



Issue Date: 07 June 2012

OALJ No.: 2012-NTS-00001  
OSHA No.: 9-3290-12-006

*In the Matter of*

**MICHAEL BEN GRAVES,**

*Complainant,*

v.

**MV TRANSPORTATION, INC.,**

*Respondent.*

**DECISION AND ORDER**  
**DISMISSING REQUEST FOR HEARING**

**Background**

This proceeding arises under the National Transit Systems Security Act of 2007 (NTSSA), 6 U.S.C. § 1142, and the implementing regulations at 29 C.F.R. Part 1982. Both the statute and the regulations provide that a party may request a hearing within 30 days after Occupational Safety and Health Administration (OSHA) has issued its written findings. *See* 6 U.S.C. § 1142(c)(2)(A); 29 C.F.R. §§ 1982.105, 1982.106. On May 16, 2012, the Office of Administrative Law Judges (OALJ) received a filing from the Complainant stating that on March 23, 2012 he had faxed a request for a hearing in *Graves v. MV Transportation, Inc.*, OSHA No. 9-3290-12-006. The Complainant alleged that OSHA failed to complete its investigation in a timely manner in violation of his due process rights.

This case was docketed for the limited purpose of determining whether OALJ has the authority to take jurisdiction over the matter under a theory of constructive denial of

the complaint by OSHA, and assuming such authority exists, whether grounds exists for granting such relief in this case.

In my prior briefing order, I noted that the constructive denial procedure had only been invoked once in a decision rendered over 25 years ago in *Plumley v. Bureau of Federal Prisons*, 1986-CAA-6 (ALJ Dec. 31, 1986). Since that time, OALJ has consistently declined to invoke this extraordinary remedy. See *Klick v. Bechtel Oil, Gas & Chemicals*, 2011-PSI-2 (ALJ Sept. 14, 2011); *Love v. United States Environmental Protection Agency*, 2008-CAA- 5 (ALJ Aug. 27, 2008) and *Surguladze v. UBS Investment Bank*, 2009-SOX-54 (ALJ Jan. 27, 2010). I also noted in the briefing order that the NTSSA provides that if the Secretary of Labor has not issued a final decision within 210 days after the filing of the complaint and if the delay is not due to the bad faith of the employee, the employee may bring an original action at law or equity for de novo review in the appropriate district court of the United States. 6 U.S.C. § 1142(c)(7); 29 C.F.R. § 1982.1114. Thus, a complainant has a statutory remedy in the event of inordinate delay in the administrative adjudication of a complaint.

Neither the Complainant nor the Respondent submitted a brief.

The Assistant Secretary for Occupational Safety and Health filed a brief arguing that the matter is not yet ripe for review by OALJ, and that the case does not present the type of extraordinary facts that would justify a departure from the statutory scheme based on constructive denial of due process from the agency's alleged failure to timely investigate. In support of its response, the Assistant Secretary submitted the declaration of an OSHA investigator explaining the current status of the investigation. The Assistant Secretary moved for dismissal without prejudice.

### **Discussion**

As noted above, assuming *arguendo* that OALJ has the authority to take jurisdiction over a NTSSA complaint based on a theory of constructive denial, such equitable relief is an extraordinary remedy. In the instant case, the only argument from the Complainant is the allegation that OSHA failed to complete its investigation in a timely fashion. It was the Complainant's burden to establish both OALJ's authority to assume jurisdiction and that grounds exist for exercise of such authority in the instant case. The Complainant has done neither. Accordingly,

**IT IS ORDERED** that the Complainant's request for a hearing is **DENIED** without prejudice.<sup>1</sup>

A

**STEPHEN L. PURCELL**  
Chief Administrative Law Judge

**NOTICE OF APPEAL RIGHTS:** To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1982.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1982.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor for Occupational Safety and Health. *See* 29 C.F.R. § 1982.110(a).

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record

---

<sup>1</sup> In a footnote, the Assistant Secretary argued that a claim of constructive denial of due process for an alleged failure of OSHA to timely complete its investigation should never succeed where a statute allows a complainant to file in district court if the Secretary delays issuance of a final order. In view of the disposition of the matter based on the Complainant's failure to establish grounds for a finding of constructive denial, I have not reached this issue.

of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1982.109(e) and 1982.110(a). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1982.110(a) and (b).