U.S. Department of Labor

Administrative Review Board
200 Constitution Ave., N.W.
Washington, DC 20210

In the Matter of:

DWIGHT BOHANON,	**ARB CASE NO. 16-048**
COMPLAINANT,	**ALJ CASE NO. 2014-FRS-003**
v.	**DATE: April 27, 2016**
GRAND TRUNK WESTERN RAILROAD CO.,	
RESPONDENT.	

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Robert B. Thompson, Esq.; ***Harrington, Thompson, Acker & Harrington, Ltd.;***
Chicago, Illinois

For the Respondents:
Susan K. Fitzke and Jessica J. Bradley, Esq.; ***Littler Mendelson, PC;***
Minneapolis, Minnesota

BEFORE: Paul M. Igasaki, ***Chief Administrative Appeals Judge*****; Luis A. Corchado,** ***Administrative Appeals Judge*****; and Anuj Desai,** ***Administrative Appeals Judge.*** **Judge Corchado dissents.**

FINAL DECISION AND ORDER DENYING MOTION TO FILE PETITION FOR REVIEW, AFTER TIME FOR THE FILING HAS EXPIRED

On March 1, 2016, a Department of Labor Administrative Law Judge issued a Decision and Order in this case arising under the whistleblower protection provisions of

the Federal Railroad Safety Act of 1982 (FRSA),[1] and its implementing regulations.[2] The ALJ determined that Respondent Grand Trunk Western Railroad Co. unlawfully retaliated against Complainant Dwight Bohanon because he reported a safety concern.[3] The D. & O. included a Notice of Appeal Rights that provided, "to appeal, you must file a Petition for review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision."[4]

Neither party filed a timely petition for review with the Board by March 15, 2016. On March 21, 2016, Grand Trunk filed a Motion for Additional Time to File a Petition for Review averring that it had failed to file a timely petition because counsel failed to properly determine the date on which the petition was due (counting the fourteen days from date of receipt rather than date of issuance). Complainant Bohanon responded urging the Board to deny Grand Trunk's Motion.

On April 15, 2016, the parties filed a Joint Motion for Approval of Settlement and Withdrawal of Complainant's Opposition to Motion for Additional Time to File Petition for Review.

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[1] 49 U.S.C.A. § 20109 (Thomson/West 2007 & Thomson Reuters Supp. 2015).

[2] 29 C.F.R. Part 1982 (2015).

[3] *Bohanon v. Grand Trunk W. RR Co.*, ALJ No. 2014-FRS-003 (Mar. 1, 2016)(D. & O.). The Secretary of Labor has delegated to the Board the authority to issue final agency decisions under the FRSA. *See* Secretary's Order 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012); 29 C.F.R. § 1982.110(a).

[4] D. & O. at 68. The Department of Labor's regulations addressing petitions for review by this Board likewise require a petition to be filed "within 14 days of the date of the decision of the ALJ." *See* Procedures for the Handling of Retaliation Complaints Under the National Transit Systems Security Act and the Federal Railroad Safety Act, 80 Fed. Reg. 69,115; 69,137 (Nov. 9, 2015) (to be codified at 29 C.F.R. § 1982.110(a) (2016)). Although in November 2015, the language of the regulations changed from "10 business days" to "14 days," this was not a change in the rule relevant to this case: both before and after the change, the limitations period is triggered by "the date of the decision of the ALJ." *Compare* 29 C.F.R. § 1982.110(a) (2015) *with* 80 Fed. Reg. 69,115; 69,137 (Nov. 9, 2015) (to be codified at 29 C.F.R. § 1982.110(a) (2016)).

DISCUSSION

The limitations period in the Department of Labor's FRSA regulations is not jurisdictional and therefore is subject to equitable modification.[5] In determining whether the Board should toll a statute of limitations, we have recognized four principal situations in which a moving party may be entitled to equitable modification: (1) when the opposing party has actively misled the movant regarding the cause of action; (2) when the movant has in some extraordinary way been prevented from filing his or her appeal before this Board; (3) when the movant has raised the precise statutory claim in issue but has done so in the wrong forum, and (4) where the opposing party's own acts or omissions have lulled the movant into foregoing prompt attempts to vindicate his rights.[6]

Nevertheless, the United States Court of Appeals for the Sixth Circuit has held that, "Equitable tolling should be applied sparingly and only when exceptional circumstances prevented timely filing through no fault of the plaintiff."[7] Further, the court has cautioned, "Only 'exceptional circumstances,' not 'garden variety claim[s] of excusable neglect,' allow us to toll the statute of limitations."[8]

Here Grand Trunk argues that we should toll the limitations period because its counsel failed to properly determine the date on which the petition for review was due: She misread the ALJ's Order to mean that the petition was due fourteen days after *receipt* of the ALJ's Order when it said "within fourteen (14) days of the date of issuance" of the ALJ's Order. At most, this is a garden variety claim of excusable neglect, which does not qualify as exceptional circumstances under Board and Sixth Circuit precedent.

Grand Trunk cites *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*,[9] and *Lorenzen v. Employees Retirement Plan,*[10] in support of its

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5 *See Macareñas v. Interstate Hotels*, ARB No. 15-068, ALJ No. 2014-STA-047, slip op. at 2 (ARB Aug.14, 2015) (same point as to the almost identical DOL regulations under the Surface Transportation Assistance Act).

6 *Woods v. Boeing-South Carolina,* ARB No.11-067, ALJ No. 2011-AIR-009, slip op. at 8 (ARB Dec. 10, 2012).

7 *Gibson v. American Bankers Insur. Co.*, 289 F.3d 943, 947 (2002)(citations omitted).

8 *Ruth v. Unifund CCR Partners,* 604 F.3d 908, 913 (6th Cir. 2010)(quoting *Gibson*, 289 F.3d at 947 and *Irwin v. Dep't of Veterans Affairs,* 498 U.S. 89, 96, (1990)). *Accord Romero v. The Coca Cola Co.,* ARB No. 10-035, ALJ No. 2010-SOX-021, slip op. at 6 (ARB Sept. 30, 2010)("Extraordinary circumstances" does not extend to excusable neglect.).

9 507 U.S. 380 (1993).

argument that its neglect was excusable and should be sufficient to toll the limitations period. These two cases are inapposite, because they apply the more lenient "excusable neglect" standard rather than the stricter "exceptional circumstances" standard required for equitable modification here. In *Pioneer Investment Services,* the bankruptcy rules relevant to the case specifically provided for the acceptance of late filings in cases of "excusable neglect."[11] No such rule applies to this case, and our long-standing precedent, instead, relies on the doctrine of equitable tolling—and thus the "exceptional circumstances" standard—to determine whether to permit a party to file a petition for review after the time for such filing has expired. In *Lorenzen*, the court also interpreted the term "excusable neglect"—language found in the Federal Rules of Civil Procedure—and equated it with "plausible misconstruction"; it then upheld a district court judge's decision permitting late filing where the state of the law was confusing and the error was induced by the opposing party's conduct, the very party who was attempting to take advantage of the error.[12] Here, Respondent did not misconstrue or misinterpret the ALJ's instructions; they were absolutely clear. No interpretation of "date of issuance" was necessary. Respondent simply misread the instructions. Moreover, in contrast to *Lorenzen*, the opposing party—here, Bohanon—has done nothing wrong; the only one at fault is Grand Trunk's own lawyer.

The Joint Motion subsequently filed by the parties does not change our evaluation of Respondent's entitlement to tolling of the limitations period. The 14-day deadline is found in a duly promulgated regulation, and the standard for equitable modification of that deadline is "exceptional circumstances." The fact that both parties belatedly agreed to a late-filed petition does not constitute "exceptional circumstances"—it certainly does not satisfy any of the four circumstances the Board has consistently cited as circumstances supporting the tolling of the limitations period.

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[10] 896 F.2d 228 (7th Cir. 1990).

[11] 507 U.S. at 388 (quoting Federal Rule of Bankruptcy 9006(b)(1)).

[12] 896 F.2d at 232-234. The court also noted that whether to excuse the late filing was discretionary and had the judge refused to do so, the court would have upheld his decision. *Id.* at 233.

Accordingly, finding no basis for excusing Respondent's failure to timely file its petition for review, we **DENY** its motion for enlargement of time to file it.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

ANUJ C. DESAI
Administrative Appeals Judge

Judge Corchado, dissenting:

The deadline for filing a petition for review is not jurisdictional. In this case, the petition was filed four business days late. Both parties are now asking the Board to accept the petition. I am not aware of a case where we have rejected a petition under such circumstances and cannot agree with the majority's decision. I dissent.

LUIS A. CORCHADO
Administrative Appeals Judge