



IN THE MATTER OF:

YEVGENIY SHEVCHENKO,
COMPLAINANT,

v.

ELBRUS LOGISTICS, INC.,
RESPONDENTS.

ARB CASE NO. 17-035

ALJ CASE NO. 2016-STA-070

DATE: May 5, 2017

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Micah D. Fargey; *Fargey Law P.C.*; Portland, Oregon

For the Respondent:

Scott T. Schaueremann, Esq; *Hitt Hiller Monfils Williams LLP*; Portland, Oregon

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; E. Cooper Brown, *Administrative Appeals Judge*; and Leonard J. Howie III, *Administrative Appeals Judge*

FINAL DECISION AND ORDER DISMISSING APPEAL

On March 24, 2016, Complainant Yevgeniy Shevchenko, filed a Petition requesting the Administrative Review Board to review a Department of Labor Administrative Law Judge's Order Granting Motion to Dismiss (Order) issued on February 22, 2017, in this case arising

under the whistleblower protection provisions of the Surface Transportation Assistance Act.¹ The Secretary of Labor has delegated authority to issue final agency decisions under the STAA to the Administrative Review Board.² A party must petition the Board for review of an ALJ's decision within fourteen (14) days of the date of the ALJ's decision.³ 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 the date the petition is received⁴.

Shevchenko filed a petition for review with the Board's Electronic File and Service Request System more than fourteen (14) days after the ALJ issued his Order. Nevertheless, the period for filing a petition for review with the ARB is not jurisdictional and therefore is subject to equitable modification.⁵ 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 defendant's own acts or omissions have lulled the plaintiff into foregoing prompt attempts to vindicate his rights.⁶ But the Board has not found these situations to be exclusive, and an inability to satisfy one is not necessarily fatal to Shevchenko's claim.⁷

Shevchenko bears the burden of justifying the application of equitable tolling principles.⁸ Accordingly, we ordered him to show cause why the petition should not be dismissed as untimely. In his response, Shevchenko failed to address any of the recognized grounds for tolling the limitations period. Instead, his attorney, Micah D. Fargey, submitted a "Declaration." Initially he misstates the basis of the Board's show cause order averring, "The Board has requested that Complainant explain why he filed this appeal within 30 days of the ALJ's Order,

¹ 49 U.S.C.A. § 31105 (Thomson/West 2007 & Supp. 2016) (STAA).

² Secretary's Order No. 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012).

³ 29 C.F.R. § 1978.110(a)(2016).

⁴ *Id.*

⁵ *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. Tennessee Valley Auth.*, ARB No. 98-011, ALJ No. 1997-ERA-053, slip op. at 40-43 (ARB Apr. 30, 2001).

⁶ *Selig v. Aurora Flight Sciences*, ARB No.10-072, ALJ No. 2010-AIR-010, slip op. at 3 (ARB Jan. 28, 2011).

⁷ *Id.* at 4.

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).

as allowed by certain Board rules, rather than within 14 days of the Court's order, which is required by certain other Board rules." To the contrary, there are no Board rules that permit a party to file a petition for review with the Board within 30 days in STAA cases, and the Board's show cause order most certainly did not assert that there are, nor did Fargery cite to any such alleged rules.

Fargery continued:

During this hearing [on Respondent's Motion to Dismiss] the ALJ specifically referenced the right to appeal his decision (though he referenced only Respondent's rights) and, as I understood it, gave 30 days from this decision to file an appeal. I respectfully submit that if (1) the ALJ did say as much, principals [sic] of estoppel, waiver, or other justifying circumstances should make this appeal timely, or (2) mistake should similarly be allowed as grounds for allowing this appeal to be decided on the merits. There should be no dispute from Respondent that it has not been prejudiced by a 16-day delay.

Fargery's declaration is unavailing. First, Fargery cannot even state unequivocally that the ALJ gave incorrect information to the Respondent ("as I **understood** it" and "**if** . . . the ALJ did say"). Second, the ALJ does not "give" parties time to appeal his decision. The STAA's implementing regulations establish the time, fourteen days, for filing an appeal. An attorney practicing before the Board is expected to familiarize himself with the applicable regulations. At most, Fargery is claiming a garden variety mistake; such a mistake does not carry a party's burden to establish entitlement to tolling.⁹ Finally, it is well settled under Board precedent that lack of prejudice to the opposing party is not an independent ground for tolling, but will only be considered once the party requesting tolling has established an applicable basis for it.¹⁰

⁹ *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).

¹⁰ *Romero v. The Coca Cola Co.*, ARB No. 10-095, ALJ No. 2010-SOX-021, slip op. at 6 (ARB Sept. 30, 2010).

Accordingly, as Shevchenko has failed to establish any sufficient basis for tolling the limitations period for filing a petition for review, we **DISMISS** his untimely petition.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

E. COOPER BROWN
Administrative Appeals Judge

LEONARD J. HOWIE III
Administrative Appeals Judge