In the Matter of:

LINDELL BEATTY,

and

APRIL BEATTY,

COMPLAINANTS,

v.

INMAN TRUCKING MANAGEMENT, INC.,

RESPONDENT.

ARB CASE NO. 09-032

ALJ CASE NOS. 2008-STA-020
2008-STA-021

DATE: June 30, 2010

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainants:
E. Holt Moore, III, Esq., Wilmington, North Carolina

For the Respondent:
Andrew Hanley, Esq., Wilmington, North Carolina

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge,* E. Cooper Brown, *Deputy Chief Administrative Appeals Judge,* and Wayne C. Beyer, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

This case arises under Section 405 of the Surface Transportation Act of 1982, 49 U.S.C.A. § 31105 (Thomson/West Supp. 2009) (STAA), and its implementing regulations, 29

C.F.R. Part 1978 (2009). On August 9, 2007, Lindell and April Beatty filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that their former employer, Inman Trucking Management, Inc. (Inman Trucking) initially violated the STAA's employee protection provisions when Inman Trucking terminated the Beattys' employment in December of 2007, and subsequently, when a third-party employer rejected the Beattys for employment because Inman Trucking had filed a negative DAC report.[1] OSHA rejected the Beattys' claim and they, in turn, requested a hearing before a Department of Labor Administrative Law Judge (ALJ). Following a hearing held on July 15, 2008, the ALJ issued a Recommended Decision and Order (R. D. & O.) on December 9, 2008, dismissing the Beattys' claim as untimely filed. The case is now before the Administrative Review Board (ARB or the Board). For the following reasons, the Board affirms the ALJ's decision in part, and reverses and remands in part.

BACKGROUND

The facts underlying this case are set forth in the R. D. & O. at 3-10, and are summarized here in relevant part.

Inman Trucking is a trucking concern that operates commercial vehicles on the highways in commerce with a gross vehicle weight rating of 10,001 pounds or more. Factual Stipulation Nos. 2 and 3, R. D. & O. at 2. The Beattys worked for Inman Trucking as drivers from August 2004 until December 14, 2005, when Alan Grover, the safety director for Inman Trucking, terminated their employment. Tr. 28, 48-49, 66-68; R. D. & O. at 3, 5.

Grover testified that after he terminated the Beattys' employment he completed DAC reports on them and turned the reports in that day. Tr. 158. He listed on the DAC report that they were fired for excessive complaints, a company policy violation, "personal contact requested" and "other;" he also indicated that "Eligible for Rehire: No." Tr. 141-44. Pursuant to OSHA request and in an effort to settle the complaint, Grover changed the DAC reports on August 24, 2007, to remove "personal contact requested" and on August 27, 2007, to remove "excessive complaints" and to change "Eligible for Rehire: No" to "review required before rehiring." Tr. 146; R. D. & O. at 7. On September 13, 2007, Grover submitted the specific DAC codes to make the final changes. Tr. 147; R. D. & O. at 7. He stated that he would not have changed the DAC report if OSHA had not attempted to settle the case. Tr. at 144.

The Beattys received unemployment benefits for twenty-six weeks after their terminations. Tr. 38; R. D. & O. at 3. They next worked for FedEx for three months. Tr. 38-39; R. D. & O. at 3. In August 2007, the Beattys applied to work for US Express. Tr. at 29. They were pulled out of orientation with US Express and, without explanation, were told that they could not be hired. *Id.* Ms. Beatty called her recruiting office to ask why they would have been pulled out of the orientation and was told that their DAC report directly affected the reason for their dismissal from orientation. Tr. at 29-30. Another employer then told Ms. Beatty that they

[1] A DAC report is an employment record maintained by a consumer reporting agency on commercial truck drivers. *See Eubanks v. A.M. Express, Inc.*, ARB No. 08-138, ALJ No. 2008-STA-040, slip op. at 2 (ARB Sept. 24, 2009).

would not be hired due to the DAC reports. Tr. at 31. Three other companies subsequently turned them down for employment; the companies did not give them a reason for their denials. Tr. at 36.

Anthony Hall, the owner of a trucking company to which the Beattys applied for employment, testified that he was told not to hire them because of a DAC report. Tr. at 118. He testified that he believed that they would have been hired had they had clean DAC reports. Tr. at 128-29.

In November 2007, the DAC reports cleared and the Beattys began work for six months. Tr. at 39-40.

The Beattys filed this STAA complaint on August 9, 2007. OSHA investigated and denied the complaint. The Beattys objected to OSHA's findings and requested a hearing before an ALJ. After a hearing on July 15, 2008, the ALJ issued an R. D. & O. dismissing the complaint because he found that it was time-barred since they had not filed it within 180 days from their termination or the date the DAC report was completed.

Although the Board issued a Notice of Review and Briefing Schedule permitting both parties to submit briefs in support of or in opposition to the ALJ's order, neither party has done so.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board her authority to issue final agency decisions under STAA. Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010). The Board automatically reviews an ALJ's recommended STAA decision. 29 C.F.R. § 1978.109(c)(1). The Board "shall issue a final decision and order based on the record and the decision and order of the administrative law judge." 29 C.F.R. § 1978.109(c).

Under the STAA, we are bound by the ALJ's fact findings if substantial evidence on the record considered as a whole supports those findings. 29 C.F.R. § 1978.109(c)(3); *BSP Transp., Inc. v. U.S. Dep't of Labor,* 160 F.3d 38, 46 (1st Cir. 1998); *Castle Coal & Oil Co., Inc. v. Reich,* 55 F.3d 41, 44 (2d Cir. 1995). Substantial evidence is that which is "more than a mere scintilla" and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Clean Harbors Envtl. Servs. v. Herman,* 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

In reviewing the ALJ's conclusions of law, the Board, 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 1996). *See also* 29 C.F.R. § 1978.109(b). Therefore, the Board reviews the ALJ's conclusions of law de novo. *Roadway Express, Inc. v. Dole,* 929 F.2d 1060, 1066 (5th Cir. 1991).

DISCUSSION

The STAA provides, "An employee alleging discharge, discipline, or discrimination in violation of . . . this section . . . may file a complaint with the Secretary of Labor not later than 180 days after the alleged violation occurred." 49 U.S.C.A. § 31105(b)(1); *see also* 29 C.F.R. § 1978.102(d). The ALJ dismissed the Beattys' claims with respect to the wrongful terminations and the blacklisting as untimely because Grover terminated their employment and filed the DAC reports on December 14, 2005, which was over 180 days before they filed their complaint on August 9, 2007.

The ALJ properly dismissed the Beattys' claims as to their terminations from employment. It is undisputed that the Beattys did not file their complaint until August 9, 2007, which was almost two years after Inman Trucking terminated their employment. The Beattys did not argue to the ALJ that their termination complaints were timely filed. Nor did they assert that any equitable modification principles apply. Accordingly, the Beattys' termination complaints are untimely. Thus, we affirm the R. D. & O. and deny the complaints based on termination.

We disagree with the ALJ regarding the blacklisting complaints however, and hold that the complaints based on blacklisting were timely. The Beattys argued to the ALJ that they did not discover that Inman Trucking had submitted a negative DAC report until they were unable to obtain employment in August of 2007. They argued that the statute of limitations did not accrue until they knew of the negative DAC reports.

Statutes of limitation run from the date an employee receives final, definitive, and unequivocal notice that an adverse employment decision has been made. *Overall v. Tennessee Valley Auth.*, ARB No. 98-111, ALJ No. 1997-ERA-053, slip op. at 34 (ARB Apr. 30, 2001). The date that an employer communicates a decision to implement such an adverse decision, rather than the date the consequences of the decision are felt, marks the occurrence of a violation. *Id.* (citing *Chardon v. Fernandez,* 454 U.S. 6 (1981) (proper focus contemplates the time the employee receives notification of the discriminatory act, not the point at which the consequences of the act become painful)); *Delaware State College v. Ricks*, 449 U.S. 250 (1980) (limitations period began to run when the employee was denied tenure rather than on the date his employment terminated)).

Claim accrual, or the date a complainant discovers he has been injured, may differ from the date the respondent decides to inflict injury. *Overall*, ARB No. 98-111, slip op. at 34. The "discovery rule" may operate to postpone the beginning of a limitations period. *Id.* (citing *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450 (7th Cir. 1990)); *see also Delaware State College v. Ricks*, 449 U.S. at 258 (statute of limitations begins to run at the time the adverse decision is made *and communicated* to an employee).

There is nothing in the record to suggest that Inman Trucking ever communicated its decision to file an arguably negative DAC report to the Beattys. Nor is there anything in the record to suggest that the Beattys were required to look at the DAC report. Because the Beattys did not know of the report until August 2007, their blacklisting claim did not accrue until then. Additionally, we note that the Beattys filed their claim on August 9, 2007, immediately after the DAC report came to their attention in August 2007. Thus, their claim regarding the DAC report is timely. We therefore reverse and remand to the ALJ for findings of fact and conclusions of law on the merits of their claim regarding the blacklisting claims.[2]

CONCLUSION

We **AFFIRM** the ALJ's recommendation to dismiss the Beattys' claims based on their terminations as untimely. However, we **REVERSE** the ALJ's decision regarding the blacklisting claim because they were timely filed. We therefore **REMAND** for further proceedings consistent with this decision.

SO ORDERED.

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge

[2] We recognize that complainants have an affirmative duty of diligent inquiry "to proceed with a reasonable investigation in response to an adverse event." But it does not necessarily follow that because the Beattys were terminated that they should suspect that Inman Trucking would file a DAC report that would prevent them from gainful employment. *See Pantanizopoulos v. Tennessee Valley Authority*, ARB No. 97-023, ALJ No. 1996-ERA-015 (Oct. 20, 1997) (in which the Board found that the complainant's claim accrued when he received a copy of a performance appraisal that negatively affected him and discovered that he had been injured, rather than when the performance appraisal was made because he was not charged with suspecting a negative performance appraisal just because he had not received a performance award for his last year of work).