



Issue Date: 07 March 2019

CASE NO.: 2017-FRS-00088

In the Matter of:

VYUNDA STRONG,
Complainant,

v.

CSX TRANSPORTATION, INC.,
Respondent.

**ORDER GRANTING RESPONDENT’S MOTION FOR SUMMARY DECISION and
DENYING COMPLAINT**

This matter arises under the employee-protection provisions of the Federal Railroad Safety Act, 49 U.S.C. § 20109 (FRSA or the Act), and its implementing regulations at 29 C.F.R., Part 1982. Vyunda Strong (Ms. Strong or Complainant) alleges that her employer, CSX Transportation, Inc. (BNSF or Respondent), violated the whistleblower protection provisions of the FRSA by disciplining her for following a treatment plan of her treating physicians, under 49 U.S.C. § 20109(c)(2). This claim was initiated with the Office of Administrative Law Judges (“OALJ”) on August 8, 2017, when OALJ received Respondent’s timely objections to the findings of the Regional Administrator of the Occupational Safety and Health Administration’s (“OSHA”). This case is before me *de novo*.

On December 26, 2018, Respondent filed a motion for summary decision under 29 C.F.R. § 18.72. As Complainant is not represented by counsel, I informed her on January 7, 2019 of the text of the rule regarding motions for summary decision, and of certain consequences of a failure to contest the facts alleged by Respondent. Ms. Strong filed a timely opposition to BNSF’s motion for summary decision. For the reasons set forth below, I find that there are no disputed issues of material fact and grant the motion.

Procedural History

Ms. Strong filed a complaint with the Occupational Safety and Health Administration on June 28, 2016, alleging that she had been removed from service by Respondent in retaliation for her following the treatment plan of her physicians. The OSHA Regional Administrator found no reasonable cause to believe that Respondent violated the Act and dismissed the complaint. Ms. Strong filed a timely objection to the Secretary’s Findings and requested a hearing before an

administrative law judge. The matter was docketed in OALJ in August of 2017, and assigned to me in September of 2017. The proceedings were stayed for several months due to an illness on the part of Complainant. The stay was lifted in November of 2018, after which Respondent filed the present motion.

Undisputed Facts

1. Background

Complainant is an employee of Respondent, working as a crew dispatcher in Respondent's Crew Management Center. [Deposition of Complainant, Ex. 2 to MSD, p. 9.] In that role, Ms. Strong calls Respondent's engineers and conductors to staff train, calls clerks into work, and has certain duties related to processing payrolls. [*Id.*, pp. 9-10, 14.] At the relevant times, she worked from 11:00 p.m. to 7:00 a.m. Tuesday through Saturday, with Sundays and Mondays off.¹ [Opposition to motion for summary decision, second page.²]

2. Medical Issues

While employed by Respondent, Ms. Strong has suffered two injuries that resulted in her continuing treatment by a physician. In August of 2006, she was in a non-work-related motor vehicle accident that resulted in lower back pain from which she continues to suffer. [Strong Depo., pp. 17-19.] In November of 2006, Complainant was released to return to work, with a limitation on work of no more than eight hours in a day. [Declaration of Craig Heligman, MD, MSD Ex. 3 at ¶ 3 and Ex. A.] In February of 2010, she suffered a work-related injury when she fell down three stairs and injured her left ankle and lower back. [Strong depo., pp. 54-55 and Ex. 8.] She was diagnosed with lower back pain and an ankle sprain, for which she received treatment, and on November 30, 2010 was returned to work without restrictions. [Heligman Decl. ¶¶ 4-5 and Ex. B and C.]

In 2015, Ms. Strong requested accommodations for her medical conditions. Respondent asked her to provide medical documentation in support of that request. [Declaration of Mark Mayo, Ex. 1 to MSD, ¶ 4.] Complainant submitted a report from Jason Lyles, physician's assistant to her treating physician Dr. Patel, stating that due to cervical and lumbar disc disease, she was restricted from prolonged sitting or standing and limited to eight hours' work per day. [Heligman Decl. ¶ 8 and Ex. E.] According to Mr. Lyles, Ms. Strong's medication for her condition did not adversely affect her alertness, coordination, judgment, vision, or gait. [*Id.*] Ms. Strong subsequently submitted a second report, this time from Dr. Patel, again limiting her to eight hours' work per day due to her chronic neck and back pain. Dr. Patel, like Mr. Lyles before him, confirmed that the restriction was not due to medication but to concern that she avoid any prolonged sitting or standing. [Heligman Decl. ¶ 9, Ex. F; Strong Depo. at 46-47.] Additionally, Complainant suffers from migraine headaches, and her treating physician for that condition, Dr.

¹ Ms. Strong testified at her deposition that she currently works from 7:00 a.m. to 3:00 p.m., Tuesday through Saturday, with Sundays and Mondays off. [Strong depo., p. 10.]

² See also various email correspondence from Ms. Strong, all sent between during the 11:00 p.m. – 7:00 a.m. shift, attached to motion and opposition briefs.

Harris, indicated that her headaches restricted her from working more than eight hours at a time. [Heligman Decl. ¶ 7 and Ex. D; Strong Depo. at 22.]

After reviewing the above medical information, Dr. Heligman, Respondent's chief medical officer, determined that it was inadequate to show that Complainant's requested accommodation to work no more than eight hours per day was medically necessary. [Heligman Decl. ¶ 10 and Ex. G.] Ms. Strong objected to that determination and provided additional medical information, which indicated that she needed to take pain medication every evening and could not take it at work; and she was therefore required to work no more than eight hours in a day. [*Id.* ¶ 11 and Ex. H.] After reviewing the new information, Dr. Heligman determined that it still did not support her requested accommodation of working no longer than eight hours a day. [Heligman Decl. ¶ 12.]

3. Training

On April 26, 2016, Gina Walters, a CSX manager, emailed all employees of the Crew Management Center advising them that they were required to attend one of six scheduled sessions of annual training. [Mayo Decl. ¶ 7 and Ex. A.] The four-hour training sessions were scheduled for Monday, May 16 and Wednesday, May 18, 2016 at 7:00 a.m., 11:00 a.m., and 3:00 p.m. [Mayo Decl. Ex. A.] All employees were instructed to attend while on overtime, either before or after their assigned shifts or on their rest day. [*Id.*] Employees were instructed to sign up by May 9 and were advised: "If you fail to attend one of these sessions, you will be immediately withheld from service." [*Id.*]

On May 13, 2016, Ms. Walters sent a follow-up email advising Crew Management Center employees that the scheduled training sessions had been canceled. [Mayo Decl. Ex. B.] On May 24, 2016, Ms. Walters sent an email advising all Crew Management Center employees that the training sessions had been rescheduled for Monday, June 13 and Wednesday, June 15, 2016. [*Id.*] Ms. Walters again advised employees that the training was mandatory, that it should be taken before or after an assigned shift or on a rest day, and that if they failed to attend one of the sessions, they would be immediately withheld from service. Employees were required to sign up for one of the sessions by June 8, 2016. [*Id.*]

On May 26, 2016, Mark Mayo, then Respondent's Assistant Vice President of Crew Management, sent an email entitled "General Notice to CMC Employees," cautioning Crew Management Center employees among others from abusing their leave entitlement under the Family and Medical Leave Act. He advised that using FMLA leave to "avoid certain work assignments, to extend time off (e.g., next to rest days, vacation days, etc.), to be off on a holiday, or to avoid working overtime" was considered misuse of the entitlement and would subject employees to personnel actions. [Mayo Decl. Ex. C.] Ms. Strong responded by email on June 9, expressing that she was saddened by Mr. Mayo's email, which she said could be construed as discriminating or retaliating against an employee who exercised his or her right to take FMLA leave. [*Id.*] Ms. Strong also requested a "reasonable accommodation" in the form of a temporary change to her rest days so that she could take the mandatory training announced by Ms. Walters. [*Id.*] Specifically, she requested that her rest days be changed from Sunday and

Monday to Saturday and Sunday, which would allow her to report on Monday, June 13 for the mandatory training. [*Id.*] Ms. Strong asserted:

As I have previously expressed, my physicians have me on a medical regimen that is more strict on my rest days than work days. Accordingly, by following this regimen, I am unavailable on my rest days. Attempts to **FORCE ME** to attend without accommodations causes disruptions in my medication requirements which is detrimental to my health.

[*Id.*] (Emphasis in original.) Mr. Mayo responded on June 10, 2016, advising Complainant that the applicable collective bargaining agreement did not allow for temporary changes to rest days. He also advised that Respondent's medical department had determined that Complainant was not restricted from attending one of the six scheduled training sessions. Mr. Mayo told Ms. Strong that she and/or her physicians could contact Dr. Heligman to discuss whether her medication regimen prohibited her from taking one of the training sessions. [Mayo Decl. Ex. D.]

Ms. Strong did not attend a training session on June 13 or 15. [Mayo Decl. ¶ 11.] On June 17, 2016, Ms. Walters sent an email informing Ms. Strong that two make-up training sessions had been scheduled for Monday, June 27, 2016 from 7:00-10:05 a.m. and from 3:00-6:05 p.m. [*Id.*, Ex. E.] Ms. Walters advised Ms. Strong that if she failed to attend one of the sessions, she would be withheld from service, and requested that she advise Ms. Walters by Friday, June 24 which session she would attend. [*Id.*]

Ms. Strong did not attend either session on Monday, June 27, 2016, and was withheld from service effective June 28. [Mayo Decl. ¶ 13.] Ms. Strong attended a special make-up training session scheduled just for her on July 6, 2016 and was immediately returned to service. [*Id.*, ¶ 14.] She attended training during her regular working hours on July 6. [Strong depo., p. 74.]

Discussion

1. Summary Decision

Summary decision may be entered pursuant to 29 C.F.R. § 18.72 under circumstances in which no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. See *Gillilan v. Tennessee Valley Authority*, 91-ERA-31 at 3 (Sec'y, Aug. 28, 1995); *Flor v. United States Dept. of Energy*, 93-TSC-1 at 5 (Sec'y, Dec. 9, 1994). The party opposing a motion for summary decision "must set forth specific facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R. § 18.40(c). See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Only disputes of fact that might affect the outcome of the suit will properly prevent the entry of a summary decision. *Anderson*, 477 U.S. at 251-52. In determining whether a genuine issue of material fact exists, however, the trier of fact must consider all evidence and factual inferences in favor of the party opposing the motion. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Thus, summary decision should be entered only when no genuine issue of material fact need be litigated. *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 467

(1962). When a respondent moves for summary decision on the ground that the complainant lacks evidence of an essential element of his claim, the complainant is then required under Fed. R. Civ. P. 56 and 29 C.F.R. Part 18 to present evidence demonstrating the existence of a genuine issue of material fact. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Celotex Corp. v. Catrett*, *supra*.

2. Federal Railroad Safety Act - Elements

Under the Act, it is unlawful for a railroad carrier to “discipline, or threaten discipline to, an employee ... for following orders or a treatment plan of a treating physician....” 49 U.S.C. § 20109(c)(2). The burdens of proof set forth at 49 U.S.C. § 42121(b), the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR21”) apply to actions under the Act. To prevail on his claim under the FRSA, Complainant must show (1) that she engaged in protected activity; (2) that she suffered an adverse employment action; and (3) that her protected activity contributed to the adverse employment action taken against her. *Palmer v. Canadian National Railway*, ARB No. 16-035, ALJ No. 2014-FRS-00154 (ARB Sep. 30, 2016); 42 U.S.C. § 42121(b)(2)(B)(iii). Failure to prove any of the elements is fatal to the claim. If Complainant meets her burden, Respondent may avoid liability by showing by clear and convincing evidence that it would have taken the adverse action in the absence of Complainants’ protected activities. 29 C.F.R. § 1982.109(b).

3. Section 20109(c)(2) Applies to Off Duty Injuries

In this matter, there is no dispute of material fact whether Ms. Strong’s treatment plan was for an on-duty or an off-duty injury or disease. The only on-duty injury identified in the pleadings was the fall in February of 2010, for which she was released to full duty without restrictions in November of 2010. Although she was under a doctor’s care by 2015, there is no evidence in the record showing that her medical condition at that time was related in any way to her 2010 fall. Accordingly, the record shows that her treatment plan was for an injury or disease incurred outside of work.

The FRSA prohibits an employer from discriminating against an employee “for following orders or a treatment plan of a treating physician....” 49 U.S.C. § 20109(c)(2). Employer argues that because Ms. Strong’s treatment plan was implemented for non-work-related injuries, it does not fall under that provision.

In *Bala v. Port Authority Trans-Hudson Corp.*, ARB No. 12-048, ALJ No. 2010-FRS-026 (ARB Sept. 27, 2013), the Administrative Review Board held that Section 20109(c)(2) applies to treatment plans for off-duty injuries. That holding was reversed in *Port Authority Trans-Hudson v. Sec’y, U.S. Dept. of Labor*, 776 F.3d 157 (3d Cir. 2015), where the Court held that the section applied only to treatment plans for on-duty injuries. After the Third Circuit’s decision, the ARB addressed the issue again in *Williams v. Grand Trunk Western Railroad Co.*, ARB Nos. 14-092, 15-008, ALJ No. 2013-FRS-033 (ARB Dec. 5, 2016). The ARB acknowledged that its earlier decision in *Bala* had been reversed by the Third Circuit, but disagreed with that decision and declined to apply it in cases arising outside of the Third Circuit. *Williams*, slip op. p. 5 (ARB Dec. 5, 2016). The Board stated:

Because there is no rule of intercircuit stare decisis, federal agencies are not bound by the decision of a circuit court in litigation arising in other circuits. Thus, we decline to apply the holding in *PATH* to cases not arising in the Third Circuit.

Ibid. The respondent in *Williams* appealed the ARB's decision to the Sixth Circuit, which again reversed the ARB, agreeing with the Third Circuit that Section 20109(c)(2) does not apply to off-duty injuries. *Grand Trunk Western R.R. Co. v. U.S. Dept. of Labor*, 875 F.3d 821 (6th Cir. 2017). The ARB has not addressed the issue again since the Sixth Circuit ruled in *Grand Trunk Western*.³ The Eleventh Circuit, under whose jurisdiction this case arises, has not addressed the issue.

Whether the ARB will continue to adhere to its positions in *Williams* that (1) Section 20109(c)(2) applies only to injuries suffered at work, (2) it disagrees with the Courts of Appeals in *PATH* and *Grand Trunk Western*, and (3) it will not apply those holdings in cases arising outside of the Third and Sixth Circuits is a matter for ARB to decide. I am bound by ARB's decision in *Williams* and, as the present case arises in the Eleventh Circuit, the ARB's precedent requires that the holdings in *PATH* and *Grand Trunk Western* not be followed. I am bound by ARB precedent for cases arising outside of those circuits that Section 20109(c)(2) applies to treatment plans for both on-duty and off-duty injuries. The ARB might conclude otherwise in the light of federal court case law after *PATH*, all of which concludes that the ARB has incorrectly interpreted the statute.⁴ Unless and until the ARB does so, however, I must follow its previous holdings.

4. *There is No Dispute of Material Facts that Complainant Did Not Engage in Protected Activity*

Ms. Strong argues that she engaged in protected activity by requesting a change to her rest days so that she could follow the orders or treatment plan of her physicians, and by declining to report for training on a rest day. Specifically, she argues that her medication regimen required that she take extra medication on her rest days, making her unable to come to work on those days.

The medical evidence addresses two considerations: the length of time Ms. Strong was medically able to work, and her medications.

