



**Issue Date: 20 July 2020**

CASE NO.: 2019-ERA-00010

*In the Matter of:*

**GARY MANSELL,**  
Complainant,

vs.

**TENNESSEE VALLEY AUTHORITY.**  
Respondent.

**DECISION AND ORDER GRANTING MOTION FOR SUMMARY DECISION**

This case arises under the whistleblower provisions of Section 211 of the Energy Reorganization Act, 42 U.S.C. § 5281, and the implementing regulations found at 29 C.F.R. Part 24. This matter is not currently set for hearing, as the hearing that was set for Monday, April 20, 2020, in Huntsville, AL was vacated by order of the Chief Administrative Law Judge due to COVID-19. *See Suspension Of Hearings And Procedural Deadlines Due To Covid-19 National Emergency*, OALJ No. 2020-MIS-00006 (Mar. 19, 2020).

I have reviewed the Respondent's January 17 and January 23, 2020, Motion to Dismiss and exhibits, as well as the Complainant's January 30, 2020 opposition. Also, on March 2, 2020, I issued an Order To Show Cause Why Motion To Dismiss Should Not Be Granted And Order Staying Discovery, inviting filings from the parties. I have reviewed Complainant's March 17, 2020 response, as well as Respondent's March 20, 2020 reply.

For the reasons below, I will construe the Respondent's Motion to Dismiss as a Motion for Summary Decision, *see* 29 C.F.R. § 18.72, and grant it.

**FINDINGS OF FACT**

**1. Complainant's workers' compensation claims**

Complainant was a truck operator for a TVA transmission line crew. In a December 27, 2016, workers' compensation filing under the Federal Employees' Compensation Act (FECA) with the USDOL Office of Workers' Compensation Programs (OWCP), he stated that he

suffered an electrical shock while at work on or about December 31, 2015. RX 2.<sup>1</sup> TVA opposed the claim by filings dated January 6, 2017. *Id.*

OWCP developed and evaluated Complainant's workers' compensation claim, including reviews of Complainant's medical evidence and other evidence submitted by both Complainant and Respondent, and denied the claim on February 21, 2017. RX 3. Complainant failed to establish that his injury occurred, in part because the diagnoses submitted were from providers (two chiropractors and a nurse practitioner) who are not "physicians" as defined in FECA. RX 3 p. 2; *see* 5 U.S.C. § 8101(2). Complainant also failed to respond to a factual questionnaire sent by OWCP, while Respondent submitted documentation that the power line was tagged out and grounded at the date and time that Complainant asserted the injury occurred. RX 3 p. 2.

Complainant timely moved for reconsideration and submitted some new evidence, including the allegation that he was coerced into not reporting his injury more promptly, which was insufficient to persuade OWCP to change its decision. OWCP denied reconsideration on May 21, 2018. According to the decision, Respondent submitted no new evidence, except to note that Complainant left work on April 6, 2017, due to a non-work-related injury and resigned effective August 25, 2017. RX 4 p. 2-3.

Complainant again moved for reconsideration, and submitted numerous published TVA documents governing workplace procedures. RX 5 p. 4. Reviewing the decision, Respondent appears to have submitted no evidence. OWCP denied reconsideration a second time by order dated September 19, 2018.

## 2. Complainant's OSHA complaint

On March 29, 2019, 191 days after the last of the three denials of Complainant's workers' compensation claim, Complainant filed a complaint with OSHA alleging whistleblower retaliation under Section 211 of the ERA. *See* 42 U.S.C. § 5851. By findings dated April 8, 2019, OSHA dismissed the complaint as untimely. RX 7; *see also* 42 U.S.C. § 5851(b)(2) (180 days from date of violation to file complaint with OSHA; *but see* 29 C.F.R. § 24.103(d)(2) (allowing equitable tolling).

