



IN THE MATTER OF:

MYRON K. HERRON,

ARB CASE NO. 16-040

COMPLAINANT,

ALJ CASE NO. 2015-STA-055

v.

DATE: December 21, 2016

**NORTH AMERICAN CENTRAL SCHOOL
BUS, LLC,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Myron K. Herron, *pro se*, St. Louis, Missouri

For the Respondent:

Kerry E. Saltzman, Esq., and Aaron W. Chaet, Esq.; *Williams, Bax & Saltzman, P.C.*; Chicago, Illinois

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; Joanne Royce, *Administrative Appeals Judge*; and Anuj C. Desai, *Administrative Appeals Judge*

FINAL DECISION AND ORDER

Myron Herron filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that Respondent North American Central School Bus, LLC (NACSB) retaliated against him in violation of Section 11(c) of the Occupational Safety and Health Act¹ and Section

¹ 29 U.S.C.A. § 660(c). Section 11(c) protects employees from retaliation who exercise any right protected by the Occupational Safety and Health Act, including reporting to management or

405 of the Surface Transportation Assistance Act of 1982.² Herron complained that NACSB took adverse action against him for engaging in protected behavior when it refused to hire him.³ On February 26, 2015, OSHA issued findings for the Secretary of Labor stating that Respondent refused to hire Herron after a background check disclosed a felony conviction, and there was no evidence of disparate treatment. Because Herron had filed both 11(c) and STAA complaints, OSHA provided him with the appellate rights for both types of complaints, which differ. For an 11(c) complaint, OSHA's non-merit finding will become a final order of the Secretary of Labor unless either party files an objection to the determination with the Directorate of Whistleblower Protection Programs (DWPP), within 15 days. For a STAA complaint, a party must file a request for a hearing with the Office of Administrative Law Judges (OALJ) within 30 days of the date of the Secretary's findings.⁴

On March 10, 2015, Herron filed a timely appeal, of the 11(c) determination with the Directorate, but he did not submit a request for a hearing to OALJ at that time. Herron apparently mistakenly believed that there was a two-step process and that he could request a hearing with an ALJ after the Directorate had finished its review.⁵ The Directorate attempted to correct this mistake by informing Herron in a letter dated March 24, 2015, that the Directorate does not process STAA appeals. The Directorate requested Herron to contact the OALJ and provided him with the address to which his request for a hearing must be sent.⁶ On May 6, 2015, 69 days after the Secretary's findings and 43 days after the Directorate reiterated that he must request a hearing on his STAA complaint with OALJ, Herron submitted his hearing request.

Accordingly, the ALJ found that because Herron had not requested a hearing within 30 days of the date on which OSHA issued the Secretary's findings, his hearing request was untimely. The ALJ then considered whether Herron was entitled to equitable tolling. The ALJ concluded that even if Herron could establish that he filed his appeal in the incorrect forum (an

asking questions about occupational safety and health matters.

² 49 U.S.C.A. § 31105 (2007 & Supp. 2016) (STAA). The STAA's implementing regulations are found at 29 C.F.R. § Part 1978 (2015).

³ *Herron v. North American Central School Bus, LLC*, ALJ No. 2015-STA-055 (Feb. 2, 2016)(D. & O.). Herron also initially filed a complaint with OSHA against First Student, Inc. stating that it had blacklisted him because he complained of unsafe school busses. But the Administrative Law Judge, to whom the case was assigned, found that Herron's hearing request only referenced NACSB and therefore there was no case pending before him regarding First Student, Inc. D. & O. at 9-10. Herron did not address the ALJ's finding that he failed to include First Student, Inc., in his hearing request.

⁴ 29 C.F.R. § 1978.106(a).

⁵ Petition for Review at 2.

⁶ D. & O. at 11.

equitable tolling ground), the limitations period was tolled only until Herron's mistaken belief that he had properly filed his hearing request was corrected. Once the Directorate informed Herron that he had filed in the wrong forum, the limitations period began to run again. Since Herron did not file with OALJ within 30 days of the date he knew, or should have known, that he had filed in the wrong forum, the ALJ found that his hearing request was not timely, in any event.⁷

Herron filed a timely petition for review with the Administrative Review Board.⁸ The Board issued a Notice of Appeal and Order Establishing Briefing on March 1, 2016. Under the terms of the Order, Herron was required to file an opening brief no later than March 17, 2016. Herron failed to file an opening brief as ordered. The Board's Order provides that if the petitioner fails to file the initial brief on time, the Board may dismiss the petition for review or impose other sanctions as the Board finds warranted. Ordinarily, the Board would issue an Order requiring the non-filing petitioner to show cause why the case should not be dismissed for his or her failure to file an opening brief as provided in the Board's order. But in this case, given Herron's pro se status and since Respondent did not move to dismiss the case, and instead, filed a brief with the Board, we decided to proceed with the appeal on the basis of Herron's petition for review alone.

DISCUSSION

The ARB reviews questions of law presented on appeal de novo, but is bound by the ALJ's factual determinations if they are supported by substantial evidence.⁹ Here, Herron does not dispute that he failed to file a request for a hearing with the OALJ until May 6, 2015. The questions to be answered are whether he is entitled to equitable tolling of the limitations period and if so, if his May 6 hearing request should be considered timely.

The limitations period for filing a request for an ALJ hearing on a STAA complaint is not jurisdictional and is subject to equitable tolling.¹⁰ In determining whether the Board should toll a statute of limitations, we have recognized four principal situations in which a moving party may be entitled to equitable modification: (1) when the opposing party has actively misled the

⁷ *Id.*

⁸ The Secretary of Labor has delegated authority to this Board to issue final agency decisions in STAA cases. Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,379 (Nov. 16, 2012); 29 C.F.R. § 1978.110(a).

⁹ 29 C.F.R. § 1978.110(b); *Lachica v. Trans-Bridge Lines*, ARB No. 10-088, ALJ No. 2010-STA-027, slip op. at 2, n.3 (ARB Feb. 1, 2012) (citations omitted).

¹⁰ See *Shelton v. Oak Ridge Nat'l Labs.*, ARB No. 98-100, ALJ No. 1995-CAA-019, slip op. at 5-6 (ARB Mar. 30, 2001).

movant regarding the cause of action; (2) when the movant has in some extraordinary way been prevented from filing; (3) when the movant has raised the precise statutory claim in issue but has done so in the wrong forum, and (4) where the opposing party's own acts or omissions have lulled the movant into foregoing prompt attempts to vindicate his rights.¹¹

Here, the ALJ found that the only potentially applicable grounds for tolling the limitations period was the filing of the precise claim in the wrong forum. Although the ALJ did not believe that this ground was applicable in this case, he nevertheless considered whether, if that ground was applicable, Herron's request could be considered to be timely. The ALJ found that it could not, citing *Hillis v. Knochel Bros., Inc.*¹² In *Hillis*, the Board held that equitable tolling only stopped the running of the limitations period until the party attempting to invoke it learned that he or she had filed in the wrong forum. At that time, the limitations period began to run again.¹³

Herron acknowledges that he believed that there were "two potential avenues to obtain further review—[a] request for review of the decision by the Directorate and a hearing before an ALJ" and "that it was to my understanding to file with the ALJ following the Directorate's decision."¹⁴ Herron requested review by the Directorate, which was only applicable to his Section 11(c) complaint, instead of requesting a hearing before an ALJ, which was only applicable to his STAA complaint. Thus, as the ALJ found, Herron did not request an ALJ hearing in the wrong forum, because he did not seek a hearing on his STAA complaint from the Directorate; he sought review of both complaints, incorrectly, from the Directorate, but not an ALJ hearing.

Nevertheless, even if Herron's confusion as to the proper procedure could toll the limitations period, equitable tolling would not preserve his claim. On March 24, 2015, the Directorate informed Herron that it did not have authority to consider his STAA complaint and instructed him to "[p]lease contact the [Office of Administrative Law Judges] to file your STAA appeal and request a hearing." In the Secretary's Findings, dated February 26, 2015, informing Herron that his complaint was denied, OSHA also informed him, "Under STAA, Respondent and Complainant have 30 days from the receipt of these Findings to file objections and to request a hearing before an Administrative Law Judge," Herron's explanation that he believed that he was to file with the ALJ after the Directorate issued its decision is not persuasive given the Directorate's request of him to please contact the OALJ and request a hearing, after informing him that the Directorate does not process STAA appeals.¹⁵ In failing, at the very least, to contact

¹¹ *Woods v. Boeing-South Carolina*, ARB No.11-067, ALJ No. 2011-AIR-009, slip op. at 8 (ARB Dec. 10, 2012).

¹² ARB Nos. 03-136, 04-081, 04-148; ALJ No. 2002-STA-050 (ARB Mar. 31, 2006).

¹³ *Id.* at 9-10.

¹⁴ Petition for Review at 2.

¹⁵ In fact, Herron did not wait until the Directorate issued its August 21, 2015 decision

OALJ once the Directorate instructed him to do so, Herron did not demonstrate the due diligence necessary to invoke equitable tolling to establish the timely filing of his hearing request.¹⁶

Accordingly, we **AFFIRM** the ALJ's D. & O. and **DISMISS** Herron's STAA complaint.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

ANUJ C. DESAI
Administrative Appeals Judge

affirming the Secretary's Findings to file his hearing request, apparently because a co-worker advised him to send his request to OALJ as soon as possible. D. & O. at 11. The record does not indicate when the co-worker gave Herron the advice.

¹⁶ See *Vicuna v. Westfourth Architecture*, ARB No. 15-034, ALJ No. 2012-LCA-023, slip op. at 5-6) (ARB Apr. 6, 2015).