



**In the Matter of:**

**CLIFFORD E. HILLIS,**

**ARB CASE NOS. 03-136**

**04-081**

**COMPLAINANT,**

**04-148**

**v.**

**ALJ CASE NO. 2002-STA-50**

**KNOCHEL BROTHERS, INC.,**

**DATE: October 19, 2004**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

*Marialena Wesbrooks, Esq., The Wesbrooks Law Firm, PLLC, Phoenix, Arizona*

*For the Respondents:*

*Gregory A. Robinson, Esq., Farley Robinson & Larsen, Phoenix, Arizona*

### **FINAL DECISION AND ORDER**

This case arises under the employee protection provisions of the Surface Transportation Assistance Act (STAA) of 1982, as amended, 49 U.S.C.A. § 31105 (West 1997) and implementing regulations at 29 C.F.R. Part 1978 (2004). Clifford E. Hillis filed a complaint alleging that Knochel Brothers, Inc. fired him in violation of the STAA. For the following reasons we dismiss the complaint.

### **BACKGROUND**

The record fully supports the ALJ's description of the procedural history of this case. To summarize, Knochel Brothers is a commercial construction company. Hillis worked for Knochel Brothers as a heavy equipment hauler. On October 3, 2001, Knochel Brothers fired Hillis. Recommended Decision and Order (R. D. & O.) at 2. On October 5, 2001, Hillis made a claim, by telephone, with the Arizona Division of Occupational Safety and Health, alleging that Knochel Brothers wrongfully terminated his

employment. Additionally, Hillis and his wife contacted several other state agencies in the months following Hillis's firing, including the Arizona Department of Transportation and the Equal Employment Opportunity Commission. Transcript (Tr.) 140-148. Eventually, Hillis filed his complaint with United States Department of Labor's Occupational Safety and Health Administration (OSHA) on September 2, 2002, more than 180 days after Knochel Brothers discharged him. R. D. & O. at 10-12.

OSHA issued a ruling on September 4, 2002, finding that Hillis's complaint was untimely. Hillis thereafter requested a hearing before an Administrative Law Judge (ALJ). The ALJ held a hearing on February 26, 2003, during which both parties addressed the merits of Hillis's complaint. On July 21, 2003, the ALJ issued the R. D. & O. finding that, although Hillis's complaint was filed after expiration of the 180-day STAA filing period, his efforts to assert his rights in other venues entitled him to equitable tolling. The ALJ proceeded to analyze the merits of the complaint and concluded that Knochel Brothers violated the STAA by firing Hillis.

### **ISSUE**

The issue we consider is whether it was error for the ALJ to hold that making a complaint in the wrong forum tolled the statute of limitations applicable to Hillis's complaint.

### **STANDARD OF REVIEW**

Under the STAA, the ARB is bound by the ALJ's factual findings if supported by substantial evidence on the record considered as a whole. 29 C.F.R. § 1978.109(c)(3); *Lyninger v. Casazza Trucking Co.*, ARB No. 02-113, ALJ No. 01-STA-38, slip op. at 2 (ARB Feb. 19, 2004). Substantial evidence is that which is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Clean Harbors Env'tl. Servs. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998), quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *McDede v. Old Dominion Freight Line, Inc.*, ARB No. 03-107, ALJ No. 03-STA-12, slip op. at 3 (ARB Feb. 27, 2004).

In reviewing the ALJ's legal conclusions, the ARB, as the Secretary's designee acts with "all the powers [the Secretary] would have in making the initial decision . . ." 5 U.S.C.A. § 557(b) (West 2004). Therefore, we review the ALJ's legal conclusions de novo. *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991); *Monde v. Roadway Express, Inc.*, ARB No. 02-071, ALJ Nos. 01-STA-22, 01-STA-29, slip op. at 2 (ARB Oct. 31, 2003).

