



**In the Matter of:**

**CHARLES G. SYSKO,**

**ARB CASE NO. 06-138**

**COMPLAINANT,**

**ALJ CASE NO. 2006-ERA-023**

**v.**

**DATE: May 27, 2008**

**PPL CORPORATION and  
PPL SUSQUEHANNA, LLC,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

**Kimberly D. Borland, Esq., *Borland & Borland, LLP*, Wilkes-Barre,  
Pennsylvania**

*For the Respondent:*

**J. Patrick Hickey, Esq., Timothy J. V. Walsh, Esq., *Pillsbury Winthrop Shaw  
Pittman, LLP*, Washington, District of Columbia**

**FINAL DECISION AND ORDER**

Charles G. Sysko filed a complaint against PPL Corporation and PPL Susquehanna, LLC (PPL) under the employee protection provisions of the Energy Reorganization Act (ERA), 42 U.S.C.A. § 5851 (West 2007),<sup>1</sup> and its implementing

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<sup>1</sup> The statute provides, in pertinent part, that “[n]o employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee” notified a covered

regulations at 29 C.F.R. Part 24 (2007). The Administrative Law Judge (ALJ) dismissed Sysko's complaint because she found his request for a hearing to be untimely filed. Sysco appealed to the Administrative Review Board (ARB). We affirm the dismissal.

## BACKGROUND

On March 21, 2006, Sysko's attorney filed a whistleblower complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA) "pursuant to the Energy Reorganization Act, 42 U.S.C.A. § 5851 and 29 C.F.R. § 24.3." Complainant's Exhibit (CX) A. He alleged that PPL violated the ERA when it suspended Sysko's site access clearance after he raised safety concerns at PPL's Susquehanna power plant.

OSHA investigated the complaint and found "no reasonable cause" that PPL violated the ERA. OSHA's determination and findings were mailed to Sysko on June 23, 2006, and sent by facsimile (fax) to his attorney on June 30, 2006. CX F. OSHA stated in its letter that "Respondent and Complainant have 30 days from the receipt of these Findings to file objections and to request a hearing before an Administrative Law Judge (ALJ)." *Id.*

Also on June 30, 2006, Sysko's attorney received copies of four letters all dated June 26, 2006, and stating that OSHA's findings were attached. Complainant's Brief (CB) at 2; CX B-E. Three of them informed the Securities and Exchange Commission, the Office of Administrative Law Judges (OALJ), and the United States Nuclear Regulatory Commission about the resolution of Sysko's complaint. CX B, D, E.

The fourth letter was addressed to PPL, to the attention of Sysko's attorney at his Wilkes-Barre, Pennsylvania address, and noted that OSHA's findings had been sent to Sysko. CX C. The letter pointed out that Sysko had five days to file an appeal with the ALJ and had to notify PPL if he did so. *Id.* The letter stated that if Sysko took no action within the allotted time, the OSHA findings became the final order of the Secretary. *Id.*

Noting that OSHA's determination and findings were not attached to any of the letters, Sysko's attorney called the Philadelphia regional office of OSHA and asked an OSHA employee to fax OSHA's findings to him. CB at 4. He also asked this employee about the five-day deadline and the employee allegedly told him that Sysko had 30 days, not five, to appeal OSHA's findings. CB at 3-4.

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employer about an alleged violation of the ERA or the Atomic Energy Act (AEA) (42 U.S.C. § 2011 *et seq.* (2000)), refused to engage in a practice made unlawful by the ERA or AEA, testified regarding provisions or proposed provisions of the ERA or AEA, or commenced, caused to be commenced or is about to commence or cause to be commenced, or testified, assisted, or participated in a proceeding under the ERA or AEA to carry out the purposes of this chapter or the AEA as amended. 42 U.S.C.A. § 5851(a)(1).

On July 14, 2006, Sysko's attorney wrote to the OALJ to request a review of OSHA's findings. CX G. By Order dated July 21, 2006, the ALJ directed Sysko to show cause why his complaint should not be dismissed for failure to file a timely request for a hearing. CX H. His attorney responded, pointing out that OSHA had failed to send its findings to him even though he was the attorney of record and that an OSHA employee had informed him that he had 30 days in which to request a hearing. CX I.

*The administrative law judge's decision*

The ALJ found that Sysko's request for a hearing was not filed within five business days of OSHA's determination that his complaint had no merit, as required by 29 C.F.R. § 24.4(d)(2). Order at 1. She noted, however, that his late filing did not automatically bar adjudication of his complaint because the ARB has held that the time limit for filing a request for hearing is not jurisdictional and is subject to the principles of equitable tolling. Order at 3.

Sysko's attorney argued that Sysko was entitled to equitable tolling of the statutory filing requirement because OSHA provided erroneous information that was confirmed by an OSHA employee, but the ALJ concluded that the circumstances of this case did not meet the limited grounds for granting relief from the filing requirement. Order at 3.

The ALJ found that the "very fact that counsel was involved in [the] complaint since its inception precludes equitable tolling." Order at 3. She added that counsel was "presumptively aware" of the law and regulations applicable to Sysko's complaint. *Id.* The ALJ further determined that OSHA's defective notice was insufficient to invoke equitable estoppel because the OSHA cover letter sent to Sysko's attorney provided the correct information. *Id.* Acknowledging the "harsh result" of not extending the time period for filing, the ALJ concluded that this case warranted application of the general rule against equitable tolling when a complainant has legal counsel. Order at 4.

### **JURISDICTION AND STANDARD OF REVIEW**

The Secretary of Labor has delegated her authority to decide this matter to the ARB. 29 C.F.R. § 24.8; *see* Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002). In reviewing the ALJ's conclusions of law, the Board, as the Secretary's designee, acts with "all the powers [the Secretary] would have in making the initial decision ... ." 5 U.S.C.A. § 557(b) (West 1996).

## DISCUSSION

Under the ERA, Part 24 of the Code of Federal Regulations governs hearing requests. Section 24.4(d)(2), which has since been amended,<sup>2</sup> identified the action that vested the Labor Department's OALJ with jurisdiction over a complaint that OSHA has investigated. Thus, the determination letter sent to counsel and complainant by OSHA shall include notice that **“any party who desires review of OSHA’s decision or any part thereof shall file a request for a hearing with the Chief Administrative Law Judge within five business days of receipt of the determination.”** 29 C.F.R. § 24.4(d)(2) (emphasis added). If a request for a hearing is timely filed, OSHA’s determination “shall be inoperative,” and shall become operative only if the case is later dismissed. If a request for a hearing is not timely filed, OSHA’s determination “shall become the final order of the Secretary.” *Id.*

*Sysko’s request for a hearing was untimely*

The regulation in effect in 2006 was clear that a request for a hearing shall be filed within five business days of receipt of the OSHA determination letter. *Id.*; see *Degostin v. Bartlett Nuclear, Inc.*, ARB No. 98-042, ALJ No. 1998-ERA-007, slip op. at 3 (ARB May 4, 1998) (time limit for filing a request for a hearing must be strictly construed). Sysko and his attorney received OSHA’s findings on June 30, 2006, a Friday. The fifth business day was Monday, July 10, 2006.<sup>3</sup> Thus, Sysko’s July 14, 2006 request for a hearing was clearly untimely.

*Principles of equitable tolling*

Even if Sysko’s request for a hearing was untimely, the five-day time limit for filing a hearing request is not jurisdictional. *Shirani v. Calvert Cliffs Nuclear Power Plant*, ARB No. 04-101, ALJ No. 2004-ERA-009, slip op. at 8 (ARB Oct. 31, 2005).

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<sup>2</sup> Effective August 10, 2007, the Department of Labor (DOL) amended section 24.4(d)(2) to extend the time for filing objections and requesting a hearing from five business days to 30 days. See 29 C.F.R. § 24.106(a). The purpose of the extension was to make the regulation governing a request for a hearing more consistent with those implementing other whistleblower statutes. See 72 Fed. Reg. 44,959 (Aug. 10, 2007). Since Sysco’s request for a hearing was filed on July 14, 2006, before the effective date of the new regulation, and DOL has not indicated that the new regulation should be applied retroactively, we will apply the regulation in effect at the time of Sysco’s filing. See *Ramos v. Lee County School Bd.*, No. 2:04CV308FTM-33SPC, 2005 WL 2405832, at \*3 n.4 (M.D. Fla. Sept. 29, 2005).

<sup>3</sup> Section 24.4(d)(2) provides five business days in which to file a request for a hearing. 29 C.F.R. 24.4(d)(2). Attorney Borland received OSHA’s findings on June 30, 2006. July 1-2 and July 8-9 were weekends, and July 4 was a holiday. Therefore, the fifth business day was July 10, 2006. Previously, the filing deadline in ERA whistleblower cases was five calendar days but that was changed on March 11, 1998, to five business days. 63 Fed. Reg. 6,622 (Feb. 9, 1998).

Thus, this regulation is subject to the principles of equitable tolling that courts have applied to cases with statutorily-mandated filing deadlines in determining whether to relax the limitations period in a particular case. *Salsbury v. Dep't of Veterans Affairs*, ARB No. 05-014, ALJ No. 2004-ERA-007, slip op. at 6 (ARB July 31, 2007).

We have elucidated these principles in many of our cases. *Hemingway v. Northeast Utils.*, ARB No. 00-074, ALJ Nos. 1999-ERA-014, 015, slip op. at 4 (ARB Aug. 31, 2000). Tolling is proper when: (1) the respondent has actively misled the complainant respecting the cause of action, (2) the complainant has in some extraordinary way been prevented from asserting his rights, or (3) the complainant has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum. *Higgins v. Glen Raven Mills, Inc.*, ARB No. 05-143, ALJ No. 2005-SDW-007, slip op. at 8 (ARB Sept. 29, 2006), citing *School Dist. of Allentown v. Marshall*, 657 F.2d 16, 19-20 (3d Cir. 1981).

As the ALJ noted, the ARB has delineated other factors to be considered in determining whether equitable tolling of a limitations period was appropriate. Those factors are whether the complainant lacked actual or constructive notice of the filing requirements, whether the complainant exercised due diligence in pursuing his rights, whether tolling would prejudice the respondent, and whether the complainant was reasonably ignorant of his rights. *Salsbury*, slip op. at 7.

Sysko bears the burden of justifying the application of these principles by alleging facts of “exceptional circumstances” that show entitlement to equitable treatment. *Wakileh v. W. Ky. Univ.*, ARB No. 04-013, ALJ No. 2003-LCA-023, slip op. at 4 (Oct. 20, 2004). See *United States v. All Funds Distributed To, or on Behalf of Weiss*, 345 F.3d 49, 55 (2d Cir. 2003) (the party seeking to benefit from the doctrine [of equitable tolling] bears the burden of proving that tolling is appropriate).

We have consistently held, however, that equitable tolling is generally not appropriate when a complainant is represented by counsel because counsel is “presumptively aware of whatever legal recourse may be available to [his or her] client.” *Mitchell v. EG&G*, No. 1987-ERA-022, slip op. at 8 (Sec’y July 22, 1993); *Howell v. PPL Servs., Inc.*, ARB No. 05-094, ALJ No. 2005-ERA-014, slip op. at 5 (Feb. 28, 2007); *Hall v. EG&G Defense Materials, Inc.*, ARB No. 98-076, ALJ No. 1997-SDW-009, slip op. at 3 n.5 (ARB Sept. 30, 1998); see *Kocian v. Getty Refining & Mktg. Co.*, 707 F.2d 748, 755 (3d Cir. 1983). Thus, attorney error does not constitute an extraordinary factor because “[u]ltimately, clients are accountable for the acts and omissions of their attorneys.” *Higgins v. Glen Raven Mills, Inc.*, ARB No 05-143, ALJ No. 2005-SDW-007, slip op. at 9 (ARB Sept. 29, 2006); *Dumaw v. International Brotherhood of Teamsters, Local 690*, ARB No. 02-099, ALJ No. 2001-ERA-006, slip op. at 5-6 (ARB Aug. 27, 2002).

*Sysko has not demonstrated entitlement to equitable tolling*

We agree with the ALJ's conclusion that Sysko was not entitled to equitable tolling for several reasons. First, there is no evidence that PPL actively misled Sysko or his attorney about the OSHA determination, that Sysko was prevented from asserting his right to a hearing, or that the hearing request was filed in the wrong forum. Therefore, Sysko has not met his burden of proof to show that tolling of the regulatory limitation under the *Allentown* factors is appropriate. *Reid v. Niagara Mohawk Power Corp.*, ARB No. 03-154, ALJ No. 2003-ERA-017, slip op. at 8 (ARB Oct. 19, 2004).

Second, we find no merit in Sysko's attorney's argument that the regulatory limitation should be tolled because OSHA provided erroneous information and failed to include in its determination letter the five-day notice that section 24.4(d)(2) required. CB at 6. Sysko's attorney was aware of the regulations implementing the ERA because he filed Sysko's complaint under the ERA and "section 24.3." CX A. His attorney admitted that after receiving OSHA's findings, he "did not research the regulations" under which Sysko's complaint had been filed "to verify" that OSHA "had correctly stated their requirements." CB at 4. Further, Sysko's attorney admitted that "while aware of the existence of the regulations . . . [he] had not specifically investigated nor made note of the hearing request deadline" before receiving OSHA's erroneous information. *Id.*

It is true that OSHA included erroneous information in its determination letter and we will assume that an OSHA employee, mistakenly confirmed OSHA's error in his telephone conversation with Sysko's attorney. But such an error on the part of a government agency does not entitle Sysko's attorney to ignore the regulations under which he filed Sysko's initial complaint. And Sysko's attorney does not explain why he relied on an OSHA investigator's knowledge of the law rather than his own. *See Hemingway*, slip op. at 5 (a complainant's "ignorance of legal rights does not toll a statute of limitations."). Sysko's attorney could easily have read the regulation that governed Sysko's complaint. His lack of diligence cannot be excused. *See Cook v. U.S. EPA*, ARB No. 06-036, ALJ No. 2005-CER-001, slip op. at 5 (ARB Feb. 22, 2006) (counsel's failure to verify the ARB's fax number and file a petition for review by overnight mail, knowing it would be one day late, will not toll the regulatory limitation).

Third, we note that the attorney had indirect notice of the five-day filing requirement in the copy of the OSHA investigator's letter to PPL which he received on June 30, 2006. CX C. He admitted that this letter dated June 26, 2006, prompted him to call the regional office because the fifth day from that date was July 1, 2006. CB at 3. He also admitted that he relied on the OSHA employee, who told him the five-day notice was in error and who "read" to him the OSHA "findings and the 29 C.F.R. § 24.4(d)(2) notice which stated that there was a thirty-day appeal period." CB at 9.

While the regulation governing an appeal of OSHA's determination now provides 30 days in which to request a hearing, *see n.2, supra*, we decline to consider this change an exceptional circumstance supporting equitable tolling. Sysko's attorney has made no argument that the expanded filing deadline should be applied, and we fail to see why an

attorney's lack of diligence in representing a complainant should be excused simply because the five-day deadline in effect in 2006 was increased to 30 days in 2007.

In sum, Sysko's attorney has not used the due diligence required to preserve the legal right of his client to obtain a hearing before an ALJ. *See Immauel v. C&D Concrete*, ARB No. 05-006, ALJ No. 2003-CAA-018, slip op. at 4 (ARB Jan. 27, 2005) (counsel's untested theory that he had ten business days from the date he **received** the administrative law judge's recommended decision to file a petition for review with the ARB shows lack of due diligence in representing complainant). As the ALJ noted, the Supreme Court long ago warned that reliance upon the government's representations is fraught with peril. Order at 3-4; *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947); cf. *Community Health Servs. of Crawford County, Inc. v. Califano*, 698 F.2d. 615, 623 (3d Cir. 1983)(where an agent of the Secretary, on five separate occasions spanning two years, incorrectly advised a charitable health care provider that CETA grants did not have to be offset against reimbursable Medicare costs, the government was estopped from subsequently seeking recoupment).

We recognize that Sysko is not personally responsible for his attorney's mistaken assumption, but complainants are ultimately accountable for the acts and omissions of their attorneys. *Dumaw*, slip op. at 5-6. The Supreme Court rejected the argument that holding a client responsible for the errors of his attorney would be unjust, stating:

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 Co.*, 370 U.S. 626, 633-634 (1962). The Court noted, however, that "if 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.

#### *Sysko's arguments on appeal*

Sysko offers several arguments in support of his position that the ALJ erred in concluding that the five-day limitations period should not be tolled. We have dealt with the equitable tolling arguments in the above discussion. Further, we reject Sysko's argument that tolling is appropriate because PPL has asserted no prejudice. CB at 10. An absence of prejudice to the other party is not an independent basis for invoking equitable tolling or "sanctioning deviations from established procedures." *Wakileh*, slip op. at 4; *Santamaria v. U.S. EPA*, ARB No. 04-063, ALJ No. 2004-ERA-006, slip op. at

4 (ARB May 31, 2006), quoting *Baldwin County Welcome Ctr.*, 446 U.S. 147, 152 (1984).

The remainder of the Complainant's brief consists of a grab bag of arguments citing no legal precedent. These include assertions that (1) dismissal of Sysko's complaint based on OSHA's own error is not in the public interest; (2) OSHA has the authority to modify the hearing request limitation because it is not jurisdictional; (3) the five-day requirement violates the Fifth Amendment due process rights of whistleblowers; and (4) the requirement is an ultra vires regulation contrary to the ERA's statutory policy. CB at 11-12. The ARB does not consider arguments made without cites to legal precedent or to precise statutory or regulatory language. *Hall v. U.S. Army*, ARB Nos. 02-108, 03-013, ALJ No. 1997-SDW-005, slip op. at 6 (ARB Dec. 30, 2004) (failure to present argument or pertinent authority waives argument).

Sysko was represented by counsel throughout his case, and is burdened with the results of that counsel's actions. The ALJ's determination that Sysko's request for a hearing was untimely was based on sound legal reasoning and we agree. Thus, the OSHA determination finding no merit to Sysko's complaint is considered under the law to be the final decision of the Secretary.

#### CONCLUSION

The regulation implementing the ERA required complainants to file a request for a hearing within five business days of their receipt of OSHA's determination letter. Sysko, represented by counsel, did not file his request within the allotted time frame. Further, we find no basis upon which to toll the statute of limitations. Therefore, we **DISMISS** Sysko's appeal.

**SO ORDERED.**

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

**DAVID G. DYE**  
**Administrative Appeals Judge**