



**In the Matter of:**

**THEODORE R. JACKSON,**

**ARB CASE NO. 01-076**

**COMPLAINANT,**

**ALJ CASE NO. 2000-STA-57**

**v.**

**DATE: April 30, 2003**

**WYATT TRANSFER, INC.,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For The Complainant***

Theodore R. Jackson, *pro se*, Chesterfield, Virginia

***For The Respondent***

David W. Chewning, President/CEO of Wyatt Transfer, Inc., *pro se*, Richmond, Virginia

### **DECISION AND ORDER OF REMAND**

This case arises under the whistleblower protection provision of the Surface Transportation Assistance Act (STAA), 49 U.S.C.A. § 31105 (West 1997), and the implementing regulations found at 29 C.F.R. Part 1978 (2002). Theodore Jackson alleges that David Chewning, President/CEO of Wyatt Transfer, denied him the ability to drive a truck for four days in October 2000 and then discharged him in December 2000 because he complained about the safety of the Wyatt trucks he drove. A Labor Department Administrative Law Judge (ALJ) conducted an evidentiary hearing.<sup>1</sup> In a May 24, 2001 decision, the ALJ recommended that Jackson's STAA complaint be dismissed. Recommended Decision and Order (R. D. & O) at 11. The ALJ based his recommended decision largely on the unsworn testimony of Jackson and Chewning.

On appeal, Jackson contends that since the ALJ "did not administer a legal oath at the

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<sup>1</sup> Both Jackson and Wyatt Transfer appeared *pro se* below and before this Board.

hearing December 19, 2000 [that] any and all Testimony giving [sic] on that day is void.” He further contends that the ALJ allowed Wyatt Transfer “to fax exhibit [sic] and send him exhibit [sic] with out any Certification.” June 18, 2001 letter from Theodore R. Jackson to Administrative Review Board. Jackson later requested a “new hearing, before a new Judge, because neither the complainant nor respondent take the legal oath before we testify at the hearing Dec. 19, 2000.” August 23, 2001 letter from Theodore R. Jackson to Administrative Review Board. We vacate the R. D. & O. and remand.

## **JURISDICTION**

We have jurisdiction to review the R. D. & O. and to issue the final agency decision pursuant to 29 C.F.R. § 1978.109(c)(1) and Secretary’s Order No. 1-2002, 67 Fed. Reg. 64272 (Oct. 17, 2002).

## **ISSUE TO BE DECIDED**

Whether the ALJ’s failure to administer an oath or affirmation to Jackson and Chewning was error, and, if so, whether the R. D. & O. should be vacated.<sup>2</sup>

## **DISCUSSION**

### *Failure To Swear Jackson and Chewning*

The ALJ did not administer an oath or affirmation to Jackson or Chewning, yet throughout the course of the hearing he asked them questions to which they responded. See Transcript generally.

STAA hearings before Department of Labor ALJs are governed by rules of practice and

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<sup>2</sup> As noted, Jackson also appears to object to the admission of Respondent’s Exhibits (RX) 1, 2, 5, 6, and 7 because they were not certified. See June 18, 2001 letter from Jackson to the ARB. We construe this objection as relating to the authenticity of the exhibits. RX 1 and 2 are letters that the ALJ requested Chewning to submit prior to the hearing and thus fall within the ambit of 29 C.F.R. § 18.50 (“The authenticity of all documents submitted as proposed exhibits in advance of the hearing shall be deemed admitted unless written objection thereto is filed prior to the hearing . . .”). Because the record does not contain a written objection filed by Jackson prior to the hearing, we deem RX 1 and 2 authentic. As to the post-hearing exhibits RX 5, 6, and 7, upon remand, Jackson may bring his objection to the ALJ’s attention.

procedure found in 29 C.F.R. Part 18. 29 C.F.R. § 1978.106(a). Specific to this case is 29 C.F.R. § 18.603: “Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness’ conscience and impress the witness’ mind with the duty to do so.”

An agency generally is required to follow its own procedures even if the procedure is more stringent than would be constitutionally required. *See generally Payne v. Block*, 714 F.2d 1510, 1517 (11th Cir. 1983). *See also Morton v. Ruiz*, 415 U.S. 199, 235 (1974) (“Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures.”).<sup>3</sup>

The ALJ made findings of fact, crucial to both Jackson and Chewning, that were based largely on their testimony. *See R. D. & O.* at 3-6, 8, 9. Because unsworn testimony is potentially unreliable, it cannot be allowed to be the basis for critical findings that ultimately determine the rights and liabilities of these parties. Thus, the ALJ’s failure to administer oaths to Jackson and Chewning, mandated by the applicable rules of procedure, constitutes error.

#### *Waiver or Procedural Default*

Where a witness is permitted to testify without being sworn, a waiver may be presumed. *See, e.g., Pooley v. State*, 62 N.E. 2d 484, 485 (Ind. 1945) (Since defendant did not object at trial, he was not permitted to assert on appeal that state’s witnesses had not been sworn.). In administrative hearings without traditional court ritual, a party may waive the right to object to the failure to have a witness properly sworn by failing to object in time or by express consent. Therefore, an objection should be made during the trial, before the verdict, or while the defect is capable of being remedied. *See Thomas v. Dad’s Root Beer & Canada Dry Bottling Co.*, 357 P.2d 418, 418 (Ore. 1960); *In re Simmons Children*, 177 S.E.2d 19, 23-24 (W. Va. 1970); *In re Da Roza’s Estate*, 186 P.2d 723, 729 (Cal. Dist. Ct. App. 1947).

Here, however, neither party was represented by counsel at the hearing. As a result, we hold that neither Jackson nor Wyatt waived their right to appeal the ALJ’s failure to swear witnesses. In so holding we rely upon the Supreme Judicial Court of Maine’s decision in *Sewall v. Spinney Creek Oyster Co., Inc.*, 421 A.2d 36 (Me. 1980), a case whose facts closely parallel ours.

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<sup>3</sup> The STAA regulations provide that upon good cause shown and after three days notice to all parties and Intervenors the judge may “waive any rule or issue such orders as justice or the administration of section 405 requires.” 29 C.F.R. § 1978.115. However, in this case the ALJ did not show good cause for failing to administer an oath, nor did he give the parties three days notice.

Maine law required the Commissioner of the Department of Marine Resources to hold an administrative hearing before granting leases to conduct aquaculture operations on Maine's York River. Maine administrative procedures required that all witnesses who testify at such a hearing be sworn. Despite the fact that the hearing officer did not swear any witnesses, the lease was awarded to Spinney Creek Oyster Co. A group of interveners appealed the lease award on the grounds that the witnesses had not been sworn. The Commissioner and Spinney Creek Oyster argued that the interveners had waived the failure to swear witnesses by not objecting at the hearing. The court recognized that a party claiming the right to have witnesses sworn may relinquish it by a genuine act of waiver. Or, by not raising a timely objection, a party may forfeit that right by "procedural default." However, the court recognized an important qualification: "When a party is not aware or is not chargeable with responsibility to be aware, of the requirement to swear witnesses, as for example when a party is not represented by counsel, the failure to make timely objection regarding such omission rarely will lead to a forfeiture by procedural default." *Id.* at 39-40.

Therefore, like *Spinney*, where a mandatory requirement that witnesses be sworn exists, but none of the witnesses were sworn, and the party claiming the right was not represented by counsel at the hearing, we will not find default. Thus, on appeal Jackson may raise the issue of the ALJ's failure to swear witnesses at the hearing.<sup>4</sup>

### *Disposition*

The ALJ conducted the hearing of this STAA complaint pursuant to 29 C.F.R. § 1978.106(a) which mandates application of the rules of practice and procedure promulgated at 29 C.F.R. Part 18. Consequently, under 29 C.F.R. § 18.57(b), his decision "shall be supported by reliable and probative evidence" and "shall be in accordance with the regulations and rulings of the statute or regulation conferring jurisdiction." The ALJ's R. D. & O., however, is not supported by reliable evidence because, as we have noted, it relies almost exclusively upon unsworn testimony. Furthermore, the decision is not in accord with the Part 18 regulation mandating that the ALJ administer an oath or affirmation to witnesses. *See* 29 C.F.R. § 18.603.

"An agency's failure to follow its own regulations can be grounds for invalidating its action. However this is not necessarily the case. If the agency's omission has not prejudiced the plaintiff, its action may be upheld." *Port of Jacksonville Maritime Ad Hoc Committee, Inc. v. Hayes*, 485 F. Supp. 741, 743 (M.D. Fla. 1980) (citations omitted). But here Jackson potentially has been prejudiced as a result of the ALJ's reliance on unsworn testimony. Therefore, we vacate the R. D. & O.

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<sup>4</sup> We note that Wyatt did not argue waiver or default. In fact, Wyatt did not file a brief or otherwise oppose Jackson's objections to the R. D. & O.

We do not decide, as Jackson urges, that the testimony given on December 19, 2000, is “void” or that the R. D. & O. is void. Nor do we order that a new hearing must be held or that a new judge be appointed. However, we remand in order that the ALJ may remedy the defects noted herein in a manner he deems proper and efficacious.

### **CONCLUSION**

The failure to administer oaths or affirmations to Jackson and Chewing was error. The Recommended Decision and Order is, therefore, vacated. Accordingly, this matter is **REMANDED** for action consistent with this opinion.

**SO ORDERED.**

**OLIVER M. TRANSUE**

**Administrative Appeals Judge**

**M. CYNTHIA DOUGLASS**

**Chief Administrative Appeals Judge**