In the Matter of:

CLIFFORD E. HILLIS,	**ARB CASE NOS. 03-136**
	04-081
COMPLAINANT,	**04-148**
v.	**ALJ CASE NO. 2002-STA-50**
KNOCHEL BROTHERS, INC.,	**REISSUED**
	DATE: March 31, 2006
RESPONDENT.	

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Mark Wesbrooks, Esq., Mia Wesbrooks, Esq., Joseph G. Yannetti, Esq.,
The Wesbrooks Law Firm, PLLC, Phoenix, Arizona

For the Respondents:
Kenneth W. Maxwell, Esq., *Bauman Loewe & Witt, PLLC, Scottsdale, Arizona*

FINAL DECISION AND ORDER ON REMAND

This matter is before us on remand from the United States Court of Appeals for the Ninth Circuit, *Hillis v. United States Dep't of Labor*, No. 05-70041, LABR No. 03-136. In a complaint filed on September 3, 2002, Clifford E. Hillis alleged that Knochel Brothers, Inc. fired him in violation of the employee protection provisions of the Surface Transportation Assistance Act (STAA) of 1982, as amended, 49 U.S.C.A. § 31105 (West 1997) and implementing regulations at 29 C.F.R. Part 1978 (2005). For the following reasons, we dismiss his complaint.

BACKGROUND

Hillis worked for Knochel Brothers as a heavy equipment hauler. Knochel Brothers fired Hillis on October 3, 2001. Recommended Decision and Order (R. D. & O.) at 2. On October 5, 2001, Hillis and his wife, Andi Hillis, made phone calls to the Arizona Division of Occupational Safety and Health (Arizona's OSHA) and the Arizona Labor Board, seeking redress for what Hillis deemed was a wrongful termination. R. D. & O. at 5, Transcript (Tr.) 140-42. Mrs. Hillis made a similar phone call to the Arizona Department of Transportation on October 22, 2001, as well as a second phone call to Arizona's OSHA on October 26, 2001. Tr. 142. Each of these agencies told the Hillises that they lacked jurisdiction over Mr. Hillis's claim. R. D. & O. at 14, Tr. 141-42.

Mrs. Hillis contacted the White House by phone, letter and e-mail to complain about the termination of her husband's employment, but received no response. T. 146. She also contacted the Equal Employment Opportunity Commission (EEOC). *Id.*[1] The EEOC provided her with a list of 48 labor attorneys. One of those attorneys suggested to Mrs. Hillis that she contact both the United States Department of Labor's Occupational Safety and Health Administration (OSHA) and Senator John McCain.[2] Mrs. Hillis spoke to an investigative administrator in OSHA's Hawaii office in September 2002,[3] who informed her of both the 180-day filing deadline and the requirements for equitable tolling. R. D. & O. at 5, Tr. 171.

Hillis filed his complaint with OSHA on September 3, 2002. OSHA issued a ruling on September 4, 2002, finding that Hillis's complaint was untimely. Hillis thereafter requested a hearing before an Administrative Law Judge (ALJ). The ALJ held a hearing on February 26, 2003, during which both parties addressed the issue of timeliness as well as the merits of Hillis's complaint. On July 21, 2003, the ALJ issued the R. D. & O. The ALJ concluded that, although Hillis's complaint was filed with OSHA after expiration of the 180-day STAA filing period, his efforts to assert his rights in other venues entitled him to equitable tolling. R. D. & O. at 14. The ALJ proceeded to the merits of Hillis's complaint and concluded that Knochel Brothers violated the STAA by firing Hillis. R. D. & O. at 28.

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[1] The record does not contain any information verifying the dates upon which Mrs. Hillis contacted the White House or the EEOC.

[2] The record does not indicate the date upon which Mrs. Hillis contacted Senator McCain. She received a reply from Senator McCain on September 16, 2002. Complainant's Exhibit (CX) 9.

[3] Mrs. Hillis testified that she contacted OSHA in September 2002 but did not indicate whether this contact took place before or after Mr. Hillis filed his complaint with OSHA on September 3, 2002.

