



In the Matter of:

HARRY SMITH,

ARB CASE NO. 06-146

COMPLAINANT,

ALJ CASE NO. 2006-STA-031

v.

DATE: June 30, 2008

CRST INTERNATIONAL, INC.,

and

LAKE CITY ENTERPRISES, INC.,

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Richard R. Renner, Esq., *Tate & Renner*, Dover, Ohio

For the Respondent:

Thomas D. Wolle, Esq., Cedar Rapids, Iowa

FINAL DECISION AND ORDER

This case arises under Section 405, the employee protection provision, of the Surface Transportation Assistance Act of 1982 (STAA)¹ and its implementing

¹ 49 U.S.C.A. § 31105 (West 2008). The STAA has been amended since Smith filed his complaint. *See* Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007). We need not decide here whether the amendments are applicable to this complaint because even if the amendments applied to this

regulations.² Complainant Harry Smith alleges that Respondents Lake City Enterprises, Inc. and CRST International Enterprises, Inc. violated the STAA by discharging him from employment and refusing to rehire him. On September 5, 2006, an Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.) dismissing the case against CRST. We affirm.

BACKGROUND

On or about November 15, 2005, Smith, through his attorney, contacted the Occupational Safety and Health Administration (OSHA) and alleged that Lake City and CRST “discharged and discriminated against [him] and refused to rehire [him].”³ OSHA investigated the allegations against CRST as Case No. 4-0350-06-008, and the allegations against Lake City as Case No. 5-8120-06-003.

OSHA issued its findings in Case No. 4-0350-06-008 on March 21, 2006. It concluded that CRST did not violate the STAA. On May 12, 2006, OSHA issued its findings in Case No. 5-8120-06-003, concluding that Lake City did not violate the STAA. On May 24, 2006, Smith filed with the Office of Administrative Law Judges (OALJ) an Objection and Request for Hearing (Objection), requesting a hearing “on his original complaint against both respondents.”⁴ The OALJ designated the case against CRST as No. 2006-STA-31, and the case against Lake City as No. 2006-STA-32.

On June 13, 2006, CRST filed a Resistance to Objection and Request for Hearing, arguing that Smith’s objection to OSHA’s findings in Case No. 4-0350-06-008 was untimely. The Administrative Law Judge (ALJ) issued a Show Cause Order on August 2, 2006, instructing Smith to show cause why his objection to the findings in the case against CRST should not be dismissed as untimely. Smith responded to the Order by submitting a Response to the Order to Show Cause and Motion for Extension of Time (Response). In his Response he argued that he did not recall receiving a copy of the findings in Case No. 4-0350-06-008, and that the filing period for his objection did not begin to run until OSHA mailed a copy of those findings to his attorney on May 22, 2006.

The ALJ issued an R. D. & O. on September 5, 2006. The ALJ held that OSHA properly notified and served Smith with its findings in the complaint against CRST, and

complaint, they are not implicated by the issues presented here and thus would not affect our decision.

² 29 C.F.R. Part 1978 (2007).

³ Complaint at 1-2.

⁴ Objection at 2.

that Smith failed to object to the findings within the regulatory time period. Concluding that Smith was not entitled to equitable tolling of the filing period, the ALJ dismissed the case against CRST. The ALJ concluded the R. D. & O. by ordering a hearing in ALJ No. 2006-STA-32, the case against Lake City.

JURISDICTION AND STANDARD OF REVIEW

The case is now before the Administrative Review Board (ARB or the Board) which automatically reviews an ALJ's STAA decision.⁵ The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under the STAA.⁶ Under the STAA, the ARB is bound by the ALJ's findings of fact if substantial evidence on the record considered as a whole supports those findings.⁷ Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."⁸ In reviewing the ALJ's conclusions of law, the ARB, as the Secretary of Labor's designee, acts with "all the powers [the Secretary] would have in making the initial decision"⁹ Therefore, we review the ALJ's conclusions of law de novo.¹⁰

DISCUSSION

The STAA's implementing regulations state that, once the complainant receives an agency's findings or preliminary order, he has 30 days to file objections to them with the Chief Administrative Law Judge, U.S. Department of Labor, Washington, D.C.¹¹ If

⁵ 49 U.S.C.A. § 31105 (b)(2)(C); 29 C.F.R. § 1978.109 (c)(1) (2007).

