



**In the Matter of:**

**HENRY W. M. IMMANUEL,**  
**COMPLAINANT,**

**ARB CASE NO. 05-006**  
**ALJ CASE NO. 2003-CAA-18**

**v.**

**DATE: January 27, 2005**

**C&D CONCRETE,**  
**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

**Richard E. Condit, Esq., Washington, D.C.**

*For the Respondent:*

**Harriet E. Cooperman, Esq., Saul Ewing LLP Attorneys at Law, Baltimore, Maryland**

### **FINAL DECISION AND ORDER**

Henry W. M. Immanuel filed a complaint alleging that his former employer, C&D Concrete, retaliated against him in violation of the whistleblower protection provisions of a number of environmental protection statutes<sup>1</sup> and their implementing regulations.<sup>2</sup> On October 15, 2004, Immanuel petitioned the Administrative Review Board for review of the Recommended Decision and Order (R. D. & O.) of a Department of Labor Administrative Law Judge (ALJ) dated September 10, 2004. Although the date of

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<sup>1</sup> These statutes include: the Clean Air Act, 42 U.S.C.A. § 7622 (West 1995); the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C.A. § 9610 (West 1995); the Federal Water Pollution Control Act, 33 U.S.C.A. § 1367 (West 2001), the Safe Drinking Water Act, 42 U.S.C.A. § 300(j)-9(i) (West 1991); the Solid Waste Disposal Act, 42 U.S.C.A. § 6971 (West 2003); and the Toxic Substances Control Act, 15 U.S.C.A. § 2622 (West 1998).

<sup>2</sup> 29 C.F.R. Part 24.

issuance indicated on the R. D. & O.'s first page and service sheet is September 10, 2004, Immanuel alleges that the copy sent to his counsel bears a postage meter date of September 24, 2004,<sup>3</sup> and counsel avers that he received it on September 30, 2004. The Board must decide whether to toll the limitations period considering that the Board received the petition twenty-four business days after the date of issuance certified on the decision, fifteen business days after the meter date and ten business days after Immanuel's counsel alleges that he received the R. D. & O. Because Immanuel did not file his petition for review within ten business days of the day on which the decision was metered and because his counsel has offered no justification for his failure to do so, we dismiss Immanuel's appeal.

### BACKGROUND

The regulations providing for the Administrative Review Board's review of an administrative law judge's decision under the whistleblower protection provisions state that a petition for review is effective if the Board receives it within ten business days of the date on which the judge issued it.<sup>4</sup> The R. D. & O. under review included this "Notice":

This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§ 24.7(d) and 24.8.<sup>5</sup>

*Id.* Given the date of issuance indicated on the R. D. & O., September 10, 2004, Immanuel's petition for review was due at the Board no later than September 24, 2004. Because Immanuel did not file his petition until October 15, 2004, the Board issued an Order to show cause why the Board should not dismiss the petition as untimely. Immanuel responded to the Order and C&D replied to Immanuel's response.

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<sup>3</sup> The meter date on the copy of the envelope attached to Immanuel's response to the Show Cause Order is not legible. Nevertheless we accept Immanuel's assertion that the envelope was metered on September 24, 2004.

<sup>4</sup> 29 C.F.R. § 24.8(a)

<sup>5</sup> R. D. & O. at 17.

## BACKGROUND

The regulation establishing a ten-day limitations period for filing a petition for review with the ARB is an internal procedural rule adopted to expedite the administrative resolution of cases arising under the environmental whistleblower statutes.<sup>6</sup> Because this procedural regulation does not confer important procedural benefits upon individuals or other third parties outside the ARB, it is within the ARB's discretion, under the proper circumstances, to accept an untimely-filed petition for review.<sup>7</sup>

The Board is guided by the principles of equitable tolling in determining whether to relax the limitations period in a particular case.<sup>8</sup> Accordingly, the Board has recognized three situations in which tolling is proper:

- (1) [when] the defendant has actively misled the plaintiff respecting the cause of action,
- (2) the plaintiff has in some extraordinary way been prevented from asserting his rights, or
- (3) the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum.<sup>9</sup>

But these categories are not exclusive.<sup>10</sup>

Immanuel argues that the Board should accept his petition for review because, although the R. D. & O. indicates that it was issued and served on September 10, 2004, the copy served on his counsel was not metered until September 24, 2004, the date on which the petition for review was due. Immanuel speculates that the R. D. & O. may not in fact have been put into the mail for several days thereafter. Thus, Immanuel argues that the Board should accept his petition because the Board received it within ten days of the date on which Immanuel's counsel received the R. D. & O.

The Respondent, C&D Concrete, urges the Board to reject Immanuel's petition as untimely. C&D argues that even from an equitable standpoint, if one assumes that the

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<sup>6</sup> 29 C.F.R. § 24.1. *Accord Hemingway v. Northeast Utilities*, ARB No. 00-074, ALJ Nos. 99-ERA-014, 015, slip op. at 3 (ARB Aug. 31, 2000); *Gutierrez v. Regents of the Univ. of Cal.*, ARB No. 99-116, ALJ No. 98-ERA-19, slip op. at 3 (ARB Nov. 8, 1999).

<sup>7</sup> *Gutierrez*, slip op. at 3; *Duncan v. Sacramento Metro. Air Quality Mgmt. Dist.*, ARB No. 99-01, ALJ No. 97-CAA-121 (ARB Sept. 1, 1999).

<sup>8</sup> *Hemingway*, slip op. at 4; *Gutierrez*, slip op. at 2.

<sup>9</sup> *Gutierrez*, slip op. at 3-4.

<sup>10</sup> *Id.* at 3.

ALJ mistakenly delayed mailing the R. D. & O. until September 24, the Board should calculate the due date for the petition from the date of mailing and not the date Immanuel's counsel received it.

While we agree that it would not be equitable to find Immanuel's petition untimely because it was not filed within ten days of the issuance date indicated on the R. D. & O. since it appears that the ALJ did not mail the R. D. & O. until September 24th, we nevertheless must dismiss the petition because we are not persuaded that Immanuel's counsel diligently pursued the appeal once he received the decision. While counsel speculates that the R. D. & O. may not in fact have been posted on September 24th, one crucial date is not subject to speculation, the date on which counsel admits that he received the R. D. & O., September 30th.

Given a ten-business-day limitation from September 24th, counsel had six business days in which to file the petition, after receiving it on September 30. Immanuel's counsel is an experienced litigator before the Board. Yet when he received the R. D. & O. indicating that pursuant to the governing regulation, his client's petition for review was past due, he did not contact the Board for guidance, he did not immediately file a protective petition for review, he did not seek an enlargement of time to file a petition for review, he did not even file a petition for review within ten business days of the R. D. & O.'s meter date, although logically, the meter date was the closest approximation to the issue date for which there is evidence.

Instead, he unilaterally decided that he had ten business days from the date he received the R. D. & O. to file the petition for review. In substantiation of his interpretation of the filing deadline he offers no support in the statute, the regulations, or case precedent, he simply avers that it would be a miscarriage of justice for the Board to disagree with his interpretation. Moreover, the petition Immanuel filed by facsimile on October 15, 2004, consisted of only one sentence of text and a one sentence footnote.<sup>11</sup> Immanuel does not argue that his counsel was unable to prepare and file this document in the six business days between September 30, and October 8. Immanuel's counsel simply chose to rely on either an untested theory or on a post hoc rationalization that the ten days should run from the day he received the R. D. & O. In either event, we do not find that Immanuel's counsel acted diligently to protect his client's rights.<sup>12</sup>

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<sup>11</sup> The text of the petition states, "Comes now the complainant, Henry W. M. Immanuel, by and through counsel, hereby files this Petition for Review seeking review of the Recommended Decision and Order issued by the Administrative Law Judge." The footnote states, "Complainant has also filed a Motion for Reconsideration with the Administrative Law Judge and will withdraw his Petition for Review if that motion is decided in his favor."

<sup>12</sup> *Accord Wilson v. Sec'y, Dep't of Veterans Affairs*, 65 F.3d 402, 404 (5th Cir. 1995), quoting *Irvin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990)(courts have been less forgiving in receiving late filings in cases in which complainants have not diligently preserved their legal rights).

While we recognize that Immanuel is not personally responsible for the failure of his attorney to timely file the petition for review:

Ultimately, clients are accountable for the acts and omissions of their attorneys. *Pioneer Investment Services Co., v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 396 (1993); *Malpass v. General Electric Co.*, Nos. 85-ERA-38, 39 (Sec’y Mar. 1, 1994). As the Supreme Court held in rejecting the argument that holding a client responsible for the errors of his attorney would be unjust:

Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have “notice of all fact, notice of which can be charged upon the attorney.” *Link v. Wabash Railroad Company*, 370 U.S. 626, 633-634 (1962) (quoting *Smith v. Ayer*, 101 U.S. 320, 326 (1879)).<sup>13</sup>

Because we find that Immanuel did not diligently seek to file his petition for review in this case, we find that it would not be appropriate to toll the limitations period. Accordingly, we **DISMISS** Immanuel’s petition for review.

**SO ORDERED.**

**M. CYNTHIA DOUGLASS**  
**Chief Administrative Appeals Judge**

**WAYNE C. BEYER**  
**Administrative Appeals Judge**

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<sup>13</sup> *Gass v. United States Dep’t of Energy*, ARB No. 03-035, ALJ No. 02-CAA-2, slip op. at 7 (Jan. 14, 2004). The Court did note, however, “[I]f an attorney’s conduct falls substantially below what is reasonable under the circumstances, the client’s remedy is against the attorney in a suit for malpractice.” 370 U.S. at 634 n.10.