On August 1, 2003, Knochel Brothers filed a Petition for Review of the ALJ's ruling with this Board. We issued a Final Decision and Order (F. D. & O.) reversing the ALJ's ruling on October 19, 2004. We noted that employees alleging retaliation in violation of the STAA must file their complaints with OSHA no more than 180 days after occurrence of the alleged violation. We also noted that the STAA limitations period is not jurisdictional and therefore is subject to waiver, estoppel, and equitable tolling. However, we held that Hillis was not entitled to equitable tolling because "the STAA regulations cite filing with another agency as a circumstance not justifying equitable tolling." F. D. & O. at 3, citing 29 C.F.R. § 1978.102(d)(3)(2004).

Hillis filed a petition for review of our F. D. & O. with the United States Court of Appeals for the Ninth Circuit. On October 17, 2005, the Assistant Secretary for Occupational Safety and Health requested the court to remand the case to this Board to allow the Board to consider further its interpretation of 29 C.F.R. § 1978.102(d)(3) in light of that provision's legislative history and to explore whether there are any other grounds for decision under the facts and applicable law. The Court of Appeals granted the motion to remand on October 26, 2005. The Board issued an order on December 12, 2005, requesting briefing from the parties and the Assistant Secretary. Both parties and the Assistant Secretary submitted briefs.

ISSUES BEFORE THE BOARD

1) Do the STAA regulations preempt the equitable principle that allows tolling of a limitations period when a complainant files "the precise statutory claim in the wrong forum?"

2) Did Hillis file "the precise statutory claim in the wrong forum?"

3) If equitable tolling is applicable to Hillis's complaint, was the filing period tolled for a sufficient amount of time to render the complaint Hillis filed with OSHA on September 3, 2002 timely?

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board the authority to issue final agency decisions under, inter alia, the STAA and the implementing regulations at 29 C.F.R. Part § 1978. Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002). Under the STAA, the ARB is bound by the ALJ's factual findings if supported by substantial evidence on the record considered as a whole. 29 C.F.R. § 1978.109(c)(3); *Lyninger v. Casazza Trucking Co.*, ARB No. 02-113, ALJ No. 01-STA-38, slip op. at 2 (ARB Feb. 19, 2004). Substantial evidence is that which is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Clean Harbors Envtl. Servs. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998), quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971);

McDede v. Old Dominion Freight Line, Inc., ARB No. 03-107, ALJ No. 03-STA-12, slip op. at 3 (ARB Feb. 27, 2004).

In reviewing the ALJ's legal conclusions, the ARB, as the Secretary's designee acts with "all the powers [the Secretary] would have in making the initial decision . . .." 5 U.S.C.A. § 557(b) (West 2004). Therefore, we review the ALJ's legal conclusions de novo. *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991); *Monde v. Roadway Express, Inc.*, ARB No. 02-071, ALJ Nos. 01-STA-22, 01-STA-29, slip op. at 2 (ARB Oct. 31, 2003).

DISCUSSION

A. Governing Law

The STAA protects employees making complaints relating to violations of commercial motor vehicle safety requirements from employer retaliation affecting their pay, terms, or privileges of employment. 49 U.S.C.A. § 31105(a)(1)(A).[4] Employees alleging employer retaliation in violation of the STAA must file their complaints with OSHA within 180 days after the alleged violation occurred. 49 U.S.C.A. § 31105(b)(1).[5] The STAA limitations period is not jurisdictional and therefore is subject to waiver, estoppel, and equitable tolling. *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).

The regulations implementing the STAA provide that:

> [T]here are circumstances which will justify tolling of the 180-day period on the basis of recognized equitable principles or because of extenuating circumstances, e.g., where the employer has concealed or misled the employee regarding the grounds for discharge or other adverse action; or where the discrimination is in the nature of a continuing violation. The pendency of grievance-arbitration proceedings **or filing with another agency** are examples of

[4] "A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because ... the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding . . .."

[5] "An employee alleging discharge, discipline, or discrimination in violation of subsection (a) of this section, or another person at the employee's request, may file a complaint with the Secretary of Labor not later than 180 days after the alleged violation occurred."

> circumstances which do not justify a tolling of the 180-day period.