⁶ Secretary's Order No. 1-2002, (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 1978.109(a).

⁷ 29 C.F.R. § 1978.109(c)(3); *Lyninger v. Casazza Trucking Co.*, ARB No. 02-113, ALJ No. 2001-STA-038, slip op. at 2 (ARB Feb. 19, 2004).

⁸ *Clean Harbors Envtl. 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. 2003-STA-012, slip op. at 3 (ARB Feb. 27, 2004).

⁹ 5 U.S.C.A. § 557(b) (West 2004).

¹⁰ *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991); *Monde v. Roadway Express, Inc.*, ARB No. 02-071, ALJ Nos. 2001-STA-022, -029, slip op. at 2 (ARB Oct. 31, 2003).

¹¹ 29 C.F.R. § 1978.105(a).

he does not file objections within 30 days, the findings or preliminary order, “become final, and not subject to judicial review.”¹² OSHA issued its findings in the case against CRST on March 21, 2006, Smith signed a certified mail receipt for the findings on March 25, 2006, and Smith objected to those findings on May 24, 2006. He therefore did not file his objection in the time allotted by the regulation.

In his brief before the Board, Smith argues that the filing period for his objection did not begin to run until OSHA mailed a copy of the findings to his attorney on May 22, 2006.¹³ This conclusion is incorrect. The STAA regulations require OSHA to send a copy of its findings by certified mail “to all parties of record.”¹⁴ Smith is the complainant of record, and the record contains a copy of a certified mail card dated March 25, 2006, and bearing his signature. Smith’s brief before this Board does not repeat his contention before the ALJ that he did not receive a copy of the OSHA findings.

Smith also argues that, because his attorney did not receive a copy of the findings until May 22, 2006, the period for filing his objection to the findings in Case No. 4-0350-06-008 should be equitably tolled.¹⁵ We disagree. In determining whether equity requires the tolling of a statute of limitations, the ARB is guided by the principles that courts have applied to cases with statutorily-mandated filing deadlines.¹⁶ Accordingly, the Board has recognized three situations in which tolling is proper:

- (1) [when] the respondent has actively misled the complainant respecting the cause of action,
- (2) the complainant has in some extraordinary way been prevented from asserting his rights, or
- (3) the complainant has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum.^[17]

¹² 29 C.F.R. § 1978.105(b)(2).

¹³ Complainant’s Brief at 6.

¹⁴ See 29 C.F.R. § 1978.104(b) (“The findings and the preliminary order shall be sent by certified mail, return receipt requested, to all parties of record. The letter accompanying the findings and order shall inform the parties of the right to object to the findings and/or the order and shall give the address of the Chief Administrative Law Judge.”).

¹⁵ Complainant’s Brief at 13.

¹⁶ *Howell v. PPL Servs., Inc.*, ARB No. 05-094, ALJ No. 2005-ERA-014, slip op. at 4 (Feb. 28, 2007).

¹⁷ *Bedwell v. Spirit-Miller NE, LLC*, ARB No. 07-038, ALJ No. 2007-STA-006, slip op. at 4 (ARB Oct. 31, 2007), citing *School Dist. of Allentown v. Marshall*, 657 F.2d 16, 19-21 (3d Cir. 1981) (citations omitted).

None of the recognized justifications for tolling apply to this case. OSHA complied with the STAA regulations by informing Smith of its findings, and Smith failed to object to those findings in a timely fashion. Compliance with the governing regulations does not constitute grounds for equitable tolling. The Board therefore affirms the ALJ's decision to dismiss the case against CRST.

CONCLUSION

Smith requested a hearing on his complaint against CRST more than 30 days after OSHA issued its findings and did not show cause why his request should not be denied as untimely. Smith's complaint against CRST, ALJ No. 2006-STA-31, is therefore **DISMISSED**.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge