



In the Matter of:

TIM HAFER,

COMPLAINANT,

v.

UNITED AIRLINES, INC.,

RESPONDENT.

**ARB CASE NOS. 05-073
05-092**

ALJ CASE NO. 2005-AIR-8

DATE: June 16, 2005

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Tim Hafer, pro se, Los Angeles, California

For the Respondent:

John Fish, Jr., Esq., Leslie C. Cheng, Esq., Litter Mendelson PC, San Francisco, California

**FINAL DECISION AND ORDER DENYING PETITIONS FOR
INTERLOCUTORY REVIEW AND DISMISSING APPEALS**

The Respondent, United Airlines, has filed two petitions for interlocutory appeal in a case arising under the whistleblower protection provisions of Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21).¹ We have consolidated these appeals for purposes of decision.

¹ 49 U.S.C.A. § 42121 (West 1997).

On March 3, 2005, a United States Department of Labor Administrative Law Judge (ALJ) issued a Notice of Postponement of Trial and Order Partly Denying Respondent's Motion to Dismiss Complaint or Stay Proceedings (N. & O.). On March 17, 2005, the Respondent, United Airlines, filed a Petition for Review of the N. & O. We assigned this appeal ARB No. 05-073. United also filed a motion asking the ALJ to reconsider the N. & O.

On April 11, 2005, the ALJ issued an Order Denying Respondent's Motion for Reconsideration and Motion to Dismiss (O. D. R. M.). On May 2, 2005, United filed a Supplemental Petition for Review.² We assigned this appeal ARB No. 05-092. United requested that the ALJ certify specified issues for interlocutory appeal and on May 5, 2005, the ALJ issued an Order Denying Respondent's Request for Certification of Issues (O. D. C.).

The issue before the Administrative Review Board is whether the Board should accept United's interlocutory appeal even though the ALJ has refused to certify the issues for appeal, the issues presented on appeal would require the Board to act as the initial fact finder and in any event, the issues are fully reviewable on appeal from the ALJ's final recommended decision. As discussed below, we find that the ALJ did not abuse his discretion in denying the certification request, and United has failed to demonstrate a compelling reason to depart from our well-established policy disfavoring interlocutory appeals.

BACKGROUND

The Complainant, Tim Hafer, is a former United employee who filed a complaint in February 2001 with the Federal Aviation Administration concerning United's aircraft maintenance practices. United subsequently terminated his employment and Hafer filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that the termination violated AIR 21's whistleblower protection provisions. Because of the December 2002 United bankruptcy, the Board stayed the administrative proceedings and the case is still pending.³ Separately, Hafer filed a workers' compensation claim against United in 1999 with the California Workers' Compensation Appeals Board (WCAB). This claim was not stayed despite the bankruptcy.⁴

² On April 27, 2005, the Board granted United's motion for extension of time in which to file its petition for review until May 2, 2005.

³ *Hafer v. United Airlines*, ARB No. 02-088, ALJ No. 2002-AIR-5, 6 (ARB May 30, 2003).

⁴ N. & O. at 1.

In the ALJ proceeding in this case, Hafer alleged that United committed additional violations of AIR 21's employee protection provisions by failing to pay him certain workers' compensation benefits to which he believes he is entitled. Describing Hafer's OSHA complaint, the ALJ found:

In particular, on August 6, 2004 the Complainant sent to [OSHA] two letters alleging that United illegally discriminated against him by: (1) refusing to pay him within a 30-day period more than \$35,000 in accumulated vocational rehabilitation maintenance allowances (VRMA) awarded to him on April 14, 2004 by a WCAB Administrative Law Judge, (2) failing to promptly reimburse him for approximately \$5,383.02 in medical expenses he allegedly incurred as a result of his work-related injury, and (3) paying him disability benefits at a lower rate than allegedly required by the State of California's workers' compensation statute.⁵

OSHA found that there was no merit to Hafer's complaint. Hafer filed a request for a hearing with the Office of Administrative Law Judges.⁶ The ALJ scheduled the case for hearing and, in response, United filed a motion requesting that the ALJ dismiss the case in its entirety or stay it pursuant to the provisions of the Bankruptcy Act. In support of the motion United argued

(1) that, as a matter of law, it cannot be held responsible for the alleged actions of its workers' compensation claims administrator, Gallagher Bassett Services, (2) that any complaints concerning the payment of workers' compensation benefits are within the exclusive jurisdiction of the California WCAB, (3) that the Complainant has withdrawn his allegation that United has failed to pay his workers' compensation benefits at the proper statutory rate, and (4) any remaining complaints are all time barred.⁷

⁵ *Id.* at 1-2. Hafer subsequently withdrew the allegation that United had paid him disability benefits at a lower rate than California's workers' compensation statute required. O. D. R. M. at 1 n.1.