29 C.F.R. § 1978.102(d)(3) (emphasis added). This regulation contains nearly identical language to that found in 29 C.F.R. § 1977.15(d)(3) (the OSH Act tolling regulation), which governs discrimination complaints filed under section 11(c) of the Occupational Safety and Health Act (the OSH Act), 29 U.S.C.A. § 660(c). We therefore interpret the two regulations as providing identical circumstances under which a late filing will be accepted. *See, e.g., Flowers v. Southern Reg'l Physician Servs., Inc.*, 247 F.3d 229, 233 (5th Cir. 2001) ("in determining the meaning of a particular statutory provision, it is helpful to consider the interpretation of other statutory provisions that employ the same or similar language.")

Prior to August 1985, 29 C.F.R. § 1977.15(d)(3) provided:

> However, there may be circumstances which would justify tolling of the 30-day period on recognized equitable principles or because of strongly extenuating circumstances, e.g., where the employer has concealed, or misled the employee regarding the grounds for discharge or other adverse action; where the employee has, within the 30-day period, resorted in good faith to grievance-arbitration proceedings under a collective bargaining agreement **or filed a complaint regarding the same general subject with another agency**; where the discrimination is in the nature of a continuing violation. In the absence of circumstances justifying a tolling of the 30-day period, untimely complaints will not be processed.

29 C.F.R. § 1977.15(d)(3)(1984) (emphasis added). OSHA modified this provision in August 1985, by final interpretive rule, "to expressly state that the pendency of grievance-arbitration proceedings or filing with another agency does not toll the 30-day period for filing section 11(c) complaints." 50 Fed. Reg. 32844, 32846 (Aug. 15, 1985).[6] OSHA noted that these two tolling exceptions were invalid pursuant to the Supreme Court's rulings in *International Union of Electrical Workers v. Robbins & Meyers*, 429 U.S. 229 (1976), and *Delaware State Coll. v. Ricks*, 449 U.S. 250 (1980). In those cases, the Court held that the pendency of the plaintiffs' grievances did not toll the applicable limitations periods. 50 Fed. Reg. at 32845-46.

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[6] The final interpretive rule also states that "the grievance-arbitration and filing with another agency tolling provisions are being deleted from 20 C.F.R. § 1977.15(d)(3) and that paragraph is being modified to expressly state that the pendency of grievance-arbitration proceedings or filing with another agency does not toll the 30-day period for filing of section 11(c) complaints." *Id.* (emphasis added).

The OSH Act tolling regulation now reads as follows:

> However, there may be circumstances which would justify tolling of the 30-day period on recognized equitable principles or because of strongly extenuating circumstances, e.g., where the employer has concealed, or misled the employee regarding the grounds for discharge or other adverse action; or where the discrimination is in the nature of a continuing violation. The pendency of grievance-arbitration proceedings **or filing with another agency**, among others, are circumstances which do not justify tolling the 30-day period. In the absence of circumstances justifying a tolling of the 30-day period, untimely complaints will not be processed.

29 C.F.R. § 1977.15(d)(3)(2005) (emphasis added). It is thus clear that the phrase "filing with another agency" in the modified regulation replaces the phrase "filed a complaint regarding the same general subject with another agency" in the predecessor regulation. The final interpretive rule indicates that the phrase "filed a complaint regarding the same general subject with another agency" refers to the pursuit of alternative remedies with agencies having jurisdiction to award relief under statutes other than the OSH Act. *See* 50 Fed. Reg. at 32845-46.

Following this change in the OSH Act tolling regulation, OSHA issued interim rules to govern whistleblower actions under the STAA in November 1986. 51 Fed. Reg. 42091 (Nov. 21, 1986). These rules stated that "[t]he pendency of grievance-arbitration proceedings or filing with another agency are examples of circumstances which do not justify a tolling of the 180-day period. *International Union of Electrical Workers v. Robbins & Meyers*, 429 U.S. 229 (1976)." 51 Fed. Reg. at 42092. This language, minus the reference to *Robbins*, was included in the final rule published in November 1988. 53 Fed. Reg. 47676, 47682 (Nov. 25, 1988). This is also the language that survives in the current version of 29 C.F.R. § 1978.102(d)(3).

