In the Matter of:

BENTZION S. TURIN,

COMPLAINANT,

v.

AMTRUST FINANCIAL SERVICES, INC.; MAIDEN HOLDINGS, LTD.; MAIDEN INSURANCE COMPANY LIMITED, MAIDEN HOLDINGS NORTH AMERICA, LTD.; and ART RASCHBAUM, Individually; Representative of the Estate of MICHAEL KARFUNKEL, Deceased, Individually; and BARRY ZYSKIND, Individually.

RESPONDENTS.

ARB CASE NO. 17-004

ALJ CASE NO. 2010-SOX-018

DATE: April 20, 2017

Appearances:

For the Complainant:
Edward S. Rudofsky, Esq.; ***Zane and Rudofsky,*** **New York, New York**

For the Respondents:
Danielle C. Lesser, Esq.; ***Morrison Cohen LLP,*** **New York, New York**

Before: Paul M. Igasaki, ***Chief Administrative Appeals Judge*****; Joanne Royce,** ***Administrative Appeals Judge*****; and Leonard J. Howie III,** ***Administrative Appeals Judge***

DECISION AND ORDER DISMISSING INTERLOCUTORY APPEAL

The Administrative Review Board reversed and remanded a Decision and Order Granting Respondents' Motion to Dismiss the Complaint issued by a Department of Labor Administrative Law Judge (ALJ) in this case arising under the whistleblower protection provisions of the Sarbanes-Oxley Act of 2002 (SOX).[1] On remand to the ALJ, Complainant Bentzion Turin presented his case-in chief over eleven days of hearing. At the close of Complainant's case, Respondents moved to dismiss AmTrust, AIIM, and Maiden as named Respondents. The ALJ granted the motion as to AmTrust and AIIM, on the grounds that Turin was unable to establish that he was a covered employee of either entity.[2] She denied the motion as to Maiden and ordered the parties to suggest dates for the hearing at which the remaining Respondents could present their case in chief.[3] The ALJ's decision did not include a Notice of Appeal Rights.[4]

Turin filed a petition requesting the Board to review the ALJ's Decision and Order Dismissing Respondents AmTrust and AIIM. Because the ALJ has not fully and finally disposed of ALJ case no. 2010-SOX-018, Turin's petition is for interlocutory review.[5] Accordingly, the Board ordered Turin to show cause why the Board should not dismiss his appeal as interlocutory.

Turin responded to the Board's Show Cause Order requesting that his response date be extended to fourteen (14) days following the ALJ's determination of his request for reconsideration of her Decision and Order Dismissing Respondents AmTrust and AIIM. Turin noted that in asking the ALJ to reconsider the decision, he also asked that if she did not grant reconsideration, that she clarify whether her decision falls within FRCP 54(c)[6] and its provision

---

[1] 18 U.S.C.A. § 1514A (Thomson West Supp. 2016). SOX's implementing regulations are found at 29 C.F.R. Part 1980 (2016). The ALJ had dismissed the complaint on the grounds that it was untimely.

[2] *Turin v. AmTrust Fin. Servs., Inc.,* ALJ No 2010-SOX-018 (Nov. 9, 2016)(Decision and Order Dismissing Respondents' AmTrust and AIIM).

[3] *Turin v. AmTrust Fin. Servs., Inc.,* ALJ No 2010-SOX-018 (Nov. 9, 2016)(Decision and Order Denying Respondents' Motion to Dismiss).

[4] The Decision and Order Denying Respondent's Motion to Dismiss found that Turin had established "a prima facie case of retaliation under the Act, and that the Respondents now had the burden of establishing by clear and convincing evidence that it would have taken the same actions against Turin absent his protected activity. *Id.* at 48. The ALJ specifically noted that she would not entertain any motions to file an interlocutory appeal of this decision. *Id.*

[5] *Elliott v. Archdiocese of New York,* 682 F.3d 213, 219 (3d Cir. 2012)("Generally, an order which terminates fewer than all claims pending in an action or claims against fewer than all the parties to an action does not constitute a "final" order for purposes of 28 U.S.C. § 1291.").

[6] See *infra* note 16.

for a "no just cause for delay" finality determination. The Board granted Turin's motion.

The ALJ denied Turin's motion for reconsideration and did not clarify whether she considered FRCP 54(c) to be applicable to the case. In any event, she made no "no just cause for delay" certification. After the ALJ denied Turin's motion for reconsideration, both Turin and AmTrust and AIIM responded to the show cause order, urging the Board to accept the interlocutory appeal.

DISCUSSION

The Secretary of Labor has delegated authority to issue final agency decisions in cases arising under the SOX to the Board.[7] This authority also includes the consideration and disposition of interlocutory appeals, "in exceptional circumstances, provided such review is not prohibited by statute."[8]

But although the Board may accept interlocutory appeals in "exceptional" circumstances, it is not the Board's general practice to accept petitions for review of non-final dispositions issued by an ALJ. When a party seeks interlocutory review of an ALJ's non-final order, the ARB has elected to look to the interlocutory review 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).[9] In *Plumley v. Federal Bureau of Prisons*,[10] 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."[11]

But even if a party has failed to obtain interlocutory certification, the ARB would consider reviewing an interlocutory order meeting the "collateral order" exception to finality that the Supreme Court recognized in *Cohen v. Beneficial Indus. Loan Corp.*,[12] if the decision

---

[7] Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,379, § 5(c)(50) (Nov. 16, 2012).

[8] *Id.* at, 5(c)(66).

[9] *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).

[10] 1986-CAA-006 (Sec'y Apr. 29, 1987).

[11] *Id.*, slip op. at 3 (citation omitted).

[12] 337 U.S. 541 (1949).

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."[13] To fall within 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."[14] Nevertheless, 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.[15]

Turin did not ask the ALJ to certify this case for appeal as provided in 28 U.S.C.A. § 1292(b). Therefore under the Board's precedent, to consider this interlocutory appeal, the Board would have to determine that the order met the collateral order exception to finality.[16] Turin

---

[13] *Id.* at 546.

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

[15] *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).

[16] Turin argues that this appeal falls within the provisions of FRCP 54(b), which provides,

> **Judgment on Multiple Claims or Involving Multiple Parties.** When an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

Under Rule 54(b), when a trial court judge dismisses some, but not all, of the parties from the case, the trial court must certify that there is no just reason to delay the appeal and **expressly direct** that judgment be entered in regard to those parties before an appeal can proceed. *Novus Franchising, Inc. v. Dawson*, 725 F.3d 885, 890-91 (8th Cir. 2013); *Brown v. New York State Supreme Court*, 372 Fed. Appx. 183, 184 (2d Cir. 2010). The ALJ made no such certification in this case. Where a party has failed to obtain the Rule 54(b) certification, some courts have considered whether to permit the interlocutory appeal under the collateral order exception. *Brown*, 372 Fed. Appx. 184-185.

does not address the collateral order exception requirements. He argues in support of interlocutory review:

> An important consideration in this regard, is that in the event the Petition were to be determined to be interlocutory and dismissed on that basis, (a) the hearing would proceed only against the Remaining Respondents, (b) the scope of the evidence deemed relevant could be materially affected, to Complainant's prejudice, (c) subject to considerations of privity, the Dismissed Respondents will not be bound by testimony, findings, etc., admitted as against the Remaining Respondents, and (d) a subsequent modification or reversal of the Order by the ARB could require a re-hearing as against either or both the Remaining Respondents and/or the Dismissed Respondents.[17]

Respondents argue that the interlocutory appeal should be accepted under the collateral order doctrine. They argue that the ALJ's Order conclusively determines the question whether Turin was an AmTrust and/or AIIM employee and only that narrow question. They further contend that the question whether Turin is an employee is "predicate to and not an 'ingredient of' a cause of action" under SOX's whistleblower protections. Finally Respondents aver that the requirement that the issue be effectively unreviewable on appeal is not to be interpreted literally, but instead means that denying immediate review "may cause significant harm."[18]

While we agree that the ALJ has conclusively decided the question whether Turin was an AmTrust and/or AIIM employee (and has decided that he was not), we disagree with Respondents' argument that whether a complainant is an "employee," as defined by SOX, is not an element of the merits of a SOX complaint, but merely a "predicate." To the contrary, whether the complainant is an employee is not collateral to his complaint that he is entitled to relief, but instead lies at the very heart of a SOX complaint.[19] Turin has put on his full case resulting in eleven days of testimony. To determine what testimony is relevant to the employer question at issue, it will be necessary for the Board to become conversant with the transcript for this eleven-day hearing and the exhibits. Regardless how the Board rules on the interlocutory appeal, when, as is likely, the case returns to the Board on appeal after Respondents present their cases, the Board will again have to reacquaint itself with the same eleven days of testimony plus exhibits. The very fact that it would be necessary to do so is a strong fact militating against a finding that this issue is completely separate from the merits. As the Supreme Court indicated in *Johnson v.*

---

[17] Complainant's Response to Show Cause Order at 3.

[18] Respondent's response at 2.

[19] *Accord Dempsey v. Fluor Daniel Inc.*, ARB No. 01-075, ALJ No. 2001-CAA-005 (ARB May 7, 2002)("Because the R. D. & O. did not dispose of the case on its merits, but only decided the initial issue whether Dempsey was a covered employee, Fluor Daniel's appeal is interlocutory.").

Jones,[20] "if the matter is truly collateral, those proceedings might continue while the appeal is pending."[21] But in this case both parties have argued that the case should not continue before the ALJ until this interlocutory appeal is settled because the scope of the evidence would be materially affected and the evidence presented might be prejudicial to the parties.

Further, the parties have failed to make any convincing argument that the issue is unreviewable on appeal from a final judgment and they have failed to cite to any cases supporting this argument.[22] In fact, the Seventh Circuit Court of Appeals held in "a **routine instance**[23] of a district judge's limiting the scope of the complaint by striking some of the parties and some of the claims" that "[s]uch orders are made **all the time** and unless certified for an immediate appeal cannot be appealed till the conclusion of the proceedings in the district court. To make them automatically appealable . . . would make extremely serious inroads into the final judgment rule of 28 U.S.C. 1291."[24]

Similarly, courts have distinguished between those cases in which interlocutory appeals have been taken of orders **granting** Eleventh Amendment immunity and those taken in cases in which Eleventh Amendment immunity claims have been **denied**. The cases in which district courts have granted such immunity are analogous to the case before us, in which the ALJ granted the motion to dismiss two employers. In both cases, it is possible that, on appeal from a final judgment, the decisions as to the parties granted immunity or, as in this case, the employers dismissed, may be reversed and the case remanded for further proceedings. But the Second Circuit in denying an interlocutory appeal of a grant of immunity noted, " '[u]nlike an order denying summary judgment based on qualified immunity, an appellant's objection to the district court's order [granting summary judgment] is in no danger of becoming moot if appellate consideration is delayed until final judgment.' The same rationale leads us to conclude that an

---

20 515 U.S. 304 (1995).

21 *Id. at* 311.

22 In *Johnson*, the Court wrote, "The requirement that the issue underlying the order be " 'effectively unreviewable' " later on, for example, means that failure to review immediately may **well** cause significant harm." *Id.* (emphasis added). Respondents watered down the effectively unreviewable standard in citing *Johnson*, stating that, "The requirement that the issue underlying the order to be 'effectively unreviewable' means that the failure to review immediately may cause significant harm." There is a significant difference in degree between the Court's *Johnson* standard, "may well cause," and Respondents inaccurate paraphrasing of that standard as "may cause."

23 Compare with the Board's "exceptional circumstances" standard for considering interlocutory appeals.

24 *Flynn v. Merrick*, 776 F.2d 184, 185 (1985)(emphasis added).

interlocutory order granting Eleventh Amendment immunity likewise is non-appealable."[25] The court's rationale applies to this case, as well. The employer issue will not be effectively unreviewable on appeal because it will not be moot. In contrast, in a case in which the court has denied an immunity claim, immunity is permanently lost once a party is forced to litigate, so an interlocutory appeal is properly granted.

The parties may be inconvenienced by having to return for additional hearing proceedings should the Board ultimately overturn the ALJ's finding that AmTrust and AIIM are not employers, but no rights will be lost. As indicated above, the most harm that will result from the Board's decision whether to accept this interlocutory appeal would be the Board's expenditure of time and limited resources in reviewing the voluminous transcript and exhibits first on interlocutory appeal and again on appeal of the final judgment, if it granted this appeal. Accepting the interlocutory appeal now does not reduce the likelihood that ultimately the final judgment will also be appealed to the Board. Accordingly, we **DISMISS** the petition for interlocutory appeal and **REMAND** the case to the ALJ to continue her hearing and decision of this case on its merits.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

LEONARD J. HOWIE III
Administrative Appeals Judge

---

[25] *Morris-Hayes v. Board of Ed. of the Chester Union Free Sch. Dist.,* 423 F.3d 153, 163 (2005)(citing *LaTrieste Rest. & Cabaret v. Village of Port Chester,* 96 F.3d 598, 599-600 (2d Cir.1996)).