



IN THE MATTER OF:

MICHAEL BUTLER,

ARB CASE NO. 16-086

COMPLAINANT,

ALJ CASE NO. 2014-STA-068

v.

DATE: November 21, 2016

NEIER, INC.; OLIVER HASTE; JOHN HAYS;
MIKE PARKER; JOHN DOE; AND MARY
ROE,

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearance:

For the Complainant:

Paul O. Taylor, Esq., *Truckers Justice Center, Burnsville, Minnesota*

BEFORE: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E Cooper Brown, *Administrative Appeals Judge*; and Anuj Desai, *Administrative Appeals Judge*

ORDER DISMISSING UNTIMELY APPEAL

On July 29, 2016, a Department of Labor Administrative Law Judge (ALJ) issued a Decision and Order Granting Relief (D. & O.) in this case arising under the whistleblower protection provisions of the Surface Transportation Assistance Act.¹ The ALJ held that complainant Michael Butler had shown by a preponderance of the evidence that his protected activity was a contributing factor in the termination of his employment and that the Respondents had failed to prove by clear and convincing evidence that they would have fired Butler in the absence of his protected activity. The ALJ found Respondents liable for damages including

¹ 49 U.S.C.A. § 31105 (Thomson/West 2007 & Supp. 2015) (STAA).

\$122,585.12 in back pay, \$50,000 for emotional distress, and \$10,000 in punitive damages, and ordered Respondents to re-instate Butler to his former position as a driver.²

The ALJ's D. & O. included a Notice of Appeal Rights that provided, "To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's decision." The notice explained the Board's electronic filing service that permits users to file documents with the Board 24 hours a day. The notice also reminded the parties, "Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing"^[3]

Butler filed a petition for review postmarked August 15, 2016. Because he filed the petition seventeen days after the ALJ issued his D. & O (three days after it was due), there was a question regarding the timeliness of the petition. Accordingly, the Board issued an Order requiring Butler to show cause why his petition should not be dismissed as untimely.

DISCUSSION

The period for filing a petition for review with the ARB is not jurisdictional and therefore is subject to equitable modification.⁴ In determining whether the Board should toll a statute of limitations, we have recognized four principal situations in which equitable modification may apply: (1) when the defendant has actively misled the plaintiff regarding the cause of action; (2) when the plaintiff has in some extraordinary way been prevented from filing his action; (3) when the plaintiff has raised the precise statutory claim in issue but has done so in the wrong forum, and (4) where the employer's own acts or omissions have lulled the plaintiff into foregoing prompt attempts to vindicate his rights.⁵ But the Board has not found these situations to be exclusive, and an inability to satisfy one of them is not necessarily fatal to Butler's claim.⁶ Nevertheless, we have held that equitable tolling should be granted sparingly and only when

² D. & O. at 30-31.

³ D. & O. at 31. *See also* 29 C.F.R. § 1978.110(a)(2015) ("A petition must be filed within 14 days of the date of the decision of the ALJ. The date of the postmark, facsimile transmittal, or electronic communication transmittal will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt.").

⁴ *Accord Hillis v. Knochel Bros.*, ARB Nos. 03-136, 04-081, 04-148; ALJ No. 2002-STA-050, slip op. at 3 (ARB Oct. 19, 2004); *Overall v. TVA.*, ARB No. 98-011, ALJ No. 1997-ERA-053, slip op. at 40-43 (ARB Apr. 30, 2001).

⁵ *Selig v. Aurora Flight Sciences*, ARB No.10-072, ALJ No. 2010-AIR-010, slip op. at 3 (ARB Jan. 28, 2011).

⁶ *Id.* at 4.

exceptional circumstances prevented the party from timely filing, through no fault of the party.⁷

Butler bears the burden of justifying the application of equitable tolling principles.⁸ He did not address any of the four situations the Board has recognized as justifying tolling. Instead, Butler first asserts that under the Office of Administrative Law Judges Rules of Practice and Procedure the petition would have been timely. But Butler does not assert that he relied on these rules in failing to timely file the petition for review. In fact, he admits, as is well established,⁹ that the ARB is not bound by these rules. Furthermore, Butler's statement that his petition would have been timely under the ALJ procedural rules is incorrect. The regulation upon which Butler relies, 29 C.F.R. § 18.32(c)¹⁰ provides that three days are added when service is by mail, "[w]henever a party has the right or is required to take some action within a prescribed period after the service of a pleading, notice, or other document upon said party." 29 C.F.R. § 18.32(c). However 29 C.F.R. § 1978.110(a) provides that to be effective the petition must be filed within "14 days of the date of the decision of the ALJ," **not** within 14 days of the date upon which the decision was served upon "said party." Thus, 29 C.F.R. § 18.32(c), by its terms is not applicable to the filing of a petition for review.¹¹

Butler's second argument is that there are "special circumstances" that justify waiving 29 C.F.R. § 110(a)'s limitation provision—citing rules applicable to cases decided under the Energy Reorganization Act (ERA) at 29 C.F.R. § 24.115.¹² Butler argues that the special circumstances provisions apply because, "[c]ounting 14 days from the date of the Decision and Order, Complainant's petition for review was due by Saturday, August 13, 2016. Mr. Butler filed the petition on the following business day, Monday, August 15, 2016." Unfortunately, the premise of Butler's argument is incorrect. Fourteen days from July 29, 2016, is Friday, August 14th, a business day when Butler could have filed the petition any time that day using the Board's e-file system. Further Butler asserts that there has been no prejudice to Respondents, but the absence

⁷ *Bohanon v. Grand Trunk W. R.R. Co.*, ARB No. 16-048, ALJ No. 2014-FRS-003, slip op. at 3 (ARB Apr. 27, 2016).

⁸ *Accord 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).

⁹ *Herchak v. American Airlines West, Inc.*, ARB No. 03-057, ALJ No. 2002-AIR-012, slip op. at 3-4 (ARB May 14, 2003).

¹⁰ Butler mistakenly identifies this regulation as 29 C.F.R. 18.32(4)(c).

¹¹ *Accord Herchak*, ARB No. 03-057, slip op. at 4.

¹² Butler does not explain why he relies on 29 C.F.R. § 24.115 applicable to ERA whistleblowers, rather than the special circumstances provision at 29 C.F.R. § 1978.115 applicable to STAA whistleblowers.

of prejudice is a factor to be considered only once the party has established a factor supporting tolling and is not by itself an independent ground establishing entitlement to equitable tolling.¹³

Butler did not explain why he failed to timely file his petition for review. In the absence of any other explanation, we are left with the probability that the failure was the result of garden variety “excusable neglect.” But the Board had held that such neglect does not qualify as an exceptional circumstance sufficient to toll the limitations period.¹⁴ Accordingly, we **DISMISS** Butler’s untimely petition for review.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Administrative Appeals Judge

ANUJ C. DESAI
Administrative Appeals Judge

¹³ *Woods v. Boeing-South Carolina*, ARB No. 11-067, ALJ No. 2011-AIR-009, slip op. at 10 (ARB Dec. 10, 2012).

¹⁴ *Bohanon*, ARB No. 16-048, slip op. at 3.