

**In the Matter of:**

**JUAN NEVAREZ,**

**ARB CASE NO. 18-005**

**COMPLAINANT,**

**ALJ CASE NO. 2013-STA-012**

**v.**

**DATE: December 14, 2017**

**WERNER ENTERPRISES,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

**Brian J. Ramsey, Esq., Millennium Legal LLC, Las Vegas, Nevada**

*For the Respondent:*

**Katherine F. Parks, Esq.; Thorndal, Armstrong, Delk, Balkenbush & Eisinger, P.C.;  
Reno, Nevada**

**Before: Paul M. Igasaki, Chief Administrative Appeals Judge; E. Cooper Brown,  
Administrative Appeals Judge; and Joanne Royce, Administrative Appeals Judge**

### **FINAL DECISION AND ORDER DISMISSING APPEAL**

On October 29 2017, Complainant Juan Nevarez filed a Petition requesting the Administrative Review Board to review a Department of Labor Administrative Law Judge's Decision and Order after Remand Denying Whistleblower Complaint (D. & O.) issued on October 12, 2017, in this case arising under the whistleblower protection provisions of the Surface Transportation Assistance Act.<sup>1</sup> The Secretary of Labor has delegated authority to issue final agency decisions under the STAA to the Administrative Review Board.<sup>2</sup> A party must petition the Board for review of an ALJ's decision within fourteen (14) days of the date of the

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<sup>1</sup> 49 U.S.C.A. § 31105 (Thomson Reuters 2016) (STAA).

<sup>2</sup> 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).

ALJ's decision.<sup>3</sup> 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 received<sup>4</sup>.

Nevarez 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.<sup>5</sup> 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.<sup>6</sup> But the Board has not found these situations to be exclusive, and an inability to satisfy one is not necessarily fatal to Nevarez's complaint.<sup>7</sup>

Nevarez bears the burden of justifying the application of equitable tolling principles.<sup>8</sup> Accordingly, we ordered him to show cause why the petition should not be dismissed as untimely. In his response, he avers that his counsel did not receive the ALJ's D. & O. until October 21, 2017, five days before the petition for review was due and that the press of other business precluded him from timely filing the petition for review. Nevarez did not file the Petition for Review until October 29th, three days after it was due and eight days after his counsel received it.<sup>9</sup>

Nevarez argues that the delay of 3 or 4 days in the delivery of the ALJ's D. & O. is an extraordinary circumstance that prevented him from timely filing the petition for review. Initially, we note that "The Board has consistently held that equitable tolling is generally not

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<sup>3</sup> 29 C.F.R. § 1978.110(a)(2016).

<sup>4</sup> *Id.*

<sup>5</sup> *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).

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

<sup>7</sup> *Id.* at 4.

<sup>8</sup> *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).

<sup>9</sup> The copy addressed to Nevarez himself was returned as undeliverable because he was no longer living at that address. Nevarez does not aver that he filed a change of address with the ALJ prior to the date on which the ALJ issued the D. & O.

appropriate when a complainant is represented by counsel because counsel is “presumptively aware of whatever legal recourse may be available to [his or her] client.”<sup>10</sup> Thus, attorney error does not constitute an extraordinary factor because “[u]ltimately, clients are accountable for the acts and omissions of their attorneys.”<sup>11</sup>

Furthermore, “extraordinary circumstances” is a very high standard that is satisfied only in cases in which even the exercise of diligence would not have resulted in timely filing.<sup>12</sup> While the fact that the ALJ’s Order was not delivered until the ninth day after it was issued may have been unusual, we do not find it so abnormal as to qualify as an “extraordinary” circumstance that prevented Nevarez from timely filing his petition.<sup>13</sup> When Nevarez’s counsel received the D. & O. he had five days to act and two legitimate choices—he could either file the petition for review as ordered or he could file a motion for an enlargement of time to file the petition for review—he did neither. Instead, he unilaterally decided, without consulting the Board, that Nevarez was entitled to toll the due date for filing because it had taken more time than usual for the petition to reach him, and he was busy. Had Nevarez’s counsel contacted the Board and explained the reasons for requiring an enlargement of time, it is likely that the Board would have granted the request, but he failed to ask for such an enlargement and thereby has failed to establish due diligence.

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<sup>10</sup> *Brown v. Synovus Fin. Corp.*, ARB No. 17-037, ALJ No. 2015-SOX-018, slip op. at 3 (ARB May 17, 2017)(citing *Sysko v. PPL Corp.*, ARB No. 06-138, ALJ No. 2006-ERA-023, slip op. at 5 (ARB May 27, 2008)(quoting *Mitchell v. EG&G*, No. 1987-ERA-022, slip op. at 8 (Sec’y July 22, 1993)).

<sup>11</sup> *Id.* (quoting *Higgins v. Glen Raven Mills, Inc.*, ARB No 05-143, ALJ No. 2005-SDW-007, slip op. at 9 (ARB Sept. 29, 2006)).

<sup>12</sup> *Romero v. The Coca Cola Co.*, ARB No. 10-095, ALJ No. 2010-SOX-021, slip op. at 5 (ARB Sept. 30, 2010). *Accord Stoll v. Runyon*, 165 F.3d 1238, 1242 (9th Cir. 1999)(“complete psychiatric disability” during the entirety of the limitations period); *Alvarez-Machain v. United States*, 107 F.3d 696 (9th Cir. 1996) (incarceration in a foreign country for the entirety of the limitations period).

<sup>13</sup> *Accord Romero*, ARB No. 10-095, slip op. at 5.

**CONCLUSION**

Accordingly, because Nevarez failed to timely file his petition for review and has not established grounds for equitable tolling, we **DISMISS** his appeal.

**SO ORDERED.**

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**E. COOPER BROWN**  
**Administrative Appeals Judge**

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**PAUL M. IGASAKI**  
**Chief Administrative Appeals Judge**

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**JOANNE ROYCE**  
**Administrative Appeals Judge**