Upon examination of the relevant interim and final agency rules, we find that the regulatory history of the OSH Act tolling regulation indicates that the phrase "filing with another agency" refers to those cases in which a complainant has "filed a complaint regarding the same general subject with another agency." We also find that the STAA tolling regulation borrows almost the exact language from the OSH Act tolling regulation. We therefore conclude that the phrase "filing with another agency" in 29 C.F.R. § 1978.102(d)(3) refers to complaints filed "regarding the same general subject with another agency," i.e., the pursuit of alternative remedies with agencies having jurisdiction to award relief under statutes other than the STAA.

B. The STAA Tolling Regulation Does Not Conflict With Case Law Permitting Tolling

The next question before us is whether 29 C.F.R. § 1978.102(d)(3), which precludes equitable tolling when a complaint is "file[d] with another agency," preempts the equitable principle that permits tolling when a complainant files "the precise statutory claim in the wrong forum." We conclude that it does not.

The Board is guided by the principles of equitable tolling that courts have applied to cases with statutorily-mandated filing deadlines in determining whether to relax the limitations period in a particular case. *Hemingway v. Northeast Utilities*, ARB No. 00-074, ALJ Nos. 99-ERA-014, 015, slip op. at 4 (ARB Aug. 31, 2000); *Gutierrez v. Regents of the Univ. of Cal.*, ARB No. 99-116, ALJ No. 98-ERA-19, slip op. at 2 (ARB Nov. 8, 1999). In *School District of the City of Allentown v. Marshall*, 657 F.2d 16, 18 (3d Cir. 1981), the court held that a statutory provision of the Toxic Substances Control Act, 15 U.S.C. § 2622(b)(1976 & Supp. III 1979), providing that a complainant must file a complaint with the Secretary of Labor within 30 days of the alleged violation, is not jurisdictional and may therefore be subject to equitable tolling. The court recognized three situations in which tolling is proper:

> (1) [when] the defendant has actively misled the plaintiff respecting the cause of action,
> (2) the plaintiff has in some extraordinary way been prevented from asserting his rights, or
> (3) the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum.

Id. at 20 (citation omitted).

At first glance, the third category espoused in *Allentown* appears to describe a complaint that has been "fil[ed] with another agency," as described in the STAA regulations. However, the phrase "filing with another agency" refers to the pursuit of remedies with agencies having jurisdiction to award relief under statutes other than the STAA. As stated above, when OSHA amended the OSH Act tolling regulation, its failure to preserve intact the phrase "filed a complaint regarding the same general subject with another agency" was not intended to eliminate tolling for a complaint presenting an OSH Act claim in the wrong forum.

The same is true for the language of the STAA tolling regulation, which was based upon the OSH Act tolling regulation. The phrase "filing with another agency" refers to proceedings initiated in the pursuit of remedies created by statutes or regulations other than the STAA. We therefore conclude that the phrase "filing with another agency" in 29 C.F.R. § 1978.102(d)(3) does not preclude us from tolling the limitations period when a complainant has filed a STAA complaint in the wrong forum.

C. Hillis's Calls to Various Agencies Immediately After His Firing Did Not Constitute Filing "the Precise Statutory Claim … in the Wrong Forum"

In our October 19, 2004 F. D. & O., we stated that Hillis "made a claim, by telephone, with the Arizona Division of Occupational Safety and Health …" F. D. & O. at 1. In doing so we deferred to the ALJ's factual finding that "Mrs. Hillis filed a complaint by telephone with Arizona's OSHA on October 5, 2001." R. D. & O. at 14. However, in light of our re-examination of the law governing this case, we now hold that Hillis did not file a claim with any of the agencies either he or his wife contacted following termination of his employment.

When seeking equitable tolling of a statute of limitations, the complainant bears the burden of demonstrating the existence of circumstances supporting tolling. *Herchak v. America West Airlines, Inc*., ARB No. 03-057, ALJ No. 2002-AIR-12 (ARB May 14, 2003), citing *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). The complainant must prove that she has mistakenly "filed" the precise statutory claim in issue in the wrong forum, but within the filing period. *Immanuel v. Wyoming Concrete Indus., Inc.*, 1995-WPC-3, slip op. at 3 (ARB May 28, 1997).

The Hillises contacted a number of state agencies following Mr. Hillis's firing. However, Mrs. Hillis testified that none of these agencies took her husband's name or generated a report. Tr. 141. Additionally, each agency told her that they lacked jurisdiction to receive Mr. Hillis's complaint. Tr. 141-42. The record indicates that the Hillises received immediate notice from the agencies they contacted that they were in the wrong forum. We therefore conclude that neither Hillis nor his wife filed complaints with any agency prior to filing his complaint with OSHA on September 3, 2002.

D. Even If Hillis's Phone Calls Constituted "Filing" in the Wrong Forum, His OSHA Complaint is Untimely

We conclude that, following termination of his employment with Knochel Brothers, neither Hillis nor his wife filed any complaints prior to filing his OSHA complaint. We also conclude that, even if the Hillises' phone calls to the aforementioned state agencies constituted filed complaints, Hillis has failed to show that the limitations period could be tolled for a sufficient number of days to render his OSHA complaint timely.

"In tolling statutes of limitations, courts have typically assumed that the event that 'tolls' the statute simply stops the clock until the occurrence of a later event that permits that statute to resume running." *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1195 (9th Cir. 2001). In this case, the limitations period was stopped only during those days when the Hillises were unaware that Mr. Hillis's complaint had been filed in the wrong forum.

The statute resumed running once the Hillises were aware that they had not filed a complaint in the proper forum. We look to the record to establish those dates.[7]

Hillis was fired on October 3, 2001. He reported his termination to Arizona's OSHA and the Arizona Labor Board on October 5, 2001. He contacted the Arizona Department of Transportation on October 22, 2001, and made a second phone call to Arizona's OSHA on October 26, 2001. During each of these contacts the Hillises were informed that these agencies had no jurisdiction over Hillis's complaint. Tr. 141-42. Therefore, viewing the evidence in the light most favorable to Hillis, the STAA's 180-day filing period was tolled for less than one month, i.e., from the first contact with Arizona's OSHA on October 5, 2001, until Hillis received a second notice from Arizona's OSHA on October 26, 2001, that it lacked jurisdiction over his complaint.

Once Hillis was aware that Arizona's OSHA had no jurisdiction to accept his complaint, the 180-day filing period resumed running and it became his duty to resume his efforts to find the proper forum. It follows that the limitations period expired no later than May 2002, well before Hillis filed his complaint with OSHA in September 2002. We therefore conclude that Hillis has failed to show that the limitations period governing his complaint could be tolled for a sufficient number of days to render his OSHA complaint timely.

E. Hillis Does Not Meet Any of the Other Requirements for Tolling

Hillis has failed to prove that, pursuant to *Allentown,* he filed the "precise statutory claim…in the wrong forum." Additionally, he has failed to prove the existence of other factors that would justify tolling of the limitations period governing his STAA complaint. Hillis contends that the limitations period should be tolled because he was unfamiliar with the filing requirements. Complainant's Brief at 3, 12. This is not grounds for equitable tolling. *See, e.g., Allentown, supra*, 657 F.2d at 21 (ignorance of the law is not a basis for equitable tolling). Hillis's asserted grounds for his delay in filing do not indicate that he was "in some extraordinary way been prevented from asserting his rights." *Id*. at 20. Finally, Hillis does not contend that Knochel Brothers ever misled him regarding any cause of action he may have pursuant to the STAA. *Id.*

CONCLUSION

Hillis failed to file a STAA complaint with OSHA within 180 days of his discharge, and he has not shown that the filing period governing his complaint could be equitably tolled for a sufficient number of days to render his complaint timely.

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[7] Hillis does not contend that he attempted to file a complaint with the EEOC. However, Hillis contends that he "filed the precise claim (via phone call, email and letter) with the executive offices of the White House." Complainant's Brief at 8. The record does not contain information verifying the dates upon which Mrs. Hillis contacted the White House. We therefore cannot consider those contacts to be claims filed pursuant to the STAA.

Therefore, his complaint is **DISMISSED**. The Board's decision in this case issued on October 14, 2004, is withdrawn.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge