



In the Matter of:

DOMINICK A. AMATO,

ARB CASE NO. 98-167

COMPLAINANT,

ALJ CASE NO. 98-TSC-6

v.

DATE: January 31, 2000

**ASSURED TRANSPORTATION AND
DELIVERY, INC.,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Dominick A. Amato, *Bloomington, California*

For the Respondent:

Robert M. Stone, Esq., *Musick, Peeler & Grant LLP, Los Angeles, California*

ORDER DENYING INTERLOCUTORY APPEAL

This matter arises under the employee protection provision of the Toxic Substances Control Act (TSCA), as amended and codified, 15 U.S.C. §2622 (1994). On April 9, 1998, Respondent Assured Transportation and Delivery, Inc.(Assured) discharged Complainant Dominick A. Amato. On May 27, 1998, *i.e.*, 48 days later, Amato filed a discrimination complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA). OSHA dismissed the complaint, without investigation, finding that the complaint was not filed timely. After a hearing on the timeliness of the complaint, an Administrative Law Judge (ALJ) issued a Recommended Decision and Order in which he recommended that the complaint be found timely because Amato had filed a complaint with the State of California on April 14, 1998, which equitably tolled the thirty-day limitation contained in the TSCA. Assured petitioned the Board to review the ALJ's recommended decision that Amato timely filed the complaint.

Although the ALJ styled his ruling as a Recommended Decision and Order, it is instead an interlocutory ruling because it did not resolve the merits of the dispute before him. Assured's petition for review, therefore, is actually an interlocutory appeal of the ALJ's resolution of the timeliness issue. The Secretary and the Administrative Review Board have held many times that

interlocutory appeals are generally disfavored and that there is a strong policy against piecemeal appeals. *Hasan v. Commonwealth Edison Co.*, ALJ Case No. 99-ERA-17, ARB Case No.99-097, slip op. at 2 (Sept. 16, 1999); *Carter v. B & W Nuclear Technologies, Inc.*, ALJ Case No. 94-ERA-13, Sec’y Order, slip op. at 3-4 (Sept. 28, 1994) and cases discussed therein.

This case presents a classic example of why we disfavor interlocutory appeals. Assured discharged Amato on April 9, 1998. Amato first filed his complaint with the State of California on April 14, 1998, and subsequently with OSHA on May 27, 1998. The ALJ found that the 30-day period to file a complaint was not jurisdictional and that the period was equitably tolled. At this point the ALJ should have ordered the parties to proceed to the merits of the case. Instead, he issued an interlocutory ruling which Assured appealed to this Board.^{1/} By taking this circuitous route, rather than deciding the merits of the complaint, the process of adjudicating Amato’s case has been delayed needlessly.

We also note that Assured’s counsel cites *In Re Consolidated Proceedings in Airline Cases*, 582 F.2d 1142, 1150-51 (7th Cir. 1978), for the proposition that the “timely filing of [a] discrimination complaint with [the] Equal Employment Opportunity Commissioner is jurisdictional.” However, the Supreme Court subsequently reversed this holding in *Zipes v. TWA, Inc.*, 455 U.S. 385, 398 (1982). Assured’s counsel also cites *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974) and *Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976), in support of this discredited proposition. The Court in *Zipes* specifically held that neither case stands for the proposition for which Assured’s counsel cited it. 455 U.S. 395-397. Not surprisingly, the Board looks with strong disfavor on attorneys who misstate the applicable law and who rely on cases which have been reversed, as Assured’s counsel has done here. *Accord* American Bar Association, Model Rules of Professional Conduct (1995 ed.), Rule 3.3(a)(3) Candor Toward the Tribunal.

Although Assured urges us to review and reject the ALJ’s apparently sound and well-reasoned opinion, we decline to do so at this stage of the litigation, but instead return the case to the ALJ to address all the issues before him.

Accordingly, Assured’s motion to set aside the ALJ’s order is **DENIED**.

SO ORDERED.

PAUL GREENBERG

Chair

E. COOPER BROWN

Member

CYNTHIA L. ATTWOOD

Member

^{1/} Regrettably, Amato was not represented by counsel. Had he been, such counsel might have opposed Assured’s filing of this interlocutory appeal.