



**In the Matter of:**

**ALBERTO CARVAJAL,**

**ARB CASE NO. 12-083**

**COMPLAINANT,**

**ALJ CASE NO. 2012-STA-019**

**v.**

**DATE: September 12, 2012**

**STEVENS TRANSPORT, INC.,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainant:***

**Alberto Carvajal; *pro se*; Lake Worth, Florida**

***For the Respondent:***

**Michael Noble, Esq.; *Stevens Transport, Inc.*; Dallas, Texas**

**Before: Paul M. Igasaki, *Chief Administrative Appeals Judge*; and Joanne Royce, *Administrative Appeals Judge***

**FINAL DECISION AND ORDER DISMISSING APPEAL**

The Complainant, Alberto Carvajal, filed a complaint on February 10, 2012, alleging that the Respondent, Stevens Transport, Inc., retaliated against him in violation of the whistleblower protection provisions of the Surface Transportation Assistance Act (STAA).<sup>1</sup> On June 15, 2012, a Department of Labor Administrative Law Judge (ALJ)

---

<sup>1</sup> 49 U.S.C.A. § 31105 (Thomson/West Supp. 2011). The STAA's implementing regulations are found at 29 C.F.R. Part 1978 (2011).

issued an Order Dismissing Complainant's Complaint as not Timely Pursuant to 49 U.S.C. § 31105(b)(1) and Cancelling Hearing (O.D.). On June 18, 2012, the ALJ issued a Supplemental Order Dismissing Complainant's Complaint as not Timely Pursuant to 49 U.S.C. § 31105(b)(1) and Cancelling Hearing (S.O.D.), in which he noted that his June 15th O.D. had not included a Notice of Appeal Rights.

The Secretary of Labor has delegated her authority to issue final agency decisions under the STAA to the ARB.<sup>2</sup> To perfect a timely appeal from an administrative law judge's decision, a party must file a petition for review with the Board within ten business days of the date on which the judge issued his decision.<sup>3</sup> Ten business days from the date on which the ALJ issued his O.D. was June 29, 2012, and ten business days from the date on which he issued his S.O.D. was July 2, 2012.

Carvajal filed a petition for review postmarked July 3, 2012. Thus Carvajal has filed his petition for review more than 10 business days from the date on which the ALJ issued both his O.D. and his S.O.D. The STAA's limitations period is not jurisdictional and therefore is subject to equitable modification.<sup>4</sup> Because Carvajal, as the party seeking tolling, bears the burden of justifying the application of equitable tolling principles,<sup>5</sup> we ordered him to show cause, why the petition should not be dismissed as untimely. We permitted Stevens to file a reply to Carvajal's response.

## DISCUSSION

In determining whether the Board should toll a statute of limitations, we have been guided by the discussion of equitable modification of statutory time limits in *School Dist. v. Marshall*.<sup>6</sup> In that case, which arose under whistleblower provisions of the Toxic Substances Control Act,<sup>7</sup> the court articulated three principal situations in which equitable modification may apply: when the defendant has actively misled the plaintiff

---

<sup>2</sup> Secretary's Order No. 1-2010 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 75 Fed. Reg. 3924 (Jan. 15, 2010).

<sup>3</sup> See 29 C.F.R. § 1978.110(a). The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing.

<sup>4</sup> *Accord Hillis v. Knochel Bros.*, ARB Nos. 03-136, 04-081, 04-148; ALJ No. 2002-STA-050, slip op. at 3 (ARB Oct. 19, 2004); *Overall v. Tennessee Valley Auth.*, ARB No. 98-011, ALJ No. 1997-ERA-053, slip op. at 40-43 (ARB Apr. 30, 2001).

<sup>5</sup> *Accord 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).

<sup>6</sup> 657 F.2d 16, 19-21 (3d Cir. 1981).

<sup>7</sup> 15 U.S.C.A. § 2622 (West 2004).

regarding the cause of action; when the plaintiff has in some extraordinary way been prevented from filing his action; and when “the plaintiff has raised the precise statutory claim in issue but has done so in the wrong forum.”<sup>8</sup> But the Board has determined that a petitioner’s inability to satisfy one of these elements is not necessarily fatal to his claim.<sup>9</sup>

Carvajal did not specifically cite to any of the three recognized bases for tolling established by Board precedent. Instead, he stated that he was in Cali, Columbia, when the order was delivered to his “USA residence,” and the first thing he did when he returned to the United States was to request the Board to accept his untimely petition.

He also indicated that his mother had become ill in Columbia and needed help bringing her to the United States for treatment. He stated that his mother entered the hospital in West Palm Beach and died “Sunday July 2012.” For these reasons he requested the Board to toll the limitations period.

In response, Stevens noted that while Carvajal contended that he was out of the country when the ALJ’s orders were delivered, he did not specify the date on which he returned to the United States. Stevens argues that being out of the United States when the orders were delivered is not a per se basis for tolling.

Stevens also asserts that

[w]hile we do not know the exact date that Complainant returned to the United States, the attached documentation shows that Complainant was at his residence and was able to conduct business in connection with his pending cases against Stevens during the week of June 24, 2012, which is a full week before the deadline to file his Petition.<sup>[10]</sup>

In support of this argument, Stevens cites to the following:

- On Saturday, June 23, 2012 at 12:56 am, Complainant emailed “the Google Team” to request deleted emails in connection with his pending Arbitration against Stevens.

---

<sup>8</sup> *Allentown*, 657 F.2d at 20 (internal quotations omitted).

<sup>9</sup> *Halpern v. XL Capital, Ltd.*, ARB No. 04-120, ALJ No. 2004-SOX-054, slip op. at 4 (ARB Aug. 31, 2005). *Cf. Allentown*, 657 F.2d at 20 (“We do not now decide whether these three categories are exclusive, but we agree that they are the principal situations where tolling is appropriate.”).

<sup>10</sup> Stevens Transport’s Reply to Complainant’s Response to Order to Show Cause (Reply) at 2.

- On Friday, June 29, 2012 at 1:08 pm, Complainant emailed the case administrator with the American Arbitration Association regarding his pending Arbitration with Stevens.
- On Friday, June 29, 2012 at 1:51 PM, Complainant prepared a letter to Lisa Mahaffey at the Office of Administrative Law Judges in which he admits to having received the June 18, 2012 Order and requesting a copy of his case file.<sup>[11]</sup>

Stevens contends that these communications establish that Carvajal was in Florida and “in possession of the Order on June 29, 2012, and was conducting business in connection with his pending cases against Stevens during that previous week.” Stevens further argues that Carvajal failed to carry his burden of showing how his alleged absence from the United States when the ALJ’s Orders were delivered justifies the tolling of his filing deadline and that the documentation of the above-cited communications establish that Carvajal possessed the Order, had knowledge of the deadline, and had sufficient time to file his Petition.<sup>12</sup>

Stevens further notes that although Carvajal asserts that his mother’s death was a factor that prevented him from timely filing his Petition, he did not specify the date on which she died. Stevens conducted an internet search which revealed two sources that stated that she died on Sunday, July 15, 2012. Stevens argues:

Her death therefore occurred thirteen (13) days *after* the deadline to file his Petition and twelve (12) days *after* he actually filed his Petition. Because the death of Complainant’s mother occurred after the filing deadline had passed, it is not an event that can justify the tolling of the filing deadline. Further, Complainant has failed to show how his mother’s subsequent death prevented him from filing his Petition a day earlier.<sup>[13]</sup>

We agree with Stevens that the fact that Carvajal was not at in the United States when the ALJ’s Orders were delivered is not in and of itself a proper basis for tolling the limitations period. Instead, it is a party’s burden to establish how this fact precluded him from timely filing a petition for review or requesting an enlargement of time in which to do so. In this case, Carvajal states that “[t]he First thing I did when returning to the USA, was reply requesting The Administrative Review Board . . . [for] permission to file his

---

<sup>11</sup> Reply at 2 (footnotes omitted).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 3 (footnote omitted).

appeal late for this very reason.” But as Stevens points out, as early as June 29th, three days before the petition for review was due, Carvajal admitted that he had received the ALJ’s S.O.D. and he was in a position to communicate with the Office of Administrative Law Judges and the case administrator with the American Arbitration Association regarding his pending complaints against Stevens. What is missing from Carvajal’s response to the show cause order is a statement of when he actually received the ALJ’s Orders and an explanation of why from June 29th (at the latest, when he acknowledges having received the S.O.D.) to July 2nd he could not file a motion with the Board requesting it to grant him an enlargement of time to file the petition, or to file the petition, itself.

Furthermore, the Board is, of course, most sympathetic to the fact that Carvajal’s mother became ill and subsequently died, and we are certainly willing to give him the benefit of the doubt that he did not intentionally omit the day of her death from his response. Nevertheless, while relying on his mother’s illness and death as a basis for requesting tolling of the limitations period, Carvajal has failed to explain when he went to Columbia to help bring her to the United States, when he returned to the United States, or why her death on July 15th precluded him from requesting an enlargement of time to file his petition for review or from filing his petition on July 2nd, especially when he was conducting other business regarding his complaints against Stevens during the limitations period.

Accordingly, we find that Carvajal has failed to carry his burden of proof to establish his entitlement to tolling of the limitations period.<sup>14</sup>

**SO ORDERED.**

**PAUL M. IGASAKI**  
**Chief Administrative Appeals Judge**

**JOANNE ROYCE**  
**Administrative Appeals Judge**

---

<sup>14</sup> *Accord Gooding v. ABB Ltd.*, ARB No. 11-059, ALJ No. 2011-SOX-018 (ARB Dec. 12, 2011); *Prince v. Westinghouse Savannah River Co.*, ARB No. 10-079, ALJ No. 2006-ERA-001 (ARB Nov. 17, 2010), *aff’d*, *Prince v. Solis*, 2012 WL 2161642 (4th Cir. 2012); *Romero v. The Coca Cola Co.*, ARB No. 10-095, ALJ No. 2010-SOX-021 (ARB Sept. 30, 2010).