



**In the Matter of:**

**HENRY W. THISSEN,**

**ARB CASE NO. 04-153**

**COMPLAINANT,**

**ALJ CASE NO. 2004-STA-35**

**v.**

**DATE: December 16, 2005**

**TRI-BORO CONSTRUCTION SUPPLIES, INC.,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**FINAL DECISION AND ORDER**

Henry W. Thissen filed a complaint with the United States Department of Labor alleging that his employer, Tri-Boro Construction Supplies, Inc., violated the employee protection provisions of the Surface Transportation Assistance Act (STAA) when it terminated him. The STAA provides that an employer may not “discharge,” “discipline” or “discriminate” against an employee-operator of a commercial motor vehicle “regarding pay, terms, or privileges of employment” because the employee has engaged in certain protected activities. These include: making a complaint “related to a violation of a commercial motor vehicle safety regulation, standard, or order”; “refus[ing] to operate a vehicle because . . . the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health”; or “refus[ing] to operate a vehicle because . . . the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle’s unsafe condition.”<sup>1</sup>

A Department of Labor Administrative Law Judge (ALJ) granted summary decision to Tri-Boro. We affirm.

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<sup>1</sup> 49 U.S.C.A. § 31105(a) (West 2004). The STAA implementing regulations are found at 29 C.F.R. Part 1978 (2005).

## BACKGROUND

Tri-Boro Construction Supplies, Inc., located in Dallastown, Pennsylvania, employed Henry W. Thissen to drive a tractor-trailer. Tri-Boro terminated Thissen on October 25, 2000, because he refused to make a scheduled trip that day after he was ordered to do so. Thissen claims that he refused the trip because he had re-injured his back the day before and to drive would have been unsafe for him and the general public. Tri-Boro claims that Thissen did not mention his back problem before refusing to make the trip. According to Tri-Boro, only after the company discharged him did Thissen complain about a back injury. Respondent's Motion for Summary Decision, Exh. B (Occupational Safety and Health Administration Discrimination Case Activity Worksheet dated Nov. 8, 2000).

Thissen filed a STAA complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) on November 8, 2000.<sup>2</sup> He alleged that Tri-Boro terminated him to retaliate for his refusal to drive on October 25. Shortly thereafter, on January 18, 2001, Tri-Boro and Thissen informally settled the matter.<sup>3</sup>

But on December 11, 2003, Thissen filed the instant STAA complaint with OSHA. He contends that Tri-Boro violated the settlement agreement by refusing to reinstate him, by contesting his workers' compensation claim, and by not paying for certain fringe benefits. According to Thissen, this continuing breach of the settlement constitutes retaliation for his October 25, 2000 refusal to drive the truck. By letter of February 3, 2004, OSHA notified Thissen that it had completed its investigation and found that his complaint had no merit. Complainant's Exhibit (CX) 1(e). Thissen objected to the OSHA finding and requested an evidentiary hearing before a Labor Department Administrative Law Judge (ALJ). Thissen's objection and request for a hearing was docketed on March 24, 2004, at the Office of Administrative Law Judges. Recommended Decision and Order (R. D. & O.) at 7; CX 12.

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<sup>2</sup> See 29 C.F.R. § 1978.102. OSHA investigates STAA complaints and then issues findings as to whether the employer has violated the STAA. If OSHA finds that an employer has violated the STAA, OSHA also issues a preliminary order providing certain prescribed relief. 29 C.F.R. §§ 1978.103, 1978.104.

<sup>3</sup> The parties did not execute a formal settlement agreement. The terms of their settlement are contained in OSHA's Final Investigative Report, dated January 23, 2001. See Respondent's Exhibit (RX) 4. STAA cases may be settled if, after the complaint is filed but before either party objects to OSHA's findings or preliminary order, OSHA and the parties agree to settle the dispute. See 29 C.F.R. § 1978.111 (d)(1).

Tri-Boro moved for summary decision on two grounds: (1) Thissen's objection to the OSHA findings and request for a hearing was not timely filed; and (2) Thissen's December 11, 2003 STAA complaint was not timely filed. Respondent's Motion for Summary Decision at 4-5. Thissen filed a response to Tri-Boro's motion. On May 19, 2004, the ALJ conducted a hearing on Tri-Boro's motion "[b]ecause the record was not entirely clear regarding the issue of the timeliness of [Thissen's] filings." R. D. & O. at 2. Furthermore, the ALJ permitted Thissen to submit additional evidence concerning the timeliness of his request for a hearing, and Thissen did so on June 1, 2004. On July 22, 2004, the ALJ granted summary decision to Tri-Boro because Thissen did not timely file his STAA complaint. *Thissen v. Tri-Boro Construction Supply Co., Inc.*, 2004-STA-00035.

### JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board (ARB) has jurisdiction to review an ALJ's recommended STAA decision.<sup>4</sup>

We review a grant of summary decision de novo, i.e., under the same standard ALJs employ. Set forth at 29 C.F.R. § 18.40(d) and derived from Rule 56 of the Federal Rules of Civil Procedure, that standard permits an ALJ to "enter summary judgment for either party [if] there is no genuine issue as to any material fact and [the] party is entitled to summary decision." "[I]n ruling on a motion for summary decision, we . . . do not weigh the evidence or determine the truth of the matters asserted . . . ."<sup>5</sup> Viewing the evidence in the light most favorable to, and drawing all inferences in favor of the nonmoving party, we must determine the existence of any genuine issues of material fact. We also must determine whether the ALJ applied the relevant law correctly.<sup>6</sup>

Though invited to do so, neither party filed a brief.

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<sup>4</sup> See 49 U.S.C.A. § 31105(b)(2)(C) and 29 C.F.R. § 1978.109(c). See also Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the STAA).

<sup>5</sup> *Stauffer v. Wal-Mart Stores, Inc.*, ARB No. 99-107, ALJ No. 99-STA-21, slip op. at 6-7 (ARB Nov. 30, 1999).

<sup>6</sup> Cf. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith*, 475 U.S. 574 (1986).

## DISCUSSION

### 1. *Thissen's Objections and Request for Hearing*

STAA regulations govern when a party must file objections to the OSHA findings and request a hearing before an ALJ:

Within thirty days of receipt of the findings or preliminary order the named person [employer] or the complainant, or both, may file objections to the findings or preliminary order providing relief or both and request a hearing on the record. The objection and request shall be in writing and shall state whether the objection is to the findings or the preliminary order or both. Such objections shall also be considered a request for hearing. The date of the postmark shall be considered to be the date of filing. Objections shall be filed with the Chief Administrative Law Judge, U.S. Department of Labor, Washington, DC and copies of the objections shall be mailed at the same time to the other parties of record, including the Assistant Secretary's designee [OSHA] who issued the findings and order.<sup>7</sup>

If a party does not file a timely objection to the OSHA findings, those findings become final and not subject to judicial review.<sup>8</sup>

In its Motion for Summary Decision, Tri-Boro asserts that Thissen's objections and request for hearing should be dismissed, and the OSHA determination be deemed final, because Thissen filed his objection on March 24, 2004, which was 50, not 30, days after OSHA's February 3, 2004 finding that Tri-Boro had not violated the STAA. Thissen countered that his attorney timely filed an objection on February 25, but the letter was not received at the Office of Administrative Law Judges (OALJ) because the envelope had been mistakenly addressed.<sup>9</sup> And when he learned that the OALJ had not received the objection, Thissen faxed a copy of the February 25 letter to OALJ. May 17, 2004 Answer to Respondent's Motion for Summary Decision at 3-4; Transcript (TR) 21.

The ALJ found that though the objection was not timely filed, Thissen had demonstrated that grounds existed to toll the 30 day filing requirement. Equitable tolling is appropriate when a party "has actively pursued his judicial remedies by filing a

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<sup>7</sup> 29 C.F.R. § 1978.105(a). *See also* 49 U.S.C.A. § 31105(b)(2)(B).

<sup>8</sup> 29 C.F.R. § 1978.105(b)(2).

<sup>9</sup> The envelope was addressed to 1800 K Street in Washington, D.C., rather than 800 K Street, the correct address for OALJ.

defective pleading during the statutory period”<sup>10</sup> and thereafter has acted diligently to preserve his rights.<sup>11</sup>

Thissen produced a copy of the misaddressed envelope and an affidavit from his attorney confirming that the letter of objection had been sent on February 25 but to the wrong address. CX 11, 15. This evidence, along with the February 25 letter to OALJ (which also misstated the OALJ address), CX 13, and Thissen’s diligence in following up when he became aware that OALJ had not received his objection, convinced the ALJ that it “would be inequitable in these circumstances to deny Complainant the opportunity to be heard because of defective mailing.” We find that the record contains substantial evidence to support the ALJ’s finding that the 30 day filing period should be tolled and that, as a matter of law, Thissen’s appeal “is properly before the OALJ.” R. D. & O. at 7-8. Therefore, the ALJ rightfully denied summary decision as to whether Thissen’s objections and request for hearing were timely filed.

Furthermore, the ALJ noted that Thissen’s attorney apparently did not mail a copy of the objection to Tri-Boro, as the rule cited above requires.<sup>12</sup> Nevertheless, she correctly concluded that this did not defeat Thissen’s right to a hearing because Tri-Boro was not unduly prejudiced by the short delay between the filing deadline and when the company actually did receive a copy of the February 25 letter.<sup>13</sup>

## 2. *Thissen’s December 11, 2003 STAA Complaint*

An employee alleging a STAA violation “may” file a complaint with OSHA not later than 180 days after the alleged violation occurs.<sup>14</sup> The 180 day statute of limitations begins to run from the date the employee receives “final, definitive, and unequivocal notice” of an adverse employment decision.<sup>15</sup> Complaints not filed within the 180 day

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<sup>10</sup> *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 95 and n.3 (1990).

<sup>11</sup> *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151 (1984).

<sup>12</sup> In his affidavit, Thissen’s lawyer avers that he did in fact mail a copy of the February 25 letter to counsel for Tri-Boro. CX 15.

<sup>13</sup> We recently held that a party’s right to adjudicate a claim brought under the whistleblower protection section of the Energy Reorganization Act, 42 U.S.C.A. § 5851, is not contingent on whether it has complied with a comparable regulation at 29 C.F.R. § 24.4(d)(3) requiring the party requesting a hearing to timely file a copy of the request on the other party. *Shirani v. Calvert Cliffs Nuclear Power Plant*, ARB No. 04-101, ALJ No. 2004-ERA-9, slip op. at 6 (ARB Oct. 31, 2005).

<sup>14</sup> 49 U.S.C.A. § 31105(b)(1).

<sup>15</sup> *Jenkins v. EPA*, ARB No. 98-146, ALJ No. 88-SWD-2, slip op. at 14 (ARB Feb. 28, 2003).

limitation period “will ordinarily be considered to be untimely.”<sup>16</sup> Even so, under certain circumstances this period may be tolled.<sup>17</sup>

Tri-Boro contends that it is entitled to summary decision because even if Thissen’s allegations that it violated the settlement agreement are true, those violations occurred more than 180 days before Thissen filed the instant STAA complaint on December 11, 2003. Respondent’s Motion for Summary Decision at 5-8. Thissen asserts that though he was a party to the January 18, 2001 informal settlement and was represented by counsel at the time, he did not know the terms of the agreement until March 2003 when his attorney sent him a copy of the OSHA Final Investigative Report containing the terms of the settlement. It was only then that he realized that Tri-Boro had reneged on its promises to reinstate him, not contest his workers’ compensation claim, and pay for fringe benefits. Therefore, “because of Tri-Boro’s continuing refusal to comply with the terms of the settlement agreement,” Thissen claims that his December 11, 2003 complaint was timely filed. Answer to Respondent’s Motion for Summary Decision at para. 30; TR 33, 49, 56, 72, 77; Dec. 8, 2003 Request for New STAA Complaint at 2.

The ALJ granted Tri-Boro’s motion for summary decision because Thissen’s complaint was not timely filed, and the surrounding circumstances did not warrant equitable tolling. As she is bound to do when deciding a summary decision motion, the ALJ reviewed the evidence in the light most favorable to Thissen. Since Thissen claimed that he first became aware that Tri-Boro was violating the settlement, and thus taking adverse action against him, on or about March 11, 2003, his December 11, 2003 filing was well beyond the 180 day limitation period. Moreover, the ALJ found that Tri-Boro’s alleged breach of promise not to contest Thissen’s workers’ compensation claim, even if true, constituted a discrete, not continuing, adverse action. We find that the alleged failure to reinstate and failure to pay for fringe benefits are also discrete, not continuing, adverse actions.<sup>18</sup>

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<sup>16</sup> 29 C.F.R. § 1978.102(d)(2).

<sup>17</sup> 29 C.F.R. § 1978.102(d)(3).

<sup>18</sup> In *National R.R. Passenger Corp. v. Morgan*, the Supreme Court distinguished hostile work environment claims from those based on discrete acts of discrimination or retaliation. Discrete acts are easy to identify—failure to promote, denial of transfer, termination, refusal to hire. 536 U.S. 101, 114 (2002). “A discrete retaliatory or discriminatory act ‘occurred’ on the day that it ‘happened.’ A party therefore must file a charge within [the number of days allowed by statute] of the date of the act or lose the ability to recover for it.” *Id.* at 110.

By contrast, a hostile work environment continues over a series of days, or perhaps years, and a single act of harassment may not be actionable on its own. *Id.* at 115. Hostile work environment claims are based on the cumulative effect of individual acts. *Id.* Such

To determine whether to toll the 180 day limitations period, the ALJ relied upon *School Dist. of Allentown v. Marshall*.<sup>19</sup> In that case, which arose under whistleblower provisions of the Toxic Substances Control Act,<sup>20</sup> the court articulated three principal situations in which equitable tolling may apply: when the defendant has actively misled the plaintiff regarding the cause of action; when the plaintiff has in some extraordinary way been prevented from filing his action; and when the plaintiff has raised the precise statutory claim in issue but has done so in the wrong forum.<sup>21</sup> The ALJ found that these circumstances did not exist. And since Thissen filed his complaint more than 270 days after becoming aware of the settlement violations, he certainly did not meet the *Baldwin* diligence test noted above.<sup>22</sup> Therefore, tolling the statute of limitations here was not warranted.

Substantial evidence supports the ALJ's finding that Thissen unquestionably filed his complaint more than 180 days after learning that Tri-Boro was not complying with the settlement agreement. Moreover, Thissen did not prove circumstances that would warrant equitable tolling. Therefore, the ALJ properly granted Tri-Boro's motion for summary decision.<sup>23</sup>

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claims are not time-barred if all the acts comprising the claim are part of the same unlawful practice and at least one act happens within the limitations period. *Id.* at 117.

<sup>19</sup> 657 F.2d 16 (3d Cir. 1981). The Board, too, has relied upon *Allentown*. See e.g., *Santamaria v. EPA*, ARB No. 05-23, ALJ No. 04-ERA-025, slip op. at 4 (ARB Mar 31, 2005); *Henrich v. Ecolab, Inc.*, ARB No. 05-036, ALJ No. 04-SOX-51, slip op. at 3-4 (ARB Mar. 31, 2005).

<sup>20</sup> 15 U.S.C.A. § 2622 (West 1998).

<sup>21</sup> *Allentown*, 657 F.2d at 20. *Allentown* is consistent with § 1978.402(d)(3), although, we note that STAA regulations indicate that filing a complaint "with another agency" is not a circumstance justifying equitable tolling. 29 C.F.R. § 1978.102(d)(3).

<sup>22</sup> See n. 10.

<sup>23</sup> The ALJ wrote that since she found that the complaint was not timely filed, she "had no jurisdiction to make a determination on the merits of Complainant's complaint." R. D. & O. at 12. But the STAA limitations period is not jurisdictional and therefore is subject to waiver, estoppel, and equitable tolling. *Hillis v. Knochel Bros.*, ARB Nos. 03-136, 04-081, 04-148, ALJ No. 2002-STA-50, slip op. at 3 (ARB Oct. 19, 2004) citing *Ellis v. Ray A. Schoppert Trucking*, No. 92-STA-28 (Sec'y Sept. 23, 1992); *Nixon v. Jupiter Chem., Inc.*, No. 89-STA-3 (Sec'y Oct. 10, 1990); *Hicks v. Colonial Motor Freight Lines*, No. 84-STA-20 (Sec'y Dec. 10, 1985).

## CONCLUSION

Thissen did not timely file his objection and request for hearing. But the ALJ tolled the 30 day limitation period and denied summary decision on the basis of the untimely filing because Thissen demonstrated that his attorney misaddressed the letter and envelope containing his objection and request and because he immediately faxed the letter to OALJ after learning it had not received the objection and request. On the other hand, Thissen could not adequately justify application of equitable tolling of the 180 day statute of limitations for filing his complaint. Therefore, the ALJ properly granted summary decision to Tri-Boro. Since substantial evidence on the record as a whole supports the ALJ's findings, and she correctly applied relevant law, we **AFFIRM** her Recommended Decision and Order and **DENY** the complaint.

**SO ORDERED.**

**OLIVER M. TRANSUE**  
**Administrative Appeals Judge**

**M. CYNTHIA DOUGLASS**  
Chief Administrative Appeals Judge