In the Matter of:

MARK G. SABAN, **ARB CASE NO. 03-143**

COMPLAINANT, **ALJ CASE NO. 03-PSI-001**

v. **DATE: March 30, 2005**

MORRISON KNUDSEN,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Mark G. Saban, pro se, *Chicago, Illinois*

For the Respondent:
Keith R. Spiller, Esq., Eric S. Clark, Esq., *Thompson Hine LLP, Cincinnati, Ohio*

FINAL DECISION AND ORDER

This case arises under the whistleblower protection provision of the Pipeline Safety Improvement Act of 2002 (PSI or the Act).[1] In 1999, Morrison Knudsen became the contract manager for a project to build a processing plant. Saban Electric Co., a

[1] That provision prohibits a person who owns or operates a pipeline facility, or a contractor or subcontractor of such a person, from discharging or otherwise discriminating against an employee because the employee engaged in any of various protected activities, e.g., informing the employer (or the Federal government) about violations of pipeline safety orders or rules, or, after informing the employer about an illegal practice pertaining to pipeline safety, refusing to engage in that activity. *See* 49 U.S.C.A. § 60129 (a).

company owned solely by Mark G. Saban, subcontracted with Morrison Knudsen to install temporary power and underground electrical power for the project. A short time later, Morrison cancelled the contract because Saban had not performed according to code standards. On January 14, 2003, Saban filed a complaint with the U. S. Department of Labor in which he alleged that Morrison violated the PSI by terminating the contract.[2]

The Department of Labor's Occupational Safety and Health Administration (OSHA) denied Saban's complaint. Saban appealed OSHA's determination and requested a hearing with the Office of Administrative Law Judges. On June 6, 2003, Morrison filed a Motion to Dismiss and Request for Attorney's Fees (Motion to Dismiss).[3] Thereafter, the ALJ ordered Saban to show cause why the Motion to Dismiss should not be granted.[4] Saban responded to the OSC on July 3, 2003.

The Administrative Law Judge (ALJ) dismissed Saban's complaint in his Decision and Order of Dismissal dated July 25, 2003 (D. & O.). The ALJ found that since Saban filed the complaint in January 2003, more than the 180 day after the alleged violation occurred in 1999, the complaint was untimely as a matter of law.[5] The ALJ also found that since the alleged adverse action (Morrison Knudsen's terminating the contract in 1999) predated the PSI's effective date of December 17, 2002, and since Congress did not intend that the Act be applied retroactively, Saban's complaint should be dismissed.[6] Saban petitioned this Board for review of the D. & O.[7] The Board issued a briefing schedule on September 15, 2003, but neither party submitted a brief.[8]

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[2] Saban's complaint does not specify the protected activity that allegedly caused Morrison Knudsen to terminate the contract.

[3] Morrison contends in its Motion to Dismiss that: (1) the complaint is untimely; (2) the PSI does not address actions occurring before December 17, 2002, the day PSI became effective; (3) Saban was not an "employee" under the PSI; (4) Saban did not engage in protected activity as defined by the PSI; (5) Morrison is not an "employer" as defined by the PSI; and (6) the complaint is frivolous and an award of attorney's fees is appropriate.

[4] Order To Show Cause (OSC) dated June 11, 2003.

[5] D. & O. at 2. *See* 49 U.S.C.A. § 60129 (b) (1) (prescribing a 180-day limitation period for filing PSI complaints).

[6] D. & O. at 3.

[7] The Department of Labor had not issued regulations governing appeals of ALJ decisions under the PSI when the D. & O. was issued on July 25, 2003. As the ALJ noted, the D. & O. constituted an initial decision that would become the final decision of the Department unless there was "an appeal to, or review on motion of, the agency within the

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JURISDICTION AND STANDARD OF REVIEW

This Board has jurisdiction to review the ALJ's D. & O. pursuant to 49 U.S.C.A. § 60129(b)(3) and 29 C.F.R. § 1981.110. As in cases arising under the employee protection provisions of the environmental and nuclear whistleblower statutes, the ARB, as the Secretary's designee, acts with all the powers the Secretary would possess in rendering a decision.[9] The Board reviews the ALJ's findings of fact under the

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time provided by rule." D. & O. at 4 (citing 5 U.S.C.A. § 557(b)). Although the ALJ referred Saban's case to this Board, Saban subsequently requested review of the D. & O. by filing a Motion to Reconsider the Decision and Order of Dismissal.

[8] Saban instead submitted twelve motions. *See* September 8, 2003 Motion to Compel Documents A/K/A Notification & Written Response to the Complaint; September 17, 2003 Supplemental Motion to Compel Documents A/K/A Notification & Written Response to the Complaint; January 26, 2004 Motion to Submit New Evidence Establishing Irreparable Harm Due To Discrimination of Equal Justice for All; January 30, 2004 Supplemental Motion to Submit New Evidence Establishing Irreparable Harm Due To Discrimination of Equal Justice for All; March 9, 2004 Motion Strike the Memorandum In Opposition To Complainant's Motion to Submit New Evidence; March 15 2004 Motion to Strike the Memorandum In Opposition To Complainant's Motion to Submit New Evidence; April 13, 2004 Motion For Leave To Proceed In Forma Pauperis And A Copy Of Complainant's Petition For A Writ Certiorari Filed Before The Supreme Court Of The United States; Motions to Submit More Evidence of Judicial Discrimination While Kept in Duress (Number 1-4); August 13, 2004 Motion To Submit More Evidence Of Judicial Discrimination While Kept In Duress #5 (Office & Property). These motions are frivolous and do not address the ALJ's findings concerning timeliness and retroactivity. Therefore, we deny all of these motions. But we note that, generally, if a party fails to file a brief in support of his petition for review, the Board will dismiss the party's appeal for failure to prosecute. *See, e.g., McQuade v. Oak Ridge Operations Office*, ARB No. 02-087 (Oct. 18, 2002); *Pickett v. TVA*, ARB No. 02-076 (Oct. 9, 2002). Because Saban has indicated his intention to prosecute his case by filing the numerous motions in this case and because, as indicated below, we have determined that as a matter of law, we must dismiss the complaint because we may not apply the PSI retroactively to the facts of this case, we have decided, in this instance, to issue a decision on the merits rather than dismissing Saban's appeal because he failed to file a brief in support of his petition for review.

[9] *See* Administrative Procedure Act, 5 U.S.C.A. § 557(b) (West 1996); 29 C.F.R. § 24.8 (2001). *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 statutes listed at 29 C.F.R. § 24.1(a)).

substantial evidence standard.[10] The ARB engages in de novo review of the ALJ's conclusions of law.[11]

Morrison submitted evidence outside the pleadings in support of its Motion to Dismiss.[12] We therefore review the motion as one for summary decision pursuant to 29 C.F.R. § 18.40.[13] The Board reviews an ALJ's recommended grant of summary decision de novo, i.e., the same standard that the ALJ applies in initially evaluating a motion for summary decision governs our review.[14] The standard for granting summary decision is essentially the same as the one used in Fed. R. Civ. P. 56, the rule governing summary judgment in the federal courts.[15] Thus, pursuant to 29 C.F.R. § 18.40(d), the ALJ may issue summary decision "if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision."

Accordingly, the Board will grant summary decision if, upon review of the evidence in the light most favorable to the non-moving party, we conclude, without weighing the evidence or determining the truth of the matters asserted, that there is no genuine issue as to any material fact.[16]

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[10] 29 C.F.R. § 1981.110 (b).

[11] *See* Administrative Procedure Act, 5 U.S.C.A. § 557(b).

[12] *See* Motion to Dismiss, Exhibits 1-4.

[13] *See Erickson v. United States Envt'l Prot. Agency*, ARB No. 99-095, ALJ No. 1999-CAA-2, slip op. at 3 (ARB July 31, 2001).

[14] *Honardoost v. Peco Energy Co.*, ARB No. 01-030, ALJ 00-ERA-36, slip op. at 4 (ARB Mar. 25, 2003).

[15] *Hasan v. Burns & Roe Enterprises, Inc*., ARB No. 00-080, ALJ No. 2000-ERA-6, slip op. at 6 (ARB Jan. 30, 2001).

[16] *See Johnsen v. Houston Nana, Inc., JV,* ARB No. 00-064, ALJ No. 99-TSC-4, slip op. at 4 (ARB Feb. 10, 2003) ("[I]n ruling on a motion for summary decision we . . . do not weigh the evidence or determine the truth of the matters asserted. Viewing the evidence in the light most favorable to, and drawing all inferences in favor of, the non-moving party, we must determine the existence of any genuine issues of material fact.") (internal citation and quotation marks omitted); *Stauffer v. Wal-Mart Stores, Inc.,* ARB No. 99-107, ALJ No. 99-STA-21, slip op. at 6 (ARB Nov. 30, 1999).

DISCUSSION

Since we are bound to view Saban's evidence in the light most favorable to it, we assume that the allegations of his complaint are true: that he engaged in activity that the PSI protects and that Morrison Knudsen cancelled the contract because of his protected activity. Even so, we agree with the ALJ's conclusion that, as a matter of law, the PSI does not apply and that Morrison Knudsen is therefore entitled to summary decision.[17]

In determining whether the PSI may be retroactively applied, the ALJ properly relied upon U. S. Supreme Court's decision in *Landgraf v. USI Film Products.*[18] The Court in *Landgraf* reviewed its jurisprudence underlying the presumption against statutory retroactivity.[19] The Court then summarized the methodology for determining whether to apply a statute retroactively.

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.[20]

Neither the plain language of the PSI nor its legislative history evinces congressional intent to apply the PSI retroactively.[21] Furthermore, applying the PSI to the 1999 contract cancellation would impair rights Morrison possessed when it acted,

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[17] D. & O. at 3.

[18] 511 U.S. 244 (1994).

[19] *Id.* at 270-273.

[20] *Id*. at 280.

[21] *See* 49 U.S.C.A. § 60129; *see also* 148 CONG. REC. S11067-01 (November 14, 2002); H.R. REP. NO. 107-605(I), reprinted in 2002 U.S.C.C.A.N. 1958 (2002).

increase its liability for past conduct, and impose new duties with respect to a transaction it had already completed. Therefore, the traditional presumption against applying statutes retroactively governs here.[22] Saban's response to the OSC contains no contrary authority, nor has he informed us of such authority. As a result, we grant Morrison Knudsen's Motion to Dismiss and **DENY** the complaint.[23]

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

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[22] *See Landgraf*, 511 U.S. at 279-80.

[23] We agree with the ALJ's conclusion that Morrison is not entitled to attorney's fees under 49 U.S.C.A. § 60129(b)(3)(c). D. & O. at 4. Therefore, we affirm the ALJ's order denying Morrison Knudsen's request for attorney's fees. We do, however, disagree with the ALJ's conclusion that, as a matter of law, Saban's complaint is untimely. D. & O. at 2. The ALJ came to this conclusion by retroactively applying the PSI's provision concerning the limitation period for filing complaints. *See* 49 U.S.C.A. § 60129(b)(1). This constitutes error because, as we have discussed and decided, the PSI does not apply retroactively.