Complainant timely appealed to OALJ, but Judge Henderson issued an Order to Show Cause as to why the case should not be dismissed on statute of limitations grounds. EX 9. By

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<sup>1</sup> Complainant's Exhibits are cited as CX, Respondent's Exhibits as RX. The cited exhibits were filed as attachments to Respondent's January 17 and January 23, 2020, Motion to Dismiss; and Complainant's January 30, 2020 opposition.

Specifically, Complainant reported: "Storm Break. With Affirmative nod from foreman, jumped up grabbed a conductor wire with left hand an static wire with right hand. Received a voltgae shock to my body" [*sic*]. RX 2 p. 1.

Though Complainant lives in Alabama, in the Eleventh Circuit, according to the Complainant's workers' compensation filing the place of injury and presumably the foreman's comment to him was "ROW [presumably "right of way"] Right across AL/TN St Line on HWY 157 in TN." EX 2 p. 1. I therefore apply ARB and Sixth Circuit law, and look to other circuits for persuasive authority. *See* 42 U.S.C. § 5851(c)(1) (review "in the United States court of appeals for the circuit in which the violation . . . allegedly occurred.")

affidavit, Complainant responded that his foreman told him to “keep his mouth shut” following the Complainant’s electric shock accident on or about December 31, 2015. RX 8 p. 6. Complainant alleges that the foreman said the same thing to a colleague. *Id.* He stated that “by my foreman’s telling me to keep my mouth shut, and my foreman not reporting my claim as required, and by my foreman’s acts and/or omissions, I did not pursue any attempts to properly have my claim reported at the appropriate time.” *Id.* Complainant also submitted an affidavit of a former TVA foreman, Bradley Ray Cox, who asserted that Complainant’s injuries should have been reported. RX 8 p. 8.

### 3. Complainant’s response to the Respondent’s January 2020 Motion to Dismiss

Complainant, through counsel of record, filed a two-page brief in opposition to the Motion to Dismiss on January 30, 2020. He argues that Complainant’s foreman had a duty and failed to report Complainant’s December 2015 injury, and that Respondent had a duty to help Complainant pursue his FECA claim against itself. Complainant alleges that because Complainant’s foreman did not report the December 2015 injury, and indeed told Complainant to “keep his mouth shut,” “Complainant would have then been in a position to properly address all legal and medical causation issues regarded by the Department of Labor and done so in a timely basis.” Complainant’s Response p. 2.

Complainant argues that “[t]he protected activity was Complainant’s attempt to report his injury to TVA when it occurred in 2015 . . . .” *Id.* “TVA’s adverse action was telling Complainant to ‘keep his mouth shut,’ because such a statement would dissuade the reasonable worker from filing a claim. Although Complainant eventually filed a claim the delay and absence of an incident report contributed to the denial.” *Id.*

Complainant incorporated, and reattached, the two affidavits filed in response to Judge Henderson’s Order to Show Cause to his response to Respondent’s January 17 and January 23, 2020, Motion to Dismiss, which I discuss above. In response to my March 2, 2020, Order to Show Cause, Complainant filed no new evidence. He refiled his August 30, 2019 affidavit discussed above, RX 8 p. 6, as well as additional argument.

### ANALYSIS

For purposes of this Decision and Order, since Judge Henderson already ruled that the Complainant might be able to establish “equitable modification of the applicable time limits,” I will continue to assume that the Complainant would do so and will evaluate the sufficiency of the Complainant’s administrative whistleblower complaint and filings to date.

Under the OALJ rules, “[a] party may move to dismiss part or all of the matter for reasons recognized under controlling law, such as lack of subject matter jurisdiction, failure to state a claim upon which relief can be granted, or untimeliness.” 29 C.F.R. § 18.70(c); *see also* Fed. R. Civ. P. 12(b). In order to promote the protection of whistleblowers, the regulations provide that whistleblower cases before OSHA are initiated by informal documents that are not required to meet the pleading standards of complaints in federal court. *Evans v. EPA*, ARB No. 08-059, ALJ No. 2008-CAA-003, 2012 WL 3164358 at \*3-5 (ARB July 31, 2012) (citing 29

C.F.R. § 24.103). “Consequently, an ALJ should not act on a [Federal Rule of Civil Procedure] 12 facial challenge until it is clear that the complainant has filed a document that articulates the claims presented to the OALJ for hearing following OSHA’s findings.” *Id.* at \*5.

That said, “once a whistleblower case goes to the OALJ for an evidentiary hearing before an ALJ, just as in federal court, an opposing party has a right to ‘fair notice’ of the charges against it,” *id.* at 6, which requires “(1) some facts about the protected activity, showing some ‘relatedness’ to the laws and regulations of one of the statutes in our jurisdiction, (2) some facts about the adverse action, (3) a general assertion of causation and (4) a description of the relief that is sought.” *Id.*

As discussed in *Evans*, in issuing the March 2, 2020, Order to Show Cause I granted the Complainant the opportunity to file a document or documents giving “fair notice” of his claim. Prior to issuance of the Order to Show Cause, the Respondent had filed its Motion to Dismiss, attaching documents that were not included in the pleadings to date. In the Order to Show Cause, I reviewed the record as it then existed, and included a discussion of the facts of record at that point, relying in part on the documents submitted by the Respondent. The Complainant therefore had sufficient notice that I would rely on the Respondent’s documents in ruling on the Motion to Dismiss, though I did not expressly at that time convert the Motion to Dismiss into a Motion for Summary Decision. *See Wysocki v. Int’l Bus. Mach. Corp.*, 607 F.3d 1102, 1105 (6th Cir. 2010) (“[w]hether notice of conversion of a motion to dismiss to one for summary judgment by the court to the opposing party is necessary depends upon the facts and circumstances of each case” (citations omitted)). I state clearly now that in order to consider those documents here, in my view I must construe the Respondent’s motion as a Motion for Summary Decision. *See, e.g., Doe v. U. of Kentucky*, 959 F.3d 246, 250 (6th Cir. 2020). On this record, I find that Complainant will not be “surprised” as a matter of law by my decision to do so. *Wysocki*, 607 F.3d at 1104.

The legal standard under the OALJ Rules of Procedure is the same as under Federal Rule of Civil Procedure 56: summary decision shall be granted when the record shows that there is “no genuine dispute as to any material fact and that the moving party is entitled to decision as a matter of law.” 29 C.F.R. § 18.72(a); *compare* Fed. R. Civ. P. 56(a); *see, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25 (1986); *Zavaleta v. Alaska Airlines, Inc.*, ARB No. 15-080, ALJ No. 2015-AIR-016, slip op. at 8 & n.30 (ARB May 8 2017). A dispute regarding a material fact is “genuine” if the evidence is such that a reasonable fact-finder could return a verdict in favor of the nonmoving party. *See, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). When ruling on a motion for summary judgment, the court is required to view all facts and inferences in the light most favorable to the nonmoving party and resolve all disputed facts in favor of the nonmoving party. *See, e.g., Bratten v. SSI Servs., Inc.*, 185 F.3d 625, 629 (6th Cir. 1999). Further, a court “may not make credibility determinations or weigh the evidence” in ruling on a motion for summary judgment. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000); *Anderson*, 477 U.S. at 254-55.

Once the moving party has made an initial showing that there is no evidence to support the nonmoving party’s case, the party opposing the motion must come forward with competent summary judgment evidence of the existence of a genuine dispute of material fact. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 586 (1986).

Under the Energy Reorganization Act,

(1) No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)—

(A) notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.);

(B) refused to engage in any practice made unlawful by this chapter or the Atomic Energy Act of 1954, if the employee has identified the alleged illegality to the employer;

(C) testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this chapter or the Atomic Energy Act of 1954;

(D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;

(E) testified or is about to testify in any such proceeding or;

(F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended.

42 U.S.C. § 5851; *see also* 29 C.F.R. § 24.109(b)(1). The Secretary of Labor’s regulations implementing investigations by OSHA under the Act mirror *Evans*, and explain that “[t]he complaint, supplemented as appropriate by interviews of the complainant, must allege the existence of facts and evidence to make a prima facie showing as follows: (i) The employee engaged in a protected activity; (ii) The respondent knew or suspected, actually or constructively, that the employee engaged in the protected activity; (iii) The employee suffered an adverse action; and (iv) The circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the adverse action.” 29 C.F.R. § 24.104(f)(1-2). The allegations may be of direct evidence, or may be circumstantial such as a showing of temporal proximity between protected activity and an adverse action. 29 C.F.R. § 24.104(f)(3). Any party may request review of OSHA’s findings before OALJ. *See* 29 C.F.R. § 24.106, .109(b)(1); *see also, e.g., Evans*, 2012 WL 3164358 at \*3-5.

#### 1. Complainant’s asserted protected activity

In his response to Respondent’s January 17 and January 23, 2020, Motion to Dismiss, Complainant alleged that his ERA-protected activity was his “attempt to report his injury to TVA when it occurred in 2015.” In my March 2 Order to Show Cause, I observed that based on the record at that time, Complainant *did not* attempt to report his injury to TVA when it occurred. By his own affidavit, Complainant reported his alleged injury to TVA just shy of one year later.

In his response to the March 2 Order to Show Cause, Complainant takes issue with this. Complainant then states: “on the record that it was set out that Complainant did not attempt to

report his injury to TVA when it occurred. To the contrary, Complainant stated (See exhibit “A”) in his affidavit that ‘On or about December 31, 2015, I was injured in Waterloo, Alabama for TVA.’” Complainant’s Response at 1. As noted, Complainant refiled the same August 30, 2015, affidavit in his response to the March 2 Order to Show Cause as he relied on in responding to Respondent’s Motion to Dismiss. There is no new evidence in the record of an earlier or qualitatively different injury *report*.

And in any event, the threshold issue here in this ERA whistleblower case is not whether Complainant was injured, or whether or when he reported his injury, it is whether Complainant engaged in protected activity. Under some whistleblower statutes, injury reports themselves are protected activity. The Federal Railroad Safety Act, for example, expressly includes reporting an injury and seeking medical treatment as protected activity. *See* 49 U.S.C. § 20109(a)(4), (c).

But under the ERA, save for limited exceptions, an individual’s ordinary injury report is not protected activity. In order to be protected activity, safety and health complaints must “touch on the concerns for the environment and public health and safety that are addressed by [the environmental] statutes.” *Melendez v. Exxon Chems. Ams.*, ARB No. 96-051, ALJ No. 1993-ERA-006, slip op. at 11 (ARB, July 14, 2000) (citations omitted). They must be an oral or written communication expressing a concern about a “condition,” or “practices, policies, directives or occurrences,” where “the whistleblower reasonably believes that compliance with applicable nuclear safety standards is in question; it is not necessary for the whistleblower to cite a particular statutory or regulatory provision or to establish a violation.” *Williams v. Mason & Hanger Corp.*, ARB No. 98-030, ALJ No. 1997-ERA-14 and 18-22, 2002 WL 31662916, at \*15 (ARB Nov. 13, 2002); *accord Ma v. Am. Elec. Power, Inc.*, 123 F. Supp. 3d 955, 963 (W.D. Mich. 2015) (citing *American Nuclear Resource, Inc. v. U.S. Dep’t of Labor*, 134 F.3d 1292, 1295 (6th Cir. 1998)). “The ERA does not protect every incidental inquiry or superficial suggestion that somehow, in some way, may possibly implicate a safety concern.” *American Nuclear Resources*, 134 F.3d at 1295. The key, limited exception to an injury report being protected activity is that complaints regarding employees’ own radiation exposure at work has been held to be protected under the ERA, because of the “applicable nuclear safety standards” implicated. *Williams*, 2002 WL 31662916 at \*15-21.

Here, the substance of the protected activity alleged by the Complainant is a gravely serious, but ordinary, workers’ compensation claim injury report of an electrical linesman: Complainant reported that he touched two power lines at work and received a shock. While certainly implicating safe work practices, the statement on its face does not “touch on the concerns for the environment and public health and safety” that are the purpose of the Act, or express any concern that all “that compliance with applicable nuclear safety standards is in question.”

In his response to the March 2 Order to Show Cause, Complainant submitted argument that his “work injury indirectly impacted the environment because the public was potentially at risk if that type of accident occurred again and was not contained.” Complainant’s Response at 2. Complainant does not elaborate further as to how his injury – as alarming and unfortunate as it was – would affect the environment or public health and safety, or relates to nuclear safety standards.

Given the opportunity to do so in my March 2 Order to Show Cause, Complainant has not stated facts, or provided evidence, to show why the activity he has alleged is an ERA-protected activity as a matter of law. *See Evans*, 2012 WL 3164358 at \*3-5.

## 2. Complainant's asserted adverse action

An ERA complainant must also show that he or she suffered a “materially adverse” employment action, defined as an action that “might have dissuaded a reasonable worker from making or supporting a charge of discrimination,” i.e., engage in protected activity, in the context it occurred. *McNeill v. U.S. Dep't of Labor*, 243 F. App'x 93, 98 (6th Cir. 2007) (citing and quoting *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 126 S.Ct. 2405, 2417 (2006)); *see also* 29 C.F.R. § 24.102(a-c). In *McNeill*, after the employee engaged in a protected activity, he was sent home, “placed on a routine administrative hold, and . . . told both that he would remain on the payroll and that he was not terminated.” 243 F. App'x at 99. The court found this was not an adverse action, *id.*, and in so doing noted that the supervisor who sent McNeill home did not have the authority to terminate him.

Here, even construed as an implicit yet vague threat, Complainant has not alleged facts so far here supporting why the threat implied from his foreman to “keep his mouth shut” qualifies as an adverse action as a matter of law. Complainant has not asserted any loss of pay or employment status as a result of the threat. Moreover, the comment appears to have occurred prior to any even arguably protected activity, i.e., the Complainant's injury report a year later. Complainant provides no context about the foreman in question, including his or her hiring, firing or disciplinary authority, or history of retaliation.

In his response to the March 2 Order to Show Cause, Complainant also argues that the threat “negatively impacted the complainant's ability to prove the merits of his claim,” Complainant's Response at 2, referring to his workers' compensation claim for his December 2015 injury. *If* a TVA manager retaliated against Complainant for ERA-protected activity by engineering the failure of his workers' compensation claim with OWCP, where OWCP was the “cat's paw,” *see, e.g., Riddell v. CSX Transp., Inc.*, ARB No. 2019-0016, ALJ No. 2014-0054, slip op. at 17 (ARB May 19, 2020), and drawing every inference in favor of Complainant, I agree that would be “materially adverse.” I will discuss this counterfactual scenario below, under causation.

## 3. Causation and relief sought

An ERA complainant must also show causation, i.e., that his or her protected activity was a contributing factor in the adverse action, defined as “any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.” *Addis v. Dep't of Labor*, 575 F.3d 688, 691 (7th Cir. 2009) (citation omitted). A complainant will have to identify causation as well as relief for the asserted injury, *see Evans*, 2012 WL 3164358 at \*6, and ultimately have to prove it by a preponderance of the evidence. *Id.*; *see also, e.g., Tennessee Valley Auth. v. U.S. Sec'y of Labor*, 59 F. App'x 732, 738–39 (6th Cir. 2003); *American Nuclear Resources*, 134 F.3d at 1295–96; *see generally* 29 C.F.R. § 24.102(a-c), .109.

Necessarily, a complainant must plead and ultimately show at least constructive knowledge of the protected activity by the person or persons who retaliated, i.e., caused a materially adverse action. *See, e.g., Bobreski v. J. Givoo Consultants, Inc.*, ARB No. 09-057, ALJ No. 2008-ERA-003, slip op. at 13-15 (ARB June 24, 2011).

Taken as a whole, the evidence may demonstrate that at least one individual among multiple decision-makers influenced the final decision and acted at least partly because of the employee's protected activity. Conversely, the evidence as a whole may demonstrate that none of the decision-makers knew about the employee's protected activity and thereby break the causation chain between the protected activity and the final adverse action.

*Id.* at 14. A finding of no contribution may be sustained, even where there is temporal proximity between protected activity and an adverse action, when there is a greater weight of evidence against contribution, such as a lack of knowledge of protected activity by the decision maker, a longer timeline disfavoring contribution, and the existence of a credible, non-pretextual intervening cause for the adverse action. *See Folger v. SimplexGrinnell, LLC*, ARB No. 15-021, ALJ No. 2013-SOX-42, slip op. at 3-6 (ARB Feb. 18, 2016) (SOX).

Here, Complainant has not pled or set out facts showing how any protected activity was a contributing factor to any adverse action against the Complainant. Complainant again argues, as he did before OSHA, *see* RX 7, that the adverse action was the denial of his workers' compensation claim or at least the "negative[] impact[] [on] the complainant's ability to prove the merits of his claim." Complainant's Response at 2. But it is undisputed that Complainant's workers' compensation claim was denied by OWCP, not TVA. Complainant has alleged no facts to support that OWCP had knowledge of any protected activity, or was the "cat's paw" for retaliation by TVA, or that any protected activity was a contributing factor in any way to the denial of Complainant's workers' compensation claim by OWCP. OWCP gave Complainant more than one opportunity to supplement his claim with additional evidence, which he appears not to have done.

Of note, the record shows that the primary reason that OWCP denied the Complainant's claim is because he filed only diagnoses by non-qualifying medical providers to prove his claim. This is a credible intervening cause for the denial of Complainant's workers' compensation claim, which Complainant does not plead facts to even allow an inference that might place the issue in dispute. *See Folger*, ARB No. 15-021, slip op. at 3-6. There is no indication of pretext or animus.

### **ORDER**

The *Evans* decision discussed above explains in detail what a complainant must show in response to a motion to dismiss for failure to state a claim once his or her case is before OALJ. In the March 2, 2020, Order to Show Cause, I provided the Complainant an opportunity to "file[] a document that articulates the claims presented to the OALJ for hearing following OSHA's findings." *Evans*, 2012 WL 3164358 at \*5.

Complainant has failed to allege facts to show an ERA-protected activity, and has failed to allege sufficient even-circumstantial facts to show that any protected activity was a contributing factor to an adverse action. *See Evans*, 2012 WL 3164358 at \*3-5; *see also* 29 C.F.R. § 24.104(f)(1-2). These are “essential elements” to his claim. *See Evans*, 2012 WL 3164358 at \*6. Complainant has not disputed the facts set out by Respondent in support of its Motion to Dismiss.

For these reasons, it is ORDERED that Respondent’s January 17 and January 23, 2020, Motion to Dismiss, construed as a Motion for Summary Decision, is GRANTED, and Complainant’s complaint is DENIED. *See* 29 C.F.R. § 24.109(d)(3).

EVAN H. NORDBY  
Administrative Law Judge

**NOTICE OF APPEAL RIGHTS:** This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board ("the Board") within 10 business days of the date of this decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: [Boards-EFSR-Help@dol.gov](mailto:Boards-EFSR-Help@dol.gov)

The date of the postmark, facsimile transmittal, or e-filing 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 for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties.

At the same time that you file your petition with the Board, you must serve a copy of the petition on (1) all parties, (2) the Chief Administrative Law Judge, U.S. Dept. of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards. Addresses for the parties, the Assistant Secretary for OSHA, and the Associate Solicitor are found on the service sheet accompanying this Decision and Order.

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

If a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor. See 29 C.F.R. §§ 24.109(e) and 24.110.