- The doctor's note dated November 2, 2006 following her motor vehicle accident in August of that year states that Complainant "should be able to work without medication." The physician imposed a restriction of "no working over 8 [hours]." [Heligman Decl. Ex. A.]

³ As instructed by the Sixth Circuit, the ARB dismissed the complaint in *Williams v. Grand Trunk Western R.R. Co.* in December of 2017.

⁴ As the Sixth Circuit noted, "Every other federal court since the *PATH* decision has followed the Third Circuit's lead. See *Stokes v. Se. Penn. Transp. Auth.*, 657 Fed.Appx. 79, 82 (3d Cir. 2016); *Murdock v. CSX Transp., Inc.*, No. 3:15-cv-1242, 2017 WL 1165995, at *3 (N.D. Ohio Mar. 29, 2017); *Miller v. BNSF Ry. Co.*, No. 14-2596, 2016 WL 2866152, at *15 (D. Kan. May 17, 2016); *Goad v. BNSF Ry. Co.*, No. 15-650, 2016 WL 7131597, at *3 (W.D. Mo. Mar. 2, 2016)." 875 F.3d at 825-26.

- The doctor's note dated February 23, 2010 following her fall at work indicated that Complainant was given prescription medication for pain as a precaution, but did not address whether her medication would affect her ability to work. The physician did not impose any length-of-duty restrictions. [Heligman Decl. Ex. B.]
- Respondent's then Chief Medical Officer, Dr. Neilson, determined on November 30, 2010 that Ms. Strong was able to return to work without restrictions. [Heligman Decl. Ex. C.]
- The Attending Physician's Return to Work Report dated March 19, 2015 indicated that the medication prescribed to Complainant for her migraine headaches might cause fatigue and somnolence, and that Ms. Strong could not work more than eight hours per day due to severe headaches. In another section of the report, however, the physician stated that Ms. Strong "will be able to work no more than 10 to 12 hours per day. (8) Hours would be preferable due to severe ... headaches with associated vision problems...." [Heligman Decl. Ex. D.]
- The Attending Physician's Return to Work Report dated March 25 and May 19, 2015 recommended certain work restrictions including that Ms. Strong work no longer than eight hours per day. [Heligman Decl. Ex. E.] In a follow-up at Dr. Heligman's request, the treating physician's assistant indicated that Complainant's "current ability" (defined as less than maximized abilities that can increase with exercise or training, or decrease with inactivity) were not due to medication. The responder recommended that Ms. Strong avoid heavy lifting, sitting or standing for prolonged periods, and that she work no more than eight hours per day. [Heligman Decl. Ex. F.]
- A note dated November 16, 2015, signed by physician's assistant Jason Lyles, indicates that Complainant cannot work more than eight hours due to her lumbar and lower extremity pain. The medication prescribed for her condition must be taken in the evening so that she can work the next day, that she cannot take the medication at work, and that a longer work schedule would prevent her from taking it at the recommended time. She was taking Flector patches and Tramadol with no side effects. [Heligman Decl. Ex. H.]
- A note from First Coast Neurology dated May 20, 2016 indicates that Complainant was taking tizanidine, amitriptyline, and gabapentin, which can cause sedative effects. A note from Dr. Patel at Riverside Pain Physicians dated June 13, 2016 indicates that Ms. Strong was cleared to return to work no more than eight hours per day.

Thus, as of June 13, 2016 (the first day that mandatory training was held), Ms. Strong was being treated for orthopedic conditions (lumbar and lower extremity pain due to degenerative disc disease) and for migraine headaches. With respect to her orthopedic conditions, her medical providers recommended (1) that she work no more than eight hours per day; (2) that she take the medication prescribed for her lumbar and lower extremity pain in the evenings; (3) that she not take the medication prescribed for her lumbar and lower extremity pain at work; and (4) that if she worked longer than eight hours in a day she would not be able to take the medication at the prescribed time. With respect to her migraine headaches, her physicians indicated that she could work 10-12 hours per day, but recommended no more than eight, and also indicated that her prescribed medication could cause fatigue and somnolence, and can cause sedative effects.

On June 9, 2016, after having received the May 24 email from Ms. Walters, Ms. Strong requested that she be permitted to change her rest days from Sunday and Monday to Saturday and Sunday, so that she could take the required training on Monday, June 13. That request was denied because (1) the applicable collective bargaining agreement did not allow for temporary schedule changes, and (2) Respondent's medical department had determined that Ms. Strong was not medically restricted from attending the training on her rest day.

Eight hour per day restriction: Ms. Strong was working Tuesday-Saturday of each week. She was required to attend training either on a rest day or before or after her work shift, and her physicians had advised her not to work longer than eight hours in a day. Attending a Wednesday training session would have resulted in her working more than eight hours on that day; thus, assuming that her treatment plan actually required that she work no longer than eight hours in a day, she could attend only a Monday training session. Had Ms. Strong's request to change her rest days been granted, she would have rested on Saturday and Sunday, June 11 and 12 and attended training on Monday, June 13. That would have resulted in her working a 12-hour shift in violation of her claimed treatment plan. On the other hand, by maintaining her schedule as it was, Ms. Strong would have rested on Sunday, June 15; attended a four-hour training class on Monday, June 16; and returned to work on Tuesday, June 17, meaning that she would not have worked more than eight hours in any day. She therefore would have followed the eight-hour work day requirement of her treatment plan.

Medication regimen: There is no evidence in the documentation from Ms. Strong's providers that her medication regimen required that she not work on her rest days. There is no evidence precisely what medication she was directed to take when. The evidence of record establishes (1) that she must take her medication the night before she works; (2) she cannot take her medication at work; and (3) working longer than eight hours would have caused her to miss her medication. Nothing in the medical documentation shows why Ms. Strong could not take her medication on Sunday night before the Monday training and could not refrain from taking it at work, and clearly a four-hour training class is less than an eight-hour day.

Ms. Strong, however, suggests that she follows her treatment plan only on her rest days – that is, that she takes less medication than prescribed on her work days so as not to violate Respondent's rules against coming to work while suffering adverse effects from medication, and takes the doses as prescribed on her rest days. She has not, however, provided any evidence that taking medication as prescribed makes her unable to come to work for a training class on her rest day. There is evidence in the medical documentation and in her testimony that one or two of her prescribed medications may make her drowsy; however, there is nothing to indicate that it in fact does make her drowsy, or that she remains drowsy for any particular period of time. Finally, Ms. Strong repeatedly told Respondent that she would come in on a rest day for the mandatory training, if her rest day schedule were changed. Presumably she would follow her medication regimen on the day she came for training, and she has not explained why doing so prevented her from coming in on one of her current rest days. Thus, there is no evidence to support her assertion that adherence to her medication regimen required that she remain absent from work on a currently scheduled rest day, and accordingly she did not engage in protected activity.

In short, Ms. Strong has not presented evidence that attending one of the three classes scheduled for her June 13, 2016 rest day would have caused her to work more than eight hours, or would have caused her to violate her medication regimen. Accordingly, she has not established a dispute of material fact whether she engaged in protected activity when she requested a change of rest days or when she failed to attend the mandatory class.

Conclusion

Because Complainant has failed to show a dispute of material fact whether she engaged in protected activity, Respondent's motion for summary decision must be granted.

ORDER

For the foregoing reasons, IT IS ORDERED:

1. Respondent's motion for summary decision is GRANTED; and
2. The complaint of Vyunda Strong under the Federal Railroad Safety Act is DENIED.

SO ORDERED.

PAUL C. JOHNSON, JR.
District Chief Administrative Law Judge

PCJ, Jr./ksw
Newport News, Virginia

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within fourteen (14) days of the date of issuance of the administrative law judge's 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

Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-filing; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1982.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1982.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor, Division of Fair Labor Standards. *See* 29 C.F.R. § 1982.110(a).

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 no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. §§ 1982.109(e) and 1982.110(a). Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of

Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1982.110(a) and (b).