**U.S. Department of Labor**

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

**In the Matter of:**

**SEBASTIEN McCRIMMONS,**

**COMPLAINANT,**

**v.**

**CES ENVIRONMENTAL SERVICES,**

**RESPONDENT.**

**ARB CASE NO. 09-112**

**ALJ CASE NO. 2009-STA-035**

**DATE: August 31, 2009**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

## FINAL DECISION AND ORDER

Sebastien McCrimmons filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) on January 29, 2009. He alleged that his employer, CES Environmental Services, violated the employee protection provisions of the Surface Transportation Assistance Act (STAA or Act) of 1982, as amended and re-codified,[1] when CES terminated his employment because he incurred work restrictions after an employment-related exposure to sodium hydroxide.[2] The STAA protects from discrimination employees who report violations of commercial motor vehicle safety rules or who refuse to operate a vehicle when such operation would violate those rules. A Department of Labor (DOL) Administrative Law Judge (ALJ) dismissed McCrimmons' complaint as untimely filed. We affirm.

[1] 49 U.S.C.A. § 31105 (West 2008).

[2] S*ee* OSHA Administrator's Findings, Mar. 12, 2009, at 1.

## BACKGROUND

McCrimmons worked for CES Environmental Services, a commercial motor carrier engaged in transporting products on the highways.[3] McCrimmons alleged that CES terminated his employment on or about May 30, 2008.[4] The record shows that McCrimmons was notified that he no longer had health insurance coverage for himself or his family through CES as of May 31, 2008, due to termination of his employment. The District Director of the Equal Employment Opportunity Commission (EEOC) mailed a Dismissal and Notice of Rights to McCrimmons on June 27, 2008, indicating that the EEOC had been unable to conclude that the information they had obtained established violations of the employment discrimination statutes and that McCrimmons had 90 days to file suit in federal or state court. The record also shows that John Carroll Boudreaux contracted with McCrimmons to represent him "in a certain claim" based on wrongful termination and discrimination against CES and that they executed a contingency fee agreement to this effect on June 13, 2008.[5]

On or about January 29, 2009, McCrimmons filed an OSHA complaint, alleging that the Respondent retaliated against him by discharging him because he had work restrictions after he was injured by an exposure to sodium hydroxide from a faulty tanker trailer valve.[6] An OSHA Regional Supervisory Investigator concluded that McCrimmons did not timely file the complaint and, therefore, he dismissed it.[7] On April 19, 2009, McCrimmons requested a hearing before a Labor Department Administrative Law Judge.[8] On May 1, 2009, the ALJ issued an Order to Show Cause why the claim should not be dismissed as untimely because it was filed more than 180 days after McCrimmons' May 30, 2008 termination.

McCrimmons responded to the ALJ's show cause order in a facsimile dated May 29, 2009, stating that he had not received his mail until May 15, 2009, as he had been at the hospital eight to twelve hours a day tending to his sick father and requesting additional time to obtain an attorney. The ALJ extended McCrimmons' time to respond to the Show Cause Order until June 26, 2009.

On June 24, 2009, McCrimmons submitted a facsimile in response to the ALJ's Show Cause Order in which he stated that he had been unable to obtain an attorney and he attached a copy of his contingency fee agreement with. Boudreaux, showing that he had an attorney during

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3 *Id.*

4 *Id.*

5 Contingency Fee Agreement, June 13, 2008.

6 S*ee* OSHA Administrator's Findings, Mar. 12, 2009, at 1.

7 OSHA Administrator's Findings, Mar. 12, 2009.

8 *See* 29 C.F.R. § 1978.105(a)(2008).

the 180-day filing period. He avowed that Boudreaux told him that he was going to file the papers three or four times, but that he had not done so. He stated that there had been many people who had "dropped the ball" regarding his case, particularly Boudreaux, but maintained that once he had found out about the action, he tried to file as quickly as he was able. He further stated that Boudreaux hid his paperwork from June 13, 2008, until or about December 31, 2008. Once he was advised that he needed to file an STAA complaint, on or about January 30, 2009, he called Anthony Incristi, an OSHA Regional Supervisory Investigator, and left him a message. He spoke to Incristi about his complaint approximately three months later and was first told about the 180-day filing period. He stated that he "had to ask for [an] appeal" but that no one, including OSHA, ever said anything about the appeal. Finally, McCrimmons asserted that he had put a lot of time and effort into his case and felt that he had been getting the "run around."

On June 26, 2009, the ALJ issued his Recommended Decision and Order Dismissing Complaint as Untimely because McCrimmons acknowledged that his complaint was not filed within the 180-day limitations period and simply blamed others for not acting or advising him to act within this time period. The ALJ stated that McCrimmons could not "avoid the consequences of an omission on the part of his or her chosen agent or attorney" because ignorance of the law is no excuse, and noted that even if others were remiss or neglectful, it did not entitle McCrimmons to equitable tolling. The ALJ pointed out that McCrimmons had an attorney during the same month that the EEOC issued the right to sue notice and that after that time, neither he nor his attorney took any action to contact OSHA until January of 2009. Accordingly, the ALJ dismissed McCrimmons' complaint.

## JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board her authority to issue final agency decisions under the STAA.[9] The Administrative Review Board automatically reviews an ALJ's recommended STAA decision.[10] The Board "shall issue a final decision and order based on the record and the decision and order of the administrative law judge."[11]

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.[12] In reviewing the ALJ's conclusions of

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[9] 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).

[10] 29 C.F.R. § 1978.109(c)(1).

[11] 29 C.F.R. § 1978.109(c).

[12] 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. It means such relevant evidence as a reasonable mind

law, the Board, as the Secretary's designee, acts with "all the powers [the Secretary] would have in making the initial decision . . . ."[13] Therefore, the Board reviews the ALJ's conclusions of law de novo.[14]

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.

**The Legal Standards**

The STAA provides that an employer may not "discharge," "discipline," or "discriminate" against an employee-operator of a commercial motor vehicle "regarding pay, terms, or privileges of employment" because the employee has engaged in certain protected activity. The STAA protects an employee who makes a complaint "related to a violation of a commercial motor vehicle safety regulation, standard, or order;" who "refuses to operate a vehicle because . . . the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health;" or who "refuses to operate a vehicle because . . . the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition."[15]

Employees alleging employer retaliation in violation of the STAA must file their complaints with OSHA not later than 180 days after the alleged violation occurred.[16] The STAA limitations period is not jurisdictional and therefore is subject to equitable tolling.[17]

Because a major purpose of the 180-day period is to allow the Secretary to decline to entertain complaints that have become stale, complaints not filed within 180 days of an alleged violation will ordinarily be considered untimely.[18] The regulation provides for extenuating circumstances that will justify tolling of the 180-day period, such as when the employer has

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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)).

[13] 5 U.S.C.A. § 557(b) (West 1996). *See also* 29 C.F.R. § 1978.109(b).

[14] *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991).

[15] 49 U.S.C.A. § 31105(a)(1).

[16] 49 U.S.C.A. § 31105(b)(1).

[17] *See, e.g., Miller v. Basic Drilling Co.*, ARB No. 05-111, ALJ No. 2005-STA-020, slip op. at 3 (ARB Aug. 30, 2007).

[18] 29 C.F.R. § 1978.102(d)(2).

concealed or misled the employee regarding the grounds for discharge or other adverse action or when the discrimination is in the nature of a continuing violation.[19]

## DISCUSSION

It is undisputed that McCrimmons did not file his complaint until January 29, 2009, which was eight months or approximately 240 days after CES terminated his employment on or about May 30, 2008. Accordingly, McCrimmons' complaint is untimely. We must therefore determine whether McCrimmons is entitled to equitable tolling of the filing period.

As a general matter, 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.[20] 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.[21]

When seeking equitable tolling of a statute of limitations, the complainant bears the burden of justifying the application of equitable tolling.[22] Furthermore, ignorance of the law is generally not a factor that can warrant equitable tolling, especially in a case in which a party is represented by counsel.[23]

McCrimmons has not asserted that the first or third situation above applies; rather, he has argued that he was prevented from asserting his rights because his attorney did not file his

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19 29 C.F.R. § 1978.102(d)(3).

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

21 *School Dist. of Allentown v. Marshall*, 657 F.2d 16, 19-20 (3d Cir. 1981) (citations omitted).

22 *Herchak v. America W. Airlines, Inc*., ARB No. 03-057, ALJ No. 2002-AIR-012, slip op. at 5 (ARB May 14, 2003), citing *Wilson v. Sec'y, Dep't of Veterans Affairs*, 65 F.3d 402, 404 (5th Cir. 1995) (complaining party in Title VII case bears burden of establishing entitlement to equitable tolling).

23 *Accord Wakefield v. R.R. Retirement Bd.*, 131 F.3d 967, 970 (11th Cir. 1997); *Hemingway v. Northeast. Utils.*, ARB No. 00-074, ALJ Nos. 1999-ERA-014, -015, slip op. at 4-5 (ARB Aug. 31, 2000).

complaint, because he was unaware of the 180-day period for filing, and because he was unable to discover the requirements for filing a claim until after the 180-day period for filing had passed.

The STAA regulations permit tolling the 180-day limitations period under certain circumstances, but we agree with the ALJ that it is not permitted in this situation. That McCrimmons' chosen attorney failed to file his claim does not constitute an extraordinary circumstance which would entitle him to equitable tolling.[24] Attorney error does not constitute an extraordinary factor because "[u]ltimately, clients are accountable for the acts and omissions of their attorneys."[25] Neither does McCrimmons' own lack of awareness of the filing period or his inability to discover it, justify equitable tolling.[26]

We have reviewed the entire record herein. The ALJ thoroughly and fairly examined the evidence each party submitted. After viewing the evidence and drawing inferences in the light most favorable to McCrimmons, the ALJ dismissed the complaint as untimely. Since the record contains no evidence that McCrimmons filed an STAA complaint within 180 days of the alleged adverse actions and does not support the application of equitable tolling, the ALJ properly dismissed McCrimmons' claim. Thus, we **AFFIRM** his Recommended Decision and Order and **DENY** the complaint.

**SO ORDERED**.

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

**OLIVER M. TRANSUE**
**Administrative Appeals Judge**

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[24] We note that we agree with the principle of law as stated by the Secretary who has held that "[e]quitable tolling is inappropriate when [complainant] has consulted counsel during the statutory period . . . . Counsel are presumptively aware of whatever legal recourse may be available to their client, and this constructive knowledge of the law's requirements is imputed to [complainant]." *Day v. Oak Ridge Operations, et al.*, ARB No. 02-032, ALJ No. 1999-CAA-023, slip op. at 10 (ARB July 25, 2003) (quoting *Mitchell v. EG&G Servs. et al.*, No. 1987-ERA-022, slip op. at 7-8 (Sec'y July 22, 1993) (citations omitted)).

[25] *Howell v. PPL Services, Inc.*, ARB No. 05-094, ALJ No. 2005-ERA-014, slip op. at 5 (ARB Feb. 28, 2007) (citations omitted).

[26] *Schafermeyer v. Blue Grass Army Depot,* ARB No. 07-082, ALJ No. 2007-CAA-001, slip op. at 16 (ARB Sept. 30, 2008).