



In the Matter of:

JACK JAMES ELIAS,

ARB CASE NO. 12-032

COMPLAINANT,

ALJ CASE NO. 2011-STA-028

v.

DATE: November 21, 2012

CELADON TRUCKING SERVICES, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Jack James Elias, *pro se*, Ramona, California

For the Respondent:

Dennis L. Elschide, Esq.; Indianapolis, Indiana

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Deputy Chief Administrative Appeals Judge*; and Lisa Wilson Edwards, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

This case arises under the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C.A. § 31105 (Thomson/West Supp. 2012) (STAA) and its implementing regulations at 29 C.F.R. Part 1978 (July 27, 2012). At issue before the Administrative Review Board (ARB or Board) is the timeliness of

Complainant Elias's request for a formal hearing before the Office of Administrative Law Judges (OALJ). Pursuant to a Decision and Order Granting Summary Decision and Dismissing Claim, issued December 23, 2011, the presiding Administrative Law Judge (ALJ) held that Elias's request was not timely filed. For the following reasons, the Board affirms the ALJ's Decision and Order.

BACKGROUND

Celadon Trucking Services, Inc. (Celadon or Respondent), a commercial motor carrier within the meaning of 49 U.S.C.A. § 31101 employed the Complainant Jack James Elias (Elias or Complainant) as a truck driver from April 9, 2002, until the date of his discharge on December 20, 2006. After Celadon terminated his employment, the Complainant filed a complaint with the Occupational Safety and Health Administration (OSHA) against Celadon on December 28, 2006, alleging that Celadon discharged him because he engaged in STAA-protected activity. Following an investigation, the Secretary of Labor, acting through the Regional Administrator for Region V of OSHA, issued Findings and a Preliminary Order on February 23, 2007, dismissing Elias's complaint.

By correspondence dated December 17, 2007, addressed to the Chief Administrative Law Judge of the Department of Labor and to the Regional and Area OSHA Administrators, Elias submitted detailed objections to the Secretary's Findings of February 23, 2007. More than four years later, by correspondence dated March 28, 2011, (styled by Elias as an "Open Letter to the Department of Labor") addressed to the Secretary of Labor, the Department's Chief ALJ, and a dozen other Labor Department and U.S. Government officials, Elias again raised his objections to the Secretary's Findings and Preliminary Order of February 23, 2007. Pursuant to this submission, Elias also requested a formal hearing before the Office of Administrative Law Judges.

OALJ assigned Elias's March 28, 2011 submission to a Department of Labor Administrative Law Judge for hearing. Prior to hearing, Respondent Celadon filed a motion to dismiss Elias's request for hearing as untimely because it had not been filed within thirty days from the date of Elias's receipt of the Secretary's Findings, as required by 49 U.S.C.A. § 31105(b)(2)(B) and 29 C.F.R. § 1978.106. In response, the presiding ALJ issued an order instructing Elias that the Respondent's motion would be treated as a motion for summary decision and afforded Elias the opportunity to submit affidavits or declarations to support any facts upon which he relied in opposing the motion. Following Elias's submissions, the ALJ granted the Respondent's motion and dismissed Elias's complaint, finding that Elias presented no justification that would warrant tolling the running of the 30-day filing period for the four-year period between Elias's receipt of the Secretary's Findings in 2007, and his March 28, 2011 submission to OALJ. Elias has filed a timely appeal of the ALJ's Decision and Order with the ARB.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the ARB the authority to issue final agency decisions under the STAA and its implementing regulations at 29 C.F.R. Part 1978.¹ The ARB “shall issue a final decision and order based on the record and the decision and order of the administrative law judge.”² We are bound by the ALJ’s factual findings if those findings are supported by substantial evidence on the record considered as a whole.³ The ARB reviews the ALJ’s conclusions of law de novo.⁴

Where, as in this case, appeal is from an ALJ’s grant of summary decision, the Board’s review is de novo. *Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 99-107, ALJ No. 1999- STA-021, slip op. at 2 (ARB Nov. 30, 1999). Accordingly, the same standard that governs the ALJ’s review of a motion for summary decision governs our review. *Id.* Under 29 C.F.R. § 18.40(d) (2012), the ALJ may issue summary decision “if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.” “The burden is on the moving party ‘to demonstrate the absence of any material factual issue genuinely in dispute.’”⁵ The Board views the evidence in the light most favorable to the nonmoving party, and then determines whether there are any genuine issues of material fact and whether the movant established that it was entitled to judgment as a matter of law.⁶ In ruling on a motion for summary decision, neither the ALJ nor the Board weighs the evidence or determines the truth of the matters asserted.⁷ The burden of producing evidence “is not onerous and should

¹ Secretary’s Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69378 (Nov. 16, 2012); 29 C.F.R. § 1978.109(a).

² *Jackson v. Eagle Logistics, Inc.*, ARB No. 07-005, ALJ No. 2006-STA-003, slip op. at 3 (ARB June 30, 2008) (citations omitted).

³ 29 C.F.R. § 1978.110(b).

⁴ *Olson v. Hi-Valley Constr. Co.*, ARB No. 03-049, ALJ No. 2002-STA-012, slip op. at 2 (ARB May 28, 2004).

⁵ *Lewis v. Walt Disney World*, ARB No. 10-106, ALJ No. 2010-SOX-027, slip op. at 2 (ARB Jan. 27, 2012); *Charles v. Profit Inv. Mgmt.*, ARB No. 10-071, ALJ No. 2009-SOX-040, slip op. at 3 (ARB Dec. 16, 2011).

⁶ *Smale v. Torchmark Corp.*, ARB No. 09-012, ALJ No. 2008-SOX-057, slip op. at 5-6 (ARB Nov. 20, 2009).

⁷ *Siemaszko v. FirstEnergy Nuclear Operating Co., Inc.*, ARB No. 09-123, ALJ No. 2003-ERA-013, slip op. at 3 (ARB Feb. 29, 2012). *See also Hasan v. Enercon Servs., Inc.*,

preclude [an evidentiary hearing] only where the record is devoid of evidence that could reasonably be construed to support the [complainant's] claim.” *White v. Baxter Healthcare Corp.*, 533 F.3d 381, 400 (6th Cir. 2008); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Denying summary decision because there is a genuine issue of material fact simply means that an evidentiary hearing is required to resolve some factual questions; it is not an assessment on the merits of any particular claim or defense.

DISCUSSION

49 U.S.C.A. § 31105(b)(2)(B) provides that a complainant dissatisfied with the Secretary's Findings and Preliminary Order must file objections to the findings or preliminary order, or both, and request a hearing on the record, not later than 30 days following notice of the Secretary's determination. *See also* 29 C.F.R. § 1978.106. Elias acknowledged to the ALJ that he timely received the Secretary's Findings and Preliminary Order,⁸ and that he was fully aware of the thirty-day filing requirement specified in the Secretary's determination letter.⁹ Elias's rationale for not filing his request for hearing within the 30-day period is, as he argued to the ALJ, that “there was no basis for filing an appeal if complaints to company managers are not protected.” Petition for Review at 8. Elias also argues that OSHA misled him into believing he had no right to appeal, *id.*, and he additionally challenges the merits of the Secretary's Findings and Preliminary Order on numerous grounds. Elias cites 29 CFR § 1978.115, which provides for the waiver of the STAA regulations “in special circumstances” or “for good cause shown” as a legal basis for waiving the thirty-day filing period.

In addressing the question of the timeliness in the filing of whistleblower complaints, the ARB has repeatedly recognized that the statutory limitations period is not

ARB No. 05-037, ALJ Nos. 2004-ERA-022, -027; slip op. at 6 (ARB May 29, 2009) (citation omitted); *Seetharaman v. G.E. Co.*, ARB No. 03-029, ALJ No. 2002-CAA-021, slip op. at 4 (ARB May 28, 2004) (citations omitted).

⁸ The ALJ states at page 2 of the Decision and Order that Elias “concedes he received [the Secretary's] findings two months after they were issued.” Cited is a letter of record from Elias to the ALJ dated April 26, 2011. However, the letter to which the ALJ cites actually contains Elias's acknowledgement that he received the Secretary's Findings and Preliminary Order within two months *after he filed his OSHA complaint*, thus acknowledging that he received the Secretary's determination letter, which was dated February 23, 2007, the latter part of February or first of March, 2007. (Similar acknowledgements of timely receipt of the OSHA determination letter are found elsewhere in Elias's submissions to the ALJ.)

⁹ Elias also stated (as the ALJ records at page 2 of the Decision and Order) that he was aware of the 30-day time period for filing objections and requesting a hearing when he received the OSHA determination letter. Complainant's Statement in Opposition to Motion to Dismiss at 6.

jurisdictional in the sense that noncompliance serves as an absolute bar to administrative action, and that the filing deadline is thus subject to equitable modification, i.e., tolling or estoppel. *Hyman v. KD Res.*, ARB No. 09-076, ALJ No. 2009-SOX-020 (ARB Mar. 31, 2010) (citations omitted).¹⁰ Accordingly, the ARB has followed the tolling principles set forth in *School District of Allentown v. Marshall*, 657 F.2d 16 (3d Cir. 1981), in determining whether to toll the running of a statute of limitations period, when:

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

Allentown, 657 F.2d at 20. In *Hyman*, the Board recognized a fourth equitable principle, i.e., “where the employer’s own acts or omissions have lulled the plaintiff into foregoing prompt attempts to vindicate his rights.” ARB No. 09-076, slip op. at 4 (quoting *Bonham v. Dresser Indus.*, 569 F.2d 187, 193 (3d Cir. 1978)).

We will construe Elias’s arguments on appeal in the light most favorable to him as an assertion that the foregoing equitable principles, either or all, apply to justify his failure to file his request for hearing within the statutorily mandated thirty-day period. Within this context, we also consider the evidentiary record in the light most favorable to Elias given both his pro se status and that he was the non-moving party before the ALJ. Extending to Elias any benefit of the doubt in considering that record, we accordingly consider Elias’s first “Open Letter”, that he filed with the Chief ALJ on December 17, 2007, as the filing by which we determine whether Elias’s filing with OALJ is deemed timely filed, even though he did not request a hearing at that time. Even so, the Board is not persuaded by the arguments raised and finds the record devoid of any evidence that would justify invoking the aforementioned equitable principles to toll the running of 30-day time period until his submission of December 17, 2007, an almost eight and one-half month period beyond the date Elias’s objections and request for hearing were required to have been filed.

¹⁰ “Equitable tolling focuses on the plaintiff’s excusable ignorance of the employer’s discriminatory act. Equitable estoppel, in contrast, examines the defendant’s conduct and the extent to which the plaintiff has been induced to refrain from exercising his rights.” *Rhodes v. Guiberson Oil Tools Div.*, 927 F.2d 876, 878 (5th Cir. 1991) (quoting *Felty v. Graves-Humphreys*, 785 F.2d 516, 519 (4th Cir. 1986)). As the First Circuit has explained, while equitable tolling focuses upon a plaintiff’s excusable ignorance of the facts underlying his or her claim, “equitable estoppel occurs where an employee is aware of his [statutory] rights but does not make a timely filing due to his reasonable reliance on his employer’s misleading or confusing representations or conduct.” *Kale v. Combined Ins. Co. of Am.*, 861 F.2d 746, 752 (1st Cir. 1988).

CONCLUSION

For the foregoing reasons, the ALJ's Decision and Order is **AFFIRMED**. Accordingly, Elias's complaint is **DISMISSED**.

SO ORDERED.

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge