



In the Matter of:

HERBERT DICKSON,

ARB CASE NO. 02-098

COMPLAINANT,

ALJ CASE NO. 01-STA-039

v.

DATE: July 25, 2003

BUTLER MOTOR TRANSIT/COACH USA,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearance:

For the Respondent:

**Heather R. Boshak, Esq., Donia Farhoud, Esq., Stanley L. Goodman, Esq.,
Grotta, Glassman & Hoffman, P.A., Roseland, New Jersey**

FINAL DECISION AND ORDER

Herbert Dickson filed a complaint alleging that the respondent, Butler Motor Transit/Coach USA (Butler), violated the Surface Transportation Assistance Act of 1982 (STAA), as amended and recodified, 49 U.S.C.A. § 31105 (West 1997), by retaliating against him for engaging in safety-related activity protected by the STAA. A Department of Labor (DOL) Administrative Law Judge (ALJ) issued a Recommended Order of Dismissal (R.O.) The Administrative Review Board (Board) adopts the ALJ's recommendation and dismisses the complaint.

BACKGROUND

Dickson filed two STAA complaints against Butler, which were investigated by the DOL's Occupational Safety and Health Administration (OSHA). By decisions issued on March 9 and April 23, 2001, OSHA found that each complaint lacked merit. On May 2, 2001, Dickson filed a request for a hearing before an ALJ.

On October 9, 2001, the ALJ issued a Notice of Hearing, advising the parties that the case would be heard beginning on December 18, 2001, and would continue if necessary through December 20. The notice also instructed the parties to provide pre-hearing statements regarding the issues to be adjudicated and the witnesses to be called. The notice further directed the parties to exchange the exhibits that each intended to submit into evidence at hearing and to provide the ALJ a list of such exhibits.

On October 24, 2001, Butler filed a motion for summary judgment, urging that Dickson had failed to timely appeal his first STAA complaint against Butler, which was decided by OSHA on March 9, 2001. Butler also argued that the relief sought in Dickson's second complaint, which was decided by OSHA on April 23, 2001, had been rendered moot by an award of unemployment benefits to Dickson by the state unemployment compensation review board. On November 13, 2001, Dickson filed a brief opposing Butler's motion, in which Dickson urged that issues of material fact regarding Dickson's receipt of the March 9, 2001 OSHA decision required that the case proceed to hearing. In addition, Dickson contended that his second complaint alleged "a pattern of continuing discrimination" and that an evidentiary hearing was required to decide issues of material fact related to that allegation.

Also on November 13, Butler filed an unopposed motion requesting the ALJ to vacate the scheduled hearing date of December 18, in view of Butler's then-pending motion for summary judgment. On November 20, the ALJ issued an Order Denying Motion for Summary Decision, in which he not only denied Butler's summary judgment motion but also ordered that the case proceed to hearing on the dates already scheduled.

On December 7, 2001, Dickson requested a continuance of the December 18-20 hearing dates, citing concerns that the scheduled hearing would interfere with employment Dickson had recently begun. Butler did not oppose that request. On December 13, the ALJ issued an Order of Continuance postponing the hearing until a date to be set.

On February 7, 2002, Butler filed a Motion to Compel Discovery, urging that Dickson had failed to provide responses to Butler's First Set of Interrogatories and failed to reply to Respondent's First Request for Production of Documents, both of which were dated November 16, 2001. By Order Granting Motion [] to Compel Discovery issued March 26, the ALJ granted Butler's motion to compel and directed Dickson to provide responsive answers to the specified set of interrogatories and the request for production of documents no later than April 10, 2002.

On April 8, 2002, counsel then representing Dickson, Paul O. Taylor, Esq., filed a motion for permission to withdraw from the case, stating that his request was prompted by a disagreement with Dickson.¹ By letter filed on April 12, Butler stated that, although it did not oppose Taylor's withdrawal, it was concerned about the effect that Dickson's unrepresented status could have on his compliance with the ALJ's order compelling discovery. Butler stated that Dickson had not yet provided the documents the ALJ had ordered. Butler requested that, if

¹ Taylor stated in his motion that he preferred not to disclose the nature of the dispute with Dickson unless ordered to do so by the ALJ. The record does not indicate that the ALJ required further information concerning the disagreement to grant the withdrawal motion.

the ALJ were to permit Taylor to withdraw, the ALJ advise Dickson of the consequences of non-compliance with the ALJ's March 26 order compelling discovery and regarding the other responsibilities of proceeding as a pro se complainant. On April 25, the ALJ issued an order granting Taylor's request to withdraw. In the April 25 order, the ALJ recited the sanctions that the ALJ could impose pursuant to Section 18.6(d)(2)(i)-(v) of the Rules of Practice and Procedure for the DOL Office of Administrative Law Judges, if Dickson failed "to provide the required information" to Butler. Order of Apr. 25, 2002 at 2; *see* 29 C.F.R. § 18.6(d)(2)(i)-(v) (2001); *see also* 29 C.F.R. § 1978.106(a) (providing for application of the procedural rules at 29 C.F.R. Part 18 in STAA hearings unless otherwise provided by the Part 1978 STAA regulations). Because Dickson's counsel was withdrawing from the case, the ALJ also extended the deadline for Dickson's compliance with the order compelling discovery, to May 10, 2002.

On June 18, 2002, Butler filed a Motion to Dismiss for Failure to Comply with Orders of the Administrative Law Judge. Butler attested that Dickson had neither provided the discovery responses ordered by the ALJ on March 26 and April 25 nor communicated with Butler regarding such responses. Butler urged the ALJ to dismiss the complaint pursuant to 29 C.F.R. § 18.6(d)(2)(v). On July 15, 2002, the ALJ issued the R.O., citing two grounds for his recommendation to dismiss. First, the ALJ relied on Dickson's failure to comply with the ALJ's orders compelling discovery and imposed the sanction of dismissal provided by Section 18.6(d)(2)(v). In addition, the ALJ determined that Dickson had abandoned the complaint, and, in reliance on Section 18.5(b), determined that dismissal was proper.

Pursuant to 29 C.F.R. § 1978.109(a), (b) (2002), the ALJ forwarded the case to the Board for entry of a final decision and order, based on the record and the ALJ's R.O. On July 23, 2002, the Board issued a Notice of Review and Briefing Schedule. That order advised the parties that briefs regarding the R.O. could be filed with the Board pursuant to Section 1978.109(c)(2) by August 14, 2002. The order also requested any party who decided not to file a brief to advise the Board by letter, telephone or facsimile. On August 14, 2002, Butler filed a Brief in Support of the Recommended Order of Dismissal with Prejudice. Dickson has neither filed a brief nor otherwise communicated with the Board concerning this case.²

STANDARD OF REVIEW

Under the STAA, the Board is bound by the ALJ's factual findings if those findings are supported by substantial evidence on the record considered as a whole. 29 C.F.R. § 1978.109(c)(3); *BSP Transp. Inc. v. United States Dep't of Labor*, 160 F.3d 38, 46 (1st Cir. 1998); *Castle Coal & Oil Co., Inc. v. Reich*, 55 F.3d 41, 44 (2d Cir. 1995). Substantial evidence is that which is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Clean Harbors Env'tl. Servs. v.*

² In a letter dated December 4, 2002, Butler advised the Board that the copy of its brief that was mailed to Dickson had been returned with a letter from the United States Postal Service. Butler provided a copy of the November 2002 Postal Service letter, which states that the Postal Service had communicated with Dickson and had ascertained that he was refusing "all delivery of mail."

Herman, 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

In reviewing the ALJ's conclusions of law, the Board, as the Secretary's designee, acts with "all the powers [the Secretary] would have in making an initial decision. . . ." 5 U.S.C.A. § 557(b)(West 1996). *See also* 29 C.F.R. 1978.109(c) (providing for issuance of a final decision and order by the Board). Therefore, the Board reviews the ALJ's conclusions of law de novo. *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991).

DISCUSSION

The ALJ's recommendation to dismiss is well-supported by the evidence and fully complies with the applicable law. As the ALJ stated, Section 18.6(d)(2) provides a range of sanctions that may be imposed for a party's failure to comply with an ALJ's order regarding participation in discovery, including the "production of documents, or the answering of interrogatories" 29 C.F.R. § 18.6(d)(2). Dickson was provided ample opportunity to comply with the ALJ's order to compel discovery. On February 7, 2002, Butler filed its motion to compel Dickson's response to Butler's First Set of Interrogatories and First Request for Production of Documents dated November 16, 2001, pursuant to 29 C.F.R. § 18.21. On March 26, the ALJ issued the order compelling Dickson to provide responses to the specified discovery requests. The ALJ's order was reiterated on April 25 when he granted Taylor's motion to withdraw and also advised Dickson of the possible consequences of his failure to comply with the ALJ's March 26 order. In view of Dickson's transition to representing himself, the ALJ's April 25 order extended the period in which Dickson was to provide the required information to Butler by a month, from April 10 to May 10, 2002.

The ALJ's April 25 order was clear and unambiguous in apprising Dickson that a decision in the proceeding could be rendered against him pursuant to Section 18.6(d)(2)(v). ALJ's Order of Apr. 25, 2002 at 2. Section 18.6(d) authorizes the ALJ to "take such action . . . as is just, including but not limited to" the five sanctions specified in Section 18.6(d)(2). 29 C.F.R. § 18.6(d)(2). As the ALJ stated, Dickson had been provided multiple opportunities to respond to Butler's specified discovery requests and did not. The ALJ also stated that Dickson had failed to offer any response to the ALJ's orders. In these circumstances, the ALJ acted well within his discretion in determining that dismissal was the appropriate sanction for failure to comply with the ALJ's orders pursuant to Section 18.6(d)(2). *See Somhorst v. Silver Eagle Transp.*, ARB No. 97-083, ALJ No. 97-STA-4 (ARB May 13, 1997); *Rowland v. Easy Rest Bedding, Inc.*, No. 93-STA-19 (Sec'y Apr. 10, 1995).

The ALJ's recommendation to dismiss based on Dickson's abandonment of the complaint is also well-supported by the facts of the case and consistent with the applicable law. The default provision at Section 18.5(b) authorizes entry of a decision, without a hearing, against a responding party who has failed to timely answer a complaint, and is thus not controlling in this case. 29 C.F.R. § 18.5(b). Any error in the ALJ's reliance on that provision is harmless, however, as the ALJ's reasoning comports with the basic principle that courts possess the "inherent power" to dismiss a case on their own initiative for lack of prosecution. *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630 (1962). This power is "governed not by rule or statute but

by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.” *Id.* at 630-31. It is necessary for the DOL administrative law judges and the Board – like the courts – to manage their dockets in an effort to “achieve the orderly and expeditious disposition of cases.” The Board will therefore concur in an administrative law judge’s recommendation to dismiss a case on abandonment grounds if the record demonstrates, as it does in this case, that a complainant has failed to prosecute his or her case.

In addition to the failure to respond to Butler’s discovery requests or the ALJ’s orders compelling discovery already discussed, Dickson failed to communicate with the ALJ in any manner following withdrawal of Taylor as the Complainant’s counsel. *See* R.O. at 2. Dickson has also not availed himself of the opportunity to communicate with the Board since the case was transmitted here by the ALJ. The Notice of Review and Briefing Schedule that was issued by the Board on July 23, 2002, clearly provided Dickson with an opportunity to offer an explanation of his inaction below, but Dickson has not done so.

Furthermore, the circumstances in this case do not suggest that Dickson’s failure to prosecute his case as a pro se complainant are linked to a lack of legal training. The July 23, 2002 notice was sent by certified mail to Dickson’s last address of record, but the return receipt has not been returned to the Board to confirm that the notice was received. Based on the November 2002 notice from the United States Postal Service indicating that Dickson had formally refused to accept mail deliveries, *see* n.1 *supra*, and Dickson’s failure to diligently pursue his case in the proceedings before the ALJ, we have no alternative but to conclude that the case must be dismissed for want of prosecution. *Cf. Somhorst, supra* (citing the return of an administrative law judge’s show cause order that was sent to the complainant by certified mail in adopting the judge’s recommendation to dismiss). Accordingly, the Board adopts the ALJ’s recommendation and **DISMISSES** the complaint.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge