



Issue Date: 27 November 2015

CASE NO. 2015-NTS-00001

In the Matter of

MICHAEL BEN GRAVES,
Complainant,

v.

**MV TRANSPORTATION, BROADSPIRE,
ACE AMERICAN INSURANCE COMPANY,
LINDA MCDONNELL, AND LAWENA
CARTER PORTER,**
Respondents.

**ORDER DENYING RESPONDENTS'
MOTIONS FOR SUMMARY DECISION**

This is a claim under the whistleblower protection provision of the National Transit Systems Security Act, 6 U.S.C. § 1142, and its implementing regulations, 29 C.F.R. Part 1982. Complainant Michael Ben Graves names as respondent parties MV Transportation and Broadspire. MV Transportation is his employer. Broadspire is the administrator of MV Transportation's worker's compensation policy.¹ Graves also names two individuals as respondents.² He essentially alleges that, in retaliation for activity protected under the Act, Respondents denied him worker's compensation benefits to which he was entitled.

Respondents move for summary decision.³ They assert that collateral estoppel precludes Graves from establishing one of the required elements of his whistleblower claim. As this is an element on which Graves bears the burden of persuasion, if Respondents are correct, they would be entitled to summary decision. Graves opposes.⁴ Having considered the submitted materials, I find the motion without merit.

¹ ACE American Insurance Company is the workers' compensation carrier. It is not a named party.

² Ms. Carter Porter works for MV Transportation. Ms. McDonnell works for Broadspire.

³ There are two separate motions: one by MV Transportation and Carter Porter, and the second by Broadspire and McDonnell. Graves filed an opposition to each motion.

⁴ Graves' oppositions principally consist of a copy of a federal civil complaint that he filed against California Governor Jerry Brown, California Attorney General Kamala Harris, some California state judges, other California officials, MV Transportation, Broadspire, ACE American Insurance, what appears to be Graves' union (Teamsters Local 572), and others. The civil complaint is verified and thus may be given the same effect as a declaration filed in opposition to summary decision.

Related Cases and Procedural History

This is the sixth whistleblower complaint Graves has filed with OSHA under the National Transit Systems Security Act. In the first, Judge Dorsey found MV Transportation liable, but he imposed no remedy beyond requiring MV Transportation to post a copy of his decision.⁵ Graves appealed, and the Administrative Review Board affirmed.⁶ On the second case at this Office, Judge Gee found in favor of MV Transportation. She concluded that Graves failed to show that his protected activity was a contributing factor in an adverse action.⁷ Graves appealed, and the Administrative Review Board affirmed.⁸

Most relevant to this motion is the third adjudication at this Office. That involved two OSHA complaints Judge Clark consolidated and heard together.⁹ Graves again named employer MV Transportation as a respondent and this time added workers' compensation administrator Broadspire. He alleged that the two companies retaliated against him in the handling of two workers' compensation claims he'd filed. He relied on the same protected activity as before, and asserted that this was a contributing factor in Respondents' improper handling of his claims.

As I will discuss in more detail below, Judge Clark decided both cases against Graves.¹⁰ The Administrative Review Board has granted Graves' petition for review, and the appeal is pending. ARB No. 14-098, review granted Sept. 19, 2014.

In the current claim, Graves names the same two companies, relies on the same protected activity, and asserts as adverse actions Respondents' later conduct involving the same workers' compensation claims. Given the similarities between the current claim and the claims Graves litigated in the case before Judge Clark, Respondents argue that Graves has had his day in court and that his current claims are barred.

Undisputed Facts¹¹

Judge Clark's decision. In the first of the two consolidated cases Judge Clark decided, Graves focused on a worker's compensation claim he filed in January 2012 for a lower back injury and a pilonidal cyst.¹² Broadspire denied the pilonidal cyst claim as not work-related. Apparently as

⁵ OALJ No. 2011-NTS-00004, Decision and Order Apr. 18, 2012.

⁶ ARB No. 12-066, Final Decision and Order, Aug. 30, 2013.

⁷ OALJ No. 2013-NTS-00002, Decision and Order, Mar. 14, 2014.

⁸ ARB No. 14-045, Final Decision and Order, July 23, 2015.

⁹ OALJ Nos. 2014-NTS-00001, 00002.

¹⁰ Decision and Order, Sept. 10, 2014, recon. denied, Sept. 29, 2014, appeal pending ARB No. 14-098. After allowing briefing, I have taken official notice of this decision. *See* Order, Aug. 25, 2015. I refer to the decision as "Clark."

¹¹ As discussed in the text below, I make findings in the light most favorable to the non-moving party (Complainant). Accordingly, the facts recited here apply to this motion only.

¹² Some of the documents suggest that Graves might have pursued only the cyst claim. But in his verified opposition, Graves states that this first workers' compensation claim was for both the cyst and his back. Other

to the back claim, Broadspire employee Linda McDonnell wrote to Graves, denying the claim or certain aspects of it because, according to Broadspire, Graves had chosen a doctor outside the approved provider network. She wrote follow-up denial letters, and she and another Broadspire employee failed to answer or return phone calls that Graves made to them.

In time, Broadspire conceded that it had made a mistake: The doctor Graves selected in fact was within the network. At that point, Broadspire paid whatever it owed, including retroactive benefits. The result was that Broadspire paid all compensation and medical care owed, but only after a delay of several weeks. Graves was without income for those weeks and filed for California State Disability Insurance benefits.

In the second case consolidated before Judge Clark, Graves cited a worker's compensation claim he'd filed in November 2012, after a passenger assaulted him while he was driving a bus for MV Transportation. Broadspire apparently agreed to an order that it pay temporary total disability compensation until Graves reached maximum medical improvement. When his doctor opined that Graves had reached maximum medical improvement, Broadspire ceased the temporary total disability compensation. It resumed permanent partial disability compensation on the earlier back injury. The result was a reduction in compensation, effective as of the date Graves reached maximum medical improvement on the injuries related to the assault. Because it took Broadspire time to implement the reduction in compensation, Broadspire overpaid Graves for a short time. It required Graves to reimburse the overpayment.¹³ Graves alleged that this was in retaliation for his protected activity.

Finally, on both cases, Graves asserted that the two companies were "partners" and "interchangeable" and that both were responsible for mishandling his workers' compensation claims. In all, he accused both companies of creating a "hardship" by temporarily refusing medical care, sending inappropriate letters, not answering or returning his phone calls, not responding to requests from his treating physician, and requiring reimbursement for the overpayment. *Id.*

Judge Clark denied Graves' claims in an order issued on September 10, 2014. He found: that MV Transportation and Broadspire were not partners or interchangeable but were "separate and distinct" companies; that the two companies had a contractual relationship concerning the processing of workers' compensation claims; that Broadspire had no knowledge of Graves' protected activity; and that the alleged "hardships" were not adverse actions within the Act because they were trivial and would not dissuade a reasonable employee from engaging in protected activity.

documents show Broadspire's reinstating permanent partial disability benefits for a back claim. Viewing the evidence in the light favorable to Graves, I accept his statement that his claim alleged both injuries.

¹³ The record is silent as to whether Broadspire demanded a direct repayment or instead made deductions from its future payments of permanent partial disability compensation. There appears also to be an issue related to deductions to pay a lien of the California Employment Development Department for the State Disability Insurance benefits that state agency provided.

Present claim. On the currently pending claim, Graves again relies on the same protected activity (from January 2011) as in his previous claims.¹⁴ He again asserts that this protected activity contributed to unfavorable actions involving one or both of the same two workers' compensation claims. But he limits his allegations to unfavorable actions occurring after the hearing that Judge Clark conducted on May 20, 2014.

In particular, Graves alleges three instances in which he says he was denied specific medical care or compensation, and he generally alleges that Respondents are discriminating against him in the provision of workers' compensation benefits. The incidents he alleges are:

- “Failing and refusing to pay me temporary disability . . . based on the [psychiatric] QME physician’s report dated July 9th [2014].
- On August 14th [2014], there was another QME examination, and the QME doctor – this was for neurology – the QME doctor declared that there was permanent disability and stated that the temporary disability dates back to January 8, 2014. So, therefore . . . I was to receive temporary total disability benefits, which also date back to January 8, 2014.
- On December 17th [2014], Ms. McDonnell denied a request from a third treating physician – psychiatric treating physician – in which that physician requested medical care and . . . that would have also required temporary disability payments and she refused to do that.”¹⁵

As to discrimination, Graves alleges:

- “Respondents were not according me workers’ compensation benefits that were accorded to other employees; so there was discrimination.”¹⁶

Discussion

On summary decision, I must determine if, based on pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed, there is no genuine issue of material fact such that the moving party is entitled to judgment as a matter of law. *See* 29 C.F.R. § 18.72(a) (2015); *see also* FED. R. CIV. P. 56. I consider the facts in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). I must draw all reasonable inferences in favor of the non-moving party and may not make credibility determinations or weigh the evidence. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000) (applying same rule in cases under FED. R. CIV. P. 50 and 56). Once the moving party shows the absence of a genuine issue of material fact, the non-moving party cannot rest on his pleadings, but must present “specific facts showing that there is a genuine issue for trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). A genuine issue exists when, based on the

¹⁴ The protected activity concerns Graves’ complaint to his then-managers that it was unsafe to parallel park a bus at the bus yard without a “spotter,” who would stand nearby on the pavement and help direct him.

¹⁵ *See* Order Closing Pleadings, July 20, 2015.

¹⁶ *Id.*

evidence, a reasonable fact-finder could rule for the non-moving party. *See Anderson*, 477 U.S. at 252.

Prior litigation of related matters can preclude later litigation under two doctrines. As the Supreme Court explained:

The preclusive effect of a judgment is defined by claim preclusion and issue preclusion, which are collectively referred to as “res judicata.” Under the doctrine of claim preclusion, a final judgment forecloses “successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit.” Issue preclusion [or collateral estoppel], in contrast, bars “successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment,” even if the issue recurs in the context of a different claim. By “preclud[ing] parties from contesting matters that they have had a full and fair opportunity to litigate,” these two doctrines protect against “the expense and vexation attending multiple lawsuits, conserv[e] judicial resources, and foste[r] reliance on judicial action by minimizing the possibility of inconsistent decisions.”

Taylor v. Sturgell, 553 U.S. 880, 892 (2008) (citations omitted). Respondents here assert issue preclusion (also known as “collateral estoppel”).¹⁷

“Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.” *Dodd v. Hood River County*, 59 F.3d 852, 863 (9th Cir. 1995), citing in *Allen v. McCurry*, 449 U.S. 90, 94 (1980).

Collateral estoppel applies only where it is established that

(1) the issue necessarily decided at the previous proceeding is identical to the one which is sought to be relitigated; (2) the first proceeding ended with a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the first proceeding.

“The party asserting preclusion bears the burden of showing with clarity and certainty what was determined by the prior judgment.”

Hydranautics v. FilmTec Corp. 204 F.3d 880, 885 (9th Cir. 2000) (citations omitted).

There can be no question that Graves is both the party against whom collateral estoppel is asserted and a party in the prior proceeding. That satisfies the third requirement listed in *Hydranautics*. But I conclude that the motions fail on each of the two remaining requirements.

¹⁷ In other cases, the Supreme Court and other courts equate *res judicata* with claim preclusion and collateral estoppel with issue preclusion.

First, issue preclusion is unavailable because the issue pending here differs – both factually and legally – from the one litigated before Judge Clark. Second, Judge Clark’s decision, on which the Administrative Review Board has granted review, is not a final order for purposes of collateral estoppel (or issue preclusion).

I. Respondents Fail to Establish That the Issue to Be Litigated Was Decided in the Previous Proceeding.

Factual differences. Most claims that courts resolve concern a transaction that has been concluded. A party has breached a contract, causing damages to the other party. A consumer used a defective product and was injured. Businesses fixed prices, a monopoly rent resulted, and consumers paid too much. There are many more examples. In each of these, a jury can determine whether there is liability and, if so, what past and future damages to assess.

But there are exceptional areas of law where disputes arise in relationships that are continuing. These include areas such as employment law, family law, and workers’ compensation. In these areas, sometimes legislatures prefer ongoing accuracy over finality: They require courts to modify orders as circumstances change over time, rather than grant remedies that become final at the time the litigation concludes.

For example, in certain workers’ compensation cases Congress allows modifications of awards as a worker’s medical needs and capacity to work change over time. *See, e.g.*, 33 U.S.C. § 922 (Longshore and Harbor Workers’ Compensation Act).¹⁸ This reflects a policy to keep the ongoing remedies tethered to the medical and vocational facts as they develop, rather than to bring the litigation to a final conclusion at the close of the hearing.

The result is that parties to workers’ compensation disputes make ongoing new demands even after “final” compensation orders have issued. A worker files newly arising demands for additional medical care. An employer contends that the worker’s condition has improved, she can earn more in alternative employment, and she is therefore entitled to a lesser compensation rate. There are many other permutations. Essentially, the possibility of additional litigation is unending so long as the worker is alive and the parties have not reached some kind of legally cognizable final settlement.¹⁹

¹⁸ *See also* 8 Lex K. Larson, Larson’s Worker’s Compensation § 131.01 (Mathew Bender, Rev. Ed. 2010). As Larson observes, “In all states, some kind of provision is made for reopening and modifying awards.” *Id.* This is in “recognition of the obvious fact that, no matter how competent a commission’s diagnosis of claimant’s condition and earning prospects at the time of hearing may be, that condition may later change markedly for the worse, or may improve, or may even clear up altogether. Under the typical award in the form of periodic payments during a specific maximum period or during disability, the objectives of the legislation are best accomplished if the commission can increase, decrease, revive, or terminate payments to correspond to a claimant’s changed condition.” *Id.* *See also* Wright and Miller § 4409 (“The nature of the compensation system reduces the need for repose and may make it easier to conclude that a failure to establish disability in a first proceeding does not preclude a later attempt to show that disability has developed since the first proceeding.”).

¹⁹ Some workers’ compensation statutes allow the parties to reach a full settlement not subject to modification even if medical or vocational changes occur. For example, under the Longshore and Harbor Workers’ Compensation Act, once the Department of Labor approves a settlement under 33 U.S.C. § 908(i), it is not subject to modification under 33 U.S.C. § 922. But no Respondent in this case asserts that the California workers’ compensation system has a

Similarly, when employers have disputes with employees, often the employment relationship continues during and after resolution of the dispute. Litigation resolving an alleged act of employment discrimination cannot preclude another discrimination claim based on new and later events between the parties (even if the new allegation is another instance of the same kind of unlawful discrimination).²⁰ The result is the same in family law, such as with ongoing child custody or child support disputes.

Cases involving these ongoing relationships – whether an ongoing need for compensation and medical care, caring for dependent children, or an ongoing employment relationship – tend to present a series of disputes involving distinct and different alleged denials of rights. Because each dispute differs factually from the previously adjudicated disputes, collateral estoppel rarely will apply.

Graves asserts here that Respondents denied him both compensation to replace lost wages and medical care for a diagnosed, work-related psychiatric injury. Drawing all reasonable inferences in favor of Graves (as I must on summary decision), it appears that the cause of his psychiatric condition at least arguably was (at least in part) the assault he sustained while driving a bus for MV Transportation. That is, seen in the light most favorable to Graves, this was a new, good faith claim for workers' compensation benefits. The medical opinions supporting this claim for compensation and medical care did not arise until after Judge Clark heard the prior case. Graves also alleges new medical evidence of a neurologically-based disability, which could also arguably relate to the assault, in which he sustained a head injury.

