



In the Matter of:

SHIH-PING KAO,

ARB CASE NO. 14-084

COMPLAINANT,

ALJ CASE NO. 2014-ERA-004

v.

DATE: September 29, 2014

AREVA INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Andrea Downing, Esq.; *The Employment Law Group, P.C.*; Washington, District of Columbia

For the Respondent:

W. David Paxton, Esq.; *Gentry Locke Rakes & Moore, LLP*; Roanoke, Virginia

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; and Luis A. Corchado, *Administrative Appeals Judge*

FINAL DECISION AND ORDER DENYING INTERLOCUTORY REVIEW

The Complainant, Shih-Ping Kao, filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA). Kao alleged that Areva violated the employee protection provisions of the Energy Reorganization Act (ERA), as amended and recodified, and its implementing regulations.¹ OSHA dismissed the complaint. On May 21, 2014, after timely serving the parties, Kao filed objections to the OSHA findings with the Office of Administrative Law Judges (OALJ), two days late. Kao then filed a motion requesting the ALJ to accept his objections as timely.

¹ 42 U.S.C.A. § 5851 (Thomson/West 2010) (ERA); 29 C.F.R. Part 24 (2013).

A Labor Department Administrative Law Judge (ALJ) determined that equitable modification principles applied and granted Kao's request to accept his hearing request as timely. The ALJ noted that the ERA regulations require that a request for hearing or objections to OSHA findings must be filed within 30 days of the receipt of the findings and that Kao filed after this period.² Relying on Board precedent,³ the ALJ concluded that the timely service of copies of the request for hearing on the Assistant Secretary for Occupational Safety and Health; the Regional Supervisory Investigator for OSHA; and the Assistant Solicitor, Fair Labor Standards Division; justified applying the doctrine of equitable tolling for a filing that was only two days late.⁴ Thus, the ALJ granted Kao's motion.⁵

Areva argued to the ALJ that the OSHA finding became the final order of the Secretary before the request for hearing was filed and that this finality, deprived the OALJ of jurisdiction (and therefore also of the ability to allow equitable tolling).⁶ Areva also asserted that a regulation that was amended after the cases on which the ALJ relied, deprived the ALJ of jurisdiction.⁷ Because of that amendment and because lack of jurisdiction is a complete bar to a proceeding, the ALJ granted Areva's request for interlocutory appeal and certified the jurisdiction issue for appeal under 28 U.S.C.A. § 1292(b). The ALJ granted Areva's motion to stay discovery until the Administrative Review Board (ARB or the Board) grants or denies review.

On August 7, 2014, the ARB received Areva's petition for interlocutory appeal. Kao filed an opposition to the petition.

² D. & O. at 1 (citing 29 C.F.R. § 24.106(a)).

³ *Shirani v. Calvert Cliffs Nuclear Power Plant, Inc.*, ARB No. 04-101, ALJ No. 2004-ERA-009 (ARB Oct. 31, 2005), *Shelton v. Oak Ridge Nat'l Labs.*, ARB No. 98-100, ALJ No. 1995-CAA-019 (ARB Mar. 30, 2001).

⁴ *Id.* at 4.

⁵ *Id.* at 2, 4.

⁶ *Id.* at 5.

⁷ See 29 C.F.R. § 24.106(b).

DISCUSSION

The Administrative Review Board (ARB or Board) has the discretionary authority to hear interlocutory appeals of administrative law judge orders under the ERA in exceptional circumstances.⁸ No exceptional circumstances exist here.

Areva argues that the ERA regulations create a jurisdictional bar to the ALJ's consideration of Kao's untimely filed objections. The ERA's regulations at 29 C.F.R. § 24.106(b) state that: "If a timely objection is filed, all provisions of the order will be stayed. If no timely objection is filed with respect to either the findings or the order, the findings and order will become the final decision of the Secretary, not subject to judicial review."

We are not sufficiently persuaded that this language creates a jurisdictional issue.⁹ Consequently, we **DENY** Areva's petition for interlocutory review without prejudice and **REMAND** the case to the Office of Administrative Law Judges for further proceedings consistent with this opinion.

SO ORDERED.

LUIS A. CORCHADO
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

⁸ Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69378, 69379 (Nov. 16, 2012).

⁹ See 49 U.S.C.A. § 31105(b)(2)(B) (Thomson/West & Supp. 2014); 29 C.F.R. § 1978.106(b) (2013); *Thissen v. Tri-Boro Constr. Supplies, Inc.*, ARB No. 04-153, ALJ No. 2004-STA-035 (ARB Dec. 16, 2005); *Spearman v. Roadway Express, Inc.*, No. 1992-STA-001 (Sec'y Aug. 5, 1992).