⁶ 29 C.F.R. § 1979.106.

⁷ N. & O. at 2.

United argued that the Bankruptcy stay provisions applied to the case because Hafer could have filed a claim for reimbursement for his medical expenses even before United filed its bankruptcy petition in December of 2002.⁸

The ALJ agreed with United that the issue of Hafer's entitlement to benefits under the California workers' compensation statute and the amount of the benefits to which he is entitled, if any, are within the exclusive jurisdiction of the California WCAB.⁹ But he found that once the WCAB has finally decided Hafer's entitlement to benefits, it would be within the Department of Labor's jurisdiction under AIR 21 to determine whether any alleged refusal to promptly pay the benefits WCAB awarded violated AIR 21's employee protection provisions.¹⁰ Accordingly the ALJ found that Hafer's claim that United retaliated against him by failing to promptly pay his medical benefits must be stayed until such time as the WCAB has issued a final decision determining the amount of any reimbursement for medical benefits to which Hafer is entitled.¹¹

But the ALJ found that United "has failed to show that there was any legitimate basis for dismissing or staying the proceeding on the remaining allegation that the Respondent delayed making the VRMA payments to the Complainant in retaliation for his whistleblower activities."¹² First the ALJ found that United had failed to show or even represent that Gallagher Bassett was not its agent and that even if Gallagher Bassett was independent from United, such independence did not as a matter of law compel the finding that United had not influenced it to delay payment of the benefits in violation of AIR 21.¹³

The ALJ also rejected United's argument that Hafer's allegation that United's delay in paying the VRMA benefits Judge Zarett ordered on April 14, 2004, was time-barred because, contrary to United's argument, the limitations period on this allegation did not begin to run on the date of Hafer's last protected activity or on the date he first incurred medical expenses.¹⁴ Instead the ALJ found that it appeared that the limitations period began to run on May 9, 2004, after Judge Zarett issued his order requiring the

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 3.

¹³ *Id.*

¹⁴ *Id.*

payment of the benefits and the 25-day period in which United was required to pay the benefits expired.¹⁵

Finally, the ALJ found that the Bankruptcy stay did not apply to Hafer's claim because Hafer could not have anticipated, prior to United's declaration of bankruptcy in December of 2002, that United would fail to timely pay the benefits that were not even due until May 9, 2004. Consequently, the ALJ found that

all proceedings concerning the failure of United to pay the Complainant for his medical expenses must be stayed until such time as the California WCAB determines the extent of the Complainant's entitlement to such reimbursement, but that no stay or dismissal is warranted concerning the Complainant's allegation that the payment of his VRMA benefits was delayed in retaliation for his protected whistleblower activities.

The ALJ rescheduled the hearing on the VMRA benefits reimbursement for May 23, 2005.¹⁶

United filed a petition for review with the Board requesting that we review the ALJ's decision to stay, rather than dismiss, Hafer's claim that, in violation of AIR 21, United did not timely reimburse his out-of-pocket medical expenses for a work-related illness. United argued that until the WCAB determines the amount of reimbursable medical expenses, if any, Hafer's complaint was premature and thus the ALJ should have dismissed rather than stayed it.

United also requested the Board to review the ALJ's decision to set a trial date on the claim that United had failed to timely pay his VRMA benefits because this claim was not included in the original complaint filed with OSHA and United had no notice of the issue until Hafer referred to it in his Opposition Brief to United's Motion to Dismiss his other claims.

On March 25, 2005, the Board issued an Order to Show Cause requiring United to state why the Board should not dismiss its interlocutory appeal because it failed to follow the Board's certification procedure and given the Board's well-established policy discouraging piecemeal appeals. United filed a response requesting the Board to "hold off" ruling on its Show Cause Order because it had filed a Motion for Reconsideration with the ALJ that might render the petition for review moot. In the alternative, United argued that the Board should excuse its failure to obtain, or to even request, certification of the issues for interlocutory appeal, the Board's well-established procedure for

¹⁵ *Id.* at 3-4.

