



**Issue Date: 25 June 2008**

CASE NO.: 2005-STA-00020

*In the Matter of:*

PAUL A. MILLER,  
Complainant,

vs.

BASIC DRILLING COMPANY,  
Respondent.

### **ORDER REFERRING CASE TO OSHA**

This matter is on remand from the Administrative Review Board (“ARB” or the “Board”). I am referring it back to the Occupational Safety and Health Administrative for investigation. We have been unable to locate Complainant, who likely is under the mistaken impression that his case has been closed, and who therefore, is taking no steps to prosecute the claim. It appears that his likely misimpression is not through any fault of his own. OALJ is not equipped to search for Complainant and asks OSHA to accomplish this with its investigative staff, if possible.

#### **HISTORY AND STATUS**

This is an action under the Surface Transportation Assistance Act. After being referred from OSHA, it was assigned to Administrative Law Judge Mapes. In June 2005, Judge Mapes recommended a decision dismissing the case as untimely filed.

ARB review of these cases is automatic. The ARB thus sent out its routine “Notice of Review and Briefing Schedule” on June 15, 2005. The file contains a certified mail return receipt that Complainant signed for the Notice on June 29, 2005. The notice had been addressed to 10300 Jersey Shore Avenue, Las Vegas, California 89135-1154.

As part of our current effort to locate Complainant, I checked the post office website ([www.usps.com](http://www.usps.com)), and learned that the zip code that the ARB used for Complainant corresponds with Las Vegas, Nevada, not Las Vegas, California. (As far as I know, there is no Las Vegas, California.) It therefore appears that the ARB staff erred when addressing the Notice to Complainant but that the post office was able to deliver the Notice because the zip code was correct. In any event, Complainant did receive the Notice: He signed the certified mail receipt, which was returned in due course to the ARB.

There is no indication in the file that either party filed a brief with the ARB. (Of course, Respondent had no reason to file a brief; it had prevailed with Judge Mapes, and Complainant didn't file anything with the ARB.)

More than two years later, on August 30, 2007, the ARB *sua sponte* vacated Judge Mapes' decision and remanded. It held that Judge Mapes had failed to consider equitable tolling. According to the certificate of service, the Board sent the remand order to the same address in "Las Vegas, CA 89135-1154." This time, however, the file does not contain a certified mail return receipt with Complainant's signature. Instead, there is a certified mail receipt with a tracking number: 7004 1160 0006 6972 1844. I checked the post office website again. It shows that this item was delivered on October 29, 2007, *but in Washington, DC.*, not Las Vegas.

I believe that the remand order was returned to the Board as undeliverable. The address that the Board put on the envelope was mistaken (actually non-existent), in that it still showed Las Vegas, California, not Nevada. Although the zip code again was right, there is no indication that the post office managed to make the delivery this time, and the circumstances suggest that Complainant never received the remand order.

Specifically, the Board mailed its Order on or about August 30, 2007, and it was not delivered for nearly two months (October 29, 2007). Had it simply gone to the right address and been delivered, it should not have taken two months. Equally important is that the Order was delivered in Washington, DC, where the Board is, not Nevada, where Complainant last was. If the Order had been returned as undeliverable, that would explain both the delay and why the Post Office shows it as being delivered to Washington, DC.

On remand, I set a briefing schedule to address equitable tolling. Unaware of any difficulty with the address I caused the notice of briefing schedule to be served at that address, although I did correct it to show the right state, Nevada. This Office mailed the schedule on November 30, 2007. I never received any kind of response from Complainant.

Respondent timely filed its opening brief but failed to serve Complainant. I ordered Respondent to serve Complainant. They soon thereafter reported that they were unable to serve him because they only had the address in Las Vegas, Nevada, and this address apparently no longer was good. They had sent the brief to that address on April 7, 2008, by certified mail, return receipt requested. They subsequently reported that the post office had returned the brief as undeliverable. The post office's records again seem consistent with this in that they show delivery on April 15, 2008 in Apache Junction, Arizona, where Respondent's office is not any community with which Complainant was associated. This is consistent with the mail being returned, much as Respondent had reported.

We searched through the file and found one other address for Complainant, 8926 East Shasta Drive, Gold Canyon, AZ 85216. I wrote to him, both at the new address (in Arizona) and at the Nevada address. I enclosed a copy of an amended briefing schedule and asked him to confirm his address. There was no response. We then searched the file and found three telephone numbers. On April 30, 2008, we tried the numbers and got the following: 702-838-6730 not in

service; 480-363-4219 not a working number; and 480-288-0977 just gave a strange noise and apparently was not working.

Having reviewed the file, I have concluded that Complainant is entitled to equitable tolling and that his complaint was timely filed. My difficulty is that I have no way to resume the case without knowing how to contact Complainant. Complainant most likely – through no fault of his own – believes that his case ended with Judge Mapes’ Decision in June 2005. He did not file a brief with the ARB and apparently never received the Board’s Decision remanding the case for further development. If that is correct, Complainant would have thought that his case ended in mid-2005, and he would have had no reason to keep OALJ or Respondent aware of his address or telephone number.

Given my conclusion that Complainant may proceed with his claims and that Complainant’s inaccessibility is not through any fault of his, I believe that it is inappropriate to dismiss for failure to prosecute until we have made exhaustive efforts to locate Complainant. We have no resources to look further and thus, request that OSHA use its investigative staff to develop an address and phone number for Complainant, if possible.

REMAND

For the foregoing reasons, this case is referred back to Occupational Safety and Health to develop contact information for Complainant. If OSHA is successful, it should notify this Office promptly and provide the information.

**A**

STEVEN B. BERLIN  
Administrative Law Judge