



**Issue Date: 07 April 2010**

OALJ Case No.: 2010-SOX-00021

In the Matter of:

JOSE ROMERO,  
Complainant,

v.

THE COCA COLA COMPANY,  
Respondent.

### **ORDER DISMISSING COMPLAINT**

This proceeding arises under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A (“Sarbanes-Oxley” or “SOX”), and the applicable regulations issued thereunder at 29 C.F.R. Part 1980.

#### **Procedural History**

Complainant Jose Romero filed a SOX complaint with the Occupational Safety and Health Administration on September 27, 2007 alleging that his employment with The Coca-Cola Company, Respondent, was wrongfully terminated on June 30, 2007 because he engaged in protected activity. OSHA subsequently found that Complainant was notified of Respondent’s intent to discharge him on June 5, 2007, and that his September 27, 2007 complaint was thus untimely.

On January 25, 2010, Complainant filed a timely notice of appeal with the Office of Administrative Law Judges. On January 26, 2010, I issued a notice of docketing and order requiring the parties to show cause why the complaint should not be dismissed as untimely. On February 25, 2010, I received Coca-Cola’s response to the show cause order. Complainant’s response was received thereafter on March 31, 2010. For the reasons stated below, I find that Mr. Romero’s complaint should be dismissed.

#### **Arguments of the Parties**

According to Mr. Romero’s counsel, the 90-day limitations period in Sarbanes-Oxley cases is not jurisdictional and is subject to the doctrine of equitable tolling. He asserts that Mr. Romero’s “failure to file within the 90 day limitation was due to [Complainant’s] being unaware of his rights and liabilities under federal law regarding [Respondent’s] retaliatory firing until

[Complainant] met with his [previous] attorney on September 5, 2007, effectively equitably tolling the 90 day limitation period until September 5, 2007.” Claimant [sic- Complainant] Jose Romero’s Response to Associate Chief Administrative Law Judge Stephen L. Purcell’s Order to Show Cause (“Comp. Resp.”) at 2. He goes on to state that an independent ground for finding the complaint timely is because “any alleged late filing by [Complainant] and [his prior counsel] was due to ‘excusable neglect.’” *Ibid.*

According to Coca-Cola’s counsel, Mr. Romero’s SOX complaint should be dismissed because: (1) it is untimely; (2) Mr. Romero is not an employee within the meaning of the statute; and (3) he was at all relevant times a foreign employee working for an overseas subsidiary of Respondent which is not subject to the whistleblower provisions of SOX. The Coca-Cola Company’s Response to Order to Show Cause (“Coca-Cola Resp.”) at 2-3.

### **Discussion**

According to Mr. Romero, he met with “Respondent[’s] representatives in Mexico City on June 5, 2007 where [he] was advised his employment would be terminated as of June 30, 2007 and the details of his severance would be ‘handled’ by Respondent’s Human Resources Department (HRD).” Affidavit of Complainant Jose Romero Garcia in Support of His Response to Associate Chief Administrative [Law] Judge Stephen L. Purcell’s Order to Show Cause (“Comp. Aff.”) at ¶ 2. He goes on to state that he was contacted the following day by HRD and provided a severance proposal a day later “which was incomplete” and about which he was “concerned . . . due to [his] immediate family needs.” *Id.* at ¶ 3. Complainant says he subsequently notified HRD that the severance proposal was incomplete, and he “began gathering employment documentation to support his position of [sic] the severance matter and, once again, on June 12, 2007, began communicating with HRD to attempt to resolve this important outstanding issue.” *Id.* at ¶ 4. Between then and June 28, 2007, he “assembled Respondent’s property in his possession and on June 28, 2007 returned it to Respondent, including his computer equipment.” *Id.* at ¶ 5.

Mr. Romero was terminated “without severance payment” on June 30, 2007, and on July 20, 2007 he “contacted an attorney group in Guatemala, Firma de Abogados, to seek legal advice concerning his rights to severance and whether his termination was lawful due to his refusal to commit ‘industrial sabotage’ . . . .” *Id.* at ¶¶ 6-7. The Guatemalan firm told him he had a legitimate severance action but advised that “any termination due to retaliation would be a legal matter he would need to discuss with an American attorney.” *Id.* at ¶ 7.

Even before he contacted the Guatemalan law firm, Complainant contacted Ken McCallion, an attorney in New York who specializes in employment law, on July 17, 2007 and was “advised there appeared to be a case against Coca Cola but he would need to see [various documents relevant to the claim].” *Id.* at ¶ 8; *see also* Affidavit of Attorney Kenneth F. McCallion in Support of the Response of Complainant Jose Romero to Associate Chief Administrative [Law] Judge Stephen L. Purcell’s Order to Show Cause (“McCallion Aff.”) at ¶¶ 2-4. Communications between Complainant and Mr. McCallion continued thereafter via phone and email, and on September 5, 2007, Mr. Romero met with the attorney at his New York law office. Comp. Aff. at ¶¶ 8-11; McCallion Aff. at ¶ 4. According to Complainant, it was at that

meeting that Mr. McCallion first advised him of the 90 day filing requirement. Comp. Aff. at ¶ 11. The subject of when Complainant was first informed of the date of his termination never came up, and Mr. McCallion filed the instant complaint on his behalf on September 26, 2007. Comp. Aff. at ¶¶ 11-12; McCallion Aff. at ¶ 5-6.

Under the statute and applicable regulations, a Sarbanes-Oxley complaint must be filed not later than 90 days after the date that an alleged violation of the Act occurs. 18 U.S.C. § 1514A(b)(2); 29 C.F.R. § 1980.103(d). The limitations period begins to run on the date an employee receives “final, definitive, and unequivocal notice” of a discharge or other discriminatory act. *See Sneed v. Radio One*, ARB No. 07-072, ALJ No. 2007-SOX-018, slip op. at 6-7 (ARB Aug. 28, 2008). “The date that an employer communicates to the employee its intent to implement the discharge or other discriminatory act marks the occurrence of a violation, rather than the date the employee experiences the consequences.” *Corbett v. Energy East Corp.*, ARB No. 07-044, ALJ No. 2006-SOX-65, USDOL/OALJ Reporter at 4 (ARB Dec. 31, 2008) (citations omitted).

Complainant acknowledges that his Sarbanes-Oxley complaint was filed more than 90 days after June 5, 2007, the date on which he became aware Respondent intended to terminate his employment. *See* Comp. Resp. at 1 (Coca-Cola “is . . . correct that [Complainant’s former] attorney filed Mr. Romero’s claim 114 days from June 5, 2007, when [Complainant] was aware of the date of his termination with [Coca-Cola].”).<sup>1</sup> He does not argue that the notice he received on that date was anything other than “final, definitive, and unequivocal notice.” *Sneed v. Radio One*, *supra* at 6-7. Instead, as noted above, he simply argues that his untimely complaint should be deemed to have been timely filed because he was unaware of his rights and liabilities under SOX until he met with his attorney on September 5, 2007. I find Complainant’s arguments in support of equitable tolling and excusable neglect unpersuasive.

### Equitable Tolling

Generally, there are three situations in which application of equitable tolling to a statute of limitations is proper: (1) when the defendant has actively misled the plaintiff respecting the cause of action; (2) the plaintiff has in some extraordinary way been prevented from asserting his rights; or (3) the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum. *City of Allentown v. Marshall*, 657 F.2d 16, 20 (3rd Cir. 1981). However, courts have held that the restrictions on equitable tolling must be scrupulously observed. *Id.* at 19. Equitable tolling is not an open-ended invitation to disregard limitations periods merely because they bar what may otherwise be a meritorious claim. *Doyle v. Alabama Power Co.*, 1987-ERA-43 (Sec’y, Sept. 29, 1989). A plaintiff bears the burden of justifying the application of equitable tolling principles. *See Wilson v. Sec’y, Dep’t of Veterans Affairs*, 65 F.3d 402, 404 (5th Cir. 1995).

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<sup>1</sup> Ninety days from June 5, 2007, when Complainant was given notice by Coca-Cola that it intended to discharge him, would be September 3, 2007. *See* 29 C.F.R. § 18.4(a). Since that date falls on a holiday (Labor Day), the time for filing would not run until the following business day, September 4, 2007. *Id.* Since the complaint filed on behalf of Mr. Romero was received by OSHA on September 27, 2007, his complaint was 23 days late, *i.e.*, it was filed 113 days after he received notice of his impending discharge.

Complainant does not assert, either explicitly or implicitly, any of the three bases for application of the doctrine of equitable tolling referenced in *City of Allentown v. Marshall*. For example, nothing in Complainant's pleadings indicates that he ever discussed with any agent of Coca-Cola his potential rights or a cause of action under Sarbanes-Oxley, nor is there any evidence that Coca-Cola actively misled Mr. Romero regarding his rights under SOX. Similarly, there is no evidence in Complainant's submissions that would support a claim he was prevented in some extraordinary way from pursuing a cause of action under Sarbanes-Oxley.<sup>2</sup> Nor is there any suggestion that Complainant raised the precise claim he is now making, but did so in another forum. On the contrary, his counsel simply argues that "after learning of his termination on June 5, 2007, [Complainant] acted with diligence and good faith in pursuing his claim," and, concomitantly, any failure to file a SOX complaint within 90 days was the product of "excusable neglect." Comp. Resp. at 2.

While Complainant asserts, and I accept as true for purposes of this decision, that he was not aware of the 90 day limitations period until he met with his attorney on September 5, 2007, his "ignorance of the law does not compel equitable tolling." *Moldauer v. Canandaigua Wine Co.*, ARB No. 04-022, ALJ No. 2003- SOX-26, slip op. at 7 (ARB Dec. 30, 2005);<sup>3</sup> As the U.S. Court of Appeals for the Sixth Circuit has noted in the context of another whistleblower statute:

It is well-settled that ignorance of the law alone is not sufficient to warrant equitable tolling. . . . Basically [Complainant's] arguments boil down to the fact that he did not know about his statutory rights until he saw an attorney after the expiration of the limitations period. Absent a showing that he was somehow deterred from seeking legal advice by his employer, this is simply not enough to warrant equitable tolling.

*Rose v. Dole*, 945 F.2d 1331, 1336 (6th Cir. 1991). There is clearly nothing in the record to demonstrate Coca-Cola in any way deterred Mr. Romero from seeking legal advice or filing a whistleblower complaint. His claim of ignorance with respect to the limitations period is thus unavailing.

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<sup>2</sup> "Extraordinary circumstances" is a very high standard that is satisfied only in cases in which even the exercise of diligence would not have resulted in timely filing. See, e.g., *Stoll v. Runyon*, 165 F.3d 1238, 1242 (9th Cir. 1999) ("complete psychiatric disability" during the entirety of the limitations period); *Alvarez-Machain v. United States*, 107 F.3d 696 (9th Cir. 1996) (incarceration in a foreign country for the entirety of the limitations period). It does not extend to excusable neglect. *Irvin v. Dep't of Veterans Affairs*, *supra.*, 498 U.S. at 96.

<sup>3</sup> See also *Wakefield v. Railroad Retirement Board*, 131 F.3d 967, 970 (11th Cir. 1997) ("Ignorance of the law usually is not a factor that can warrant equitable tolling."); *Barrow v. New Orleans Steamship Ass'n*, 932 F.2d 473, 478 (5th Cir. 1991) (plaintiff's unfamiliarity with legal process, lack of representation, or ignorance of legal rights insufficient to justify equitable tolling); *Larson v. American Wheel & Brake, Inc.*, 610 F.2d 506, 510 (8th Cir. 1979) (lack of knowledge of applicable filing deadlines not basis for equitable tolling); *James v. USPS*, 835 F.2d 1265, 1267 (8th Cir. 1988) (neither unfamiliarity with legal process nor lack of representation during applicable filing period sufficient for application of equitable tolling); *Smale v. Torchmark Corp.*, ARB No. 09-012, ALJ No. 2008-SOX-057, slip op. at 7 (ARB Nov. 20, 2009) ("[I]gnorance of the law is generally not a factor that can warrant equitable modification."); *Flood v. Cendant Corp.*, ARB No. 04-069, ALJ No. 2004-SOX-016, slip op. at 4 (ARB Jan. 25, 2005) (same).

Similarly, Complainant cannot rely on the failure of his prior attorney, Mr. McCallion, to file a timely complaint as a basis for invoking the doctrine of equitable tolling. In *Irwin v. Department of Veterans Affairs*, the Court wrote, *inter alia*:

Under our system of representative litigation, “each party is deemed bound by the acts of his lawyer-agent and is considered to have notice of all facts, notice of which can be charged upon the attorney.”

*Irwin, supra* 498 U.S. at 92, citing *Link v. Wabash R. Co.*, 370 U.S. 626, 634 (1962). Other courts have similarly confirmed that a party’s reliance on counsel as a basis for avoiding a statute of limitation is not sufficient to afford the protection of equitable tolling. For example, as one court wrote: “Equitable tolling is not appropriate where the failure to timely file was allegedly caused by the plaintiff’s reliance on the advice of counsel.” *Dimetry v. Department of U.S. Army*, 637 F. Supp. 269, 271 (E.D.N.C. 1985) citing *Genovese v. Shell Oil Co.*, 488 F.2d 84 (5th Cir. 1973).<sup>4</sup> Of course, by the time Mr. Romero met with Mr. McCallion in New York on September 5, 2007, it was already too late to file a timely complaint under Sarbanes-Oxley.<sup>5</sup> However, he and his attorney had been communicating with each other by phone and email since July 17, 2007 and, accepting as true Mr. Romero’s statement that the attorney never mentioned the 90-day limitations period under SOX until September 5, 2007, his attorney’s failure to discuss with Complainant the limitations period prior to that date does not relieve Complainant of the burden of filing a timely complaint.

#### Excusable Neglect

Complainant’s counsel also argues that his client’s failure to file a complaint within the 90-day limitations period should be forgiven under the “excusable neglect” provision of Fed. R. Civ. P. 60(b)(1). Comp. Resp. at 5-8. He cites no case decisions, and I have found none, where that rule has been applied in the context of a statutory limitations period, including any of the whistleblower statutes administered by the Department of Labor. Indeed, the primary authority he offers in support of his argument is the Supreme Court’s decision in *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993) where the Court discussed the application a bankruptcy rule in relation to a court-imposed deadline. As explained below, I find that Rule 60(b)(1) and the cases upon which counsel relies are inapposite and do not provide a basis for excusing Mr. Romero’s failure to file a timely SOX complaint.

“Rule 60(b) sets forth the grounds on which a court, in its discretion, can rescind or amend a final judgment or order.” *Nemaizer v. Baker*, 793 F.2d 58, 61 (2<sup>nd</sup> Cir. 1986).<sup>6</sup> By its

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<sup>4</sup> See also, *Woods v. Denver Department of Revenue*, 818 F. Supp. 316, 318 (D. Colo. 1993) (reliance on advice of counsel, even bad advice, not grounds for invoking doctrine of equitable tolling); *Dumaw v. International Brotherhood of Teamsters, Local 690*, ARB No. 02-099, ALJ No. 2001-ERA-6, slip op. at 5-6 (ARB Aug. 27, 2002) (“Ultimately, clients are accountable for the acts and omissions of their attorneys.”).

<sup>5</sup> As noted previously, since Complainant was notified of his impending discharge from Coca-Cola on June 5, 2007, the 90-day period would have run on September 3, 2007. Since September 3<sup>rd</sup> was Labor Day, Complainant had until September 4, 2007 to file his complaint.

<sup>6</sup> See also, *Gonzalez v. Crosby*, 545 U.S. 524, 528-29 (2005) (“Rule 60(b) allows a party to seek relief from a final judgment, and request reopening of his case, under a limited set of circumstances including fraud, mistake, and newly discovered evidence.”).

express language, Rule 60(b)(1) applies to relief sought by a party from “a final judgment, order, or proceeding . . . .” Fed. R. Civ. P. 60(b).<sup>7</sup> Indeed, the rule is contained within Part VII of the Federal Rules of Civil Procedure, captioned “Judgment,” which, *inter alia*, defines “judgment,”<sup>8</sup> delineates the procedures for assessing costs and attorney fees,<sup>9</sup> establishes the procedures necessary to obtain a default or summary judgment,<sup>10</sup> and describes the predicate for a court order granting a motion for a new trial.<sup>11</sup> The rule clearly governs relief from orders and judgments resulting from proceedings before federal courts.<sup>12</sup> It does *not* provide a mechanism by which a party may seek relief from a Congressionally imposed limitation period.

Counsel’s reliance on *Pioneer Investment Services Co.* is similarly misplaced. In that case, the Court was specifically asked to consider “whether an attorney’s inadvertent failure to file a proof of claim within the deadline set by the court can constitute ‘excusable neglect’ within the meaning of [Federal Rule of Bankruptcy Procedure] 9006(b)(1).”<sup>13</sup> *Pioneer Investment Services Co.*, *supra.* 507 at 382-83. The deadline at issue in the case was the date for filing a creditor’s proof of claim set by the Bankruptcy Court in its “Notice of Meeting of Creditors” issued the day after the bankruptcy petitioner filed its Chapter 11 petition.<sup>14</sup> Of particular relevance here, the Court noted that: “There is, of course, a range of possible explanations for a party’s failure to comply with a *court-ordered* filing deadline.”<sup>15</sup> *Pioneer Investment Services Co.*, *supra.*, 507 U.S. at 387 (italics added). Other cases cited by Mr. Romero’s counsel similarly implicate untimely actions taken by a party with respect to court orders or judgments, not a statute of limitations.<sup>16</sup> “Excusable neglect” under Rule 60(b)(1) simply does not provide a basis for excusing Mr. Romero’s failure to file a timely complaint in this case.

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<sup>7</sup> See also 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2851 (2d ed. 2010) (“Rule 60 regulates the procedures by which a party may obtain relief from a final judgment. . . . The rule attempts to strike a proper balance between the conflicting principles that litigation must be brought to an end and that justice should be done.”).

<sup>8</sup> “[A] decree and any order from which an appeal lies.” Fed. R. Civ. P. 54(a).

<sup>9</sup> Fed. R. Civ. P. 54(d).

<sup>10</sup> Fed. R. Civ. P. 54, 55.

<sup>11</sup> Fed. R. Civ. P. 59.

<sup>12</sup> See, e.g., *FHC Equities, L.L.C. v. MBL Life Assurance Corp.*, 188 F.3d 678, 683-87 (6th Cir.1999) (neither strategic miscalculation nor counsel’s misinterpretation of law warrants relief from a judgment under Rule 60(b)(1)); *Robb v. Norfolk & Western Ry. Co.*, 122 F.3d 354, 357 (7th Cir. 1997) (“The text of Rule 60 provides for discretionary relief from a final judgment on the basis, *inter alia*, of “excusable neglect.””).

<sup>13</sup> Rule 9006(b)(1) of the Federal Rules of Bankruptcy Procedure empowers a bankruptcy court to permit a late filing if the movant’s failure to comply with an earlier deadline “was the result of excusable neglect.” Rule 9006(b)(1) is patterned after Fed. R. Civ. P. 6(b)(1) which similarly allows a district court to enlarge the period of time for performing an act set forth by the Federal Rules of Civil Procedure, by any notice given by a court thereunder, or by any order of a court.

<sup>14</sup> Pursuant to Rule 3003(c) of the Federal Rules of Bankruptcy Procedure, creditors are required to file a proof of claim with the bankruptcy court before the deadline, or “bar date,” established by the court in Chapter 9 Municipality and Chapter 11 Reorganization cases.

<sup>15</sup> The Court similarly noted, with respect to Fed. R. Civ. P. 60(b)(1) that the rule permits courts to reopen judgments, not limitation periods established by statutes. *Pioneer Investment Services Co.*, *supra.*, 507 U.S. at 393.

<sup>16</sup> See, e.g., *Cheney v. Anchor Glass Container Corp.*, 71 F.3d 848, 850 (11th Cir. 1996) (untimely motion to set aside final judgment and demand for trial *de novo* was result of “excusable neglect” under Rule 60(b)(1)); *Thomas v. Kroger Co.*, 24 F.3d 147, 149 (11th Cir. 1994) (district court did not abuse its discretion in considering summary judgment motion filed 24 days late under local rules).

### Covered Employee/Employer

As noted above, Respondent also asserts that Mr. Romero's SOX complaint should be dismissed because neither he nor his employer are covered by Sarbanes-Oxley. Coca-Cola argues that Complainant was employed as Assistant Director for Coca-Cola's Guatemalan subsidiary, CSDN, and that CSDN "is a legal entity existing under the laws of the Republic of Guatemala, Central America, not listed on any United States securities exchange, and operates in Central America and the Caribbean." Coca-Cola Resp. at 1-2. It further argues that SOX protects only employees working within the United States, and, since Mr. Romero lived and worked in Guatemala, he cannot avail himself of the protections offered under the statute.<sup>17</sup> *Id.* at 3.

While both of Coca-Cola's alternative arguments in support of dismissal may have merit,<sup>18</sup> I need not address them here in light of my findings that Mr. Romero's complaint is untimely and there is no basis for equitably tolling the limitations period.

### **Conclusion**

In light of the foregoing, I find Complainant has failed to establish any basis upon which the 90-day limitations period under Sarbanes-Oxley should be equitably tolled. Inasmuch as Mr. Romero's complaint was filed more than 90 days after June 5, 2007, the date on which he was unequivocally told he would be discharged by Respondent, the complaint is untimely and must be dismissed.

### **Order**

Based on the foregoing, IT IS HEREBY ORDERED that the Sarbanes-Oxley whistleblower complaint of Jose Romero is DISMISSED.

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STEPHEN L. PURCELL  
Acting Chief Administrative Law Judge

Washington, D.C.

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<sup>17</sup> Although his response to my show cause order was filed after Coca-Cola's response, and it expressly addresses Coca-Cola's arguments regarding timeliness and equitable tolling, Mr. Romero's counsel does not address Respondent's arguments that dismissal of the complaint is proper because neither Complainant nor Respondent are covered by the whistleblower provisions of SOX.

<sup>18</sup> *See, e.g., Carnero v. Boston Scientific Corp.*, 433 F.3d 1 (1st Cir. 2005) (no clear expression of Congressional intent to give extraterritorial effect to 18 U.S.C. § 1514A regarding employee of non-publicly traded foreign subsidiary of U.S. company); *Salian v. ReedHycalog UK*, ARB No. 07-080, ALJ No. 2007-SOX-020, slip op. at 8-9 (ARB Dec. 31, 2008) (foreign citizen of wholly owned foreign subsidiary of publically traded U.S. company who was working outside U.S. not entitled to whistleblower protections afforded by SOX).

**NOTICE OF APPEAL RIGHTS:** To appeal, you must file a Petition for Review (“Petition”) with the Administrative Review Board (“Board”) within ten (10) business days of the date of the administrative law judge’s decision. *See* 29 C.F.R. § 1980.110(a). The Board’s address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; 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. § 1980.110(c). Your Petition must specifically identify the findings, conclusions or orders to which you object. Generally, you waive any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(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. The Petition must also be served on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

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. § 1980.109(c). Even if you do file a Petition, 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 after the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b).