

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, SW
Atlanta, Georgia 30303-3104

Secretary Of Labor,

Complainant,

v.

Straight Ahead Construction, Inc.,

Respondent.

OSHRC Docket No. **12-0047**

EAJA

Appearances:

Melanie L. Paul, Esquire
Office of the Solicitor, U.S. Department of Labor
Atlanta, Georgia
For the Complainant

Vincent F. Vaccarella, Esquire
Vincent F. Vaccarella, P. A.
Fort Lauderdale, Florida
For the Respondent

Before: Administrative Law Judge Sharon D. Calhoun

**DECISION AND ORDER ON APPLICATION FOR FEES AND EXPENSES
PURSUANT TO THE EQUAL ACCESS TO JUSTICE ACT**

Respondent, Straight Ahead Construction, Inc. (Straight Ahead), seeks fees and expenses pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504, 29 C.F.R. § 2204.101, *et seq.* (EAJA), for costs incurred in its defense of a two-item citation and proposed penalties issued by the Secretary of Labor (Secretary) on June 11, 2012. For the reasons set forth below, Straight Ahead's application for fees and expenses is dismissed.

Background

Straight Ahead is a construction company which engages in roadwork construction, including the installation of underground utilities. On October 18, 2011, an Occupational Safety

and Health Administration (OSHA) Compliance Safety and Health Officer (CSHO) conducted an inspection of Straight Ahead's worksite at the intersection of NW 31st Street and NW 27th Avenue in Miami, Florida. As a result of OSHA's inspection, the Secretary issued a citation to Straight Ahead on November 11, 2011, alleging Straight Ahead committed violations of two OSHA construction standards. The Citation alleges in item 1 a serious violation of 29 C. F. R. § 1926.651(h)(1), alleging Straight Ahead permitted its employees to work in an excavation in which water had accumulated; and in item 2 a serious violation of 29 C. F. R. § 1926.652(a)(1), alleging Straight Ahead failed to provide adequate protection from a cave-in for employees working in an excavation that was more than 5 feet deep. The Secretary proposed total penalties in the amount of \$8,400.00 for the cited violations.

The undersigned issued a Decision in this matter on June 11, 2012, vacating both items and proposed penalties. The Decision was docketed by the Commission on June 18, 2012. Neither party filed a Petition for Discretionary Review of the Decision. The Commission did not direct review. Therefore, the Decision became a Final Order of the Commission on July 18, 2012.

On August 17, 2012, Straight Ahead sent by email and by first class mail copies of its Application for Attorney's Fees and Expenses (Application) to counsel for the Secretary. According to counsel for the Secretary, the copy sent by first class mail was received by the Secretary on August 23, 2012. Neither the emailed copy nor the mailed copy of the Application included a cover letter indicating that a copy of the Application had been sent to the Commission.¹

It was not until November 2, 2012, that the Commission received the Application when Straight Ahead emailed to the Commission a copy of the information it had previously sent to the Secretary. The Application was docketed as having been received by the Commission on November 2, 2012. After the Application was docketed, the Secretary filed on November 30, 2012, a Motion to Dismiss Respondent's EAJA Application as Untimely (Motion). Straight

¹ The Secretary's counsel asserts in her Reply that she contacted the Commission four to five times between August 20, 2012, and October 18, 2012, inquiring whether the Commission had received Straight Ahead's EAJA Application. According to the Secretary's counsel, she was advised each time that the last document filed in this matter was the Notice of Docketing dated June 18, 2012.

Ahead filed a Response in Opposition to the Secretary's Motion (Opposition) on December 14, 2012, to which the Secretary filed a Reply on December 21, 2012.

Discussion

The Equal Access to Justice Act entitles certain parties who prevail in litigation against the government to receive related attorney's fees and expenses. 29 C.F.R. § 2204.101. An EAJA eligible corporation is one with a net worth not exceeding \$7 million and no more than 500 employees. 29 C.F.R. § 2204.105. A prevailing party who meets the financial qualifications may receive an award of attorney fees and expenses unless the Secretary's position throughout the proceeding was substantially justified or special circumstances make an award unjust. 29 C.F.R. § 2204.106. An EAJA application must be filed "in no case later than thirty days after the period for seeking appellate review expires." *See* Rule 302(a), 29 C.F.R. § 2200.302(a).

In *Martin Constr., Inc.*, 22 BNA OSHC 1089 (No. 06-0700, 2008) the Commission held that Rule 302(a) "establishes that the period for appellate review expires sixty days after an unreviewed judge's decision becomes a final order of the Commission, at which time the thirty-day period for filing an EAJA application begins." Thus, the period for filing the EAJA application in this case expired on October 16, 2012. Under the Commission's EAJA rules, "[a]n EAJA application is deemed to be filed only when received by the Commission." *See* Rule 301, 29 C.F.R. § 2204.301.

Because Straight Ahead's Application was not filed with the Commission until November 2, 2012, the Secretary contends Straight Ahead's Application is untimely. Straight Ahead contends it mailed its EAJA Application to the Commission on August 17, 2012, and that for reasons unknown to it, "the Commission did not acknowledge receipt of [the Application] until November 2, 2012." Opposition, p. 2. In support, Straight Ahead submitted with its Opposition an affidavit from a paralegal in its counsel's office. According to the affidavit, the paralegal prepared an envelope addressed to the Commission on August 17, 2012, and enclosed the Application in the envelope. After placing the appropriate postage on the envelope, the paralegal placed the envelope in the "outgoing mailbox on August 17, 2012." On that same date, the paralegal sent the EAJA Application by email to the Secretary's counsel.

