



Issue Date: 17 November 2004

In the Matter of:
Henry W.M. Immanuel
Complainant

Case Number: 2003-CAA-00018

v.

C&D Concrete
Respondent

ORDER

DENIAL OF MOTION FOR RE-ISSUANCE OF RECOMMENDED DECISION AND ORDER DENIAL OF MOTION FOR RECONSIDERATION

This case comes pursuant to Section 322(a)(1-3) of the Clean Air Act (42 USC §7622), Section 110(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (42 USC §9610), Section 507(a) of the Federal Water Pollution Control Act (33 USC §1367), Section 1450(i)(1)(A-C) of the Safe Drinking Water Act (42 USC §300j-9(i)), Section 7001(a) of the Solid Waste Disposal Act (SWDA) (42 USC §6971) and/or Section 23(a)(1-3) of the Toxic Substances Control Act (15 USC §2622) and 29 CFR Part 1978, implementing regulations found at 29 CFR Part 24, and the Rules of Practice and Procedure for Administrative Hearings.

The Complainant is represented by Richard E. Condit, Esquire, Washington, D.C. The Respondent is represented by Harriet E. Cooperman, Esquire and Patrick E. Clark, Esquire, Saul Ewing LLP, Baltimore, Maryland. On May 18, 2004, a hearing was held in Baltimore, Maryland, for the purpose of taking testimony on the issue of timeliness in this case. Thereafter, on September 10, 2004, I issued a Recommended Decision and Order granting the Respondent's Motion for Summary Decision based on the timeliness issue.

On October 15, 2004, the Complainant signed a Petition for Review of the Recommended Decision and Order as well as a Motion for Reconsideration and Re-Issuance thereof. These filings were received by the Office of Administrative Law Judges ("OALJ") on October 19, 2004, and October 25, 2004, respectively. On November 4, 2004, the Respondent signed a Memorandum in Opposition to the Complainant's Motion for Reconsideration and Re-Issuance of the Recommended Decision. The Respondent's filing was received by OALJ on November 5, 2004.

Motion for Re-issuance

The Complainant argues that there is "significant confusion" surrounding the deadlines he faces in appealing his case because of the discrepancy in dates between when I issued the Recommended Decision and Order and when he actually received it in the mail. *See*

Complainant's Motion at 2. Specifically, he alleges that, while my Recommended Decision and Order was issued September 10, 2004, he did not actually receive his copy in the mail until September 30, 2004. *Id.* at 1-2. In light of these date discrepancies, the Complainant requests that the Recommended Decision and Order be reissued.

The regulations provide that a petition for review of a recommended decision “must be received within ten business days of the date of the recommended decision ...” 29 CFR § 24.8(a). Taking the Complainant’s assertion as true, that he did not receive the Recommended Decision and Order until September 30, 2004, it is significant that his Petition for Review was not even signed until October 15, 2004, and not received by OALJ until October 19, 2004. Thus, as argued by the Respondent, “based on even the most generous measure of the deadline,” the Complainant’s Petition for Review was untimely.¹ *Respondent’s Memorandum* at 2-3. Consequently, as re-issuance would not serve to cure any such defects in filing, the Complainant’s Motion for Re-Issuance of the Recommended Decision and Order is denied.

Motion for Reconsideration

Although the procedure for filing a petition for review is specifically addressed in the Code of Federal Regulations, no such procedure is delineated with regard to filing a motion to reconsider. The likely reason is that neither the Clean Air Act, 42 U.S.C. § 7622, nor the implementing regulations at 29 C.F.R. Part 24, expressly authorize reconsideration of a Recommended Decision and Order by an administrative law judge (“ALJ”). Relevant cases suggest that an ALJ does not have jurisdiction over a matter once the Recommended Decision and Order has been issued. *See Willy v. The Coastal Corp.*, 1985-CAA-1, n. 1 (ALJ Dec. 4, 1997) (noting general lack of authority to reconsider, but finding it proper to correct clerical errors and the like); *Stephenson v. National Aeronautics & Space Administration*, 1994-TSC-5 (ALJ Jan. 6, 1998). *See also, Dutile v. Tighe Trucking, Inc.*, 1993-STA-31 (Sec’y Mar. 16, 1995); *Smith v. Tennessee Valley Auth.*, 1989-ERA-12 (Sec’y June 2, 1994); *Tankersley v. Triple Crown Servs., Inc.*, 1992-STA-8 (Sec’y Feb. 18, 1993); *Roberts v. Battelle Memorial Inst.*, 1996-ERA-24 (ALJ Jan. 15, 1997); *Rex v. Ebasco Servs., Inc.*, 1987-ERA-6 & 40 (ALJ Apr. 13, 1994)). Accordingly, it appears that I no longer have jurisdiction in the instant matter, since jurisdiction now lies with the Administrative Review Board.

Alternatively, I note Respondent’s argument that when the issue of filing deadlines for motions to reconsider has arisen in similar contexts, the deadline for filing petitions for review has served as a guide. *Respondent’s Memorandum* at 3. In that regard, Respondent cites the case of *Fowler v. Butts*, Case No. 92-WAB-01, 1992 WL 515932, at *2 (June 25, 1992), in which a motion for reconsideration was deemed untimely based on the deadline for filing a petition for review. Applying the ten business day deadline for filing petitions for review, set forth at 29 CFR § 24.8(a), it is clear that the Complainant’s motion for reconsideration is untimely. As observed by the Respondent, the deadline for the Complainant to file his Petition

¹ In other words, assuming that the Complainant had ten business days from September 30, 2004, the date he claims to have received the Recommended Decision and Order, his Petition for Review should have been filed by October 14, 2004, at the latest. However, as stated previously, his Petition for Review was not even signed until October 15, 2004, and not received by OALJ until October 19, 2004.

for Review was, at the very latest, October 14, 2004. *Respondent's Memorandum* at 3. However, his Motion for Reconsideration was not even signed until October 15, 2004 and was not received by OALJ until October 25, 2004. Thus, assuming that I did have jurisdiction to reconsider this matter, the Claimant failed to file a timely Motion requesting that I do so.

Notwithstanding that I lack jurisdiction to reconsider this matter and that, even assuming I did have jurisdiction in this matter, the Claimant failed to file a timely Motion for Reconsideration, I will nevertheless, in an abundance of caution, consider the substantive issues raised by the Claimant. The Claimant's first proposed ground for reconsideration is that I erred in assuming that his previous experience as an environmental whistleblower "provided adequate information to direct him regarding current filing requirements." *Claimant's Motion* at 2. In that regard, the Claimant contends that the procedures for filing an environmental whistleblower claim are different now than they were when he filed such claims in the past. *See id.* at 3. In emphasizing the alleged differences in filing environmental whistleblower claims, however, the Claimant sidesteps the fact that he is a relatively seasoned environmental whistleblower, who, after receiving two decisions on previous whistleblower claims, was on inquiry notice of the filing procedures. A relatively prudent person, who has been well-educated and who has filed environmental whistleblower claims in the past, would have confirmed the procedures for filing such claims.

The Claimant's second proposed ground for reconsideration is that I erred in deciding "it was highly unlikely that OSHA would have supplied the Complainant with ... misinformation" regarding the filing procedures. *Claimant's Motion* at 3 quoting *Recommended Decision and Order* at 15. The Claimant contends that there "exists a tangle of bureaucracies that administer whistleblower protection programs" and that I did not adequately consider the confusion faced by workers wishing to report whistleblower claims. *Id.* The Claimant then requests that I take judicial notice of information supplied on the U.S. Department of Labor's OSHA web site, which provides in pertinent part that "[w]orkers in the 23 states operating OSHA-approved State Plans may file complaints of employer discrimination with the state plan as well." *Id.* at 4 quoting <http://www.osha.gov/as/opa/worker/whistleblower.html>. Preliminarily, as argued by the Respondent, the information supplied on the web site is not newly discovered or previously unavailable evidence. *Respondent's Memorandum* at 6. It would therefore be inappropriate to take judicial notice of it at this stage. Moreover, in issuing my September 10, 2004 *Recommended Decision and Order*, I did consider the confusion faced by workers wishing to report whistleblower claims; I also weighed this confusion against other relevant factors, such as the Complainant's credibility, his educational background, and his experience in filing environmental whistleblower claims.

The Claimant's third proposed ground for reconsideration is that he lacked notice and the opportunity to brief the issues post hearing. At hearing, I advised the parties that the record would remain open to receive briefs from the parties; however, neither party chose to submit post-hearing briefs after the official transcript became available. Moreover, as argued by the Respondent, the issue of timeliness was the sole focus of both the Respondent's Motion for Summary Disposition and the Claimant's Cross-Motion for Summary Disposition, both of which were fully briefed prior to the hearing. *Respondent's Memorandum* at 7. The Claimant does not

contend that novel issues arose at hearing with respect to the timeliness issue nor does he now offer any argument that he would have presented in a post-hearing brief.

ORDER

Accordingly, **IT IS HEREBY ORDERED:**

The Complainant's Motion for Re-issuance of the Recommended Decision and Order and Motion for Reconsideration is **DENIED**.

SO ORDERED

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**DANIEL F. SOLOMON
ADMINISTRATIVE LAW JUDGE**