



**ARB CASE NO. 99-065**  
**ALJ CASE NO. 98-DBA-11**  
**DATE: September 3, 1999**  
**CORRECTED**

**In the Matter of:**

**Disputes concerning the payment of  
prevailing wage rates and overtime pay by:**

**SUPERIOR PAVING & MATERIALS, INC.**

**With respect to laborers and mechanics  
employed by the prime contractor on  
Department of Transportation, Project No.  
0785-1994, Carrollton, Ohio.**

**ORDER ACCEPTING PETITION FOR REVIEW  
AND ESTABLISHING BRIEFING SCHEDULE**

In this case arising under the Davis-Bacon and Related Acts, 40 U.S.C. § 276(a) et seq., and the applicable regulations issued thereunder at 29 C.F.R. Part 5, the Deputy Administrator of the U.S. Department of Labor's Wage and Hour Division seeks to recover from Superior Paving & Materials, Inc., the petitioner, unpaid prevailing wages and overtime compensation allegedly due laborers and mechanics employed on a federally funded construction project. The Administrative Law Judge (ALJ) mailed his Decision and Order to the parties on February 19, 1999. Superior Paving filed its Petition for Review of the ALJ's decision with the Administrative Review Board (ARB) on April 3, 1999, that is, 43 days after the date of the ALJ's decision. Under the regulations governing enforcement actions under the Davis-Bacon Act, a Petition for Review shall be filed "within 40 days after the date of the decision of the Administrative Law judge (or such additional time as is granted by the Administrative Review Board)." 29 C.F.R. §6.34 (1998). Superior Paving did not seek, nor did the Board grant, any additional time for filing the Petition for Review. Accordingly, on April 9, 1999, the ARB issued an Order to show cause why the Petition should not be dismissed as untimely.

In response to our show cause Order, Superior Paving argues that the Petition should not be dismissed because it was timely filed. Superior Paving acknowledges that 29 C.F.R. §6.34 requires that a petitioner file a Petition for Review within 40 days of the date of the ALJ's order; however, it argues that 29 C.F.R. §6.3(b) allows an additional five days for filing when documents are sent by mail. Therefore, because the Petition for Review was filed on the forty-third day, Superior Paving asserts that it was filed timely. In the alternative, Superior Paving

contends that we should accept the Petition for Review because it relied on its interpretation of 29 C.F.R. §6.3(b) in good faith.

The Deputy Administrator asserts that the Petition is untimely. He contends that 29 C.F.R. §6.3(b) unambiguously applies only to documents filed with the Office of Administrative Law Judges and is not applicable to petitions for review filed with the Administrative Review Board. Although the Deputy Administrator agrees that we may accept a Petition for Review filed after the 40-day deadline if the petitioner establishes good cause for the late filing, he asserts that Superior Paving has failed to meet the standard for accepting a late filing because the regulation is not susceptible to Superior Paving's interpretation.

We agree with the Deputy Administrator that 29 C.F.R. §6.3(b) applies only to documents that are filed with the Chief Clerk at the Office of Administrative Law Judges. Petitions for review of ALJ decisions are not filed with the Chief Clerk at the Office of Administrative Law Judges. The regulation relating to appeal rights, 29 C.F.R. §6.34, provides that such petitions must be transmitted to the Board as provided in part 7 of Title 29 and "a copy thereof to the Chief Administrative Law [J]udge." Part 7 provides that [t]he petition (original and four copies) accompanied by a statement of service shall be filed with the Administrative Review Board . . . ." 29 C.F.R. §7.3. Although the Petitioner is required to serve the Chief Administrative Law Judge with a copy of the petition, the Petition is not filed with the Chief Clerk of the Office of Administrative Law Judges, it is filed with the Board. Thus, 29 C.F.R. §6.3(b), applicable to documents that are not deemed filed until received by the Chief Clerk at the Office of Administrative Law Judges, is inapplicable to a Petition for Review that must be filed with the Board. Accordingly, Superior Paving's Petition for Review is untimely.

The Board has recognized in interpreting filing provisions analogous to those at 29 C.F.R. §6.34 that compliance with such filing periods is not a jurisdictional prerequisite to obtaining review. Instead, such filing provisions are procedural in nature, comparable to a statute of limitations, which may be tolled for equitable reasons. *See, e.g., Duncan v. Sacramento Metropolitan Air Quality Management District*, ARB No. 99-011, Ord. Accepting Appeal and Establishing Briefing Schedule (Sept. 1, 1999); *Degostin v. Bartlett Nuclear, Inc.*, 98-ERA-7 (ARB May 4, 1998); *Staskelunas v. Northeast Utilities Co.*, 98-ERA-8, (ARB May 4, 1998); *Backen v. Entergy Operations*, 95-ERA-46 (ARB June 7, 1996). This interpretation is fully consistent with Supreme Court and Federal Appellate Court precedent holding that an administrative agency may waive procedural requirements in the interest of justice, provided that such a waiver will not prejudice the other party. *See e.g., American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532 (1970); *Salgado v. Atlantic Richfield Co.*, 823 F.2d 1322 (9th Cir. 1987); *Ancor, Inc. v. Brock*, 780 F.2d 897 (11th Cir. 1986). *Accord Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982).

In *Burnett v. New York Central Railroad Co.*, 380 U.S. 424 (1965), the Supreme Court discussed the purpose of statutes of limitations:

Statutes of limitations are primarily designed to assure fairness to defendants. Such statutes "promote justice by preventing surprises through the revival of claims that have

been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." Moreover, the courts ought to be relieved of the burden of trying stale claims when a plaintiff has slept on his rights.

(Citation omitted). The Deputy Administrator has failed to demonstrate that he was prejudiced by the Petitioner's error. This case involves neither a stale claim, nor a petitioner who has "slept on his rights." Furthermore, we agree with the Petitioner that the cases cited by the Deputy Administrator are distinguishable. In *S.D.F., Inc.*, WAB Case No. 92-12, WAB Order of Dismissal (Mar. 30, 1993), the petitioner filed the Petition for Review five weeks late and the only reason it proffered for the late filing was that it waited to file its Petition until it could review the position the Wage Hour Administrator took in her Petition for Review. Similarly, in *Summit Barricade, Inc.*, WAB Case No. 93-04, WAB Decision (May 26, 1993), in which the petitioner filed the Petition for Review two weeks late, the petitioners had previously ignored time limits set by the ALJ, and they offered no explanation for the late filing. In *Cynthia Aiken*, BSCA Case No.92-06, BSCA (Dec. Jul. 31, 1992), the petitioner filed the Petition for Review six weeks late and the petitioner had previously failed to comply with time limits in the case. In this case, however, Superior Paving filed only three days late based on its incorrect reading of the regulations and there is no allegation that it previously had failed to comply with deadlines assigned by the ALJ.

Accordingly, we **ACCEPT** Superior Paving's Petition for Review and brief filed April 3, 1999, and establish the following briefing schedule:

1. The Administrator, Wage and Hour Division, shall file a brief - not to exceed 30 double-spaced pages - in response to the Petition for Review and brief **on or before October 4, 1999.**
2. The Petitioner and all other parties and Interested Persons may file a reply brief - not to exceed 30 double-spaced typed pages - on or before **November 3, 1999.**
3. **All motions and other requests for extraordinary action by the Board (including, but not limited to, requests for extensions of time or expansion of page limitations) shall be in the form of a motion appropriately captioned, titled, formatted and signed, consistent with customary practice before a court. See, e.g., Fed. R. Civ. P. 7(o).**
4. **All pleadings, briefs and motions should be prepared in Courier (or typographic scalable) 12 point, 10 character-per-inch type or larger, double-spaced with minimum one inch left and right margins and minimum 1 1/4 inch top and bottom margins, printed on 8 1/2 by 11 inch paper, and are expected to conform to the stated page limitations unless prior approval of the Board has been granted.**

**5. An original and four copies of all pleadings and briefs shall be filed with the Administrative Review Board, U.S. Department of Labor, 200 Constitution Avenue, N.W, Room S-4309, Washington, D.C., 20210.**

6. Only parties and Interested Persons filing a notice of intervention and participation need be served with pleadings or briefs.

**SO ORDERED.**

**PAUL GREENBERG**  
Chair

**E. COOPER BROWN**  
Member

**CYNTHIA L. ATTWOOD**  
Member