¹⁶ *Id.* at 5.

obtaining interlocutory review, because the pro se Complainant's failure to comply with AIR 21's procedural requirements qualifies as "special circumstances" justifying waiver of the certification requirements.¹⁷

On April 11, 2005, the ALJ issued an order denying United's request for reconsideration. The ALJ stated that he had fully explained his finding that Hafer's allegation that United failed to timely reimburse his medical expenses falls within the Department of Labor's jurisdiction under AIR 21 and that United had failed to demonstrate as a matter of law that it was not a proper party because Gallagher Bassett was responsible for paying the workers' compensation benefits in the N. & O.¹⁸

Citing federal court precedent, the ALJ again rejected United's argument that he should have dismissed rather than stayed Hafer's claim that United's alleged failure to timely reimburse him for medical expenses violated AIR 21's whistleblower protection provisions.¹⁹ The ALJ rejected United's argument that Hafer's complaint that it had failed to timely pay his VRMA benefits was untimely because Hafer had produced documents that "strongly suggest" that he did timely file a complaint regarding the VRMA benefits with OSHA on August 5, 2004.²⁰ Thus, the ALJ found that it was necessary to hold an evidentiary hearing so that he could properly weigh United's evidence that OSHA had not received the complaint against Hafer's evidence that he had filed the complaint.²¹ The ALJ also stated that even if the complaint was not filed until October 26, 2004, as United alleges, "because any retaliatory failure to make a timely payment of the VRMA benefits would have constituted a continuing violation of AIR 21, the statute of limitations on the VRMA claim would not have run out until 90 days after the Complainant received full payment of his VRMA benefits in August of 2004."²²

Finally, the ALJ found that the document Hafer submitted indicating that he had informed both counsel for United and the senior claims examiners at Gallagher Bassett of the WCAB order requiring payment of the VRMA benefits raised material issues of fact regarding the declarations provided from Gallagher Bassett employees asserting that the failure to timely pay Hafer's VRMA benefits was inadvertent.²³ The ALJ concluded that

¹⁷ 29 C.F.R. § 1979.114 provides, “

¹⁸ O. D. R. M. at 3.

¹⁹ *Id.*

²⁰ *Id.* at 3-4.

²¹ *Id.* at 4.

²² *Id.*

²³ *Id.*

these material issues of fact could only be resolved by a full evidentiary hearing.²⁴ Thus, the ALJ denied United's motion for reconsideration.²⁵

On April 22, 2005, United requested the ALJ to certify three "legal" issues for interlocutory review by the Administrative Review Board:

- (1) Whether the complainant "should be allowed to bypass the procedural requirements" of AIR21,
- (2) Whether the statute of limitations in this case can be extended under the continuing violations doctrine, and
- (3) Whether the Office of Administrative Law Judges should "retain jurisdiction over an unripe claim."²⁶

The ALJ denied United's request. The ALJ found that the first issue was not in fact a legal issue but was instead a mixed question of law and fact. He noted that, "[b]ecause of the differing accounts concerning the date the complainant first complained to OSHA about the late payment of his VRMA benefits, the question of when the VRMA complaint was first submitted to OSHA will be one of the key issues to be resolved in the May 23, 2005 hearing."²⁷ The ALJ concluded that until he makes the required factual determination, consideration of issues one and two would be premature. The ALJ also found that United had failed to establish any "urgent need to resolve the question of whether the Complainant's complaint concerning the payment of his out-of-pocket medical expenses can be stayed pending the completion of proceedings on that matter by the [WCAB]."²⁸ The ALJ concluded that, "Indeed, the respondent's latest request for interlocutory review appears to be frivolous and in complete disregard of the ARB precedents concerning the rare circumstances in which interlocutory appeals will be considered."²⁹

On May 2, 2005, United filed a supplemental petition for review requesting the Board to entertain an immediate appeal of the three issues it had requested the ALJ to certify and presenting argument in support of the request for interlocutory review. Hafer filed a response to the supplementary petition.

²⁴ *Id.*

²⁵ *Id.*

²⁶ O. D. C. at 1.

²⁷ *Id.* at 2.

²⁸ *Id.*

²⁹ *Id.*

JURISDICTION

The Secretary of Labor has delegated her authority to issue final administrative decisions in cases arising under AIR 21 to the Administrative Review Board.³⁰ Because the ALJ has not issued his final recommended decision and order in this matter, United's request that the Board review the N. O. and O. D. R. M presents an interlocutory appeal. The Secretary's delegation of authority to the Board includes, "discretionary authority to review interlocutory rulings in exceptional circumstances, provided such review is not prohibited by statute."³¹

DISCUSSION

As an initial matter we note that because United has timely petitioned for review of the O. D. R. M. (ARB No. 05-92) and two of the issues of which he seeks review in ARB 05-092 are identical to the issues he raised in his appeal of the N. O. (ARB No. 05-073), we consider United's appeal of the N. O. to be moot and therefore we **DISMISS** ARB No. 05-073 and consider the issues raised in ARB 05-092.

The Secretary of Labor described the procedure for obtaining review of an administrative law judge's interlocutory order in *Plumley v. Federal Bureau of Prisons*.³² The Secretary determined that where an ALJ has issued an order of which the party seeks interlocutory review, the procedure for certifying interlocutory questions for appeal from federal district courts to appellate courts is applicable.³³ According to this procedure:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order.³⁴

³⁰ Secretary's Order 1-2002, 67 Fed. Reg. 64272 (Oct. 17, 2002).