### **DISCUSSION**

The STAA protects employees making complaints relating to violations of commercial motor vehicle safety requirements from employer retaliation affecting their

pay, terms, or privileges of employment. 49 U.S.C.A. § 31105(a)(1)(A).<sup>1</sup> Employees alleging employer retaliation in violation of the STAA must file their complaints with OSHA within 180 days after the alleged violation occurred. 29 C.F.R. § 1978.102(c). The STAA limitations period is not jurisdictional and therefore is subject to waiver, estoppel, and equitable tolling. *Ellis v. Ray A. Schoppert Trucking*, No. 92-STA-28 (Sec’y Sept. 23, 1992); *Nixon v. Jupiter Chem., Inc.*, No. 89-STA-3 (Sec’y Oct. 10, 1990); *Hicks v. Colonial Motor Freight Lines*, No. 84-STA-20 (Sec’y Dec. 10, 1985).

In determining whether equitable principles require the tolling of a statute of limitations in certain whistleblower cases, the Board has been guided by the discussion of equitable tolling of statutory time limits in *School Dist. of Allentown v. Marshall*, 657 F.2d 16, 19-21 (3d Cir. 1981). In that case, which arose under whistleblower provisions of the Toxic Substances Control Act, 15 U.S.C.A. § 2622 (West 2004), the court articulated three principal situations in which equitable tolling may apply: when the defendant has actively misled the plaintiff regarding the cause of action; when the plaintiff has in some extraordinary way been prevented from filing his action; and when “the plaintiff has raised the precise statutory claim in issue but has done so in the wrong forum.” *Allentown*, 657 F.2d at 20 (internal quotations omitted).

Although this Board has been guided by *Allentown*, the STAA regulations cite filing with another agency as a circumstance not justifying equitable tolling:

[T]here are circumstances which will justify tolling of the 180-day period on the basis of recognized equitable principles or because of extenuating circumstances, e.g., where the employer has concealed or misled the employee regarding the grounds for discharge or other adverse action; or where the discrimination is in the nature of a continuing violation. The pendency of grievance-arbitration proceedings *or filing with another agency are examples of circumstances which do not justify a tolling of the 180-day period.*

29 C.F.R. § 1978.102(d)(3) (emphasis supplied). *See, e.g., Hoff v. Mid-States Express, Inc.*, ARB No. 03-051, ALJ No. 2002-STA-6 (ARB May 27, 2004). Thus, to the extent that a STAA complainant requests equitable tolling because he filed in the wrong forum, *Allentown* is inapplicable. The ALJ erred by relying on *Allentown* to proceed to a hearing on the merits of Hillis’s complaint. R. D. & O. at 12-14.

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<sup>1</sup> “A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because ... the employee, or another person at the employee’s request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding . . . .”

Hillis's brief before this Board argues that the remaining circumstances set forth in *Allentown* are applicable to this case. We disagree. First, the record does not indicate that Knochel Brothers actively misled Hillis regarding his cause of action. Second, although Hillis engaged in serious efforts to assert his rights under the STAA, no person or entity took any action to prevent him from timely filing his complaint with OSHA. We therefore conclude that the ALJ erred by tolling the limitations period applicable to Hillis's complaint, and we reverse the ALJ's finding that Knochel Brothers violated the STAA.

Because Hillis has not prevailed on his complaint, he is not entitled to attorney's fees and costs. 49 U.S.C.A. § 31105 (b)(3)(B). We therefore vacate the fees awarded in the April 12, 2004 Decision and Order on Attorney Fees and the July 14, 2004 Supplemental Attorney's Fee Order.

### CONCLUSION

Hillis failed to file a STAA complaint with OSHA within 180 days of his discharge, and he has not shown that this deadline should be equitably tolled. Therefore, his complaint is **DISMISSED** and the ALJ's attorney's fee orders are **VACATED**.

**SO ORDERED.**

**WAYNE C. BEYER**  
**Administrative Appeals Judge**

**M. CYNTHIA DOUGLASS**  
**Chief Administrative Appeals Judge**