



Issue Date: 09 November 2005

CASE NUMBER: 2005-AIR-00008

In the Matter of:

TIM HAFER,
Complainant,

v.

UNITED AIRLINES,
Respondent.

Appearances

Tim Hafer
1536 Malcolm Avenue
Los Angeles, California 90024
Pro Se

Leslie C. Cheng, Esquire
Littler Mendelson
650 California Street, 20th Floor
San Francisco, California 94108
For the Respondent

Before: Paul A. Mapes
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

The above-captioned matter arises from a complaint by Tim Hafer (“Hafer” or “the Complainant”) against United Airlines, Inc. (“United” or “the Respondent”) under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act, 49 U.S.C. § 42121 (“AIR21” or “the Act”). A trial on the merits of the complaint was held in Long Beach, California, on May 23 and 24, 2005, and in San Francisco, California, on June 27, 2005. The following exhibits were admitted into evidence: Complainant’s Exhibits (“CX”) 1-19, 21-26 and Respondent’s Exhibits (“RX”) 1- 16. Nine witnesses testified, and both parties submitted post-trial briefs.

BACKGROUND

The Complainant began working for United in 1989 as a computer technician in one of United’s Southern California facilities. Tr. at 119-20, 138. Two years he later, he transferred to a job as an aircraft mechanic. Tr. at 119-20, 138. In 1997, he took a job as a warranty investigator for United, based on his physician’s advice that a blood platelet condition he had

apparently acquired in the early 1990's would worsen from continued exposure to aviation fuel. Tr. at 119-20. In approximately 1999, the Complainant transferred from his job in Los Angeles to a job as a contract administrator for United in San Francisco. Tr. at 120. According to the Complainant, while he was working as a contract administrator, he discovered that some of the independent companies that United hired to perform aircraft maintenance had been doing work improperly. Tr. at 120-21, 124. In particular, the Complainant asserted that one of the independent companies that United hired to replace generator breakers on its fleet of 727 aircraft had instead merely "cleaned up" and re-installed used breakers on the planes. Tr. at 124-27. In the Complainant's view, the failure to install new breakers created a risk that planes with the old breakers would experience flash fires and lose all engine power. Tr. at 127. At about the same time, he testified, he learned that United employees in San Francisco had been assigned to "sign off" on aircraft maintenance and repair jobs even though those employees were not mechanics and the maintenance or repairs had actually been performed by independent contractors at other locations throughout the United States. Tr. at 127-29. Later, the Complainant testified, he printed out various computerized records that documented this practice and mailed the records to a Federal Aviation Administration ("FAA") inspector. Tr. at 130. According to the Complainant, the inspector subsequently called him and said that he had inadvertently disclosed to United that the Complainant was the person who had provided the computerized records to the FAA. Tr. at 130.

Later, the Complainant called a FAA "hotline" and met with other FAA inspectors. Tr. at 133-34. According to the Complainant, one of the FAA inspectors subsequently told him that the FAA investigation was going "gung ho" and that the "bigwigs at United" were involved. Tr. at 137. The Complainant further testified that the inspector also told him that United's Quality Assurance department had been given the Complainant's name as someone who could explain how United employees were able to sign off work that was supposed to have been done by independent contractors. Tr. at 137. According to the Complainant, about two weeks after this conversation, he received a letter informing him that he was being fired for having made an unauthorized copy of a document that listed United's violations of the Clean Air Act. Tr. at 135-137, 144.

After the Complainant's employment with United was terminated, he filed a complaint with the San Francisco regional office of the Occupational Safety and Health Administration ("OSHA") alleging that his termination violated the provisions of AIR21.¹ In addition, the Complainant appeared on various television news programs, during which he repeated his criticisms of United's aircraft maintenance practices. Tr. at 142-43. Eventually, the Complainant testified, his initial complaint to the FAA caused the FAA to send United a "letter of correction," but did not result in the imposition of any fines against United. Tr. at 141-42, EX 5.

The Complainant's Workers' Compensation Claim

According to the Complainant, in 1998 blood test results showing improvement in his blood platelet levels led him to suspect that his blood condition had in fact been caused by his

¹ Because of the December 2002 bankruptcy of United, the administrative proceeding concerning that complaint was stayed by the Administrative Review Board and is still pending.

exposure to aviation fuel. Tr. at 143-44, 198. As a result, in 1999 he retained attorney Mark Malter to file a workers' compensation claim against United with the State of California's Workers' Compensation Appeals Board ("WCAB"). Tr. at 144. Thereafter, United, which is self-insured for workers' compensation claims, assigned responsibility for handling the claim to an independent third-party administrator of workers' compensation claims known as Gallagher Bassett. Tr. at 60, 203-04, 220, 291. Gallagher Bassett, in turn, retained the law firm of Laughlin, Falbo, Levy & Moresi ("Laughlin Falbo") to represent United in the proceeding before the WCAB. Tr. at 48, 292. Laughlin Falbo is a firm that specializes in workers' compensation cases and has approximately 140 attorneys in 11 offices throughout California. Tr. at 241-42. Although Gallagher Bassett issues checks to pay any workers' compensation awards against United, it is not an insurance company and United eventually bears the cost of any such payments. Tr. at 62, 70.

According to Gerald Burke, the managing partner in the Laughlin Falbo office that handled the Complainant's WCAB case, when his firm defends workers' compensation claims against United, the firm "represents" and deals directly with Gallagher Bassett, which then directly pays the law firm's fees. Tr. at 237-238, 247. Moreover, he testified, he never spoke with anyone at United about the Complainant's WCAB case and has not in fact had any contact with anyone at United for five or six years. Tr. at 239-40, 249. Mr. Burke also testified that he is unaware of whether United has any role in Gallagher Bassett's decisions about making workers' compensation payments. Tr. at 239-40.

During the early stages of the proceeding before the WCAB, the Complainant's counsel and an attorney at Laughlin Falbo jointly selected Dr. David S. David to be an "agreed medical examiner" with responsibility for providing an expert medical opinion concerning the cause of the Complainant's blood condition and the extent of any related disability. Tr. at 145. Dr. David later examined the Complainant and on May 16, 2002 produced a report which concluded that the Complainant's blood condition was related to his employment at United Airlines and that the Complainant was a "qualified injured worker," a categorization under California's workers' compensation law that typically entitles an injured worker to receive vocational rehabilitation benefits. CX 1. Accordingly, on April 14, 2004, Russell G. Zarett, an Administrative Law Judge at the WCAB, issued an order and a separate opinion concluding that United owed the Complainant vocational rehabilitation maintenance allowance ("VRMA") payments for the period between March 1, 2001 and May 15, 2002. CX 1.

The text next to Judge Zarett's signature on the order awarding VRMA benefits to the Complainant indicates that copies of the decision were simultaneously served by mail on all "parties as shown on the Official Address Record." CX 1. In addition, on the day after the issuance of the order, the Complainant's attorney used a fax machine to send copies of the order to both Lorraine Dickeroff, the Laughlin Falbo attorney then assigned to the Complainant's case, and to "Crystal D-Amico" a claims examiner at Gallagher Bassett who at that time was responsible for the Complainant's claim.² The faxes sent by the Complainant's attorney also included a cover letter demanding immediate compliance with the order. CX 22.

² The correct spelling of the claims examiner's last name is actually "D'ammico."

According to the testimony of Sonya Riley, the Gallagher Bassett supervisor with responsibility for handling workers' compensation claims against United, under California's workers' compensation law, Gallagher Bassett is obligated to pay WCAB awards, such as the award of benefits issued by Judge Zarett, within 25 calendar days from the award's service date. Tr. at 295, 319. *See also County of Los Angeles v. Batt*, 69 CCC 162 (2005) (imposing a penalty on a California employer that paid benefits 33 days after issuance of an order awarding workers' compensation benefits).

Delay in Gallagher Bassett's Payment of the Complainant's VRMA Benefits

Despite the fact that Judge Zarett and the Complainant's attorney both promptly sent copies of Judge Zarett's VRMA order to Laughlin Falbo and Gallagher Bassett, the Complainant's VRMA benefits were not paid within the 25-day period allowed under California law. During the trial, various employees of Laughlin Falbo, Gallagher Bassett, and United provided testimony concerning the reasons for this failure to promptly pay the Complainant.

According to the trial testimony of Jan Romero, the assistant manager of the Gallagher Bassett branch in Sacramento, California that handled the Complainant's WCAB claim, a copy of the April 15, 2004 fax from the Complainant's WCAB attorney was recently found in Gallagher Bassett files and was date-stamped as received on April 15, 2004. Tr. at 255-58, 261, 269-70 271-72, 274-75. However, she testified, "none of the process" used by Gallagher Bassett for handling and recording the receipt of such documents was followed. Tr. at 261. As a result, she testified, nothing about the fax was "notebooked" into Gallagher Bassett's computer system, the original of the fax did not go to Ms. D'ammico, and no one provided a copy of the document to Ms. D'ammico's supervisor. Tr. at 261-63. Although Ms. Romero testified that she could not explain why the regular process for handling such documents was not followed or even how the fax was eventually placed in the proper file, she insisted that no one at United had induced her to delay the payment of the Complainant's VRMA benefits in any way. Tr. at 265, 270-71. She also denied having any knowledge of the Complainant's whistleblowing activities until just weeks before the trial of this matter. Tr. at 265. In addition, she acknowledged that at least five different adjustors had worked on the Complainant's WCAB claim at different times, and that each adjustor would have been simultaneously handling about 200 to 225 claims files. Tr. at 263-64. She also acknowledged that Ms. D'ammico was only a contract worker hired through a temporary agency and is not now working for Gallagher Bassett in any capacity. Tr. at 262, 277-78.

Ms. Romero's representations concerning Gallagher Bassett's procedures were amplified and corroborated by Ms. Riley. Tr. at 290-91, 295-98, 306-07, 322. Ms. Riley also testified that Gallagher Bassett would not want to deliberately delay payment of anyone's workers' compensation benefits because under California law a claimant's attorney could seek to have a judge impose sanctions and assess penalties if Gallagher Bassett engaged in "bad faith" in processing claims. Tr. at 300. In addition, Ms. Riley explicitly denied that anyone at United had induced Gallagher Bassett to delay the payment of the Complainant's VRMA benefits. Tr. at 302.

According to the testimony of Tracy Venter, a United employee who monitors Gallagher Bassett's administration of workers' compensation claims, only Gallagher Bassett has authority to determine when VRMA claims are paid and thus she has no authority over the payment of such claims. Tr. at 203-05. She denied having any conversations with anyone at Gallagher Bassett or Laughlin Falbo concerning the payment of the Complainant's VRMA benefits at any time prior to September of 2004, but did acknowledge that sometime before August of 2004 she had seen a Gallagher Bassett status report that mentioned that the Complainant was a whistleblower. Tr. at 296-07, 217. According to the testimony of Ms. Riley, the Complainant's whistleblower activities were mentioned in the status report because one of the documents generated in the WCAB case was a psychiatric report indicating that one of the issues in the Complainant's WCAB case concerned whether he had suffered any psychiatric injuries as a result of conflicts with United's management over its alleged "dangerous short cuts." CX 23 (psychiatrist's report), Tr. at 302-05 (testimony of Sonya Riley).

Any involvement in the delay in the payment of the Complainant's VRMA benefits was also denied by John Midgett, the senior in-house attorney for United who handled the Complainant's 2001 AIR21 complaint against United. Tr. at 219-21, 223.

According to the trial testimony of Ms. Dickerhof, she was the Laughlin Falbo attorney assigned to handle the Complainant's WCAB claim in April of 2004, but, for unknown reasons, she never received the April 15, 2004 fax from the Complainant's attorney demanding payment of the retroactive VRMA benefits awarded by Judge Zarett. Tr. at 49, 71. Ms. Dickerhof also testified that although Judge Zarett's order should have been mailed by the WCAB to all of the parties, the order's lack of a "proof-of-service" certificate signed by a WCAB secretary suggests that the WCAB did not in fact mail out the order. Tr. at 49. Ms. Dickerhof acknowledged that she had been expecting Judge Zarett to issue a decision concerning the Complainant's VRMA benefits in April or May of 2004 and that during May of that year she had even asked Ms. D'ammico if she had received an order from Judge Zarett. Tr. at 53. According to Ms. Dickerhof, when Ms. D'ammico said that she had not yet received an order from Judge Zarett, she just assumed "the judge must be a little behind." Tr. at 53. Ms. Dickerhof denied ever discussing the Complainant's VRMA claim with anyone from United and also denied that the Complainant's whistleblowing activities had any influence on the way she handled his claim. Tr. at 53-54, 87.

Testimony about how Gallagher Bassett eventually came to pay the Complainant's VRMA benefits was provided by Michelle Cuenca, a Laughlin Falbo attorney who substituted for Ms. Dickerhof at a July 22, 2004 conference concerning the Complainant's workers' compensation case that was held before WCAB Administrative Law Judge Jerold Cohn. RX 2, RX 4, Tr. at 101. According to Ms. Cuenca's testimony, during the conference, the Complainant's attorney complained that the VRMA benefits awarded by Judge Zarett had still not been paid and in response, Judge Cohn immediately issued an order directing United "to comply with order of 4/14/2004 forthwith." RX 2, Tr. at 101-03. Ms. Cuenca further testified that because of Judge Cohn's order, on July 25, 2004 she sent Gallagher Bassett a letter directing it to issue a check for \$38,896 to the Complainant. RX 3, Tr. at 104. The text of the Ms. Cuenca's letter asserted that even though Judge Zarett's order was signed on April 14, 2004, "we" did not receive it until the settlement conference before Judge Cohn. RX 3. For that

reason, Mr. Cuenca's letter concluded, the \$38,896 check should be issued to the Complainant by August 10, 2004. RX 3. In a subsequent letter dated August 4, 2004, Mr. Cuenca informed Gallagher Bassett that she made an error in calculating the amount owed to the Complainant and that the amount actually owed was \$38,984.40. RX 5. Ms. Cuenca also testified that when she examined the Complainant's claim file to prepare for the conference with Judge Cohn she did not see any order from Judge Zarett concerning VRMA payments. Tr. at 102, 113. In addition, she testified that before that conference, Ms. Dickerhof told her that she was expecting an order from Judge Zarett, but had not yet received it. Tr. at 102, 112-13.

The Complainant's AIR21 Complaint

According to the Complainant's testimony, even though he did not receive the check for his VRMA benefits within 25 days after the issuance of Judge Zarett's order, he did not contact anyone at United about the delay. Tr. at 166-67. Rather, he testified, on August 5, 2005 he wrote a letter of complaint to OSHA's San Francisco regional office alleging that United's failure to promptly pay his retroactive VRMA allowance was motivated by an intent to retaliate against him for having complained to the FAA and therefore violated the whistleblower provisions of AIR21.³ Tr. at 148, CX 2. The Complainant further testified that he both faxed this letter to OSHA's San Francisco office and sent it by certified mail. Tr. at 148-49, 167-69. To substantiate this testimony, the Complainant submitted: (1) original telephone bills showing that he had either called or faxed OSHA's San Francisco telephone number on August 5, 2004, (2) original Postal Service receipts showing that he had mailed an envelope by certified mail to OSHA's San Francisco office on August 6, 2004, and (3) a certified mail receipt showing that the envelope sent by the Complainant on August 6, 2004 was delivered to OSHA's San Francisco address on August 16, 2004.⁴ CX 25, Tr. at 328-43.

According to the Complainant's testimony, about five days after sending his complaint to OSHA, he received a Federal Express envelope from Gallagher Bassett containing a \$38,984.40 check in payment for his VRMA benefits. CX 4, Tr. at 147, 171. The Complainant further testified that on or about the day after he received the check from Gallagher Bassett, he got a telephone call from OSHA investigator Lawrence Ricci, who told him that he had received the Complainant's letter of August 5, 2004. Tr. at 149-50, 174. At that time, the Complainant recalled, he told Mr. Ricci that he had just received his VRMA benefits and Mr. Ricci asked, "Is there anything else we can help you with?" Tr. at 150-52, 174-75. In reply, the Complainant testified, he told Mr. Ricci that United had still not reimbursed him for his out-of-pocket medical

³ It is noted in this regard that under the doctrines of primary and exclusive jurisdiction, complaints of discriminatory conduct that allegedly occurred during the course of a proceeding before an administrative agency must ordinarily be resolved by that agency. However, a party's refusal to comply with a final order of an administrative agency, such as alleged in this case, may properly be considered in this forum. See *Grizzard v. Tennessee Valley Authority*, 90-ERA-52 (Sec'y September 26, 1991) (holding that the Department of Labor had authority to consider an allegation that an employer had violated the whistleblower provisions of the Energy Reorganization Act by deliberately delaying its compliance with a final order issued by Equal Employment Opportunity Commission).

⁴ The Respondent stipulated that the Complainant has originals of each of the foregoing documents. Tr. at 329-42. Consequently, only copies of these documents were admitted into evidence and the Complainant was directed to retain the originals.

expenses and was using incorrect wage-base data to compute his weekly disability benefits. Tr. at 150-52, 174-75. According to the Complainant, Mr. Ricci then told him to set forth those complaints in another letter and date it "August 5," so that he would not lose any time off the 90 days allowed for filing AIR21 complaints. Tr. at 152. However, the Complainant testified, he had just unexpectedly broken up with his girl friend and was too distracted to compose and send the second letter to OSHA until the first week of September. Tr. at 152-54, 177-78. At that time, he testified, he both faxed the letter to OSHA's San Francisco office and sent it by regular mail. Tr. at 152-53, 154. Like the Complainant's letter concerning the VRMA allowance, this letter was also dated August 5, 2004. RX 7, Tr. at 179-80. Most of the text in the second letter is identical to text in the first letter and the only substantive differences between the two letters are found in the third paragraphs of both letters. Tr. at 180. In particular, the third paragraph of the letter the Complainant alleges he sent in September complains that United based his weekly disability benefits on a final salary of \$840 per week instead of his actual salary of \$1119.92 per week and goes on to allege that United failed to reimburse him for \$5,383.02 in out-of-pocket medical expenses. RX 7. The letter, however, makes no reference to any unpaid VRMA benefits. RX 7.

On September 8, 2004, Mr. Ricci sent a letter to United's law department informing United that the Complainant had filed a complaint under AIR21 and requesting that United provide a written response within 20 days. RX 7. Attached to the letter was a copy of the Complainant's letter concerning the amount of his weekly disability benefits and his out-of-pocket medical expenses. RX 7. Markings on the letter indicate that it had been received by OSHA's San Francisco Regional Office at 8:06 a.m. on September 3, 2004. RX 7.

Subsequently, the Complainant testified, he received a series of calls from another OSHA investigator named Lisa Trecartin, who asked him for information about his out-of-pocket medical expenses and arranged for him to speak directly to Leslie Cheng, United's counsel in this case. Tr. at 154-56. During the course of these discussions, the Complainant decided to withdraw his complaint concerning the wage-base data that was used to compute his workers' compensation benefits, but continued to pursue his complaints about his out-of-pocket medical expenses and VRMA benefits. Tr. at 156, 185.

On October 11, 2004, United's outside counsel sent OSHA a letter responding to the Complainant's allegations about his out-of-pocket medical expenses. RX 8. The letter noted that the Complainant had withdrawn his complaint regarding the amount of his weekly benefits, but did not in any way refer to any allegations concerning the late payment of VRMA benefits. RX 8. On October 21, 2004, United's counsel sent OSHA another letter which contended that the Complainant's request for out-of-pocket medical expenses was a matter within the exclusive jurisdiction of the WCAB. RX 9.

On October 20, 2004, Ms. Trecartin sent the Complainant a letter asking him to sign a form verifying that he was withdrawing an AIR21 complaint. Tr. at 156, 185. In an October 26, 2004 letter responding to Ms. Trecartin's request, the Complainant listed three reasons for his decision not to withdraw his AIR21 complaint. CX 21. According to the Complainant's letter, the first of these reasons was United's failure to have promptly paid the VRMA benefits awarded by Judge Zarett, as required by California law. CX 21. In concluding the letter, the Complainant

pointed out that under the provisions of AIR21, he could be entitled to compensatory damages for pain and suffering resulting from any violation. CX 21.

On November 17, 2004, OSHA Deputy Regional Administrator Christopher Lee sent the Complainant a letter informing him that his complaint under AIR21 was being dismissed because the Complainant failed to establish a nexus between his protected activities and the perceived discriminatory action. RX 10 at 38. The letter also asserted that the Complainant's AIR21 complaint was "received and docketed" on September 3, 2004 and that it pertained to the underpayment of disability benefits and refusal to pay for out-of-pocket medical expenses. RX 10 at 38. The letter, however, does not contain any reference to VRMA benefits.⁵ Thereafter, the Complainant filed a timely request for a hearing with the Office of Administrative Law Judges.

Attempts to Obtain Relevant Evidence from OSHA

After this matter was referred to the Office of Administrative Law Judges, United filed a motion asking that the Complainant's AIR21 complaint be dismissed insofar as it concerned VRMA benefits. As grounds for this motion, United asserted that no complaint regarding such benefits had been submitted to OSHA until after the expiration of AIR21's 90-day statute of limitations. Because the Complainant submitted various documents indicating that he had mailed and faxed a VRMA complaint to OSHA in early August of 2004, the undersigned Administrative Law Judge sent a letter to Mr. Ricci on March 18, 2005 explaining the conflicting allegations and requesting that Mr. Ricci "double check" all his files to determine when the Complainant first made allegations concerning the payment of VRMA benefits. The letter also informed Mr. Ricci that the Complainant had provided a statement asserting that Mr. Ricci had telephoned him on or about August 12, 2004 concerning his VRMA complaint.

On April 11, 2004, Alison C. Pauly responded to the letter addressed to Mr. Ricci. In her letter, Ms. Pauly reported that Mr. Ricci had accepted a new position and that she had become the Acting Regional Supervisory Investigator for OSHA. Ms. Pauly's letter indicated that she had reviewed OSHA's files and determined that they contained no evidence that the Complainant had raised the VRMA issue with OSHA until his October 26, 2004 letter to Ms. Trecartin.

Because it was determined that there was a genuine factual issue concerning the date that the Complainant first submitted his VRMA complaint to OSHA, United's motion to dismiss the VRMA allegations was denied and a trial concerning that matter was scheduled for trial in Long Beach, California. Thereafter, United filed a pre-trial statement naming Ms. Pauly as one of the Respondent's trial witnesses and the Complainant submitted a witness list that included Mr. Ricci's name. Accordingly, in a letter dated May 5, 2005, the undersigned Administrative Law Judge asked Frank Strasheim, OSHA's regional administrator in San Francisco, to direct both Mr. Ricci and Ms. Pauly to appear as trial witnesses. The letter noted that their testimony would be "crucial" and offered to allow both individuals to testify by telephone or in San Francisco if it

⁵ Although this letter from OSHA's San Francisco office indicates that a copy of the decision was sent to the Respondent, United's counsel did not receive the decision or learn of it until after the Complainant filed his request for a hearing. Tr. at 236.

would be inconvenient for them to travel to Long Beach. In addition, the letter asked for a complete copy of “all the OSHA files” concerning Mr. Hafer’s 2004 complaints.

On May 20, 2005, the letter to Mr. Strasheim was answered by James E. Culp, the Acting Associate Solicitor for the Division of Management and Administrative Legal Services. In the letter, Mr. Culp noted that Department of Labor (“DOL”) regulations generally prohibit DOL employees from furnishing information in response to a subpoena or demand without the approval of a Deputy Solicitor of Labor. The letter then indicated that decisions about releasing information require the Deputy Solicitors to weigh a “party’s ‘need for the testimony against the adverse effects on the DOL’s concerns.” Such concerns, it added, “include ‘centralizing the dissemination of information of the agency (e.g. restricting investigators from expressing opinions on policy matters), minimizing governmental involvement in controversial matters unrelated to official business and avoiding the expenditure of government time and money for private purposes.” The letter noted that Mr. Ricci’s testimony was sought in order to obtain his response to the Complainant’s allegation that Mr. Ricci had called him on August 12, 2004 concerning a complaint that United had failed to pay his VRMA benefits. Without further explanation, the letter then indicated that Mr. Culp had decided against authorizing Mr. Ricci to testify. The letter also denied the request that Ms. Pauly be allowed to testify. As a result, no testimony was received during the trial from either Mr. Ricci or Ms. Pauly.

On May 26, 2005, however, OSHA did provide a copy of what is purported to be “the disclosable portions of OSHA’s investigatory file” concerning Mr. Hafer’s complaint. That document, which was also provided to both parties, is hereby admitted into evidence as Administrative Law Judge Exhibit (“ALJX”) 1. This exhibit does contain copies of various VRMA-related documents, but it is clear that all such documents had been provided to OSHA by the Office of Administrative Law Judges and that none of them had been provided directly to OSHA by the Complainant during August of 2004.⁶ For this reason, during the trial the Complainant quipped that OSHA “did a real good job of cleaning” out the file it provided to the Office of Administrative Law Judges. Tr. at 347.

ANALYSIS

Under the whistleblower provisions of AIR21, an employee of an air carrier, its contractors, or its subcontractors may seek redress from the Secretary of Labor if the employee has been discriminated against “with respect to compensation, terms, conditions, or privileges of employment” in retaliation for having provided safety-related information to an employer or to the Federal Government. 49 U.S.C. §42121(a). Protected activities include actions that provide or cause to be provided to an employer or to the Federal Government information related to the violation of FAA standards or regulations or other Federal laws related to air safety; the filing or causing to be filed of a proceeding relating to such

⁶ Because the file failed to contain any indication that OSHA received any certified mail or faxes from the Complainant at any time during the month of August of 2004, OSHA was asked to review its files for a second time to ensure that there had been no inadvertent omissions. As a result, on August 2, 2005, Mr. Culp sent the Office of Administrative Law Judges an additional 201 pages of documents. However, none of the additional pages contain any information indicating that OSHA had received any faxes or certified mail from the Complainant during August 2004.

violations; testifying in such a proceeding; and assisting or participating in such a proceeding. 49 U.S.C. §42121(a). Complaints of violations of this provision are barred unless filed within 90 days.

Responsibility for conducting preliminary investigations of employee complaints under AIR21 has been delegated to OSHA by the Secretary of Labor. 49 U.S.C. §42121(b)(2)(B); 29 C.F.R. §1979.103(c). Either party may object to OSHA's preliminary determination and obtain a hearing before an Administrative Law Judge. 29 C.F.R. §1979.106. At a hearing before an Administrative Law Judge, a complainant must show by a preponderance of the evidence that a protected activity was a "contributing factor" in the adverse action taken by a respondent. 49 U.S.C. §42121(b)(2)(B)(iii); *Peck v. Safe Air Int'l, Inc.*, ARB No. 02-028, slip op. at 9 (ARB Jan. 30, 2004). If a complainant meets this burden, a respondent may nevertheless avoid liability if the respondent "demonstrates by clear and convincing evidence" that it would have legitimately taken the same adverse action even if the complainant had not engaged in a protected activity. 49 U.S.C. §42121(b)(2)(B)(iv); 29 C.F.R. §1979.109(a); *Peck*, slip op. at 9. The "burden shifting pretext framework" applied to adjudication of complaints under the amended Energy Reorganization Act ("ERA") whistleblower statute also applies to AIR21 complaints, so "unless a complainant proves that the employer fired him in part because of his protected activity, it is unnecessary to proceed to determine whether the employer has demonstrated by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity." *Peck*, slip op. at 10; *Kester v. Carolina Power & Light Co.*, ARB No. 02-007 (ARB Sept. 30, 2003).

In this case, the Complainant contends that he made safety complaints to the FAA and that these protected activities motivated United to retaliate against him by deliberately failing to pay his VRMA benefits within the time period allowed under California law for making such payments.

In contrast, the Respondent contends that the Complainant failed to submit his AIR21 complaint to the DOL within 90 days of the alleged violation and that his complaint is therefore time barred. In addition, the Respondent argues that even if the Complainant did file a timely complaint, the evidence does not support a conclusion that the Respondent's failure to promptly pay his VRMA benefits was in any way motivated by an intention to retaliate against the Complainant's protected activities.

For the reasons set forth below it has been concluded that the Complainant did in fact file a timely AIR21 complaint against the Respondent, but that the preponderance of the evidence fails to demonstrate that the delay in the payment of the Complainant's VRMA benefits was in any way related to his protected conduct as a whistleblower.

1. Timeliness of the Complainant's AIR21 Complaint

The Respondent's contention that the Complainant's AIR21 complaint is time barred is primarily based on the fact that the investigatory file provided by OSHA fails to contain any documents indicating that the Complainant complained to OSHA concerning VRMA benefits before October 26, 2004, when he responded to Ms. Trecartin's request that he withdraw his AIR21 complaint. The Respondent's contention is also supported by Ms. Pauly's April 11, 2005

letter, which asserts that her examination of OSHA's investigatory file failed to find any evidence that the Complainant had complained about the late payment of VRMA benefits before October 26, 2004.

On the other hand, the Complainant's contention that he sent a complaint about VRMA benefits to OSHA in early August of 2004 is supported by a considerable amount of documentary evidence, including phone bills showing that he faxed or called OSHA's San Francisco telephone number on August 5, 2004, a Postal Service receipt showing that he sent an envelope to OSHA's San Francisco office by certified mail on August 6, 2004, and a certified mail receipt showing that the envelope was delivered to OSHA's San Francisco address on August 16, 2004. In addition, the Complainant has provided his own sworn testimony that both of the foregoing communications to OSHA's San Francisco office contained an AIR21 complaint concerning the late payment of his VRMA benefits. The Complainant also testified that his AIR21 complaint concerning his disability benefits and out-of-pocket medical expenses was dated August 5, 2005 only because Mr. Ricci had called him in mid-August and recommended that he send OSHA a second, back-dated letter concerning these additional allegations.

After considering all the relevant evidence, it has been concluded that the Complainant has established that he filed a timely AIR21 complaint concerning the late payment of his VRMA benefits by fax on August 5, 2004 and by certified mail on August 6, 2004. There are four reasons for this conclusion.

First, it is highly likely that on or before August 5, 2004 the Complainant would have been strongly motivated to file an AIR21 complaint alleging that the delay in the payment of his VRMA benefits was retaliatory. This conclusion is supported by the fact that the value of the VRMA benefits awarded by Judge Zarett is substantial (\$38,984.40) and by the fact that that by early August of 2004 the payment of those benefits had been inexplicably delayed for nearly three months beyond the State of California's statutory deadline. Additionally, there is undisputed evidence that before August of 2004, the Complainant had made a series of safety-related complaints about United that, at least in his opinion, could have motivated United to retaliate against him by deliberately delaying the payment of his VRMA benefits.

Second, the Complainant has provided documentary evidence clearly establishing that he did in fact call or fax OSHA's San Francisco telephone number on August 5, 2004 and mail something to that same office by certified mail on the following day. Although the documents provided by OSHA fail to include any records showing that OSHA received any telephone calls, faxes, or certified mail from the Complainant at all during August of 2004, the certified mail receipt provided by the Complainant clearly establishes that the certified mail from the Complainant was in fact delivered to OSHA's San Francisco office on August 16, 2004.

Third, although there is no documentary evidence to corroborate the Complainant's testimony that the fax and certified mail he sent to OSHA on August 4 and 5 of 2004 alleged that United violated AIR21 by delaying the payment of his VRMA benefits, it is highly unlikely that the Complainant's fax and certified mail could have pertained to any other subject. In this regard, it is recognized that OSHA did produce a copy of a letter from the Complainant dated

August 5, 2004, which alleges that United violated AIR21 by miscalculating the Complainant's weekly disability benefits and failing to reimburse him for approximately \$5,383 in out-of-pocket medical expenses. However, there are several reliable reasons for concluding that this letter is not the document that was faxed to OSHA on August 5, 2004 and sent to OSHA by certified mail on August 6, 2004. Most significantly, the OSHA date stamp on the letter concerning the disability benefits and out-of-pocket medical expenses plainly shows that it was not received by OSHA until September 3, 2004. RX 7. In addition, it seems virtually certain that any letter that the Complainant actually composed on August 5, 2004 would have complained vociferously that even though three months had elapsed since the issuance of Judge Zarett's order, United had still not paid the nearly \$39,000 in VRMA benefits that were owed to him. Instead, the letter OSHA received on September 3, 2004 complained only of two far less significant matters---an alleged miscalculation in the Complainant's weekly disability benefits and United's purported failure to pay \$5,383 in out-of-pocket medical expenses. Indeed, the fact that this letter does not even mention VRMA benefits tends to corroborate the Complainant's testimony that he was told by Mr. Ricci in mid-August of 2004 to send a second letter and back date it to August 5, 2004.

Fourth, the Complainant's demeanor when testifying that Mr. Ricci called him in mid-August of 2004 to discuss his VRMA complaint was entirely credible, as was the Complainant's demeanor when describing the substance of his conversation with Mr. Ricci. The credibility of the Complainant's testimony concerning this conversation is enhanced by the fact that neither Mr. Ricci nor anyone else in the DOL has ever denied the Complainant's representations concerning his conversation with Mr. Ricci. Indeed, the failure of the Acting Associate Solicitor for the Division of Management and Administrative Legal Services to provide an affidavit from Mr. Ricci or to even give a specific reason for refusing to permit Mr. Ricci to testify in this proceeding provides further justification for concluding that OSHA's San Francisco office simply does not want to admit that the Complainant has been telling the truth about when he first sent his VRMA complaint to OSHA. Obviously, OSHA would not want to verify the accuracy of the Complainant's testimony because any such verification would amount to an admission that OSHA has lost, hidden, or destroyed the Complainant's original complaint. Unfortunately, OSHA's refusal to acknowledge its deficiencies in its handling of this matter has imposed substantial and unnecessary burdens on the Complainant, the Respondent, and the Office of Administrative Law Judges. Even more significantly, it created an unconscionable risk that the Complainant's AIR21 complaint could have been unjustly rejected on the grounds that it was barred by the 90-day statute of limitations.

2. Reasons for the Delay in the Payment of the Complainant's VRMA Benefits

According to the Complainant's post-trial brief, his allegation that United deliberately delayed the payment of his VRMA benefits for retaliatory reasons is demonstrated by various types of circumstantial evidence, including the following categories of such evidence: (1) the fact that after he began questioning United's safety practices, United engaged in a series of adverse actions against him, including the termination of his employment, (2) the fact that United monitors Gallagher Bassett's payments of workers' compensation benefits, (3) the fact that as a client of both Gallagher Bassett and Laughlin Falbo, United would have had the authority to direct those firms to delay the payment of the Complainant's VRMA benefits, (4) the fact that various employees of Gallagher Bassett and Laughlin Falbo knew or could have known that the

Complainant had made safety allegations against United, and (5) the improbability of United's assertion that the delay in the payment of his VRMA benefits was due only to inadvertence and a series of clerical errors.

United's contention that the delay in paying the Complainant's VRMA benefits is not attributable to retaliatory motives is supported by the following evidence: (1) the fact that United has delegated all decision-making authority concerning the payment of workers' compensation benefits to Gallagher Bassett, (2) the fact that there is no direct evidence that United directed Gallagher Bassett to delay payment of the Complainant's VRMA benefits, and (3) the fact that every one of the witnesses involved in the process of paying workers' compensation benefits to United employees has denied being involved in any effort to delay payment of the Complainant's VRMA benefits.

After weighing all of the relevant evidence, it has been concluded that although the reasons for the delay in the payment of the Complainant's VRMA benefits are still not entirely clear, the Complainant has failed to show by a preponderance of the evidence that the delay was attributable to retaliatory motives. There are three reasons for this conclusion.

First, all but one of the individuals having responsibility for paying the Complainant's VRMA benefits has provided credible sworn testimony indicating that they were not involved in any effort to intentionally delay the payment of the Complainant's VRMA benefits. As previously noted, this group includes two attorneys at Laughlin Falbo (Lorraine Dickerhof and Michelle Cuenca) and two supervisory employees of Gallagher Bassett (Jan Romero and Sonya Riley). In addition, two employees of United (Tracey Venter and John Midgett) also credibly denied any involvement with any intentional effort to delay payment of the Complainant's VRMA benefits. Although no testimony was received from Crystal D'ammico, the former Gallagher Bassett claims examiner to whom the Complainant's case was assigned during the Summer of 2004, there is no reason to believe that she would have provided any testimony of a different nature. Indeed, the evidence indicates that Ms. D'ammico was only a temporary, low level employee and therefore unlikely to have been privy to any improper scheme.

Second, although United may have some animosity toward the Complainant, any effort to deliberately delay the payment of his VRMA benefits would have been an illogical way of attempting to punish him. As Ms. Riley pointed out, California's workers' compensation statute imposes financial penalties on employers that unreasonably fail to promptly pay amounts awarded by the WCAB. *See* California Labor Code Section 5814 (specifying that employers who unjustifiably fail to promptly pay workers' compensation benefits must pay the person entitled to such benefits an additional 10 or 25 percent of the unpaid amount). Indeed, because such penalties must be paid to the person whose benefit payments have been delayed, deliberately delaying payment of the Complainant's VRMA benefits could have the counterproductive effect of financially rewarding the Complainant. Moreover, as Ms. Riley pointed out, the State of California can also impose sanctions on Gallagher Bassett if it engages in bad faith in processing claims. In short, it would have been irrational for United to have sought to harm the Complainant by delaying the payment of his VRMA benefits. Conversely, it is highly unlikely that employees of Gallagher Bassett and Laughlin Falbo would have agreed to

participate in any such counterproductive scheme, even if United had requested their participation.

Third, although the Complainant contends that it would be “preposterous” to believe that the delay in the payment of his VRMA benefits was due only to inadvertence and clerical errors, this explanation for the delay in the payment of his benefits appears to be more likely than the possibility that the delay was deliberate. Indeed, the testimony of the employees of Gallagher Bassett and Laughlin Falbo indicates that both organizations handle such large volumes of workers’ compensation claims and so frequently reassign responsibility for handling such cases that administrative errors like those that allegedly occurred in this case are inevitable. It is also noted that the apparent failure of Crystal D’ammico to have received the order that the Complainant’s attorney faxed to her on April 15, 2004 may simply be due to the fact that she was a temporary employee whose name on the fax had been misspelled as “Crystal D-Amico.”

ORDER

The Complainant’s AIR21 complaint concerning the late payment of his VRMA benefits is hereby dismissed.

A

Paul A. Mapes
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1979.110, unless a petition for review is timely filed with the Administrative Review Board (“Board”), U.S. DOL, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210, and within 30 days of the filing of the petition, the Board issues an order notifying the parties that the case has been accepted for review. The petition for review must specifically identify the findings, conclusions, or orders to which exception is taken. Any exception not specifically urged ordinarily shall be deemed to have been waived by the parties. To be effective, a petition must be filed within ten business days of the date of the decision of the Administrative Law Judge. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the Board. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. DOL, Washington, D.C. 20210. *See* 29 C.F.R. §§ 1979.109(c) and 1979.110(a) and (b).