³¹ *Id.* at 64273.

³² 86-CAA-6 (Sec'y April 29, 1987).

³³ *Id.*

³⁴ 28 U.S.C.A. § 1292(b) (West 1993):

In *Plumley*, the Secretary ultimately concluded that because no ALJ had certified the questions of law raised by the respondent in his interlocutory appeal as provided in 28 U.S.C.A. § 1292(b), “an appeal from an interlocutory order such as this may not be taken.”³⁵ Some courts have held that certification by the district court is a jurisdictional prerequisite to interlocutory review under section 1292(b).³⁶ In *Ford Motor Co.*, the court explained:

The whole point of § 1292(b) is to create a dual gatekeeper system for interlocutory appeals: Both the district court and the court of appeals must agree that the case is a proper candidate for immediate review before the normal rule requiring a final judgment will be overridden.³⁷

Nevertheless, it is unnecessary for the Board to determine if this rule, applicable to district court certifications, is also applicable in this administrative setting in which administrative law judges render recommended rather than final decisions because, in any event, we find that the ALJ did not abuse his discretion in refusing to certify the questions of which United seeks review.³⁸

First, as provided in section 1292(b), the certification procedure applies only to controlling questions of law. As the ALJ recognized, United’s argument that Hafer’s complaint is untimely depends upon a factual finding that must await a hearing for determination. Furthermore, if the ALJ finds that Hafer did timely file his complaint, then the issue whether the failure to timely pay the VRMA benefits is a continuing violation becomes moot. Thus the ALJ properly denied certification of these two issues because they depend upon the ALJ’s resolution of a factual issue.

We also find that the ALJ properly denied certification of the stay issue because United has failed to establish that resolving the stay issue will “materially advance the termination of the litigation” given the remaining issues to be decided by the ALJ.

³⁵ *Plumley*, slip op. at 3 (citation omitted).

³⁶ See e.g., *In re Ford Motor Co.*, 344 F.3d 648, 654 (7th Cir. 2002); *Mason v. Stallings*, 82 F.3d 1007, 1009 (11th Cir. 1996).

³⁷ 344 F.2d at 648.

³⁸ See *White v. Nix*, 43 F.3d 374, 376-377 (8th Cir. 1994); *Jones v. St. Louis-San Francisco Ry. Co.*, 728 F.2d 257, 260 n.2 (6th Cir. 1984); *Tokio Marine & Fire Ins. Co.*, 322 F.2d 113, 115 (11th Cir. 1963).

Moreover, even if the ALJ had certified the question, it remains within the Board's discretion whether to hear the appeal.³⁹ We would not exercise that discretion in this case because, as we discuss below, United has failed to articulate sufficient grounds warranting departure from our strong policy against piecemeal appeals.⁴⁰

The purpose of the finality requirement underlying the Board's interlocutory appeal policy is "to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results."⁴¹ Nevertheless, the Supreme Court has recognized a "small class [of decisions] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."⁴² In *Coopers & Lybrand v. Livesay*,⁴³ the Court further refined the "collateral order" exception to technical finality.⁴⁴ The Court held that to fall within the collateral order exception, the order appealed must "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment."⁴⁵

In determining whether to accept an interlocutory appeal, we must strictly construe the *Cohen* collateral appeal exception to avoid the serious "hazard that piecemeal appeals will burden the efficacious administration of justice and unnecessarily protract litigation."⁴⁶ Most obviously, all three questions of which United has requested review are fully reviewable on appeal from the ALJ's recommended decision and order in this case. Therefore, this appeal does not fall within the collateral appeal exception to the finality rule.

³⁹ 28 U.S.C.A. 1292(b); *White* at 376 n.2 (citing *In re Convertible Rowing Exerciser Patent Litig.*, 903 F.2d 822 (Fed. Cir. 1990)).

⁴⁰ *Accord Welch v. Cardinal Bankshares Corp.* ARB No. 04-054, ALJ No. 03-SOX-15 (ARB May 13, 2004).

⁴¹ *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

⁴² *Id.*

⁴³ 437 U.S. 463 (1978).

⁴⁴ *Van Cauwenberghe v. Biard*, 406 U.S. 517, 522 (1988).

⁴⁵ 437 U.S. at 468.

⁴⁶ *Corrugated Container Antitrust Litig. Steering Comm. v. Mead Corp.*, 614 F.2d 958, 961 n.2, quoting *Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1094 (5th Cir. 1977).

Because the ALJ did not abuse his discretion in denying United's section 1292(b) certification request and United has failed to establish sufficient grounds to compel us to depart from our well-established policy against accepting interlocutory appeals, we **DISMISS** United's interlocutory appeals.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge