In the Matter of:

CHARLES COMISKEY, **ARB CASE NO. 07-055**

COMPLAINANT, **ALJ CASE NO. 2007-CER-001**

v. **DATE: July 22, 2008**

BHE ENVIRONMENTAL, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Richard E. Condit, Esq., *PEER,* Washington, District of Columbia

For the Respondent:
Brian P. Gillan, Esq., *Wood & Lamping, LLP,* Cincinnati, Ohio

FINAL DECISION AND ORDER

The Complainant, Charles Comiskey, filed a complaint on February 6, 2006, with the Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that his employer, the Respondent, BHE Environmental, Inc., terminated his employment in violation of the whistleblower protection provisions of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),[1] the Toxic Substances Control Act (TSCA),[2] and the Safe Drinking Water Act (SDWA),[3]

[1] 42 U.S.C.A. § 9610 (West 2005).

[2] 15 U.S.C.A. § 2622 (West 1998).

and their implementing regulations.[4] The question before the Administrative Review Board is whether Comiskey has carried his burden of establishing that he timely filed a request for a hearing before a DOL Administrative Law Judge where OSHA issued its Findings on December 22, 2006, and Comiskey did not file a request for a hearing until January 9, 2007. We conclude that Comiskey has not carried his burden of proving that his hearing request was timely when the only explanation he proffered to explain why his attorney did not receive OSHA's Findings until almost twelve days after OSHA issued them (when counsel for the Respondent received the Findings in four days and the Office of Administrative Law Judges (OALJ) received the Findings in five days) was that his attorney was absent from her office during the holiday season and therefore was not available to receive the Findings until January 3, 2007.

BACKGROUND

On December 19, 2006, an OSHA Regional Investigator from the Atlanta regional office informed Comiskey's counsel that the Regional Administrator's Findings in response to Comiskey's whistleblower complaint under the CERCLA, TSCA, and SDWA would be sent out by certified mail shortly before December 25, 2006. The counsel understood that both Comiskey and she would be served with the Findings and she immediately called Comiskey to inform him that OSHA would issue the Findings soon.[5] On December 22, 2006, the OSHA regional office issued the Secretary's Findings in this matter. OSHA found that, upon investigation, Comiskey's complaint had no merit. OSHA sent a copy of the closing letter, which explained the rationale for its decision, to Comiskey's attorney. The letter explained, "Respondent and Complainant have 5 days from the receipt of these Findings to file objections and to request a hearing before an Administrative Law Judge (ALJ). If no objections are filed, these Findings will become final and not subject to court review."

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[3] 42 U.S.C.A. § 300j-9(i) (West 2003).

[4] The Department of Labor (DOL) has amended the CERCLA, TSCA, and SDWA implementing regulations, found at 29 C.F.R. Part 24, since Comiskey filed his complaint. 72 Fed. Reg. 44,956 (Aug. 10, 2007). Since Comiskey filed his whistleblower complaint prior to the effective date of the amendments, and DOL has not indicated that the new regulations should be applied retroactively, we will apply the regulations in effect when Comiskey filed his complaint. *Sysko v. PPL Corp.*, ARB No. 06-138, ALJ No. 2006-ERA-023, slip op. at 3-4 n.2 (ARB May 27, 2008). *See Ramos v. Lee County School Bd.*, No. 2:04CV308FTM-33SPC, 2005 WL 2405832, at *2 n.4 (M.D. Fla. Sept. 29, 2005).

[5] Response to Motion to Dismiss Action in the Matter of Charles Comiskey, Complainant v. BHE Environmental, Inc., Respondent (Feb. 13, 2007) (R. M. D.).

Respondent BHE received its copy of the Findings on December 26, 2006. The Office of Administrative Law Judges (OALJ), in Washington, D.C., received its copy of the Findings and closing letter on December 27, 2006. But Comiskey's counsel was absent from her office during the holidays and was not able to accept delivery of her copy of the Findings until January 3, 2007.[6]

Later that day, Comiskey faxed a request for hearing to the OALJ. He also informed the ALJ that his former counsel was unable to continue to represent him. By letter dated January 12, 2007, BHE filed a "procedural objection" to the timeliness of Comiskey's hearing request. BHE contended:

> Our office received [OSHA's] findings (by certified mail, return receipt requested) on December 26, 2006, which is a reasonable period for regular mail delivery to Cincinnati from Atlanta following a December 22 postmark. The office of Complainant's counsel . . . is in suburban Atlanta. Findings mailed on December 22 would have reached her office as early as December 23 (a Saturday), and certainly by December 26 (the next business day, in light of the intervening Sunday and Christmas holiday) – the day we received the findings 500 miles away in Cincinnati.[7]

In response, the ALJ issued an Order to Show Cause Why Motion to Dismiss Should Not Be Granted. The Order informed Comiskey that BHE had filed a Motion to Dismiss his complaint on the grounds that he had failed to timely request a hearing as provided in 29 C.F.R. § 24.4(d)(2). The ALJ gave Comiskey ten days to file a response to his Order.

Comiskey responded "in opposition to the motion filed by Respondent, BHE Environmental, Inc." He contended that OSHA sent the Findings to his counsel by certified mail and that she received and signed for the letter on January 3, 2007. He further averred that on January 9, she called Comiskey to inquire why he "had not contacted her about a response to the Findings," and when Comiskey informed her that he had not received the Findings, she faxed a copy to him. Shortly thereafter, Comiskey faxed a hearing request to the OALJ. Accordingly, Comiskey asserted that his hearing request was timely because it was filed within 5 days of the date his counsel received the Findings.[8]

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[6] Complainant's Initial Brief in Opposition to the ALJ's Recommended Decision and Order Dismissing Complaint (C. I. B.) at 3.

[7] Letter from BHE to Chief Administrative Law Judge (Jan. 12, 2007) at 1.

[8] R. M .D.

The ALJ agreed with BHE that Comiskey bore the burden of establishing that he timely filed his hearing request and that because he failed to submit evidence establishing when his attorney received the Findings, he had failed to carry his burden.[9] The ALJ noted that 29 C.F.R. § 18.4(c)(3) "provides guidance as to [the] presumed receipt of a document which is mailed, in the absence of proof of receipt."[10] This regulation states that if a party has the right or is required to take an action within a specified period after a document is served on the party by mail, five days shall be added to the specified period for filing. Applying that guidance to the facts of this case, the ALJ concluded that it should be presumed that Comiskey's counsel received the Findings by December 27, 2006, and therefore the hearing request would have been due no later than January 5, 2007.[11]

The ALJ acknowledged that the Board has held that the limitations period for filing a hearing request is not jurisdictional and is subject to the principles of equitable tolling.[12] But the ALJ found that Comiskey had failed to adduce any evidence that would meet the limited grounds for granting such relief. Accordingly, the ALJ recommended that Comiskey's claim be dismissed.

Comiskey filed a timely petition with the Administrative Review Board requesting the Board to review the ALJ's R. D. & O. The Board issued a Notice of Appeal and Order Establishing Briefing Schedule, and both Comiskey (once again represented by counsel) and BHE filed briefs with the Board.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board her authority to issue final agency decisions under the environmental statutes at issue here.[13]

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[9] Recommended Decision and Order Dismissing Complaint (R. D. & O.) at 1-2.

[10] *Id.* at 1 n.1.

[11] *Accord Crosier v. Westinghouse Hanford Co.*, 1992-CAA-003, slip op. at 10 (Off. Adm. App. Jan. 12, 1994)(when record did not reveal when the complainant actually received the Findings, ALJ properly deemed them to have been received on the fifth day following the day on which they were issued). *But see Staskelunas v. Northeast Utils. Co.*, ARB No. 98-035, ALJ No. 1998-ERA-008, slip op. at 3 n.5 (ARB May 4, 1998)(declining to apply ALJ Part 18 regulations and holding that if there is a dispute as to the actual date of receipt, the complainant bears the burden of establishing that his or her request for hearing was timely filed).

[12] R. D. & O. at 2.

[13] Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002); 29 C.F.R. § 1980.110(a).

We review a recommended decision granting summary decision de novo.[14] That is, the standard the ALJ applies, also governs our review.[15] The standard for granting summary decision is essentially the same as that found in the rule governing summary judgment in the federal courts.[16] Accordingly, summary decision is appropriate if there is no genuine issue of material fact. The determination of whether facts are material is based on the substantive law upon which each claim is based.[17] A genuine issue of material fact is one, the resolution of which "could establish an element of a claim or defense and, therefore, affect the outcome of the action."[18]

We view the evidence in the light most favorable to the non-moving party and then determine whether there are any genuine issues of material fact and whether the ALJ correctly applied the relevant law.[19] "To prevail on a motion for summary judgment, the moving party must show that the nonmoving party 'fail[ed] to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'"[20] Accordingly, a moving party may prevail by pointing to the "absence of evidence proffered by the nonmoving party."[21] Furthermore, a party opposing a motion for summary decision "may not rest upon the mere allegations or denials of [a] pleading. [The response] must set forth specific facts showing that there is a genuine issue of fact for the hearing."[22]

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[14] Because the parties relied on evidence outside of the pleadings in litigation of this motion, we review it as a motion for summary decision under 29 C.F.R. § 18.40 and review the ALJ's R. D. & O. de novo, thereby applying the same legal standards that governed the ALJ's decision-making process. *See Salsbury v. Edward Hines, Jr. Veterans Hosp.*, ARB No. 05-014, ALJ No. 2004-ERA-007, slip op. at 4 (ARB July 31, 2007).

[15] 29 C.F.R. § 18.40 (2007).

[16] Fed. R. Civ. P. 56.

[17] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

[18] *Bobreski v. United States EPA*, 284 F. Supp. 2d 67, 72-73 (D.D.C. 2003).

[19] *Lee v. Schneider Nat'l, Inc.*, ARB No. 02-102, ALJ No. 2002-STA-025, slip op. at 2 (ARB Aug. 28, 2003); *Bushway v. Yellow Freight, Inc.*, ARB No. 01-018, ALJ No. 2000-STA-052, slip op. at 2 (Dec. 13, 2002).

[20] *Bobreski*, 284 F. Supp. 2d at 73 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

[21] *Bobreski*, 284 F. Supp. 2d at 73.

[22] 29 C.F.R. § 18.40(c). *See Webb v. Carolina Power & Light Co.*, No. 1993-ERA-042, slip op. at 4-6 (Sec'y July 14, 1995).

DISCUSSION

A party who wishes a DOL administrative law judge to conduct a de novo review of his or her environmental whistleblower complaint under the statutes at issue here must file a request for such review with the Chief Administrative Law Judge within five business days of the date of the receipt of the determination.[23] The party who requests a hearing bears the burden of establishing that he or she timely filed the request.[24]

The Atlanta regional OSHA office issued its Findings on December 22, 2006. BHE received them in Cincinnati, Ohio on December 26, 2006, and the OALJ in Washington, D.C. received the Findings on December 27, 2006. In response to BHE's motion to dismiss Comiskey's complaint on the grounds that his hearing request, filed on January 9, 2007, was untimely, Comiskey responded that because his counsel did not receive the Findings until January 3, 2007, his hearing request was timely filed. However, Comiskey's only explanation for why his counsel did not receive the Findings until eight or nine days after BHE and OALJ received them (even though her office is in suburban Atlanta) was that at the time the Findings were sent to Comiskey's counsel, she was out of town and thus she could not accept delivery until January 3, 2007.[25]

The environmental whistleblower regulations in effect when Comiskey filed his request for a hearing required expedited filing. These regulations have been strictly construed.[26] Nevertheless, knowing that it was OSHA's intention to issue the Findings before December 25, 2006, Comiskey's counsel made no provisions to assure that a timely request for hearing could be filed in her absence. In fact, even BHE concedes that had she simply acted expeditiously upon her return to the office, she still could have filed a timely notice of hearing.[27] She simply failed to do so.

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[23] 29 C.F.R. § 24.4(d)(2).

[24] *Staskelunas*, slip op. at 2.

[25] C. I. B. at 3.

[26] *Degostin v. Bartlett Nuclear, Inc.*, ARB No. 98-042, ALJ No. 1998-ERA-007, slip op. at 3 (ARB May 4, 1998); *Crosier*, slip op. at 10.

[27] Letter from BHE to Chief Administrative Law Judge (Jan. 12, 2007) at 2.

Parties' counsel can not circumvent the regulations' expedited filing requirements by absenting themselves from their offices and making themselves unavailable to accept delivery of the OSHA Findings.[28] This is especially true in this case in which Comiskey's counsel presumably knew of the expedited procedure for requesting a hearing and OSHA informed her that it intended to issue the Findings before December 25th. Counsel had an obligation to her client to make arrangements to protect his rights while she was unavailable and she failed to fulfill this obligation. Although Comiskey asserts that his attorney was under the misapprehension that he would be served with the Findings as well, Comiskey's counsel can not shift the professional obligations she assumed by agreeing to represent Comiskey to her client. While we recognize that Comiskey is not personally responsible for the failure of his attorney to timely file the hearing request, parties are ultimately responsible for the acts and omissions of their freely chosen representatives.[29] As the Supreme Court held in *Link v. Wabash Railroad Co.*, "[a]ny other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all fact, notice of which can be charged upon the attorney.'"[30]

In opposition to the ALJ's R. D. & O., Comiskey makes three arguments. First, he argues that BHE's alleged failure to serve him with a copy of its January 12th letter requesting that his claim be dismissed resulted in a prohibited ex parte communication with the ALJ and violated his due process because he was prevented from properly responding to BHE's request to dismiss his whistleblower complaint.[31] We reject this argument because it is raised before us for the first time on appeal.[32] Comiskey stated in

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[28] *Cf. Crosier*, slip op. at 11 (counsel's explanation that he did not timely file a hearing request because he was "on travel" does not fit within the prescribed reasons for equitable modification of the time deadlines in the employee protection provision regulations).

[29] *Dumaw v. International Brotherhood of Teamsters, Local 690*, ARB No. 02-099, ALJ No. 2001-ERA-006, slip op. at 5(ARB Aug 27, 2002).

[30] 370 U.S. 626, 633-634 (1962) (quoting *Smith v. Ayer*, 101 U.S. 320, 326 (1879)). The Court in *Link* did note, however, that "if an attorney's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is against the attorney in a suit for malpractice." 370 U.S. at 634 n.10.

[31] C. I. B. at 5-8

[32] *Stevenson v. Vertex Pharms., Inc.*, ARB No. 06-107, ALJ No. 2006-SOX-056, slip op. at 3 (ARB Feb. 29, 2008); *Stephenson v. Yellow Transp.*, ARB No. 06-133, ALJ No. 2004-STA-058, slip op. at 4 (ARB Jan. 31, 2008); *Montgomery v. Jack-in-the-Box*, ARB No. 05-129, ALJ No. 2005-STA-006, slip op. at 8 (ARB Oct. 31, 2007); *Rollins v. Am. Airlines, Inc.*, ARB No. 04-140, ALJ No. 2004-AIR-009, slip op. at 4 n.11 (ARB Apr. 3, 2007 (corrected)); *Carter v. Champion Bus, Inc.*, ARB No. 05-076, ALJ No. 2005-SOX-023, slip op. at 7 (ARB Sept. 29, 2006).

his response to the show cause order that he was responding "in opposition to the motion filed by Respondent, BHE Environmental, Inc." Thus it is indisputable that Comiskey knew that BHE had filed a motion to dismiss even if he never received a copy of it. The appropriate time to object to BHE's failure to serve him, therefore was in his response to the ALJ's show cause order, but Comiskey made no such assertion.

Secondly, Comiskey argues that the ALJ erred when he failed to adequately inform Comiskey of the nature of the response necessary to avoid dismissal of his complaint.[33] But even if we were to accept Comiskey's argument that the ALJ should have offered more assistance to him given his pro se status, this fact would not change our decision.

The ALJ recommended that Comiskey's complaint be denied because he failed to support his assertion that his attorney received the Findings on January 3, 2007, with "actual evidence or a sworn affidavit stating when he or his attorney received the Findings."[34] However upon de novo review and given Comiskey's concession that his counsel did not receive the Findings until January 3rd because she was absent from her office during the holidays (and had made no alternative arrangements to accept delivery of the Findings in her absence) as a matter of law, Comiskey can not prevail. Therefore even if we had found that the ALJ did not adequately inform Comiskey of his obligations in response to the motion for summary judgment, his error, at most, was harmless.

Finally, Comiskey argues that the ALJ's decision is not supported by evidence of which the Board should take official notice, including an acknowledgement from the Postal Service that Comiskey's counsel did not receive the Findings until January 3rd and an e-mail message from an OSHA employee confirming that OSHA only sent a copy of the Findings to Comiskey's designated legal representative. But again, even if this was the type of evidence of which the Board could properly take judicial notice (and we note that Comiskey has cited no legal support for his argument that it is), such notice would not resolve the fundamental defect in his case, i.e., that his counsel's absence from her office did not obviate her responsibility to arrange for acceptance of the OSHA Findings and the timely filing of the request for a hearing with the OALJ.

CONCLUSION

Comiskey's counsel's absence from her office when OSHA issued its Findings and her consequent inability to timely accept delivery of them does not excuse her failure to timely file a request for a hearing in her client's case. This is especially true given that OSHA informed her that it intended to issue the Findings before December 25th and nevertheless she made no arrangements for the timely receipt of the Findings and filing of

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[33] C. I. B. at 8-9.

[34] R. D. & O. at 2.

a request for a hearing. We conclude that Comiskey has failed to raise any material facts in dispute regarding the timeliness of his hearing request. Accordingly, we accept the ALJ's recommendation and **DISMISS** Comiskey's complaint.[35]

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge

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[35] On July 19, 2007, Comiskey filed Complainant's Motion to Strike and Complainant's Motion to Supplement the Record. In the Motion to Strike, Comiskey asked the Board to Strike the portions of BHE's "Reply Brief" that he had redlined and five Exhibit/Attachments to the Brief. With the exception of the statement that Comiskey was represented by counsel at the time the Findings were issued, our decision does not rely on any of the assertions to which Comiskey objects, so his motion as to those statements is moot and therefore we **DENY** it. As to the assertion that Comiskey was represented by counsel when the Findings were issued, this statement is fully supported by Comiskey's personal filings in this matter, e.g., "[t]he Findings were sent via certified mail to my attorney, Ms. Helen de Haven . . . ." (R. M. D.); "[o]n January 9, Ms. De Haven called to inquire why I had not contacted her about a response to the Findings" (R. M. D.); "[i]n my appeal letter, [dated January 9, 2007] I informed the Chief Judge that Ms. De Haven was no longer representing me and that I would be representing myself until I could secure new counsel. **From that point on**, . . . I served as my own counsel. . . . Respondent's contentions that Ms. De Haven was my counsel **after January 9th . . .** is incorrect speculation" Affidavit of Charles E. Comiskey (attached to Complainant's Reply to the Respondent's Brief (emphasis added), as well as the e-mail from Aaron Gaskins, the OSHA investigator, of which Comiskey has asked the Board to take judicial notice, i.e., "[a]s I explained to you . . . our records indicate that a copy [of the OSHA Findings] was not mailed to any another [sic] address except that **of your legal representative indicated at the time"** (emphasis added). Thus we **DENY** Comiskey's motion that we strike this statement.

In regard to Comiskey's Motion to Supplement the Record, as we stated above, we have reviewed these documents, and we do not find them to be material because they fail to address the determinative issue, i.e., whether Comiskey's counsel's absence from her office obviated her responsibility to arrange for acceptance of the OSHA Findings and the timely filing of the request for hearing with the OALJ. Thus we **DENY** this motion.