



In the Matter of:

**MICHAEL BEN GRAVES,
COMPLAINANT,**

ARB CASE NO. 15-058

ALJ CASE NO. 2015-NTS-001

v.

DATE: May 29, 2015

**MV TRANSPORTATION, INC.,
BROADSPIRE, ACE TEMPEST
REINSURANCE USA, LINDA
McDONNELL, and LAWENA
CARTER PORTER,**

RESPONDENTS.

Appearances:

For the Complainant:

Michael Ben Graves, *pro se*, Carson, California

BEFORE: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; and Luis A. Corchado, *Administrative Appeals Judge*

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

ORDER DENYING INTERLOCUTORY APPEAL

On April 24, 2015, the Administrative Review Board received “Complainant’s Appeal of April 9, 2015 Interlocutory Order” in this case arising under the employee protection provisions of the National Transit Systems Security Act (NTSSA), 6 U.S.C.A. § 1142 (Thomson/West Supp. 2014), and its implementing regulations, 29 C.F.R. Part 1982 (2014). Complainant has appealed an Order Striking Second Amended Complaint

filed by a Department of Labor Administrative Law Judge assigned to Complainant's case.

The Secretary of Labor has delegated authority to issue final administrative decisions in cases, arising under the employee protection provisions of the NTSSA to the Administrative Review Board.¹ The Secretary's delegated authority to the Board includes, "discretionary authority to review interlocutory rulings in exceptional circumstances, provided such review is not prohibited by statute."²

The ALJ explained the circumstances that compelled him to issue his order. On March 25, 2015, Graves filed a purported amended complaint. The ALJ construed the filing as a motion for leave to amend together with a proposed amended complaint. The ALJ held a telephone status conference on March 31, 2015, to discuss the proposed amended complaint and other pending questions. During the conference, Graves recited for the record the specific adverse actions that he was alleging. He conceded that he had alleged no new specific facts in the amended complaint and that the amendment essentially only extended the general allegations to an additional individual. Graves claimed that this would not be his last amended complaint because he was seeking additional information from the Occupational Safety and Health Administration (OSHA). He stated that OSHA had failed to provide him with copies of Respondents' submissions during the OSHA investigation, but it has recently assured him that it would do so. Graves expected that these documents would provide him information he needed to make specific new allegations in an amended complaint.³

The ALJ issued orders on the record during the telephone conference and memorialized them in an Order issued on April 1, 2015. He joined two individuals as respondent parties, but otherwise denied without prejudice Graves's motion for leave to amend. The ALJ described his order:

I ordered that Complainant either get the documents from OSHA or decide to abandon that process. He was then to inform this Office that he was ready to proceed. If he learned new information from the documents OSHA supplied, he could file a motion for leave to amend his

¹ 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); 29 C.F.R. § 1982.110(a).

² *Id.* at § 5(c)(48).

³ Respondents contended that they sent Graves copies of their position statements when they sent them to OSHA, but even though Graves did not dispute this contention, he persisted in wanting OSHA to send him copies in addition.

complaint along with a proposed amended complaint. If he decided that he did not want to amend, he was to notify this Office of that as well. After the complaint was finalized, I would set a new hearing date.^[4]

On April 6, 2015, Graves filed another amended complaint. Graves asked to add another individual to the complaint, one of the attorneys representing one of the respondents. The ALJ concluded that it also appeared to allege new adverse actions, none of which appeared to be based on the documents Graves was trying to get from OSHA, and none of which Graves mentioned just four days earlier when stating for the record his allegations of Respondents' adverse actions. Most significantly to the ALJ, Graves did not state that he had completed his efforts to get the documents from OSHA or that he had abandoned his attempt to get the documents. Further, he did not move for leave to amend or explain why he did not include his new allegations when this matter was pending at OSHA.

The ALJ summarized the actions Graves took in filing the April 6th amendment:

In summary, Complainant filed a proposed amended complaint on March 25, 2014. During a phone conference six days later, I allowed him to join two new respondents and otherwise denied his motion for leave to amend without prejudice. I established a procedure to complete and close the pleadings and thus allow the parties to get ready for a hearing. Inconsistent with that procedure, [Complainant] signed and filed a second proposed amended complaint just four days later.^[5]

Accordingly, the ALJ struck the proposed amendment without prejudice to Complainant's filing an amendment consistent with the procedure the ALJ established in his orders and notified Graves that if he attempts "to file an additional amended complaint inconsistent with the ALJ's Order Striking Second Amended Complaint, that amended complaint will be stricken with prejudice and Complainant will not be permitted to file any additional amended complaints (or amendments to his existing complaint)."⁶

Upon review of the ALJ's Order Striking Second Amended Complaint and Graves's Petition for Interlocutory Review and supporting documents, we find that

⁴ Order Striking Second Amended Complaint at 2.

⁵ *Id.*

⁶ *Id.* at 3.

Graves has failed to demonstrate exceptional circumstances supporting the extraordinary procedure of interlocutory review in this case.

DISCUSSION

The Secretary of Labor and the Board have held many times that interlocutory appeals are generally disfavored and that there is a strong policy against piecemeal appeals.⁷ Nevertheless, where an ALJ has issued an order of which the party seeks interlocutory review, the ARB has elected to look to the procedures providing for certification of issues involving a controlling question of law as to which there is substantial ground for difference of opinion, an immediate appeal of which would materially advance the ultimate termination of the litigation, as set forth in 28 U.S.C.A. § 1292(b) (Thomson/West 2006), to determine whether to accept an interlocutory appeal for review.⁸ In *Plumley v. Federal Bureau of Prisons*,⁹ the Secretary ultimately concluded that because no ALJ had certified the questions of law raised by the respondent in his interlocutory appeal as provided in 28 U.S.C.A. § 1292(b), “an appeal from an interlocutory order such as this may not be taken.”¹⁰ Graves did not seek certification of the issues arising in the ALJ’s interlocutory order in this case.

Even if a party has failed to obtain interlocutory certification, the ARB would consider reviewing an interlocutory order meeting the “collateral order” exception recognized by the Supreme Court in *Cohen v. Beneficial Indus. Loan Corp.*,¹¹ if the decision appealed belongs to that “small class [of decisions] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.”¹² To fall within

⁷ Order to Show Cause, slip op. at 3 (ARB Dec. 16, 2014). See, e.g., *Gunther v. Deltek*, ARB Nos. 12-097, 12-099; ALJ No. 2010-SOX-049 (ARB Sept. 11, 2012); *Welch v. Cardinal Bankshares Corp.*, ARB No. 04-054, ALJ No. 2003-SOX-015 (ARB May 13, 2004).

⁸ *Powers v. Pinnacle Airlines, Inc.*, ARB No. 05-138, ALJ No. 2005-SOX-065, slip op. at 5 (ARB Oct. 31, 2005); *Plumley v. Federal Bureau of Prisons*, 1986-CAA-006 (Sec’y Apr. 29, 1987).

⁹ 1986-CAA-006 (Sec’y Apr. 29, 1987).

¹⁰ *Id.*, slip op. at 3 (citation omitted).

¹¹ 337 U.S. 541 (1949).

¹² *Id.* at 546.

the “collateral order” exception, the order appealed must “conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment.”¹³

Graves has not demonstrated that his appeal falls within the collateral order exception. As we held in *Hasan v. Commonwealth Edison Co.*,¹⁴ we are very reluctant to interfere with an ALJ’s control over the course of a hearing. Contrary to Graves’s argument in support of his petition for interlocutory review, the ALJ has not denied him the right to “submit a prima facie case.”¹⁵ Instead, the ALJ has merely established a procedure for submitting an amended complaint and has required that Complainant adhere to it. The ALJ’s interest in providing for an efficient procedure for proceeding through the hearing process is obvious and within his reasonable discretion. In any event, if Graves does not ultimately prevail before the ALJ, he may file an appeal.

CONCLUSION

Accordingly, Graves’s motion for interlocutory review is **DENIED**.

SO ORDERED.

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LUIS A. CORCHADO
Administrative Appeals Judge

¹³ *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978).

¹⁴ ARB No. 99-097, ALJ No. 1999-ERA-017, slip op. at 2 (Sept. 16, 1999).

¹⁵ Complainant’s Appeal of April 9, 2015 Interlocutory Order at 2.