*, 114 F.3d 305 (D.C. Cir. 1997) (the EAJA deadline is jurisdictional), with *Washington v. Washington Metro. Area Transit Auth.*, 160 F.3d 750 (D.C. Cir. 1998), *cert. denied*, 527 U.S. 1038 (1999) (principles of equitable tolling apply to a Title VII deadline).

Based on the foregoing, the untimeliness of the EAJA application deprived the Commission of jurisdiction. Since the Commission does not have jurisdiction over the EAJA application, it is DENIED. All proposed findings of fact and conclusions of law inconsistent with this decision are also DENIED.

So ORDERED.

/s/

Michael H. Schoenfeld
Judge, OSHRC

Dated: March 08, 2002
Washington, D.C.

⁴Although *Lindert* is an unpublished decision, it makes clear that the Sixth Circuit continues to hold that EAJA time limits are jurisdictional and cannot be waived by the parties or tolled by the court. That the Sixth Circuit did not expressly distinguish *Irwin* does not mean, *a priori*, that it was unaware of the case and that its decisions therefore lack precedential value. Rather, it should be assumed that the Sixth Circuit court sedulously sought applicable precedent.