Neither party provided information regarding the events that occurred after the envelope addressed to the Commission was placed in the "outgoing mailbox on August 17, 2012." Those circumstances are not known. The only event known with certainty is that the Application was

not received by the Commission by the October 16, 2012, filing deadline. Assuming, however, Straight Ahead mailed the Application on August 17, 2012, as it contends, the Commission never received that mailing, and the terms of Rule 301 prohibit any presumption of receipt based on a claimed mailing. Rule 301 provides, as set forth above, “[a]n EAJA application is deemed to be filed *only* when received by the Commission.” [emphasis added] Accordingly, Straight Ahead’s Application, received by the Commission on November 2, 2012, was received seventeen days after the filing deadline, and therefore was untimely.

As a result of the untimeliness of Straight Ahead’s Application, the undersigned must determine whether the circumstances surrounding the late filing are appropriate for equitable tolling of the filing deadline in this matter. Straight Ahead asserts equitable tolling is appropriate here, as it diligently pursued its rights regarding its EAJA Application. Further, Straight Ahead asserts that Commission Rule 107 provides that in special circumstances not contemplated by the rules and for good cause shown, a Judge may “waive any rule or make such orders as justice or the administration of the Act requires.” See 29 C.F.R. § 2200.107. Opposition, pp. 9-14. In support, Straight Ahead asserts that, in light of recent Supreme Court decisions, filing deadlines like those under the EAJA are not jurisdictional but rather claims processing rules. See, e.g., *Scarborough v. Principi*, 541 U.S. 401, 413-14 (2004). It further asserts that based on that precedent, many circuit courts have held that an untimely EAJA application may be equitably tolled in appropriate circumstances. See, e.g., *Townsend v. Comm’r of Soc. Sec.*, 415 F.3d 578, 582-83 (6th Cir. 2005).

Straight Ahead is correct that an EAJA filing deadline is not jurisdictional and that equitable tolling may apply in appropriate circumstances when an application is untimely. Its statement that the Commission has not yet decided this issue, however, is inaccurate. See, Opposition, p. 11. In 1996, the Commission held that the EAJA application filing period is not jurisdictional and that the EAJA permits equitable tolling. It also held, however, that equitable tolling must be applied sparingly. *Tri-State Steel Constr. Co.*, 17 BNA OSHC 1769, 1772-73 (Nos. 93-0512 & 93-0513, 1996) (*Tri-State*). These holdings were based on *Irwin v. Veterans Admin.*, 498 U.S. 89, 95-96 (1990) (*Irwin*), the language of the EAJA, and post-*Irwin* federal court decisions. *Tri-State*, 17 BNA OSHC at 1772-73.

According to the Secretary, equitable tolling is not appropriate in the circumstances of this case. The Secretary relies on *Nat'l Coal Museum*, 2002 WL 465789 (OSHR CALJ), digested at 19 BNA OSHC 1837 (No. 99-2240) (*Nat'l Coal*). There, the claimant, a non-attorney, filed his EAJA application 30 days late. Proof was submitted of the claimant's hospitalization and subsequent convalescence at home during the application filing period. The Commission Judge deciding the case first noted the claimant could have filed his application during his convalescence, given his doctor's letter stating that some "light work" could be done during that time; the Judge also noted the claimant while hospitalized had filed pleadings with the Commission as well as actions against several entities. Finally, the Judge set forth situations where equitable tolling could apply, citing *Tri-State* (i.e., where claimant actively pursued legal remedies by filing defective pleading during statutory period; where government misconduct caused claimant to miss filing deadline; where agency's confusing or misleading rules caused the untimely filing). The Judge found that none of those situations existed in *Nat'l Coal*. The Judge further noted that "claims of excusable neglect or failure to exercise due diligence in preserving legal rights do not justify tolling the statutory time limitation." 2002 WL 465789 at *3, citing *Irwin*, 498 U.S. at 96 (attorney's absence from office when right-to-sue notice received was not basis for equitable tolling of 30-day time limit for bringing employment discrimination action against United States). Finding no condition that justified equitable tolling, the Judge did not waive the EAJA filing deadline in *Nat'l Coal*.

None of the circumstances warranting equitable tolling set forth in *Tri-State and Nat'l Coal* are present here. The only excuse or justification provided by Straight Ahead is that the Application was placed in the "out-going" mail at its counsel's office. No further details were provided. Straight Ahead presented no reliable evidence that it filed its Application in a timely manner with the Commission. The circumstances surrounding Straight Ahead's late filing do not merit equitable tolling, and are "at best a garden variety claim of excusable neglect." See *Irwin*, 498 U.S. at 96. Accordingly, the undersigned concludes that there are no conditions in this case which justify equitable tolling. Straight Ahead's claims in that regard are rejected. Further, no special circumstances not contemplated by the rules exist, and no good cause has been shown to justify waiving the EAJA filing rule. Therefore, the Secretary's Motion is granted, and Straight

Ahead's Application is hereby dismissed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

ORDER

Based upon the foregoing decision, the Secretary's Motion to Dismiss Respondent's EAJA Application as Untimely is **GRANTED**. Straight Ahead's Application for Attorney's Fees and Expenses is **DISMISSED**.

/s/
Sharon D. Calhoun
Administrative Law Judge

Date: **March 8, 2013**
Atlanta, Georgia