Broadspire offers nothing to refute that it was required to consider Graves' demand for compensation and medical care based on this newly arising medical information. Broadspire could not simply refuse the demands on the basis that it had previously paid for (or refused) benefits on other injuries arising out of the same workplace incidents. According to Graves, in two of its determinations Broadspire denied compensation, and in a third it denied psychiatric care. These are new denials of newly discovered medical needs; they arose after and are distinct from the unfavorable decisions that were the subject of the prior claim.

similar provision. More to the point, no Respondent asserts that Graves and the workers' compensation carrier agreed to such a "final" settlement.

If Respondents could show that Graves' workers' compensation claims are finally closed, yet he continues to file demands based on these claims, Respondents likely could be successful on summary decision. They could argue that the closed status of the case shows, by clear and convincing evidence, why they would not provide benefits: As a matter of law, Graves would have received all benefits to which he was or might become entitled. But Respondents do not contend that this scenario describes the present case.

²⁰ See *Mahroom v. Hook*, 563 F.2d 1369, 1377 (9th Cir. 1977) (holding that "it is totally inappropriate to forever bar an applicant for federal employment from either administrative or judicial consideration of a discrimination charge simply because that individual had claimed similar acts of discrimination at an earlier time and had not prevailed."); *Perkins v. Board of Trustees of University of Illinois*, 116 F.3d 235, 236-37 (7th Cir. 1997) (a finding that a discharge is non-discriminatory does not foreclose a subsequent claim of discrimination post-discharge "such as the failure to permit the continuation of medical insurance"). As Judge Easterbrook observed in *Perkins*, to do otherwise would be to allow an employer to discriminate "with impunity for the rest of [the applicant's] life. That cannot be right." 116 F.3d at 237.

Moreover, it is entirely possible that Broadspire's motivation changed from the time it made the decisions involved in the earlier case. Judge Clark found that the decision-makers at Broadspire did not know Graves had engaged in protected conduct. But it appears that the Broadspire decision-makers learned of the protect activity during the course of the litigation before Judge Clark.²¹ That could have contributed to Broadspire's denial of the benefits that are the subject of the current litigation.²²

As to MV Transportation, whatever its involvement in Broadspire's decision-making in the previous case, that involvement might have been different on Graves' current workers' compensation demands. Judge Easterbrook's comment applies equally here: foreclosing future allegations of a violation of the Act based on a worker's failure to establish an earlier violation would permit the employer to violate the Act as to that worker with impunity for the rest of his employment, if not for the rest of his life.²³

Legally different claims. Collateral estoppel can preclude relitigation of legal issues as well as factual issues. Here, Respondents argue that Judge Clark decided that Graves had not established legally sufficient unfavorable actions and that the alleged unfavorable actions here are no different.

But the unfavorable actions Graves is pursuing here are materially different. As the Act provides: "A public transportation agency, or a contractor or a subcontractor of such agency, or an officer or employee of such agency, shall not discharge, demote, suspend, reprimand, *or in any other way discriminate against* an employee for [engaging in protected activity related to hazardous work conditions]." 6 U.S.C. § 1142(b) (emphasis added). The regulations are to the same effect. *See* 29 C.F.R. § 1982.102(a)(2).²⁴

²¹ Though this is not entirely established on the record, I must draw all reasonable inferences in favor of Graves as the non-moving party. Broadspire manager Rod Bramasco testified on behalf of Broadspire. He said that he knew the Broadspire manager (Ms. McDonnell) who was a decision-maker on Graves' claim, and that the two worked in the same office (though they did not interact every day). I infer for purposes of these motions that the Broadspire decision-makers knew of the previous case, including Graves' allegations of protected activity.

Nonetheless, at the hearing Graves must establish by a preponderance of the evidence that each Respondent knew of his protected activity when she or it took the unfavorable action. Otherwise, Graves risks a likely adverse decision on the merits as to that Respondent. Nothing in this Order establishes any facts for the hearing.

²² Respondents misplace their reliance on *White v. City of Pasadena*. 671 F.3d 918 (9th Cir. 2012). The present case is not an alleged continuing violation. Graves is not asserting that the "hardships" litigated before Judge Clark continue to harm him. He is asserting that Respondents denied his new demands for compensation and medical care based on new medical opinions.

²³ *See* fn. 19, *supra*.

²⁴ The regulation uses the word "retaliate" rather than "discriminate." As it states: "A public transportation agency, contractor, or subcontractor of such agency, or officer or employee of such agency, shall not discharge, demote, suspend, reprimand, *or in any other way retaliate against*, including but not limited to intimidating, threatening, restraining, coercing, blacklisting, or disciplining, an employee for [engaging in protected activity related to hazardous work conditions]" (emphasis added). A denial of employment benefits (such as workers' compensation) is not explicitly listed as prohibited retaliation. But the listed examples are not exclusive, and I conclude that a denial of a benefit for a work-related injury is as much a denial of a term and condition of employment as would be a wage loss associated with a suspension – a loss expressly in the list of prohibited retaliatory acts.

MV Transportation is a public transportation agency or a contractor of one within the meaning of the Act. Broadspire is a contractor or subcontractor of MV Transportation, responsible to administer its employment-related workers' compensation benefits.²⁵ Graves alleges that both companies (and the individual employees) discriminated against him as they generally applied the workers' compensation policy, and specifically when they denied him compensation and medical care for a psychiatric injury and compensation for a neurological injury. This discrimination is an adverse action within the meaning of the Act.

In the case before him, Judge Clark considered only conduct such as a few weeks' delay in paying a workers' compensation claim (when the carrier paid in full retroactive to the injury date), sent letters mistakenly denying the claim (until the error was corrected), failed to answer or return phone calls, and sought reimbursement to which it was entitled for an overpayment that occurred because of another error. Judge Clark found that those actions were trivial, would not discourage others from engaging in activity that the Act protects, and thus were not unfavorable actions within the meaning of the Act.

But none of these actions, which Graves described as "hardships," amounted to an actual denial of the workers' compensation benefits to which Graves asserted he was entitled as an incident of his employment. Judge Clark never held that a denial of benefits accorded employees under the terms and conditions of employment or discrimination in the administration of an employee benefit was trivial, would not discourage protected activity, or fell short of an unfavorable action that the Act prohibits. I find that such denials and discrimination are unfavorable within the meaning of the Act.

II. Finality of Judge Clark's Decision and Order.

Respondents argue that Judge Clark's decision meets the requirement for collateral estoppel that the order in the earlier case be final. They assert that it is "sufficiently firm" and that the pendency of the appeal at the Administrative Review Board is not relevant. But they misplace their reliance on *Collins v. D.R. Horton, Inc.*, 505 F.3d 874, 882 (9th Cir. 2007), for the proposition that collateral estoppel effect may be given to Judge Clark's decision and order despite the pending appeal.

In *Collins*, the Ninth Circuit held that an arbitrator is not free to ignore the preclusive effect of prior court judgments, but that an arbitrator has the authority to decide whether preclusion applies and the discretion to decide whether to apply preclusion when it would not be mutual. 505 F.3d at 882. In that context, the court held that preclusive effect could (and generally should) be given to a district court's final judgment even if the judgment is pending appeal.²⁶ *Id.* at 882-83.

²⁵ It appears that MV Transportation has a contract with the Carson City, California to operate its public transit buses. MV Transportation has a contract with ACE American to provide workers' compensation. ACE American has a contract with Broadspire to administer the workers' compensation policy.

²⁶ The court explained how problems this engenders in a district court setting can be addressed. As it stated:

"In some cases, litigants and the courts have collaborated so ineptly that the second judgment has become conclusive even though it rested solely on a [prior] judgment that was later reversed." In the context of district court litigation, this potential problem can be "avoided, whether by delaying

Collins is inapposite because of the administrative setting that applies here. Judgments that Article III district courts issue are final. Indeed, their finality is generally what creates jurisdiction for appellate courts to review them. *See, e.g.*, 28 U.S.C. § 1291. Absent a stay, parties must comply with district court orders even if the orders are pending appeal; the appeal does not render the court orders inoperative.

The administrative regime for the National Transit Systems Security Act differs. Congress delegated adjudicative authority to the Secretary of Labor, *see* 6 U.S.C. § 1142(c), and expressly required that: “the Secretary of Labor shall issue a final order providing the relief prescribed by this paragraph or denying the complaint.” 6 U.S.C. § 1142(c)(3)(A). It is only from a final order of the Secretary that an appeal may be taken to the U.S. Court of Appeals (much as from a final judgment of a district judge). *See* 6 U.S.C. § 1142(c)(4)(A).

Under the regulatory scheme, Judge Clark’s order – far from being the final order of the Secretary – is currently inoperative as a matter of law. Here’s how the implementing regulations work:

“The decision of the ALJ will become the final order of the Secretary *unless a petition for review is timely filed with the ARB and the ARB accepts the petition for review.*” 29 C.F.R. § 1982.109(e) (emphasis added). Even when a petition for review is timely filed, the ALJ’s decision becomes the final order of the Secretary if the ARB does not timely accept it for review. 29 C.F.R. § 1982.110(b).

But the ARB that has been “delegated the authority to act for the Secretary.” 29 C.F.R. § 1982.110(a). When the ARB accepts review, rather than the ALJ’s decision and order becoming the final order of the Secretary, it immediately becomes “inoperative” except insofar as the ALJ ordered reinstatement of the complainant’s employment. 29 C.F.R. § 1982.110(b). Even as to reinstatement, the ARB may stay that portion of the ALJ’s order based on a showing of exceptional circumstances. *Id.*

Here, the Administrative Review Board timely granted review of Judge Clark’s Decision and Order. The appeal is pending. The result is that Judge Clark’s Decision and Order never became the Congressionally-mandated final order of the Secretary. It is and will remain inoperative unless the ARB issues an order adopting it. *See* 29 C.F.R. § 1982.110(b).

I conclude that the final order for purposes of collateral estoppel is the final order of the Secretary that Congress mandated. Judge Clark’s decision and order is currently inoperative and

further proceedings in the second action pending conclusion of the appeal in the first action, by a protective appeal in the second action that is held open pending determination of the appeal in the first action, or by a direct action to vacate the second judgment.”

Id. at 882-83 (citations omitted).

not the final order of the Secretary. Respondents' motions must therefore be denied for this separate and independent reason.

Order

Respondents' motions for summary decision are DENIED for two separate and independent reasons, each of which requires denial. The issues presented here are neither factually nor legally identical to those the parties previously litigated. And the Decision and Order in the previous case is not final.²⁷

SO ORDERED.

STEVEN B. BERLIN
Administrative Law Judge

²⁷ The denial of the current motions for summary decision leaves the parties' respective burdens at the hearing unchanged from what they were before the motions. Though our procedural rules allow for summary adjudication of facts short of full summary decision, *see* 29 C.F.R. § 18.72(g), I make no finding here that any fact has been established for purposes of the evidentiary showing at the hearing.

To prevail against any one Respondent on the merits, Graves must establish at the hearing that he engaged in protected activity; that the Respondent is among those to whom the Act's requirements apply; that the Respondent took an unfavorable action (within the meaning of the Act) against Graves; that the Respondent knew of Graves' protected activity at the time she or it took the unfavorable action; and that the protected activity was a contributing factor to the Respondent's taking the unfavorable action. If Graves establishes this by a preponderance of the evidence, each Respondent may still avoid the imposition of a remedy if she or it shows by clear and convincing evidence that she or it would have taken the same unfavorable action absent Graves' protected activity.