



IN THE MATTER OF:

JOHN E. SPARRE,

ARB CASE NO. 18-022

COMPLAINANT,

ALJ CASE NO. 2016-FRS-038

v.

DATE: May 31, 2018

**NORFOLK SOUTHERN RAILWAY
COMPANY**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Kevin W. Betz, Esq. and Courtney E. Endwright, Esq.; *Betz and Blevins*, Indianapolis, Indiana

For the Respondent:

John C. Duffey, Esq., and Barry L. Loftus, Esq., *Stuart & Branigin LLP*, Lafayette, Indiana

Before: Joanne Royce, *Administrative Appeals Judge* and Leonard J. Howie III, *Administrative Appeals Judge*, and

FINAL DECISION AND ORDER DISMISSING UNTIMELY APPEAL

On November 14, 2017, a Department of Labor Administrative Law Judge issued an Order Granting Respondent's Motion for Summary Decision¹ in this case arising under the whistleblower protection provisions of the Federal Railroad Safety Act.² The Secretary of Labor has delegated authority to issue final agency decisions under the FRSA whistleblower protection provisions to the Administrative Review Board.³ Pursuant to 29 C.F.R. § 1982.110(a), "a petition [for review] must be filed within 14 days of the date of the decision of the ALJ. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt."⁴ Fourteen days from the date of the ALJ's Order Granting Respondent's Motion for Summary Decision was November 28, 2017. On December 14, 2017, Complainant John E. Sparre filed a Petition for Review and Brief requesting the Administrative Review Board to review the ALJ's Order. Pursuant to 29 C.F.R. § 1982.110(a), Sparre's petition for review was untimely.

In response to Sparre's untimely-filed petition for review, Respondent Norfolk Southern Railway Company filed a Motion to Dismiss Complainant's Petition for Review as Untimely and proposed order. Sparre then filed Complainant's Notice of Intent to Respond and Request to Respond to Respondent's Motion to Dismiss. Respondent answered with Norfolk Southern Railway Company's Response to Complainant's Notice of Intent to Respond and Request to Respond to Respondent's Motion to Dismiss. Sparre filed Complainant's Verified Response in Opposition to Respondent's Motion to Dismiss. **Finally**, Respondent filed Norfolk Southern Railway Company's Reply in Support of its Motion to Dismiss Complainant's Petition for Review as Untimely.

Although Sparre failed to file a timely petition for review, the period for filing a petition for review with the ARB 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 equitable modification may apply: (1) when the defendant has actively misled the plaintiff regarding the cause of action; (2) when the plaintiff has in some extraordinary way been prevented from filing his action; (3) when the plaintiff has raised the precise statutory claim in issue but has done so in the wrong forum, and (4) where the defendant's

¹ *Sparre v. Norfolk S. Ry. Co.*, No. 2016-FRS-038 (Nov. 14, 2017) (ALJ Ord.).

² 49 U.S.C.A. § 20109 (Thomson Reuters 2016)(FRSA). The FRSA's implementing regulations are found at 29 C.F.R. § 1982 (2017).

³ Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012).

⁴ 29 C.F.R. § 1982.110(a).

⁵ *Accord Hillis v. Knochel Bros.*, ARB Nos. 03-136, 04-081, 04-148; ALJ No. 2002-STA-050, slip op. at 3 (ARB Oct. 19, 2004); *Overall v. Tennessee Valley Auth.*, ARB No. 98-011, ALJ No. 1997-ERA-053, slip op. at 40-43 (ARB Apr. 30, 2001).

own acts or omissions have lulled the plaintiff into foregoing prompt attempts to vindicate his rights.⁶ But the Board has not found these situations to be exclusive, and an inability to satisfy one is not necessarily fatal to Sparre's claim.⁷ Nevertheless, the Board, like the courts, has "generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights."⁸ We have considered the parties' filings, the FRSA and its implementing regulations and applicable case precedent and accordingly, we hold that Sparre is not entitled to equitable tolling of the limitations period.

Sparre bears the burden of justifying the application of equitable tolling principles.⁹ The only issue properly presently before the Board is whether the Board should toll the limitations period for the filing of Sparre's untimely-filed petition for review. Nevertheless, Sparre devotes the first argument in his response to Respondent's motion to dismiss to the argument that a party is not required to file a timely petition for review with the Board to obtain review in the court of appeals. Not only is this argument irrelevant to the issue whether to toll the limitations period in this case before the Board, this argument is belied by a duly promulgated regulation by the Department of Labor that provides, "Any party desiring to seek review, including **judicial review**, of a **decision of the ALJ**, . . . **must file a written petition for review with the ARB**"¹⁰ Further, even if the Board was inclined to consider the issue, it would be bound by its delegation of authority from the Secretary of Labor providing, "The Board shall not have jurisdiction to pass on the validity of any portion of the Code of Federal Regulations that has been duly promulgated by the Department of Labor and shall observe the provisions thereof, where pertinent, in its decisions."¹¹ Finally we note that Sparre has failed to cite to even one appellate court decision in support of his argument that a party may file an FRSA appeal to the federal appellate courts directly from an ALJ's decision.¹²

⁶ *Selig v. Aurora Flight Sciences*, ARB No.10-072, ALJ No. 2010-AIR-010, slip op. at 3 (ARB Jan. 28, 2011).

⁷ *Id.* at 4.

⁸ *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)); *Romero v. The Coca Cola Co.*, ARB No. 10-095, ALJ No. 2010-SOX-021, slip op. at 4 (ARB Sept. 30, 2010).

⁹ *Accord Wilson*, 65 F.3d at 404 (complaining party in Title VII case bears burden of establishing entitlement to equitable tolling).

¹⁰ 29 C.F.R. 1982.110(a)(emphasis added).

¹¹ Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378, 69,379 at § 5(c)(66) (Nov. 16, 2012).

¹² On January 12, 2018, Sparre filed a petition for review with the United States Court of Appeals for the Seventh Circuit.

Sparre does not argue that Respondent has actively misled him regarding the cause of action; that Sparre raised the precise statutory claim in issue but has done so in the wrong forum, or that Respondent's own acts or omissions lulled Sparre into foregoing prompt attempts to vindicate his rights. In an apparent attempt to demonstrate that Sparre has in some **extraordinary** way been prevented from filing his action, he presents the Board with a smorgasbord of arguments that he asserts supports equitable tolling of the limitations period, i.e., the ALJ issued the decision too quickly and unannounced; the ALJ failed to tell Sparre that if he failed to timely file with the ARB, he was precluded from filing with the appellate courts;¹³ Sparre was on the road and could not receive mail;¹⁴ the ARB was confused about the appropriate limitations period;¹⁵ and Sparre's counsels were busy, limited by pregnancy, ill, traveling, or celebrating the Thanksgiving holiday. But given that Sparre's counsel placed his petition for review and brief in the mail thirty days to the day after the ALJ issued his decision, it appears likely that these excuses were simply post-hoc rationalizations for the actual reason that the petition for review was not timely filed, i.e., Sparre's counsel ignored the ALJ's notice of appeal rights specifying that the Petition for Review must be filed with the Board within fourteen days of the date of the issuance of the administrative law judge's decision. Instead counsel "separately investigated the deadline for appealing to the ARB" and mistakenly assumed that a regulation applicable to appeals of civil money penalties, found in 29 C.F.R. § 580.13 established a 30-day deadline to file the petition for review.¹⁶ In any event none of the arguments Sparre advances establish a basis for tolling the limitations period.

¹³ This argument is especially surprising given that Sparre argues at length that he is not required to file a timely appeal with the ARB before appealing to the appellate court.

¹⁴ But Sparre does not contend that he was unable to receive phone calls, nor does his counsel indicate what attempts he made to contact Sparre after receiving the ALJ's decision.

¹⁵ Sparre argues that the ARB's clerk appears to have misconstrued the applicable FRSA regulations because the Petition for Review was marked by a date stamp of December 22, 2017, although it was put in the mail on December 14, 2017. Respondent's assertion that the Clerk misconstrued the FRSA regulations is groundless. The date stamp affixed to documents submitted to the ARB establishes the date on which the document was processed in the Office of the Clerk of the Appellate Boards, not the date the document was filed.

¹⁶ Part 580 of 29 C.F.R. is entitled, "Civil Money Penalties,-Procedures for Assessing and Contesting Penalties." There were no civil money penalties assessed or contested in this case. The regulation establishing the 14-day limitation period applicable to this case is found in 29 C.F.R. Part 1982, entitled, "Procedures for the Handling of Retaliation Complaints under the National Transit Systems Security Act and the Federal Railroad Safety Act." Sparre does not explain why his attorney assumed that the Part 580 regulations applied to this case, rather than the Part 1982 regulations other than, "no other counsel was available to confirm this deadline" and the counsel who made the erroneous determination, "was under significant time constraints as well as other health limitations related to a first pregnancy." We note that, even if the Civil Money Penalty regulations were applicable to this case, the petition for review would still have been untimely because these regulations provide that documents are not considered filed with the Board until the Board receives them, either on or before

Initially we note that ordinarily, a party represented by counsel is not entitled to equitable tolling¹⁷ because counsel is “presumptively aware of whatever legal recourse may be available to [his or her] client.”¹⁸ An attorney practicing before the Board is expected to familiarize himself or herself with the applicable regulations.¹⁹ Attorney error does not constitute an extraordinary factor because “[u]ltimately, clients are accountable for the acts and omissions of their attorneys.”²⁰

Furthermore, even if, as Sparre argues, his attorney’s laundry list of excuses for failing to timely file could establish “excusable neglect,” such neglect is not sufficient to meet the “extraordinary” standard for tolling the limitations period.²¹ Finally, it is well settled under Board precedent that lack of prejudice to the opposing party is not an independent ground for tolling, but will only be considered once the party requesting tolling has established an applicable basis for it.²²

the due date, and that no additional time shall be added where service is made by mail. 29 C.F.R. § 580.13(c)(2017). Sparre’s petition for review was not received by the Board by December 14, 2017.

¹⁷ *Brown v. Synovus Fin. Corp.*, ARB No. 17-037, ALJ No. 2015-SOX-018, slip op. at 3 (ARB May 17, 2017).

¹⁸ *Sysko v. PPL Corp.*, ARB No. 06-138, ALJ No. 2006-ERA-023, slip op. at 5 (ARB May 27, 2008)(quoting *Mitchell v. EG&G*, No. 1987-ERA-022, slip op. at 8 (Sec’y July 22, 1993)).

¹⁹ *Bohanon v. Grand Trunk W. R.R. Co.*, ARB No. 16-048, ALJ No. 2014-FRS-003, slip op. at 3 (ARB Apr. 27, 2016).

²⁰ *Higgins v. Glen Raven Mills, Inc.*, ARB No 05-143, ALJ No. 2005-SDW-007, slip op. at 9 (ARB Sept. 29, 2006). But the Supreme Court did note in *Link v. Wabash R. R. Co.* 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. 626, 634 n.10 (1962).

²¹ *Accord Irvin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 96 (1990)(Petitioner argued that his failure to timely file his suit should be excused because his lawyer was absent from his office at the time that the EEOC notice was received, and that he thereafter filed within 30 days of the day on which he personally received notice. But equitable tolling principles do not apply to “what is at best a garden variety claim of excusable neglect.”). See also, *Bohanon v. Grand Trunk W. R.R.*, ARB No. 16-048, ALJ No. 2014-FRS-003, slip op. at 3-4 (ARB Apr. 27, 2016)(Board finds parties’ reliance on *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380 (1993) and *Lorenzen v. Emps. Ret. Plan*, 896 F.2d 228 (7th Cir. 1990), unavailing because those decisions apply the more lenient “excusable neglect” standard rather than the stricter “exceptional circumstances” standard required for equitable modification applicable to tolling of the limitations period for filing a timely FRSA appeal).

²² *Romero v. The Coca Cola Co.*, ARB No. 10-095, ALJ No. 2010-SOX-021, slip op. at 6 (ARB Sept. 30, 2010).

While it appears that Sparre's counsels were very busy with other pressing matters, it is simply not credible that none of them could have spared the fifteen minutes it would have taken to file a single paragraph motion requesting an enlargement of time to file the petition for review. Failing to do so, and failing to demonstrate that Sparre was precluded by extraordinary circumstances from timely filing his petition for review, Sparre has failed to establish the diligence expected of parties wishing to litigate appeals before the Administrative Review Board.

Accordingly, Sparre's petition for review is **DENIED**.

SO ORDERED.

JOANNE ROYCE
Administrative Appeals Judge

LEONARD J. HOWIE III
Administrative Appeals Judge